Case Number:	Civil Appeal 79 of 2010
Date Delivered:	19 Sep 2012
Case Class:	Civil
Court:	Court of Appeal at Eldoret
Case Action:	Ruling
Judge:	Riaga Samuel Cornelius Omolo, John walter Onyango Otieno, Erastus Mwaniki Githinji
Citation:	Joseph Wanambisi & 3 others v Trans-Nzoia Investment Company Limited [2012] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Uasin Gishu
Docket Number:	-
History Docket Number:	59 of 2005
Case Outcome:	Appeal Allowed
History County:	Trans Nzoia
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE COURT OF APPEAL

AT ELDORET

CORAM: OMOLO, GITHINJI & ONYANGO OTIENO, JJ.A.

CIVIL APPEAL NO. 79 OF 2010

BETWEEN

1. JOSEPH WANAMBISI

2. ALFRED WANAMBISI

3. WEKESA WAMINILA

4. IBRAHIM ONGARO.....APPELLANTS

AND

TRANS-NZOIA INVESTMENT COMPANY LIMITED.....RESPONDENT

(Appeal from the Ruling and order of the High Court of Kenya at Kitale (Ombija, J)

dated 11th November, 2009 and 16th December, 2009

in

H.C.C.C NO. 59 OF 2005)

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JUDGMENT ONYANGO OTIENO, J.A.

The record before us demonstrates a protracted wrangling between the appellants ***JOSESPH WANAMBISI, ALFRED WANAMBISI, WEKESA WAMILA, SAMMY WANJALA*** and ***IBRAHIM ONGARO*** who claim to be representatives of some members of the respondent company and the respondent ***TRANS-NZOIA INVESTMENT COMPANY LIMITED*** over the control and leadership of the respondent company. At one time the misunderstanding resulted into a criminal case – **Criminal Case**

No. 734 of 1998 at the end of which the then Senior Principal Magistrate at Kitale did give appropriate advice in the ruling stating:-

"The solution, as I see it, is in calling an AGM and conducting fair elections afresh to restore confidence in the board of directors and to ensure they are answerable and accountable to the shareholders. That in my view is what will bring a lasting solution to the leadership wrangles that the company is experiencing and has experienced for the past decade, and that is my advice to the shareholders."

That advice was given in a ruling delivered in that criminal case on 14th July, 2000. It would appear from the plaint dated 12th May, 2005 filed by the respondent company against the appellant which is the subject of this matter, at paragraph 5 thereof that it held an Annual General Meeting on 29th November, 2004 at Nahilingo farm where apparently no directors were elected as it resolved that the company was dormant and should be dissolved. Returns were filed with the Registrar of companies on 11th December, 2004. Minutes of that alleged Annual General Meeting is in the record and it shows that 1,950 members of the respondent company together with seven Directors were present at that meeting and the District Officer of the area addressed it. However, the appellants denied any knowledge of that meeting and maintained that since 1994 the respondent company had not held any Annual General Meeting and so members had not received any financial reports and had not held any elections of Directors. In their view the respondent was being mismanaged and its properties were being wasted and there was no accountability by the appellants. As the main cases and possibly other matters between the parties have not been finalized, we will limit ourselves to the matter before us for fear of prejudicing the full hearing.

The appellants and other members of the company as a result of what is stated above gave notice of an extra-ordinary General Meeting of the company which was scheduled to be held on 14th May, 2005 at the Agricultural Society of Kenya show ground at Kitale. That notice dated 7th April, 2005 was issued in a document which had the letterhead of the appellants' advocates G*.P. Wekulo & Co. Advocates*. The agenda for that meeting was to:-

"1. Receive and deliberate on the financial and asset report regarding the company since 1994.

2. To appoint external auditors to audit and report over the assets and financial position of the company for 1994 to date.

3. To make recommendations regarding the proper directions of the company since 1994.

4. A.O.B."

That notice was based on alleged requisition of that meeting on 12th March, 2005. On the attention of the directors of the respondent company being drawn to that notice, they responded by filing a plaint dated 12th May, 2005 I have alluded to hereabove in which they sought:-

(a) ***A declaration that the defendants requisition of 12/3/2005 and notice of 7/4/05 given pursuant to the said requisition and illegal, null are void and of no legal consequences for violating the mandatory provisions of the Companies Act.***

(b) ***A temporary injunction.***

(c) ***Costs.***

(d) ***Interest.***

(e) ***Any other relief that this Honourable Court may deem fit to grant."***

Together with that plaint was filed a chamber summons dated 12th May, 2005 in which the respondent sought orders against the appellants as follows:-

"1. The service of this application in the first instance be dispensed with.

2. That this Honourable Court do issue a temporary injunction to restrain the Defendants their agents and or servants or anybody claiming under them from holding, convening or conducting an Extraordinary General Meeting or any other meeting whatsoever over the business or operations of Trans-Nzoia Investment Co. Ltd on the 14/5/05 or any other date, at the Kitale Agricultural Society of Kenya Show Ground or at any other place whatsoever, while pending the interpartes hearing of this application and while pending the hearing and determination of the suit herein.

3. That the Officer Commanding Kitale Police station be directed to ensure the compliance of the orders made herein.

4. That costs be in the cause."

The record indicates that that application was certified urgent on 12th May, 2005 and was heard *exparte* on 13th May, 2005 by W. Karanja J. (as she then was) who found that the respondent had established a prima facie case with a high probability of success to merit the orders sought. She granted the interim orders sought and directed that the application be heard interpartes on 25th May, 2005. The appellants filed their response through *G.P. Wekulo and Company, Advocates* but that response was eventually struck out by Karanja J. (as she then was) on 17th October, 2006, as Weluko, advocate had been struck out of the role of advocates. I note herein, that the interim order was not extended, but as the meeting that was sought to be stopped was scheduled for 14th May, 2005, and the interim order granted on 12th May, 2005, effectively dealt with that issue, perhaps parties found it unnecessary to pursue that aspect. Be that as it may, the matter was adjourned from time to time but apparently the meeting that was originally set for 14th May, 2005 either did not proceed or if it did proceed, there is no clear record of what the respondent did about it. It does appear however that the appellants scheduled another meeting for 2nd March, 2007, and the application dated 12th May, 2005 I have referred to hereinabove, was revived and was heard by Ochieng J. on 1st March, 2007. The learned Judge after hearing that application made orders as follows:-

"1. That the extra ordinary General Meeting of Trans-Nzoia Investment Co. Ltd scheduled for 2.3.07 is hereby and now put off, until further orders of the court.

2. That the defendants have the liberty to apply.

3. That costs be in the cause."

The respondents in a notice of motion dated 7th May, 2007 moved the court pursuant to section 3, 3A and 63 of the Civil Procedure Act and Order ***39 Rules 2A (2)*** and ***(3)*** and **Order 50** ***Rule 1*** of the Civil Procedure Rules seeking three main orders to wit:-

"2. That the respondents/Defendants herein be detained in prison for six (6) months for disobeying the injunction order issued on the 1st day of March, 2007.

3. That the extra ordinary meeting held on 2.3.07 contrary to the Order of the court was null and void non-consequential.

4. That the respondents/defendants be condemned to pay the costs."

The grounds advanced in support of that application were that the order made by Ochieng J. on 1st March, 2007 which put off the extra ordinary meeting convened by the appellants was disobeyed by the appellants despite the same order being extracted and served upon them; that notwithstanding the order and service upon them for that order, the appellants went ahead and held their offensive meeting; and pursuant to the same meeting and resolutions allegedly passed the appellants were seeking handing over from the *bona fide* directors of the respondent and seeking help of the administration as the appellants were making fake advertisements that they were the new directors of the respondent company. That application was supported by two affidavits sworn by the Secretary/Director of the respondent company one *Ronald Sawenya Wahulengu* and a supplementary affidavit sworn by a process server *Mr. Archibold Wekesa Nyakundi*. The appellants opposed that application and in a lengthy affidavit sworn on their behalf by the first appellant Joseph Wanambisi, each appellant denied having been served with the order made by Ochieng J on 1st March, 2007. They admitted attending the meeting on 2nd March, 2007 but stated that they did so because they had not been served with any order stopping the meeting and because no meeting of the respondent company been held for over ten (10) years. They said further that Police had given them permit for the meeting to proceed and the meeting was in public domain so was not a hidden matter and it had been properly convened pursuant to the provisions of the Companies Act. It had been ordered by the Registrar of Companies and not by them and after the same meeting, the registrar of companies moved to the District Commissioner, Trans-Nzoia District seeking confirmation whether the meeting was held, the which confirmation was made by the District Commissioner to the registrar and that pursuant to the above, the registrar of companies affected changes in the list of directors of the respondent company. They also maintained that the meeting stopped by the court was extra-ordinary General Meeting which was a different meeting from the meeting that took place on 2nd March, 2005 which was an Annual General Meeting. Lastly, they stated that as neither they nor their advocates then on record were served with the court order and as the meeting they attended was not an extra-ordinary Annual General Meeting but Annual General Meeting, they did not disobey any relevant court order. That application came up for hearing before *Ombijah J.* After what appears to have been a protracted hearing in which the process server was also cross-examined and re-examined on the contentious issue of whether the order issued on 1st March, was served or not, the learned Judge, in a lengthy ruling delivered on 11th November, 2009 found that the evidence before him demonstrated that the appellants were duly served with the order of 1st March, 2007 and further found the appellants in contempt of the court and sentenced each appellant to pay a fine of Kshs.5,000/= in default each of them to be jailed for six (6) months. He also declared the meeting held on 2nd March, 2007 a violation of the court order of 1st March, 2007 and was therefore null and void and inconsequential. He addressed himself on both prayers as follows:-

"On the available evidence and a (sic) law, I am fully satisfied that the respondents are in contempt of court. I sentence each one of them to pay a fine of Kshs.5,000/= in default each of them shall be jailed for 6 months. This takes care of the of the first limb of the preliminary objection.

I have been urged on the second limb of the application to declare the extra-ordinary Annual General Meeting held on 2nd March, 2007 in violation of the court order of 1st March, 2007 null and

void and inconsequential. My reaction to this is that if any act is done in violation of the law it is void. If it is void it is in law a nullity. It is not only bad, but automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And any proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect to stay. It will collapse (see *MACFOY VS. UNITED AFRICA CO. LTD (1961)3ALL ER 1169* ***at*** *page 1170****, Lord Denning delivering the opinions of the Privy Council."***

On the same day, after the ruling was read, the learned counsel for the appellants addressed the court in mitigation saying that the appellants were remorseful and were ready to purge the contempt. He said further that all the appellants were advanced in age and some were sickly. He prayed for a lenient sentence. The learned counsel for the respondents urged custodial sentence as the disobedience was willful and deliberate. Upon those pleadings, the court suspended the sentence and released the appellants on bond. It is difficult to appreciate this part of the proceedings but I see it as reflecting an afterthought in that the learned Judge having included the punishment for contempt in his ruling, apparently realized that that was a mistake when the two counsel sought to address him, one in mitigation and the other on the enhancement of the sentence. However, in another ruling delivered on 16th December, 2009 the learned Judge sentenced the appellants to the same fine of Kshs.5,000/- in default to imprisonment for a term of six (6) months. He gave them right of appeal.

These two rulings, one of 11th November, 2009 and the other of 16th December, 2009 prompted the appeal before us as all the appellants were aggrieved by the two rulings which are in effect one. They moved to this Court in a memorandum of appeal dated 30th March, 2010. They contend in that memorandum of appeal that the learned Judge erred in finding them in contempt when the weight of evidence and the submissions were to the contrary; that he erred in entertaining the application as no leave to bring the application had been applied for and obtained as required by law; that he erred in failing to distinguish that the order of the court was stopping extra-ordinary Annual General meeting of the company and not an Annual extra-ordinary meeting of the company while the two meetings are distinctly different under the provisions of the Companies Act; that the learned Judge failed to make a finding that the offending meeting was called by the Registrar and presided over by the District Commissioner both of whom were not cited in contempt proceedings; that the learned Judge failed to consider the reasons why the Registrar of Companies called the offending meeting which was that since 1994, the Directors of the company had not called any Annual General Meeting as required by the Companies Act; that the learned Judge failed to consider the reasons why the Registrar called the meeting the which reasons were in the various correspondence before the Registrar and the then Board of Directors; that the learned Judge erred in failing to appreciate that the application which gave rise to contempt proceedings had been dealt with by *Karanja, J* (as she then was) and was thus not available for any consideration and that the learned Judge failed to consider that the respondent's counsel *Peter Kiarie* had conflict of interest as he had directly benefited from the respondent company's ill decisions.

Both Mr. Mokua, the learned counsel for the appellant and *Mr. Kiarie,* the learned counsel for the respondents addressed us at length on the reasons why the appeal should be allowed and the reasons why it should be dismissed respectively. Again, as i have said above, as this is an interlocutory appeal, I restrain myself from going into the details of their submissions most of which touched on the substantive matters that are as yet to be canvassed at the pending hearing in the High Court. However, I have considered the same submissions and I feel indebted to the two learned counsel.

Both parties do agree that a meeting was held on 2nd March, 2007. The appellants say it was a different meeting – i.e. normal Annual General Meeting and not extra-ordinary Annual General Meeting which had been stopped by the court in its order of 1st March, 2007. The appellants do not dispute the respondent's statement that the court did stop respondent's meeting scheduled for 2nd March, 2007. All

they say is that the order stopping that meeting was not served upon them as is required by law. Further the appellant's stand is that the meeting they attended on 2nd march, 2007 was convened by the Registrar of Companies and presided over by the District Commissioner, thus they merely attended and took part as members of the second respondent but according to them, if there was non compliance with the order of the court, the disobedience was by the Registrar and the District Commissioner Trans-Nzoia Distrct and not by them.

This is a first appeal and that being so, I am enjoined by law to revisit the entire evidence afresh, analyze it, evaluate it and come to my own conclusion but always aware that the trial court had the advantage of seeing the witnesses, their demeanor and hearing them and giving allowance for that – See ***SELLE VS. MOTOR BOAT CO. LTD [1968] EAI 23.***

In this case the first issue that I need to consider is whether the appellants were each served with the court order of 1st March, 2007 together with the penal notice thereof. The learned Judge who heard the process server give evidence on that aspect and also read his affidavit was satisfied that the appellants were properly served. That is a matter of fact upon which I must not interfere with the findings of the Judge unless I am certain that matters that needed to be considered before arriving at that conclusion were not considered or that matters that were not for consideration i.e. irrelevant matters were considered or that looking at the entire decision on that issue, he was plainly wrong. I have considered this ground with those aspects in mind but in my view, I find no reason to fault the learned Judge on that. In my view, considering the process server's evidence, I am also satisfied that the appellants were properly served with the order stopping the offending meeting.

The appellants contended in their affidavit I have referred to hereinabove at paragraph 17, that the meeting that they attended on 2nd March, 2007 was ordered by the Registrar of Companies and they annexed a letter to that effect marked JWIV. That letter was written on 5th January, 2007 and was apparently addressed to the respondent although it would appear the words "The Directors" were later added in hand. It merely told the respondents that the registrar had received a complaint from shareholders that Annual General Meeting had not been called since 1994 and sought reasons for that delay within 14 days otherwise the registrar would mandate shareholders to call Annual General Meeting of the company. It never called any meeting of the company as alleged by the appellants and certainly never called the meeting of 2nd March, 2007 the subject of the contempt proceedings. The other letter of 13th march, 2007 from the registrar was a response to a letter which requested registration of new directors pursuant to elections at the offending meeting. It was not a follow up letter from the registrar as alleged at paragraph 19 of the appellant's replying affidavit. I entertain no doubt that the appellants in their affidavit which was before the trial court was attempting to mislead the court on that aspect and the learned Judge rightly rejected those allegations even though he did not in his ruling specifically point them out as I have done here.

The next issue is whether the meeting held on 2nd March, 2007 was an Annual General Meeting or an Extra-ordinary Annual General meeting. A copy of the Notice convening such meeting annexed to Welukengo's supporting affidavit sworn on 26th February, 2007 answers it all. It is headed notice of Extra-Ordinary Annual General Meeting – Trans-Nzoia Investment Company Limited and it states in its body:-

"Notice is hereby given for an extra-ordinary general meeting for the shareholders Trans-Nzoia Investment Company Limited. The meeting will take place at Kenyatta Stadium-Kitale on Friday 2nd March,2007 at 10.00 a.m.

AGENDA

1. ***Elections***

2. ***Any other business.***

Please be on time.

Trans-Nzoia Investment Company Limited Shareholders."

That notice resolves two main issues which are first that the meeting was not convened by the Registrar as alleged by the Appellants and secondly that it was clearly an Extra-ordinary General meeting and not Annual General Meeting as alleged. The order issued by *Ochieng J*. on 1st March, 2007 precisely stopped that meeting and none other.

Thus on my own independent analysis and evaluation of the evidence that was before the trial court, my view, having given room for the advantage the learned Judge had over us on matters of facts, is that the appellants were properly served with the order that stopped the offending meeting; that the meeting was not convened by the Registrar of Companies as alleged; that the meeting was extra-ordinary annual general meeting and not Annual General Meeting and lastly that the appellants proceeded with the meeting despite knowledge that the court had stopped it. I am persuaded that the learned Judge's conclusion in his ruling cannot be disturbed on the finding that the appellants were in contempt.

On the punishment, I have already indicated my concern that the learned Judge spelt out the fine of Kshs.5,000/= in his ruling without first receiving the mitigating factors and thereafter meting out the sentence. This Court has in several judgments in criminal cases stated that even where sentence is by law stated to be mandatory, the trial court should not sentence an offender before receiving and considering mitigating factors. Contempt proceedings, though Civil as is here, are in nature akin to criminal proceedings and the principles guiding the courts as regards sentencing need to be adopted. Secondly, the history of this matter, in my mind called for a more lenient sentence. In saying so, I am not in any way to be understood as encouraging or condoning disobedience of court orders; far from it. All I am saying is that I see protracted wrangles over the issue of the leadership of the respondent company coupled with what may appear genuine concerns over the use of the company properties which the appellants feel are being wasted. In the circumstances, heavy punishment may not be the cure but as the learned Senior Principal Magistrate did say way back in the year 2000, a properly organized election of the respondent leaders may help instill sanity into the respondent company. With all the above in mind, I would allow appeal on sentence and reduce the fines imposed on each appellant to Kshs.1,000/= in default each appellant to serve a jail term of three (3) months. Thus I do propose that the sentence of 5,000/= imposed on each appellant is set aside and in its place each appellant is sentenced to a fine of Kshs.1,000/= in default to three (3) months imprisonment. Only to that extent does the appeal succeed. Otherwise I would dismiss it. I make no order as to costs in view of the history of the case.

This judgment is delivered under ***Rule 32(3)*** of this Court's Rules.

DATED and DELIVERED at ELDORET this 19th day of September, 2012.

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

JUDGMENT OF GITHINJI, JA.

I have had the advantage of reading the Judgment of Onyango Otieno, JA in draft. I respectively agree with it entirely and I have nothing useful to add. I also agree with the proposed orders.

Accordingly the appeal is allowed to the extent that the sentence of fine of Shs.5,000/= in default sixth months imprisonment imposed on co-appellant is set aside and substituted with a fine of Shs.1,000/= in default three months imprisonment. The excess fine paid to be refunded to each appellant. Otherwise the appeal is dismissed with no orders as to costs.

This judgment is delivered under Rule 32(3) Court of Appeal Rules as Omolo JA is no longer performing judicial functions.

Dated and delivered at Nairobi this 19th day of September, 2012.

E. M. GITHINJI

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JUDGE OF APPEAL