



**Ceven Limited v Gichuhi & 4 others (Civil Suit 586 of 2014)
[2022] KEHC 16423 (KLR) (Commercial and Tax) (16 December 2022) (Ruling)**

Neutral citation: [2022] KEHC 16423 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT 586 OF 2014
A MABEYA, J
DECEMBER 16, 2022**

BETWEEN

CEVEN LIMITED PLAINTIFF

AND

ERASTUS GICHUHI 1ST DEFENDANT

DANIEL THUKU 2ND DEFENDANT

TIDAL SPACE LIMITED 3RD DEFENDANT

EXPRESS PAYMENTS LIMITED 4TH DEFENDANT

ACCESS KENYA LIMITED 5TH DEFENDANT

RULING

1. This is a ruling on the plaintiff's notice of motion dated January 19, 2015. The same was brought under section 5 of the Judicature Act; sections 1A,1B, 3 and 3A of the Civil Procedure Act; order 40 rule 3(1) and (3) and order 50 rule 1 of the Civil Procedure Rules 2010; the Contempt of Court Act 1981 (United Kingdom) and part 81, rule 81.4 of the Civil Procedure Rules (Amendment no.2) 2012 (United Kingdom).
2. The plaintiff sought to have the 1st and 2nd defendant cited for contempt of court and be committed to civil jail for willfully violating and/or disregarding the court's order of December 15, 2014.
3. Further the plaintiff sought to have the costs of the application borne by the 1st and 2nd defendant on a full indemnity basis.
4. The grounds for the application were that the plaintiff filed an application dated December 11, 2014 whereby the court (Amin J) made an *ex parte* mandatory order, *inter alia*, compelling the 1st and



- 2nd defendant to immediately grant the plaintiff and/or any person designated by the plaintiff, full administrator privileges to the PataPawa system including the plaintiff's server co-hosted by the 5th defendant and to disclose all administrator passwords and login particulars thereto.
5. Further, pending the determination of the application dated December 11, 2014 and this suit, the 1st, 2nd, 3rd and 4th defendant were restrained from interfering in any manner with the PataPawa software and system data and/or information on the plaintiffs' server and any server co-hosted by the 5th defendant.
 6. That the 5th defendant was served with a copy of the order on December 16, 2014 and thereafter took action in an attempt to comply on its part with the orders which interrupted the normal operation of the subject servers. The 1st and 2nd defendant were made aware of the existence of the order and the plaintiff confirmed the existence of the same to them.
 7. Notwithstanding the foregoing, the 1st and 2nd defendant proceeded to deliberately evade personal service of the orders and continued to interfere with the plaintiff's PataPawa system, data and information while keeping the plaintiff's server offline since December 17, 2014.
 8. The plaintiff averred that on January 7, 2015, the 1st defendant was served with the order of December 15, 2014 and duly acknowledged receipt of the same by signing copies thereof. The aforesaid service was conducted in the presence of the 2nd defendant who declined to acknowledge service in the absence of additional copies of the aforesaid documents and thereafter proceeded to evade personal service.
 9. The plaintiff further contended that the 2nd defendant was personally served with the order of December 15, 2014 on January 12, 2015 and duly acknowledged receipt of the same by signing copies thereof. That in breach of the said order, the 1st and 2nd defendant refused to grant the plaintiff full administrator privileges to the PataPawa system and/or to disclose all administrator passwords and login particulars relating to the PataPawa system and refused to hand over the system passwords to manually turn on the plaintiff's system causing the system to remain inoperative since December 17, 2014.
 10. That as a result of the 1st to 4th defendants' activities, the plaintiff continued to be exposed to estimated losses in excess of Ksh 20,000,000 as at the time of the application and continue to suffer daily losses of up to Ksh 8,000,000/-.
 11. The plaintiff pleaded that it was unable to mitigate its losses and resume its normal business operations due to the 1st and 2nd defendant's persistent refusal to provide it with access to its system as ordered by the court while the 1st and 2nd defendant continued to unjustly enrich themselves using the plaintiff's intellectual property.
 12. In opposition, the 2nd and 4th defendant filed a replying affidavit sworn on February 3, 2015 by the 2nd defendant who is the director of the 4th defendant and had the authority to swear on its behalf.
 13. He denied that he and the 4th defendant had disobeyed the order of the court dated December 16, 2014. He stated that he and the 4th defendant did not switch off the system as alleged and that they did not have such control. That although they share the same service provider, they had nothing to do with the plaintiff's dealings with the 1st defendant.
 14. That the software as claimed by the plaintiff was not owned by it but it has recently sought to negotiate a buy-out option with the 1st defendant.
 15. In the premises, the 2nd and 4th defendant prayed that the application be dismissed with costs.
 16. The court has considered the pleadings, affidavits and the submissions of learned counsel.



17. For contempt of court to be established, there must be a court order that a party, who is aware of the same, willingly disobeys the same.
18. In this case, it is not in dispute that the court issued an order on December 15, 2014 directed at the defendants. The 1st and 2nd defendant were served on January 7, 2015 and January 12, 2015, respectively.
19. The defendants submitted that the 1st and 2nd defendant were served with the ex parte orders 15 days beyond the stipulated timeframe under order 40 rule 4(3) which requires service within 3 days from the date of issue.
 20. order 40 rule 4(3) of the Civil Procedure Rules provides: -

“(3) In any case where the court grants an *ex-parte* injunction the applicant shall within three days from the date of issue of the order serve the order, the application and pleading on the party sought to be restrained. In default of service of any of the documents specified under this rule, the injunction shall automatically lapse.”
21. It is clear from the foregoing that once an order is not served together with the pleadings within 3 days of its issuance, the injunction is automatically discharged by the operation of law. This is because, the matter having been certified urgent and the order granted ex-parte, the same should be brought to the attention of the person directed at at the earliest.
22. My view is that, since sometimes it may be difficult to get the intended recipient for personal service of the order together with the pleadings set out in order 40 rule 3 of the Civil Procedure Rules, it would be sufficient to notify such person of the order. That in my view should save the life of the order. This is because of the likelihood of a defendant evading service of all the documents with a view to ‘kill’ the order.
23. In the present case, I have noted that via an email dated December 17, 2014 annexed as ‘HW2’ in the plaintiff’s supporting affidavit sworn on January 19, 2015, the director of the plaintiff, Andrew Gitonga, notified the 1st defendant of the order and that the 1st defendant agreed to adhere to the order.
24. This email shows that there was a conversation with the 1st defendant about the court order. In this regard, as far as the 1st defendant was concerned, he was aware of the order as at December 17, 2014, the second day after the order was granted.
25. As regards the 2nd defendant, he was served on January 12, 2015. That was well outside the three days set out under order 40(3) of the Civil Procedure Rules. By that time, the order as against him had expired. There is no evidence to show that the 2nd defendant was aware of the order before January 12, 2015.
26. It is clear that the order was never complied with. The same seem to have been issued in vain. That won’t do.
27. Accordingly, I find that the 1st defendant was in contempt of the said court order and convict him accordingly. The 2nd defendant was not. In this regard, the 1st defendant is hereby summoned to appear in open court on January 26, 2023 for mitigation and sentencing.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF DECEMBER, 2022.

A. MABEYA, FCIArb



JUDGE

