



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS COMMERCIAL DIVISION

CIVIL CASE NO. 45 OF 2017

CARL DOUGLAS RUSNELL1ST PLAINTIFF/APPLICANT

FERNWOOD DEVELOPMENTS LTD.....2ND PLAINTIFF/APPLICANT

VERSUS

JOSEPH BUSHEBI (in his personal capacity

And also trading as Bushmell Auto Scanners).....DEFENDANT/RESPONDENT

RULING

1. This ruling relates to a notice of motion application dated 30th August 2017, brought under the provisions of sections 1A, 1B, 3A, and 63 (a) (b) (c) and (e) of the Civil Procedure Act, Order 40 Rule 3 (1), (2), Order 50 Rule 1 of the Civil Procedure Rules and sections 5 and 8 of the Contempt of the Court Act.

2. The Applicants are seeking for orders as here below reproduced:-

a) The Honourable Court be pleased to grant leave to the Plaintiffs/Applicants to institute criminal contempt proceedings against the Defendant/Respondent.

b) The Honourable Court be pleased to issue a Notice to show Cause against the Defendant/Respondent herein inviting him to show cause why he should not be cited for contempt for disobeying Court orders, failure to which he be committed to jail for contempt of Court.

c) Pending the hearing and determination of this Application, and subsequently of the substantive suit, the Court be pleased to grant interim orders for all money collected accruing from all the rental properties situated in Land Parcel Numbers 6845/72 Utawala and 209/28/1 Ruaraka be deposited in court or in an account held, in a reputable bank, by the firm of Advocates for the Plaintiff /Applicants who shall provide their professional undertaking to retain and preserve all the funds deposited therein, giving a statement of account, from time to time, to illustrate the status of the account.

d) Pending the hearing and determination of this Application and subsequently of the substantive suit, the Honourable Court be pleased to allow the Plaintiffs/Applicants to elect and/or appoint a firm of Commercial Agents that shall be responsible for collection of rent from all the rental property subject matter of this application and suit.

e) Pending the hearing and determination of this Application and subsequently of the substantive suit, the Honourable Court be pleased to call for a statement of accounts from the current Commercial Agents collecting rent from these properties to illustrate the status of the estate, subject of this Application and suit.

f) Pending the hearing and determination of this Application and subsequently of the substantive suit, the Honourable Court be pleased to call for a statement of accounts of account number 0092020002348 Kayole Branch held, at Rafiki Microfinance Bank, by the Defendant /Respondent.

g) The costs of this Application be provided for.

3. The application is supported by an affidavit dated 30th August 2017, sworn by Muyuri M. Dennis, an associate in the firm of; Ogetto, Otachi & Co. Advocates, which is seized of this matter on behalf of the Applicants. He deposed that, by consent of the Advocates

representing the parties herein on 25th July 2017 and in the presence of the Respondent, the Honourable Court, issued injunctive orders, restraining the Respondent from collecting rent, or in any manner dealing with the properties; a block of apartments at Utawala registered as L.R. Number 6845/72; and the housing units on Plot Number 209/28/1, at Ruaraka along Thika, pending the hearing and determination of the suit.

4. The order further directed that, any funds collected, held and received monthly from rent of the properties and any other funds accruing be paid into an account to be designated by the Applicants or their agents or into such other account as the court may direct. Further, any income received from the subject properties in form of rent or otherwise be deposited into an interest earning account opened in a reputable commercial bank, in joint names of the counsels representing the respective parties. The account was to be opened within seven (7) days of this order.

5. That efforts by the Applicants law firm and the correspondence vide a letters dated 26th July 2017, and 14th August 2017, as well as conversation between the parties lawyers to open a joint account pursuant to the said orders have not yielded fruits as, the Respondent, either jointly and/or severally with his Advocate on record have declined to act accordingly. Hence an entire month has lapsed since the issue of orders with respective July rent paid contrary to the orders. The second installment of rental payment is due to be collected by commercial agents and deposited to an account unknown to the Applicants in total disregard of the court order. The orders sought shall aid the court appreciate the financial benefit accrued to the Respondent and determine the suit on merit.

6. The Applicants further argued that, the prayer for provision of statements of account held at Rafiki Microfinance Bank, shall assist the court conduct forensic audit to establish the true extent of rental incomes collected for periods prior to and during the period of the hearing of the suit which form the substratum of the merits of this suit.

7. It was averred that, orders have been issued in the Chief Magistrate's Court, Criminal Case No. 1315 of 2016 freezing the Respondent's bank Account Number [particulars withheld] held at Rafiki Microfinance Bank, Kayole Branch, where the all the rental income is held. But the Respondent has irregularly substituted the commercial agents and the bank account to avoid the freezing order. Therefore, it is cogent that for the ends of justice to be met and for impartiality, a neutral commercial agent be appointed to collect and deposit all rental income into court or an account to be opened and maintained by the Applicant's firm, as prayed for. In the alternative, or in the absence of a commercial agent, the Respondent be called upon to provide the statements of account as sought.

8. It was further deposed that even if the Respondent intends to appeal against the orders given, the Respondent should obey the court orders as there is no stay order. That the Respondent has demeaned the sanctity of the court and abridged the authority bestowed upon him, shown disrespect for judicial process and has interminably offended provisions of; Section 4 of the Contempt of Court Act, 2016. Consequently, the Respondent should provide security for costs, as his actions militate against compliance with the orders in place. He who seeks equity must seek with unclean hands.

9. However, the Application was opposed vide a Replying affidavit dated 21st September 2017, sworn by the Respondent. He deposed that on 25th July 2017, he was in court with his Advocate for the hearing of the applications dated 30th January 2017 and dated 11th July 2017. As the proceedings were being conducted, he heard the trial judge recording consent order without his permission and that of his Advocate. His Advocate did not agree with the consent order given on the said date. He instructed his Advocates to file an appeal against that order. On 26th July 2017, the notice of appeal was filed and served upon the Applicants on 1st August, 2017.

10. The Respondent denied disobeying order issued on 25th July 2017 and stated that he is willing to abide by it. That it is common practice that, the Applicants having been served with the notice of appeal, ought to have waited for the Court of Appeal to hear and determine the Application for stay of execution first. Hence this Application is premature, as he has not disobeyed the subject order

11. The Respondent swore a further a Replying affidavit dated 21st September 2017, sworn by Thomas Kabaka, an Advocate of the High Court of Kenya, who has conduct of this matter at the date of the order. He stated that on 25th July 2017, he attended court for the hearing of the applications dated 30th January 2017 and 11th July 2017. On that date 25th July 2017, the court gave an order which the Respondent did not agree with the terms as recorded by the Honourable court and he was instructed to file an appeal against the said order which he filed on 26th July 2017 and served the Applicant on 1st August 2017. He also requested for certified copies of the proceedings.

12. That he has complied with the order by opening a joint account with the Applicants Advocates as such he has not disobeyed the court order issued on 25th July 2017. He is willing to abide by it. That the Respondent has filed an Application for stay of the said orders pending hearing and determination of the intended appeal.

13. The parties disposed of the Application by the filing submissions, whereupon, the Applicant invited the court to consider the following issues for determinant:-

a) what is the threshold of contempt of Court;

b) whether a notice of appeal constitutes stay of proceedings;

c) What remedies and/or punishment are available for contempt of Court

14. The Applicants referred the court to the definition of contempt under the Black's Law Dictionary, 9th Edition which provides that contempt is "conduct that defies the dignity or authority of a court or legislature." It is an act that undermines the administration of justice and is punishable by imposition of a fine or imprisonment.

15. The provisions of Section 4 of the Contempt of Court Act of Kenya were cited which stipulates that :-

(1) *Contempt of Court includes-*

(a) *Civil contempt which means willful disobedience of any judgment, decree, direction, or other process of a court or willful breach of an undertaking given to a court;*

(b) *Criminal contempt which means the publication, whether by words, spoken or written by signs, visible representative, or otherwise, of any matters or the doing of any other act which-*

(i) *scandalizes or tends to scandalize, or lowers or tends to lower the judicial authority or dignity of the court;*

(ii) *Prejudices, or interferes or tends to interfere with the due course of any judicial proceedings; or;*

(iii) *Interferes or tends to interfere with, or obstructs or tends to obstruct the administration of justice.*

(2) *In any case not relating to civil or criminal proceedings as contemplated under subsection (1), an act that is willfully committed to interfere, obstruct or interrupt the due process of the administration of justice in relation to any court, or to lower the authority of a court, or to scandalize a judge, judicial officer in relation to any proceedings before the Court, on any other manner constitutes contempt of Court.*

16. The Applicants referred the court to the case of; Re Bramblevale Ltd (1970) Ch 128, unreported, High Court, Pringle, J, 16 may 1972 (1975-No. 18355) where contempt of Court was considered and was thus stated:

“a contempt of court is an offence of criminal character, a man may be sent to prison for it. It must be satisfactorily proved. To use the time honoured phrase, it must be proved beyond reasonable doubt. It is not proved by showing that when the man was asked about it he told lies. There must be further evidence to incriminate him.”

17. Further reference was made to the case of; Republic vs Kenya School of Law & 2 Others Ex parte vs Juliet Wanjiru Njoroge & 5 Others (2015) eKLR, where the court referred to the case of; Econet Wireless Kenya Ltd vs Minister for Information & Communication of Kenya & Another (2005) 1 KLR 828 and stated that if for any reason a party has difficulty in complying with court orders, the honourable thing to do is to go back to court and explain the difficulties faced by the need to comply with the order. Once a court order is made in a suit, the same is valid unless set aside on review or on appeal.

18. The court thus expressed itself in the case of; Econet Wireless Kenya Ltd vs Minister for Information & Communication of Kenya & Another (supra) as follows:-

“It is essentially for the maintenance of the rule of law and order that the authority and the dignity of our Courts are upheld at all times. The court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a Court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or void.”

19. The Applicant averred that save for opening an account outside the timelines given the Respondent is in contempt of court orders wit that he has failed to deposit all rental incomes, from the properties subject matter of this suit, in a joint interest earning account for two months from the date of the order and has continued to divert the rental incomes, to unspecified account to the exclusion and oblivion of the /Applicants, contrary to the orders of the Honourable Court. Neither has he returned to court and explain any difficulties, if any, he has in obeying the orders issued. In the alternative, he has arrogantly and mischievously abrogated the orders of the court, made provision to cater for his urgent and priority domestic needs from the joint account tha extended equity to him.

20. That as per the provisions of; Order 42 Rule 6(1) of the Civil Procedure Rules, 2010, the Respondent has not made an application before this Court for stay of the subject orders and cannot purport to seek aid of the Court of Appeal to stay the orders and neither can he rely on the fact that, he has filed a notice of appeal as the notice does not constitute automatic stay. Therefore, without an order for stay the Respondent's conduct is in deliberate blatant rebellion against the court's authority.

21. The Applicants referred to the case of; Awadh vs Marumbu (No 2) No. 53 of 2004 (2004) KLR 458, where the Court held that, court orders must be obeyed at all times in order to maintain the rule of law and good order and the authority and dignity of the courts must be upheld at all times. It is the duty of the court not to condone deliberate disobedience of its orders nor waiver from its responsibility to deal decisively and firmly with the approved contemnors.

22. Therefore the Applicants relied on the case of; Wildlife Lodges Ltd vs County Council of Narok and Another (2005) 2 EA 344 (HCK), and argued that the Respondent should be cited for being in contempt of court and consequently be committed to civil jail and/or be subjected to attachment or denied audience, before the court until the contempt is purged.

23. However the Respondent submitted that, although on 6th September 2017, Hon Justice Fred Ochieng granted the Applicants leave to institute criminal proceedings for contempt of the court orders but the Applicants failed to comply with the orders as they did not file a substantive application and serve the Respondent as soon as possible but only served this application dated 30th August 2017 on 20th

September 2017. Hence the Application is an abuse of the court process.

24. The Respondent submitted that under the Contempt of Court Act (herein “the Act”), 2016 before proceedings for contempt are instituted the Applicant must first move the court to issue a notice to show cause accompanied by an affidavit against the Respondent. The rules of natural justice take precedent once notice to show cause is issued by the court. The Respondent relied on Section 7 (3) of the Act. The Respondent also relied on Article 47 and 50 of the Constitution of Kenya, to argue that the application is null and void ab initio because no notice to show cause by way of summons has been served upon the Respondent.

25. It was submitted that the procedure existing before the enactment of the Contempt of Court Act was held in decision of Court of Appeal in *Christine Wangari –vs- Elizabeth Wanjiru Evans & 11 Others [2014]eKLR* where the court found that under Rule 81.4 of the Civil Procedure (Amendment No. 2) Rules, 2012 which deals with breach of judgment, order or undertaking, the application for contempt is made in the proceedings in which the judgment or order was made or undertaking given by what is referred to as “application notice” which application is required to set out fully the grounds on which the committal application is made, identify separately and numerically, each alleged act of contempt and be supported by Affidavit(s) containing all the evidence relied upon. The said Application and Affidavit(s) must be served personally on the respondent unless the Court dispenses with the same if it considers it just to do so or authorizes an alternative mode of service.

26. The Respondent further submitted that, the application offends order 45 of the Civil Procedure Rules on the basis that, the Applicants are trying to seek further interim orders for all money collected accruing from properties situated on land reference numbers 6845/72 Ruaraka to be deposited in Court, the Plaintiff to be allowed to elect or appoint commercial agents to collect rents from the said properties and call statement of accounts of Account No. 0092020002348 Kayole Branch held at Rafiki Microfinance bank, by the Defendant/Respondent are based on the orders being appealed against.

27. That the legal procedures required the Applicants to apply for a review of the court order issued on 25th July 2017. All the orders being sought originated from the order being appealed from and granting new orders will render our court Appeal Civil Application No. 214/2017 nugatory. Hence the orders being sought are abuse of court process and there and that the application be dismissed with costs.

28. It was further argued that the application seeking orders to commit one for contempt ought to be served personally upon the person sought to be committed.

29. However, it suffices to note that as the ruling on the subject application was pending, the Defendant/Applicant s filed a notice of motion application dated 13th September 2019 brought under the provisions of Order 45 Rule 1(1)(a)(b) of the Civil Procedure Rules, Section 3A, 1A, 1B, Section 80 and 63(e) of the Civil Procedure Act and Article 50(1), (4), Article 47 159(2) (a) of the Constitution of Kenya 2010, Section 64, 65 and 67. Evidence Act Cap 80, Section 11 of the Oaths and Statutory Declarations Act Cap 15 Laws of Kenya, Rule 3(1) and (2) High Court (Practice and Procedure) Rules and Section 10 of the High Court (Organization and Administration) Act No. 27 of 2015 and all enabling provisions of the law), seeking for orders that:-

(a) The court stay the ruling on the application dated 30th August 2017 scheduled for 17th September 2019 and be pleased to review and vacate the orders made on 29th August 2019;

(b) further the court be pleased to allow the Defendant/Applicant’s advocate to cross examine Mr. Muyuri N. Dennis and Mr. Gerishom Otachi Omanwa as per the notice of cross examination filed on 25th April 2018

30. The application is supported by an affidavit sworn by the Defendant/Applicant dated 13th September 2019. He deposes that, Mr. Muyuri the Advocate appearing for the Plaintiffs whom the Defendant intends to cross examine has sworn a false affidavit hence the need to establish the authenticity, accuracy ,veracity credibility and genuineness of the facts deponed upon to enable the court arrive at a fair, informed and just determination of the issues in question.

31. The Defendant/Applicant argues that, Mr. Muyuri misunderstood, misread, misconstrued, misapprehends and misinterpreted the terms of the consent order dated 25th July 2017. Further that the cross examination of Mr. Otachi from the firm representing the Plaintiffs regarding the contents of the application dated 30th August 2017 is intended to set the record straight on important matters intentionally disregarded and/or omitted by the Applicants in that application.

32. That the failure to cross examine the deponents shall cause him great prejudice and injustice. The applicant avers that he has a right to fair administrative action pursuant to Article 47of the Constitution of Kenya which includes action that is expeditious, efficient, lawful, reasonable and procedurally fair. Finally the Applicant avers that, there is a glaring mistake, omission or error apparent on the face of the record and other sufficient reason to review the order in respect of the order scheduled for 17th September 2019.

33. Upon service of the Defendants application, the Plaintiff/Respondent filed grounds of opposition dated 16th September 2019 and argued that the notice of intention to cross examine the Counsels is fatally bad in law as it offends the provisions and spirit of Order 19 Rule 2(1) of the Civil Procedure Rules, Article 10 of the Constitution of Kenya 2010 in that it does not abide by the rules of law. In the alternative and without prejudice, the application is frivolous, misguided and prejudicial as Mr. Otachi is not the deponent of the affidavit disclosed herein. It is an abuse of the court process and an attempt to stagnant, scuttle and/or defeat expeditious disposal and conclusion of the suit which is against the rules and contract to the provisions of the law especially oxygen principles.

34. That the Defendant/Applicant has conveniently, notoriously and continuously filed applications at all material times when the matter is scheduled for hearing of the application by the Plaintiff which mischief has shifted to delay in delivery of the ruling. That as the Defendant/Applicant files the applications, he continuous to undermine the authority of the court as is in contempt of the court orders. That even then, the Defendant/Applicant has not followed the procedure of filing applications in court in that the application filed under certificate

of urgency ought to be brought before a Judge who would give directions on the urgency and a date when the matter will be heard inter parties. The Plaintiff/Applicant received the Defendant's application under protest. Suspiciously, the application was to be heard on the date the matter was scheduled for delivery of the ruling. Further, as the file was pending ruling, and therefore expected to be in the Judge's chambers, the application was filed and therefore it is with mischief and does not bear any fabric of genuineness.

35. Finally it was argued that, the notice of cross examination does not disclose any substantive or cogent purpose that the cross examination shall serve or the grounds upon which it is premised as the order for cross examination is the discretion and the power of the court, the Defendant/Applicant ought to convince the court to grant it.

36. Be that as it were, the subject notice of motion application dated 16th September 2019 was filed in court on the same date before the vacation duty court. Upon considering the same, the court ordered that, the application be served, the Respondent file a reply and the matter be mentioned before the trial court on 17th September 2017. On that date, the court heard the parties thereon, whereupon the Plaintiffs protested at the application seeking to stay the ruling on their application. The Defendants/Applicants argued that, it will not be in the interest of justice to deliver the ruling before hearing the application. The court sought for time to consider the arguments and after considering the notice of motion application dated 30th August 2017 and the prayers therein, the grounds and the affidavit in support, the replying affidavit filed thereto dated 21st September 2017, the submissions by the parties and the application dated 13th September 2017, supported by notice to cross the Advocate filed on 12th April 2018, the court rules that it shall consider all the applications at the same time which I hereby do.

37. The main issue in the matter as I perceive it is whether, the parties have complied with orders made on 25th July 2017. It is argued that the Defendant/Applicant has intentionally disobeyed those court orders. The Defendant however argues that it has not disobeyed those court orders and are ready to abide by them. Indeed they have opened the Bank account a fact within the knowledge of the Plaintiff/Applicant.

38. However, the subject orders required beyond the opening of the account. The orders were clear that; any income received from the subject properties in the form of rent or otherwise, be deposited in an interest earning joint account in the names of the counsels representing respective parties. The account was to be opened within seven (7) days of the order. It was further ordered that any liabilities towards third parties would be discharged accordingly from the profits collected from the subject properties.

39. The court further directed that the parties to prepare the suit for hearing within one month of that order and the matter be set for mention 22nd September 2017 to confirm compliance and case management conference. By 1st September 2017, there was no compliance with those orders giving rise to the filing of the subject application dated 30th August 2017 whereby the court granted the Plaintiffs leave to institute criminal contempt proceedings against the Defendant/Respondent. That was not immediately done.

40. From the evidence on record the following issues are evident:-

(a) There has been no total compliance with the orders issued by the court on 25th July 2017; the Defendant argue that they did not agree with the terms of the said orders and that they have filed a notice of appeal against the same. However, as supported by case law; referred to herein if a party is dissatisfied with a court order or is unable to comply, the party should go back to the same court and explain the challenge faced making it unable to obey the court order. So long as the court order remains on record, however illegal and ambiguous tainted or otherwise it may be, that order ought to be obeyed until it is otherwise set aside upon review and/or appeal by a court of competent jurisdiction.

(b) The mere filing of a notice of appeal does not constitute a stay of proceedings and/or the order impugned. Therefore the Defendants are bound to obey the orders issued on 25th July 2017. It is trite law that a party who has failed to obey court orders should not have a right of audience before the same court and on that ground alone,, the application filed by the Defendants dated 13th September 2019 should not be entertained.

(c) However, I note that, Plaintiffs/Applicants sought for under prayer (2) of the application dated 30th August 2017, for leave to institute criminal proceedings against the Defendant/Respondent, which prayer was allowed as stated herein. Under prayer (3) of the application, the Plaintiffs/Applicants seek that a notice to show because why the Defendant/Respondent should not cited for contempt of the court order be issued. That prayer was not dealt with. I find that it will be in the interest of justice to grant that prayer. Thus before the Defendant can be cited for disobedience they ought to be given an opportunity to show cause. In my understanding of the Defendant's response to the application as per the affidavit sworn by the Defendant/Applicant and his previous Counsel Mr. Kabaka is that they have partially obeyed the court order of 25th July 2017, by opening the account and they are ready to abide by the entire orders given.

(d) It is also evident that as stated above, the Applicants have not instituted criminal proceedings against the Defendants/Respondents after being granted the leave and therefore the court cannot commit the Defendant/Respondent to civil jail as prayed for. It can only as aforesaid deny them audience if they fail to comply with the subject orders and for no good cause.

41. In conclusion, I find that, the manner in which these proceedings are being conducted will not serve the interest of justice and/or attain the goal of the overriding objectives under Section 1A and 1B of the Civil Procedure Act. These proceedings have been in court for almost two (2) years now, and despite the court giving directions on 25th July 2017, that the parties prepare the main suit for hearing, they have taken to filing and serving applications. The appeal alluded to herein by the Defendant/Respondent does not bar the continuity of these proceedings.

42. It is against this background, that the court makes the following orders:-

(a) That orders issued on 25th July 2017, be complied with within fourteen (14) days of the date of this order, and if the account has been opened as stated herein, the rest of the orders must be obeyed within the given period;

(b) If any of the parties will not have obeyed any of these orders, the court will not give them a right of audience thereafter and either party will be at liberty to apply;

(c) In the meantime, the parties must prepare the main suit for hearing and in that regard, they should conduct the Case Management conference before the Hon. Deputy Registrar within 21 days of the date of this order;

43. Thereafter the matter will come to court for certification and the hearing of the main suit on priority basis.

44. All other pending applications herein are stayed to allow the hearing of the main suit. Costs of the application to abide the outcome of the main suit.

45. Those then are the orders of the court.

Dated, delivered and signed in an open court this 30th day of September 2019.

G.L. NZIOKA

JUDGE

In the presence of:

Mr. Muyuri for the Plaintiff

No appearance for the Defendant

Dennis-----Court Assistant