



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 75 OF 2016

ASSOCIATED WAREHOUSING CO. LTD.....APPELLANT

VERSUS

KENYA POWER & LIGHTING CO. LTD.....RESPONDENT

RULING

1. The application dated 29th January, 2018 has been brought under the provisions of Sections 1(a), 1(b), 3, 3(a) and 63(b) and (e) of the Civil Procedure Act, Cap 21 Laws of Kenya, Order 51 of the Civil Procedure Rules, 2010, Section 5 of the Judicature Act and all enabling provisions of the Laws of Kenya.
2. It seeks the following orders:-
 - (i) Spent;
 - (ii) That the Respondent's Regional Manager be cited for contempt of this Honourable court's order dated 17th January, 2018 and thus be arrested and brought before this court for punishment under the law and/or in the alternative;
 - (iii) That the Respondent do pay the plaintiff's damage (sic) of Kshs. 25,000.00 per day for loss of business from 17th January, 2018 till the date of reconnection; and
 - (iv) That the costs be borne by the Respondent.
3. The application is supported by the affidavit of Nitichandra Pandya sworn on 29th January, 2018. Paragraphs 4, 5 and 8 of the said affidavit state that the Respondent's Regional Manager, Engineer Hezekiah Mwalala (Mwalwala) and Mr. Hicks Waswa were both served with the said order on the 17th and 18th of January, 2018 respectively, but had since 17th January, 2018 to the date of filing the application failed, ignored and/or refused to comply with the orders issued by the court.
4. The court on 5th February, 2018 granted orders for warrants of arrest to issue to the Regional Manager of Kenya Power and Lighting Company Limited, Engineer Hezekiah Mwalwala and Mr. Hicks Waswa, of the said company.
5. After due process, this court found Engineer Mwalwala guilty of contempt of court on 7th February, 2018. He was fined Kshs. 100,000/= and in default thereof, he was to serve 3 months imprisonment at Shimo-la-Tewa Prison. The matter that I now need to determine is if Mr. Hicks Waswa is equally guilty of contempt of court.
6. Mr. Waswa filed a replying affidavit on 13th February, 2018 to oppose the contempt of court proceedings. On the said date, Mr. Kiarie Kariuki, Learned Counsel for the respondent applied for summons to issue to Mr. Urbanus Kioko, the Process Server who filed an affidavit of service on 29th January, 2018 confirming that he effected service of the court order dated 17th January, 2018 and a Notice of Motion application under certificate of urgency dated 15th January, 2018 and a hearing notice on Mr. Hicks (Hicks) Waswa, the defendant's Acting Regional Manager on 18th January, 2018.
7. On being called to the witness stand on 16th February, 2018, Mr. Urbanus Kioko indicated that he is a Process Server who works at Miller and Company Advocates. On being cross-examined by Mr. Kiarie Kariuki, he stated that on 18th January, 2018, he received instructions to serve Mr. Hicks Waswa with a court order and an application at Mbaraki Kenya Power & Lighting (KPLC) Station. On asking for him, he was told that Mr. Waswa had gone to Electricity House. Mr. Kioko further stated that at Mbaraki KPLC offices, he was not asked to sign a register at the gate.

8. He testified that he then proceeded to the 8th floor of Electricity House where he asked the guards if Mr. Waswa, the Acting Regional Manager was present. He signed a register therein for 18th January, 2018. On being shown the KPLC Electricity House register, Mr. Kioko confirmed that his name was not reflected thereon. He stated that although the register shows that he went to Electricity House on 19th January, 2018, his affidavit states that he went there on 18th January, 2018. He indicated that he was not allowed to access Mr. Waswa's office by his secretary Sally and he left the court order on a table outside the Manager's office. On being referred to paragraph 5 of his affidavit, he stated that he deposed that he pasted the court order on the Regional Manager's office for his information.

9. Mr. Kioko informed the court that he did not see Mr. Waswa personally when he went to serve him but he could hear the Regional Manager's secretary talking to him on the phone. He said that she told him (Kioko) that she did not want to receive court orders.

10. On re-examination by Mr. Matheka, the Learned Counsel for the applicant, Mr. Kioko stated that when he received instructions to serve Mr. Hicks Waswa he went to Mbaraki KPLC offices before going to look for him at Electricity House. He indicated that he heard Sally talking to Mr. Hicks Waswa on phone. She told him that he could enter the Regional Manager's office but just when he was about to enter, she told him that she would call Mr. Waswa and inform him first. He stated that from his observation, it appeared that she was told to peruse the documents as she informed Mr. Waswa that they were court orders. Mr. Kioko further stated that he told the Regional Manager's Secretary, Sally, that his instructions were to serve Mr. Waswa as she appeared to have been told that similar orders had been served on Mr. Mwalwala.

11. Mr. Kioko stated that as he was waiting to be let in, Mr. Waswa left the Regional Manager's office through a side door. Sally then opened the office door to the Regional Manager's office and told him to check and see that Mr. Waswa was not in the said office. Mr. Kioko reiterated that he heard Mr. Waswa leave the office.

12. Mr. Kariuki submitted that Mr. Hicks Waswa was never served with the court order issued by this court as per the affidavit of service, which must be precise. He stated that Mr. Kioko's signature on the KPLC register shows that he went to Electricity House on 19th January, 2018, yet his affidavit states that he went to Electricity House on 18th January, 2018. It was submitted that Mr. Waswa was not in Electricity House on 18th January, 2018 as per paragraph 8 of his affidavit. This court was urged not to cite Mr. Waswa for contempt of court as the application dated 29th January, 2018 sought orders for the Regional Manager to be cited for contempt of court, and the court can only give the orders as prayed. He added that there was no application for Mr. Waswa to be cited for contempt of court. He prayed for his discharge. He made reference to court decisions in **Basil Criticos vs Attorney General & 4 Others** [2012] eKLR, **Payless Car Hire and Tours Ltd vs Imperial Bank Limited** [2012] eKLR, and **Katsuri Limited vs Kapurchand** [2016] eKLR, attached to the respondent's list of authorities to the effect that the court can only punish for contempt of court if a party is aware of the court orders he is accused to be in contempt of. He submitted that no other attempt was made to serve Mr. Waswa with the court orders and no explanation was given as to why the court order was not left with the secretary. He stated that Mr. Waswa did not evade service of the court order. He prayed for the security deposited in court on behalf of Mr. Waswa to be released to the law firm of Kiarie Kariuki and Company Advocates.

13. Mr. Matheka submitted that when they went to serve the Regional Manager with court orders, they did not find him and so they looked for the Assistant to the Regional Manager to serve him with the same. In the Counsel's view, Mr. Hicks Waswa frustrated service of court orders. It was contended that Engineer Mwalwala was served with the court orders on 17th January, 2018 but electricity was not reconnected until 29th January, 2018. Mr. Matheka indicated that Mr. Waswa evaded service thus frustrating the orders of this court.

ANALYSIS AND DETERMINATION

The issue for determination is if the allegation of contempt of court has been proved.

14. This court has considered the chronology of events and the answers by Mr. Urbanus Kioko to questions put forth to him by Mr. Kariuki. He asserted that he was unable to effect service on Mr. Waswa purportedly because he used a side door to leave the respondent's Mombasa Regional Manager's office so as to evade service. The facts reveal that the respondent's Regional Manager, Mombasa was served with the court order dated 17th January, 2018 as per the affidavit of service of Parmenus Mbugua Mathare filed on 29th January, 2018. It was not disclosed by Counsel for the respondent why there was need to serve a similar order on Mr. Waswa after the order had been served on the Respondent's Regional Manager. The second attempt at service was therefore superfluous and would have served no useful purpose.

15. As submitted by Mr. Kariuki, Mr. Urbanus Kioko was not candid in his depositions in his affidavit of 22nd January, 2018. The entry in the register of Mombasa KPLC offices at Electricity House is a clear indicator that his attempt to effect service on Mr. Waswa was not on the 18th of January, 2018 but on the 19th of January, 2018. It is thus evident that his depositions cannot be relied upon.

16. In the application dated 29th January, 2018, the applicant dragged Mr. Waswa into the application by stating that the Respondent's Regional Manager, Engineer Hezekiah Mwalwala and Mr. Hicks Waswa were both served with the said order on 17th and 18th January, 2018, respectively. It turned out that although Mr. Kioko stated that he pasted the court orders, the application and hearing notice on the Regional Manager's office for his information, in his oral evidence he stated that he left the said documents on a table outside the Regional Manager's office.

17. In the authority cited by Mr. Kariuki of **Basil Criticos and Others Attorney General and 4 Others** [2012] eKLR the court stated that an application for civil contempt of court can only be allowed if the particular order of the court has been served on that person and the copy of that order must be endorsed with the notice informing the person whom the copy is served that if he disobeys the order, he is liable to the process of execution to compel him to obey the order.

18. In **Teacher's Service Commission vs Kenya National Union of Teachers and 2 Others**, Petition No. 23 of 2013, the court stated as follows:-

“The reason why courts will punish for contempt of court is to safeguard the rule of law which is fundamental in the administration of justice. It has nothing to do with the integrity of the judiciary or the court or even the personal ego of the presiding Judge. Neither is it about placating the applicant who moves the court by taking out contempt of court proceedings. It is about preserving and safeguarding the rule of law. A party who walks through the justice door with a court order in his hands must be assured that the order will be obeyed by those to whom it is directed. A court order is not a mere suggestion or an opinion or a point of view. It is a directive that is issued after much thought and with circumspection. It must therefore be complied with and it is in the interest of every person that this remains the case. To see it any other way is to open the door to chaos and anarchy and this court will not be the one to open that door. If one is dissatisfied with an order of the court, the avenues for challenging it are also set out in the law. Defiance is not an option.”

19. The submission by Mr. Matheka that they looked for Mr. Waswa to effect service on him as the Assistant to the Regional Manager KPLC Mombasa after failing to find the Regional Manager is misconceived. I say so as on the 17th of January, 2018, the said Regional Manager acknowledged service of the court order and an affidavit of service was duly filed. It is my finding that the roping in of Mr. Waswa in contempt proceedings was unnecessary as his senior, the Regional Manager, had been served. Once the Regional Manager defied the court orders, all that the applicant needed to do was to move to court to cite him for contempt. I therefore hold that Mr. Waswa was not a necessary party to these proceedings and his name should not have been dragged in the application dated 29th January, 2018, which when read as a whole, gave the court the impression that both Engineer Hezekiah Mwalala and Mr. Hicks Waswa defied court orders.

20. It is worth noting that contempt of court proceedings can have far reaching ramifications on persons who are in employment as such proceedings paint the picture of an employee who is defiant and contemptuous of the rule of law. It can lead to a very negative image on the character of a person and can cause a blight on the professional career of such an employee. In such proceedings therefore, only the necessary parties should be tagged and cited for contempt.

21. Although it was submitted that Mr. Waswa evaded service of court orders by using a side door to exit the Regional Manager's office, this court will not address the said issue as it was not necessary to effect service on Mr. Waswa with orders which had been served on Engineer Mwalwala.

22. It is evident from the foregoing summation that I find Mr. Hicks Waswa not guilty of contempt of the court orders issued on 17th January, 2018. For the said reason he is hereby discharged from the said proceedings. The security deposit of Kshs. 200,000/= made on his behalf by the law firm of Kiarie Kariuki and Company Advocates shall be released forthwith. Having found Mr. Hezekiah Mwalwala guilty of contempt of court through earlier proceedings, the applicant has partly succeeded in its application dated 29th January, 2018. The respondent will therefore pay a half of the costs of the said application.

It is so ordered.

DELIVERED, DATED and SIGNED at MOMBASA on this 27th day of April, 2018.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Mathare holding brief for Mr. Matheka for the appellant/applicant

Ms Obura holding brief for Mr. Kiarie Kariuki for the respondent

Mr. Oliver Musundi - Court Assistant