



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL DIVISION

HIGH COURT CIVIL CASE NO. 238 OF 2014

AFFILIATED BUSINESS CONTRACTS LTD.....PLAINTIFF/APPLICANT

VERSES

ALLIOS FINANCE KENYA LIMITED.....DEFENDANT/RESPONDENT

RULING

1. The Notice of motion application dated 23rd September 2015 seeks the following orders:

- 1. That the Honourable court be pleased to order the sequestration of the properties of the Defendant herein for blatant disobedience of the Order of this Honourable court made on the 7th August 2014**
- 2. That in addition to or in lieu of sequestration of the Defendant's properties the Defendants properties the defendants directors be committed to civil jail for a period of six months or for such other period as this Honourable court shall deem necessary for being in blatant disobedience of the order made by this Honourable court on 7th august 2014**
- 3. That any other or further orders that this Honourable court will deem necessary to ensure that the dignity and authority of the court is respected**
- 4. That the costs of this application be met by the defendant in any event.**

2. The application is based on the grounds on its face and is supported by the affidavit sworn by Alice Njiru, the Applicant's Administration Manager. It is averred that by a lease agreement dated 22nd November, 2013, the Respondent leased the 2nd floor of the Applicant's building commonly known as Abcon House. A generator was installed at the building and payment was to be made through the rent payable by the Respondent.

3. It is further averred that the parties subsequently fell out and the Respondent violently and forcefully moved out of the building. It is further stated that the Applicant thereafter moved to the Court and was granted a temporary injunction, stopping the Respondent from repossessing the generator. That the orders were subsequently extended on various other dates.

4. That despite the subsistence of the said orders on 16th September 2015, the Respondent through Phtuma auctioneers purported to proclaim the generator. That on the same day, another auctioneer, Bealine auctioneers were at the Applicant's premises for the duration of the day seeking to take away generator. That the Applicant thwarted this by seeking the intervention of security agencies and instructed its Counsel to take up the issue. That subsequently the auctioneers purported to issue another proclamation, which they have refused to withdraw despite the subsistence of the Court Orders.

5. That the Respondent's subsequently wrote to the Applicant indicating that they have retained the services of auctioneers to repossess the generator and to recover an alleged sum of Ksh 2,063,008.52, which are matters, substantially in issue before the Court.

6. The application is opposed. David Namai Luswesti, the Respondent's Loan Officer and Isaac Onyango Olloo their lawyer swore affidavits and denied that the Respondent is in contempt of court. That the last time they were given an update of their case was on, the 14th August, 2014 and thereafter the judge directed the hearing date be taken in the registry and the case be mentioned on 30th September. It's their case that due to the Plaintiff's inactivity their advocates complied with pre-trial procedures and filed documents on 20th May, 2015. They claim not to have been aware of the order stopping the repossession. That it was the indolence of the Plaintiff which caused them to issue a

Proclamation Order for the recovery of the money on the 1st September 2015.

7. It is they contended that the said repossession of the generator was not successful and they thereafter instructed Bealine auctioneers to proclaim the same as the amount of money remained unpaid as at 16th September 2015. That their advocates telephoned the Applicant's Advocates on the 16th September 2015 at 2 p.m., is when they were informed of the existence of the Court Order. Thereafter, based on the legal advice of their counsel they ceded.

8. It is the Respondent's case that they were informed by their advocate that a draft order had been served to their offices for approval on the 18th September 2015. That thereafter on the 22nd September 2015 the Applicant's advocates informed them of the existence of the Court Order and therefore it's clear that on the 16th September 2015, they had not been served with any orders. Knowledge of the extension of the orders on 30th September 2014 is denied. It is stated that both the Respondent and their counsel were not in court on the said date.

9. The parties to the application filed their respective submissions which the Court has dully considered. The court takes notice, the application was filed before the Contempt Of Court Act 2016 had come into place. This therefore means that the legal procedure that existed before the Act is the one that is going to apply.

10. At the material Section 5 of the Judicature Act, Chapter 8 Laws of Kenya was the substantive law on contempt of court. The said section provided as follows:

“1. The High court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and such power shall extend to upholding the authority and dignity of subordinate courts.

2. An order of the High court made by way of punishment for contempt of court shall be appealable as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the High Court”.

11. This is anchored on Order 40 rule 3 of the Civil Procedure Rules which provide as follows:

“ (1) In cases of disobedience, or of breach of any such terms, the court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the court directs his release.

(2).No attachment under this rule shall remain in force for more than one year, at the end of which time, if the disobedience or breach continues, the property attached may be sold, and out of the proceeds the court may award such compensation as it thinks fit, and shall pay the balance, if any, to the party entitled thereto.

(3) An application under this rule shall be made by notice of motion in the same suit.”

13. Black's Law Dictionary (9th Ed) defines contempt of court as:-

“Conduct that defies the authority or dignity of a court. Because such conduct interferes with the administration of justice, it is punishable usually by fine or imprisonment.”

14. The temporary injunctive orders herein were issued by the Court on the 8th August, 2014. The Respondent's advocate was in court when they were extended on the 14th August, 2014. They were again extended on the 30th September, 2014. The Respondent's contention is that they had no idea that the order had been extended on the 30th September, 2014 as their efforts to trace the matter in the cause list was futile. To this the Applicant's responded that it was incumbent upon the Respondent's to go and peruse the court file and establish the position and status of the case.

15. Contempt of Court is a serious offence. It is not a matter that is to be taken lightly. For an Applicant to succeed in an application for contempt, one must show that there was either personal service or actual knowledge of the court order, which must be beyond reasonable doubt.

16. In the case of **Sam Nyamweya & 3 others v Kenya Premier League Limited & 2 others [2015] eKLR** the court observed as follows:

“I reiterate that contempt proceedings are of a criminal nature and involve, if proved, loss of liberty, the applicant must therefore endeavor to prove all facts relied on by way of evidence beyond reasonable doubt. It is not like in the case of any other ordinary matter like service of summons to enter appearance or hearing notice upon a party, where, even if service was regular, the courts have found that exparte proceedings or judgment made in default could still be set aside on terms in the discretion of the court”

17. In the case of **Shimmers Plaza Limited (supra)** the Court of Appeal stated thus:

"The notice of the order is satisfied if the person or his agent can be said to either have been present when the judgment or order was given or made; or was notified of its terms by telephone, email or otherwise. In our view, 'otherwise' would mean

any other action that can be proved to have facilitated the person having come into knowledge of the terms of the judgment and/or order. This would definitely include a situation where a person **is represented in court by counsel**. Once the applicant has proved notice, the respondent bears an evidential burden in relation to *willfulness and mala fides disobedience*. This Court in the Wambora case (supra) affirmed the application of these requirements.

... On the other hand however, this Court has slowly and gradually moved from the position that service of the order along with the penal notice must be personally served on a person before contempt can be proved."

18. One must prove beyond reasonable doubt the facts upon which they seek to establish that contempt of Court has been committed by the accused party. The burden of proof because of the consequences that would follow, is certainly higher and is not on a preponderance of probabilities. One has to also show that there was either personal service or actual knowledge of the court order.

19. The generator in question was proclaimed on 16th September, 2015. The Court Orders the subject of the application at hand were given *exparte* on 7th August, 2014. Thereafter the said orders were extended on 14th August, 2014 and on 30th September, 2014 in the presence of counsel for both parties. On 30th September, 2014, the court record reflects that the orders made were that the parties obtain a suitable date in the registry. The interim orders were extended generally as there was no time limit that was imposed. It seems that thereafter the Applicant's went to sleep until they were woken up by the auctioneers.

20. The failure to fix the matter for hearing following the extension of the orders on 30th September, 2014 connotes abuse of court process. There is also no evidence of the service of the extracted orders. This would have forestalled any lack of clarity as opposed to the telephone conversations alluded to.

21. In the upshot, this court gives the benefit of doubt to the Respondent. Consequently, the application is dismissed with costs.

Dated, signed and delivered at Nairobi this 26th day of Sept., 2018

B. THURANIRA JADEN

JUDGE