



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NUMBER 264 OF 2011

POSTAL CORPORATION OF KENYA. PLAINTIFF

VERSUS

FTS AFRICA LIMITED. DEFENDANT

RULING

1. The Applicant took out the Notice of Motion dated 2nd July, 2015 where he sought prayers to wit: -
 - a) That this application be certified urgent and heard Ex-parte in the first instance.
 - b) That Honourable court be pleased to issue an order for committal to Civil jail against Arunkumar Acharya and other directors of the Defendant/Respondent for a period of 6 months or as the Court may direct for disobeying the Consent Orders of the Court issued on 27th July, 2011.
 - c) That costs of this application be provided for.
2. The application is premised on the grounds that by the consent order recorded in this court on 27th July, 2011 the Defendant was required to install the system gadgets in 102 vehicles upon the depot of Khs.700,000/- That to date, it has only fixed the system gadgets on 95 vehicles leaving a balance of 7 vehicles. That, the already installed system gadgets in the 95 vehicles are almost becoming absolute for failure to test and commission the same and that they are almost being overtaken by recent technological changes without the Applicant having any benefit of the same. That the Respondent is in further breach of the consent orders since it has refused to complete testing and commissioning, software customization, post implementation review, project closure report and training of personnel on operation and maintenance of the system. That despite the Applicants complying with all the undertaking, the Respondent on the other hand is in breach of the orders of this court which it has no intention of complying with.
3. The Respondent did not file a replying affidavit in response.
4. When the matter came up for inter partes hearing on 16th August, 2016, there was no appearance for the Respondent. On its part, the Applicant orally submitted that the application seeks for the detention of the Respondent's Directors for 6 months or any other period that the court may deem fit due to their disobedience of orders issued on 25th July, 2011. It contended that according to the consent order, the Applicant was required to deposit Ksh.700,000/- in joint interest earning account to be operated by both advocates representing the parties. It averred that the 2nd order was to the effect that upon deposit of the

said sum the Respondent was to commence installation of the software system within a period of six days. It argued that the respondent only installed in 95 out of the 102 Motor vehicles leaving a balance of 7 and that even despite the installation the Respondent failed to customize the software, test, commission it, training the Applicant's employees on how to use it and to also provide a project closure in accordance with the contract. It asserted that upon raising this sue with the Respondent, it responded vide the letter dated 23rd October, 2012 which the Applicant/Respondent responded to and clarified the position. It concluded that despite its response the Respondent has failed to perform its part of the contract in terms of the consent orders.

5. I have perused the record. Indeed on 27th July, 2011 the parties appeared before Hon. Dulu, J and recorded a consent. According to the consent, the Plaintiff/Applicant was required to deposit a sum of Ksh.700,000/- in a joint earning interest account for both Plaintiff and Defendant within 14 days. The Plaintiff/Respondent was required to proceed and commence the installation process within 14 days from the date of the deposit of the Ksh.700,000/-. Parties also agreed that the issues between them be referred to arbitration as provided in their agreement dated 6th March, 2009 and finally that either party be at liberty to apply. The consent was adopted as an order of the court.

6. The Applicant seeks the Directors to be committed to civil jail for failure to install the software system in 7 of the remaining motor vehicle. It has however, acknowledged that the Respondent has installed the software system in 95 motor vehicles out of the 102 motor vehicles that are supposed to be installed with the software. In addition to the installation, the Applicant is aggrieved by the failure by the Respondent to customize the software, test it, commission it, train the Applicant employee's on how to use it and to also provide a project closure in accordance with the contract, which it claims is a breach of the consent order.

7. It is important to note that the five allegedly breached obligations by the Respondent were not part and parcel to the consent order. The consent entered by the parties was very specific. It required the Applicant to deposit Ksh.700,000/- in a joint earning interest account in the name of both counsels representing the parties within 14 days, which it did. Secondly, the Respondent was required to commence installation process within 14 days, which it did on 95 motor vehicles but has not done so on 7 motor vehicles. The parties further agreed that on the remaining issues, the same should be referred to arbitration. Therefore, the Respondent can only be held in contempt for failure to install the software system on the alleged remaining 7 motor vehicles and not the other five listed purported omission. The Applicant should refer its discontent on these issues to the arbitration as agreed.

8. Looking at the correspondences annexed to the application, it is evident that the parties have been in communication about the failure by the Respondent to carry out installation on the 7 remaining motor vehicle vide a letter dated 17th September, 2012, the applicant relayed its dissatisfaction to the Respondent on the remaining 7 vehicles and forwarded a schedule of motor vehicles to enable the Respondent progress with the installation. In response to this letter, the Respondent vide its letter dated 23rd October, 2012 expressed its disappointment on change of officers by the Applicant which change apparently forced them to go over the planning process again. It further expressed its frustration since the Applicant changed its list of the vehicles to be fitted with the system which list was different from the one previously provided by the applicant. In response to these allegations by the Respondent, the Applicant wrote the letter dated 13th December, 2012 where it forwarded the revised schedule of vehicles to be fitted with the system. There were no further correspondences exchanged between the parties.

9. Obviously, given that the consent by the parties on 27th July, 2011 which is over 5 years ago, then it goes without saying that the Respondent ought to have observed/performed its part of the consent agreement and fitted all the 102 motor vehicles with the fleet management system. However, it is noted that it partly honoured the consent by installing the system on 95 motor vehicles the system leaving 7 motor vehicles due to the purported lack of co-operation on the part of the Applicant. Despite the fact that 5 years is a long time for it's in action, it is only just and in the interest of justice to give the Respondent an opportunity to act before its Directors are committed to civil jail. Committal to civil jail should be done where all avenues have been exhausted in the case of **Farieda Co'etzee Vs Republic of South Africa Case No. CCT 19/94** the judgment reads: -

“there can be no doubt that committing someone to prison invokes a severe curtailment of that person’s freedom and personal security. Indeed, the very purpose of committal is to limit the freedom of the person concerned. Given the manifest and substantial invasion of personal freedom thus involved the real issue that we have to decide is whether such infringement can be justified in terms of general limitations on rights permitted by Section 33 of the Constitution. This is the nub of the problem before us.”

10. In another case of **Board of Governors Moi High School Kabarak & Another Vs Malcolm Bell [2013] eKLR**, Supreme Court Petition No’s 6 & 7 of 013, the supreme Court of Kenya described the power to punish for contempt as a power of the court to safeguard itself against the contemptuous or disruptive intrusion from elsewhere and identified that power as one of the indisputable attributes of the court inherent power. Since without that power, protection of citizens’ right and freedoms would be impossible. Court of law should be reduced to futile institutions giving orders in vain.

11. The duty, therefore, of parties to obey the law cannot be gainsaid as it is paramount.

12. In the circumstances and in the interest of justice, the Respondent is given 60 days to perform his part of the consent being installation of the system on the 7 remaining motor vehicles failure to which its Directors will be deemed to be in contempt and committed to civil jail for 6 months.

Dated, signed and delivered at Nairobi this 13th day of October, 2016.

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L NJUGUNA

JUDGE

In the presence of

..... **for the Plaintiff**

..... **for the Defendant.**