



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
MILIMANI LAW COURTS
CIVIL CASE NO. 154 OF 2014

**ELIUD MUTURI MWANGI (Practising in the name and
style of Muturi & Company Advocates).....PLAINTIFF**

Versus

LSG LUFTHANSA SERVICES EUROPA/AFRICA GMBH.....1ST DEFENDANT

LSG SKY CHEFS KENYA LIMITED.....2ND DEFENDANT

RULING

Contempt of court, perjury and service of summons out of jurisdiction

[1] The Plaintiff has applied for a number of orders in his application dated 22nd July 2014. But the said prayers can be summarized into six significant prayers as follows:

- 1) Leave of the court to file contempt proceedings against the Dr. Stephan Zilles, Mr Ndung'u Gathinji, Mr Tobias Diebold, Mr Matu Wamae, Mr Paul M.F Lyimo and Mrs Terry Otaba;**
- 2) Leave of court to file perjury proceedings against Mr Gathinji. Connected with this, the Applicant also prays for an order of the court compelling Dr. Stephan Zilles, Mr Ndung'u Gathinji, Mr Tobias Diebold, Mr Matu Wamae, Mr Paul M.F Lyimo and Mrs Terry Otaba to appear in court to answer charges of giving false information and for interference with the administration of justice. And the said persons to be accordingly committed to jail or penalized to fine;**
- 3) Leave to serve summons or notice of summons outside Kenya upon Dr. Stephan Zilles, Mr Tobias Diebold and Mr Paul M.F Lyimo;**
- 4) An order summoning Dr. Stephan Zilles, Mr Ndung'u Gathinji, Mr Tobias Diebold, Mr Matu Wamae, Mr Paul M.F Lyimo and Mrs Terry Otaba to appear for cross-examination on certain matters which are detailed in the submissions of the parties;**

5) An order for discovery, inspection and production of Concession Agreement, Build-Operate-Transfer Agreement, Lease Agreement, Mr Diebold's passport, and any other related material; and

6) An order to preserve the copyright in the work of the plaintiff against continued unlawful use by the Defendants.

[2] The Application is supported by the Affidavit of ELIAB MUTURI MWANGI sworn on 23rd April 2014.

THE APPLICANT'S GRAVAMEN

Perjury and false information

[3] The Applicant has alleged that Mr Gathinji committed perjury when he knowingly and wilfully made a statement under oath which was false in material particular. The specific statement is in paragraph 11 of his affidavit to the effect that the Agreements herein were signed on 8th May 2014 when they were actually signed on 13th May, 2014. Similarly, the Applicant averred that Mrs Otaba gave the court false information when she stated that the documents herein were served on the wrong office and on 9th May 2014. To show that Mrs Otaba gave false information, the Applicant gave an account as to how, when and where the documents herein were served by M/S Bollore Africa Logistics Kenya Limited; that is, upon the 1st Defendant's registered office at *Dornhofstrasse 38, Neu-Isenburg 63263, Offenbach am Main* in the Federal Republic of Germany on 6th May 2014. Counsel for the Applicant confirmed the said dates of service in his submissions. They submitted that a person known as Sistas received the documents. The Plaintiff averred that 1st Defendant's address became known to him when he acted for the 1st defendant in the agreements in question. The Plaintiff has annexed two affidavit of service which deposes that the Applicant caused delivery of the documents in question to the UPS collection point on 2nd May 2014 for purposes of effecting service by courier on the 1st Defendant at their registered office. The Applicant was then issued with official receipt and the "Shppers Copy" showing tracking number.

Contempt

[3] According to the Applicant Dr. Stephan Zilles, Mr Ndung'u Gathinji, Mr Tobias Diebold, Mr Matu Wamae, Mr Paul M.F Lyimo and Mrs Terry Otaba have committed acts of contempt of court. All of them were aware that the Applicant had applied, through the application dated 23rd April 2014, for orders of status quo to prevent the conclusion and signing of the Agreements herein between the Defendants and Kenya Airport Authority for commercial benefit pending determination of the application. But despite this knowledge, they went ahead to conclude and sign the Agreements on 13th May 2014- an event which was publicized in the various local television stations as well as in the *youtube* at <http://www.youtube.com/watch?v=SIX1wfOMNO>. The Applicant was able to recognize Mr Ndung'u Gathinji, Mr Tobias Diebold, Mr Matu Wamae, Mr Paul M.F Lyimo in the ceremony. These individuals entered into a conspiracy between themselves which was aided or abetted by their counsel Mrs Otaba to defeat the Plaintiff's legitimate claim in the suit. The instructions by Dr Zilles to, acceptance of those instructions and relaying them to court by Mrs Otaba were part of the conspiracy. The conduct of all these persons was calculated to interfere with the course of justice, undermine the rule of law, and therefore, is reprehensible and amounts to contempt of court, giving false information and perjury. The Applicant was convinced that all the depositions by the Defendants and their counsels on the alleged service on "wrong office" and receipt of documents on 9th May 2014 were calculated to enable Mrs Otaba secure an adjournment herein; "buy time" for the defendants to complete their conspiracy and introduce third parties in the scenario; and thereby diminish the prospects of the plaintiff obtaining an injunction. This is clear from the kind of submissions they are now making; there was no court order which prevented them from concluding and signing the Agreements in question; and that in any event the orders being sought have been overtaken by events because the Agreements have already been executed. They should accordingly and respectively be committed for contempt of court, interference with administration of

justice, perjury and giving false information.

Cross-examination of deponent of affidavit

[4] The Applicant urged that, because of the false depositions by Mr Gathinji and Counsel for the Defendants especially on instructions from their clients particularly by Dr Stephan Zilles, the said counsels, Mrs Otaba and Gathinji should be ordered to appear and be cross-examined on details relating to those instructions. With regard to Dr Stephan Zilles, he should be cross-examined on the instructions he allegedly gave to M/S Coulson Harney Advocates and in particular on, but not limited to:-

- 1) details as to time, place and circumstances on service of the Plaintiff's application dated 23rd April and filed on 24th April 2014; the affidavit of Mr Eliab Muturi Mwangi sworn on 23rd April 2014 in support of the said application and the certificate of urgency accompanying the application upon the 1st defendant;
- 2) What the 1st defendant meant in giving instructions to its advocates to the effect that the said documents were served at "the wrong office"; and
- 3) What the 1st defendant meant in giving instructions to its advocates to the effect that the documents in question were served on 9th May 2014.

[5] And the Applicant argued further that Mrs Terry Otaba should be cross-examined on the instructions she allegedly received from Dr Stephan Zilles and which she passed on to the court on 12th May 2014 that documents herein were served on the wrong office and received on 9th May 2014 by the 1st Defendant. She must shed light on the steps she took to verify those instructions. She should also be required to clear why she did not reveal to the court on 12th May 2014 the fact that the Agreements herein had already been signed on 8th May 2014, which fact was material to this case.

[6] As for Mr Gathinji, the Applicant posit that he should be cross-examined on deposition at paragraph 11 of his affidavit where he deposes that the Agreements were signed on 13th May 2014 together with the details as to the time, place and circumstances of the signing of the Agreements in light of the information which is in public domain that the Agreements were signed by the 2nd Defendant and KAA on or about 13th May 2014.

[7] Tobias Diebold, Matu Wamae and Paul M.F. Lyimo were present during the signing of the Agreements and their cross-examination will shed light on the time, place and circumstances of the signing of the Agreements.

Discovery

[8] The Applicant also sought orders for discovery, inspection and production of the Agreements herein against Dr. Stephan Zilles, Mr Ndung'u Gathinji, Mr Tobias Diebold, Mr Matu Wamae, Mr Paul M.F Lyimo and Mrs Terry Otaba. The request for discovery includes the passport of Dr Zilles.

Revocation of the Agreements

[9] In all the above, the Applicant is convinced that the Agreements and the execution thereof were obtained through an illegality and as a result of contempt of court. On that basis they should be revoked.

Preservation of copy right

[10] In the circumstances of the case, there is need to preserve the copyright in the plaintiff's work product against continued unlawful use by the Defendants to their commercial benefit through further development of, putting into operation and management of an in-flight kitchen at Jomo Kenyatta

International Airport pursuant to Tender Reference KAA/119/2011-2012.

[11] The Applicant buttressed their foregoing stand points on the various requests through the ably presented oral submissions by Counsel, Mr Nderitu. Counsel also relied on the judicial authorities which he filed. He made the distinction between Criminal and Civil Contempt. According to him, the nature of the contempt here is Criminal Contempt, and unlike in Civil Contempt, it does not require a court order to be in place so as to make its disobedience a prerequisite for contempt to be committed. It is sufficient to establish that false information was given to the court or that there was intention by the contemnor to interfere with the administration of justice. He, however, made it clear that perjury proceedings were against Mr Gathinji only. On that basis, leave of the court should be given to institute contempt proceedings together with summons on the contemnors who reside outside the country. Section 5 of the Judicature Act applies here. He was clear that contempt requires very high standard of proof and therefore, the court should examine all the affidavits filed and examine the parties on those affidavits. He refuted the submission by the Respondents that the individuals being sought to be cited for contempt were not parties in the suit; they were officers of the defendants except Mrs Otaba who is their legal counsel. Contempt of court can be taken out against the officers of a company.

The respondent opposed the entire application

[12] The Respondents as well as the contemnors opposed the application. Mr Gathinji filed an affidavit sworn on 31st July, 2014. He reiterated the averments in his affidavit sworn on 19th May 2014. He averred that he was aware that the 2nd defendant was required to execute all the three Agreements herein in the implementation of the KAA Tender. These Agreements were executed in the morning of 8th May 2014 at KAA Offices at JKIA in the presence of:- 1) Mr Tobias Diebold on behalf of the 1st Defendant; 2) Mr Paul M.F Lyimo on behalf of Continental Services Limited; 3) Mr Matu Wamae, Kareithi Njogu, Ann Muchiri and Mr Ndung'u Gathinji on behalf of the Apatana Investment Limited; and 4) Lucy Mbugua, Victor Arika, Bernard Mugambi and Michael Goa on behalf of the KAA. He averred that he was informed by Mrs Otaba that on 29th April 2014, the Plaintiff applied to serve application upon the 1st defendant out of jurisdiction by courier. And that the court also directed that the PO by the Respondents should be heard on 12th May 2014.

[13] Mr Gathinji further averred at paragraph 9 of his affidavit that he was informed by Dr Zilles that sometime on 9th May 2014, after Dr Zilles had made enquiries from his colleagues about a package from Kenya, the Manager in the Customs Affairs Department of the 1st Defendant informed him that there were documents which had been delivered to their offices at Hugo-Eckner-Ring, Gate 2 Building 116, 60549 Frankfurt-Airport, Germany. These are not the registered office of the 1st Defendant. The registered office of the 1st Defendant and where Dr Zilles works is situated at Dornhofstrafse 38, 63263 Neu-Isenburg, Germany. According to information by Dr Zilles, the application in question was served upon the wrong unit or office and he only received it in the afternoon of 9th May 2014 and he passed over that information to Mrs Otaba through the email of 9th May 2014 done by him. Mr Kuyo for the Defendants emphasized that service of the application was on the wrong office.

[14] Mr Kuyo also submitted that there was no order of the court which had been issued and so the question of contempt of court will not arise at all. The Applicant seeking leave to institute contempt proceedings against the defendants must provide proof of existence of a court order endorsed with a penal notice and service thereof before leave is granted. He cited the case of **Mike Kamau vs A-G** in support of the foregoing position. He agreed with Mr Ndeirtu that, due to the dire consequences which attend contempt of court, the law has placed a high standard of proof in contempt proceedings. Similarly, the court should sparingly and cautiously exercise this coercive power of punishing for contempt. Kuyo, however, disagreed with Mr Nderitu's argument that there are two types of contempt and he insisted that there is only one form of contempt; the distinction proffered by Mr Ndeirtu is non-existent in law.

[15] Another issue; Mr Kuyo contended that the signing of the agreements in question is a fact within the knowledge of those who signed and those who witnessed the signing. The **you-tube** communication about

the signing has not even been provided. Equally, the persons who are sought to be committed for contempt are not parties in the suit. Therefore, in the absence of clear order of the court which has been disobeyed, no leave should be granted. They argued that the application should be dismissed.

THE DETERMINATION

[16] As I stated in the opening part of this ruling, the Applicant has sought a number of orders. Some of the orders sought are coercive, these are; leave to initiate proceedings for contempt of court, committal for perjury and giving false information to the court. There are others which are purely of procedure, these are; leave to cross-examine certain individuals on their depositions in an affidavit or on information they provided to court; leave to serve summons or notice outside the jurisdiction of the court; and for discovery, inspection and production of documents. I propose to deal with them in the broad clusters I have outlined.

[17] However, the bedrock of the entire application is that the individuals sought to be committed to jail or cross-examined were aware of the application herein as early as 6th of May 2014 but engaged themselves in a conspiracy to defeat justice. Service of the notice of the application in question has been emphasized a lot by the Applicant and I should think it is the linchpin which drives the decision of the court in all the application for contempt of court, perjury, giving false information and also for cross-examination of the persons concerned on certain matters relating to the impugned service and the signing of the agreements herein. But before I engage in the substantive matters, I will first discuss and determine three matters which are of both legal and conceptual preliminary significance. These matters are; 1) whether a person who is not a party in a proceeding could be cited for contempt of court; 2) the standard of proof in contempt of court proceedings; and 3) the distinction between civil and criminal contempt.

Citing third parties for contempt

[18] The law is that any person who has committed an act of contempt of court is liable for indictment. Therefore, even third parties who are not parties in a suit may be committed for contempt of court and classic examples are contempt on the face of the court, contempt by officers of a company or corporation, contempt by persons who are claiming under the title of a party in a suit or as assigns or successors in title. I therefore agree with the submissions by Mr Nderitu that the intended contemnors herein being officers of a corporation may be cited for contempt of court. The only question is whether the acts complained of amount to contempt or could be a basis for issuance of leave to initiate contempt proceedings against those individuals. This question will be ultimately answered after the court has fully carried out an analysis of the entire circumstances of the case. Let me consider the other two issues.

Standard of proof in contempt proceedings

[19] This is the leave stage and I should think that one is only required to provide cogent material through affidavit evidence which would impel the court to grant leave to institute contempt proceedings against the intended contemnors. Such material should reveal matters of grave intensity and which in the court's view, if proved, would amount to contempt of court. I will proceed as such. However, once leave is granted and the substantive contempt proceedings are filed, the appropriate standard of proof which must be attained is as was set out in the case of **OCHINO & OTHERS –VS- OKOMBO & OTHERS (1989) KLR 165**, by the Court of Appeal that:-

“...the standard of proof in contempt proceedings must be higher than proof on a balance of probabilities, almost but not exactly beyond reasonable doubt.”

Civil and criminal contempt

[20] Good amount of energy was spent by counsel in making out the distinction between Civil and Criminal contempt. I too will not disappoint them. According to the **Black's Law Dictionary, 9th Edition**,

Civil Contempt is:

The failure to obey a court order that was issued for another party's benefit. A civil contempt proceeding is coercive or remedial in nature. The usual sanction is to confine the contemnor until he or she complies with the court order....Imprisonment for civil contempt is indefinite and for a term that lasts until the defendant complies with the court decree.

Criminal contempt is:-

An act that obstructs justice or attacks the integrity of the court. A criminal contempt proceeding is punitive in nature. The purpose of criminal contempt proceeding is to punish repeated or aggravated failure to comply with a court order. All the protections of criminal law and procedure apply, and commitment must be for a definite period. Also known as common law contempt.

[21] Therefore, there is a difference between civil and criminal contempt. There are other forms of contempt like "*direct contempt of court*" which is committed in the immediate vicinity of the court, especially in the presence of the judge and is ordinarily referred to as contempt in the face of the court. Such contempt should be immediately punishable once the transgression occurs. And for the kind of contempt in the face of the court, there is no necessity to have had a formal order in existence and a violation thereof. Similarly, an outright abuse of court process, in extreme cases, may be a subject of contempt of court. But what should be carefully understood in this case is that the Applicant claims that the contemnors were aware of a pending suit or application but engaged in acts which were calculated at subverting the administration of justice in the suit. The arguments presented by Mr Nderitu were that the contemnors were aware of court proceedings which remind of the principle of *lis pendens* in a civil set-up as well as the broader concept of interference with due administration of justice. The former should be distinguished from contempt of court and the remedies which are available where the principle of *lis pendens* applies may be altogether different. Interference with due administration of justice is too wide a concept and should be strictly applied and construed in civil proceedings to only specific instances which have been proved to be outright interference with the due administration of justice. And it should be noted that acts which constitute contempt of court are acts of interference with the administration of justice. Invariably, for purposes of committal to jail for interference with due administration of justice, the Applicant must establish and prove existence of acts which are punishable in law, either under the law on contempt of court or the general criminal law. Therefore, in a civil proceeding, it would be safe that the Applicant should be specific on the particular acts committed which constitute contempt of court, and applies as such for committal of the contemnor to jail, instead of coming under the general cover of interference with administration of justice. It is not surprising that the practice of contempt of court limits Committal for "*interference with the due administration of justice*" to criminal proceedings. And even though unwanted interference with administration of justice is to be prevented and nobody shall be permitted to pollute the stream of justice, the law on contempt based on interference with due administration of justice should accord to the constitutional objectives in fair adjudication of cases especially civil cases where no specific order has been issued and violated. See the recent amendment on 1st October, 2012 on the Civil Procedure (Amendment No. 2) Rules, 2012 of England in PART 81 (Applications and Proceedings in Relation to Contempt of Court) which in Rule 81.11- *Committal for "interference with the due administration of justice"* is applicable only in criminal proceedings. However, I should think, and I hope I am not wrong, since the offence of "interfering with the administration of justice" is also referred to as "perverting the course of justice" and as "obstructing the administration of justice", within the practice of contempt of court and its wider connotation in law, there is nothing which would restrict liability for contempt of court in respect of conduct intended to impede or prejudice the administration of justice, whether in criminal or civil proceedings. But the acts must be specified and specifically proved to constitute "interfering with the administration of justice" within the sense of the law as opposed to general assertion that one was aware of proceedings to have been intended to restrain the act complained of. This test will be applied on the allegations made in this case.

[22] Consider these arguments by the Applicant: That Dr. Stephan Zilles, Mr Ndung'u Gathinji, Mr

Tobias Diebold, Mr Matu Wamae, Mr Paul M.F Lyimo and Mrs Terry Otaba have committed acts of contempt of court. All of them were aware that the Applicant had applied, through the application dated 23rd April 2014, for orders of status quo to prevent the conclusion and signing of the Agreements herein between the Defendants and Kenya Airport Authority for commercial benefit pending determination of the application. But despite this knowledge, they went ahead to conclude and sign the Agreements on 13th May 2014- an event which was publicized in the various local television stations as well as in the *youtube* at <http://www.youtube.com/watch?v=SIX1wfOMNO>. The Applicant was able to recognize Mr Ndung'u Gathinji, Mr Tobias Diebold, Mr Matu Wamae, and Mr Paul M.F Lyimo in the ceremony. The Applicant is convinced that these individuals entered into a conspiracy among themselves which was aided or abetted to by their counsel Mrs Otaba to defeat the Plaintiff's legitimate claim in the suit. According to the Applicant, the instructions by Dr Zilles to, acceptance of those instructions and relaying them to court by Mrs Otaba were part of the conspiracy. The conduct of all these persons was calculated at interfering with the course of justice, undermining the rule of law, and therefore, reprehensible as it amounts to contempt of court, giving false information and perjury. The Applicant also averred that all the depositions by the Defendants and their counsels on the alleged service on "wrong office" and receipt of documents on 9th May 2014 were calculated to enable Mrs Otaba secure an adjournment herein; "buy time" for the defendants to complete their conspiracy and introduce third parties in the scenario; and thereby diminish the prospects of the plaintiff to obtain an injunction. The Applicant had taken avowed stand point that this is clear from the kind of submissions the Defendants made that; there was no court order which prevented them from concluding and signing the Agreements in question; and that in any event the orders being sought have been overtaken by events because the Agreements have already been executed. The Applicant thinks these individuals should accordingly be committed for contempt of court, interference with administration of justice, perjury and giving false information.

[23] This is a civil case. And the test here is whether the pendency of a civil suit or application *per se* is a basis for contempt proceedings especially in a matter where there is no express statutory provision on *lis pendens*. I may contrast this case to others, for instance, the consequences of intermeddling with the estate of a deceased person under the Law of Succession Act or dealing with mortgaged property subject of a suit in section 52 of the now repealed ITPA. In the foregoing cases, there are specific provisions of the law, and, generally, *lis pendens* may, in appropriate cases form a solid ground for issuance of other reliefs including injunctions or conservatory orders or compensation or committal to jail, and is also feasible option in cases of infringement of copyright and patent. But, arguments such as the ones being advanced herein fall in the realm of conspiracy where certain ingredients are needed to be present if an offence of conspiracy is to be well-founded as a basis for contempt of court; agreement by two or more persons to commit an unlawful act. Therefore, as a basis for contempt of court, much more cogent evidence is needed as to appeal to the court that a robust case has been made on which permission to institute contempt proceedings on the basis of *lis pendens* or conspiracy should be granted. And given what I have said about committal for interference with due administration of justice, there is no such material presented which would impel the court to grant permission on the basis of *lis pendens* or *conspiracy to defeat the course of justice*. These matters will become clearer after I have determined the question of service of the documents herein.

Making false statement of truth or disclosure statement

[23] But, perhaps the only type of contempt whose prospect I should consider is *Committal for "making false statement of truth or disclosure statement*. The nature of the said contempt and the procedure for applying is provided for under Rule 81.17 of the Civil Procedure (Amendment No. 2) Rules, 2012 of England in PART 81 that:

“A committal application in relation to a false statement of truth or disclosure statement in connection with proceedings in the High Court, a Divisional Court or the Court of Appeal, may be made only;

a) with the permission of the Court dealing with the proceedings in which the false statement or disclosure statement was made.....”

[24] The Applicant alleges that the intended contemnors made false statements of truth or disclosure statement to the court to the effect that they were served with the application in contest on 9th May 2014, and that by the time the application was received, the agreements had already been signed, but which statements, the Applicant averred were calculated at securing an adjournment which in turn would allow time for the signing of the agreements in question, thereby, dissipating the subject matter of the suit. But the question still lingers: were they served with the application or notice as ordered by the court?

Service of notice of or application

[25] The hallmark of the entire application is that notice of or application was served on the 1st Defendant as ordered by the court on 29th April 2014. To show that the intended contemnors gave false information to the court, the Applicant gave an account as to how, when and where the documents herein were served by M/S Bollore Africa Logistics Kenya Limited; that is, upon the 1st Defendant's registered office at *Dornhofstrasse 38, Neu-Isenburg 63263, Offenbach am Main in the Federal Republic of Germany on 6th May 2014*. Counsel for the Applicant stated that service was done on the date indicated. They submitted that a person known as Sistas received the documents. The Plaintiff reinforced his argument and averred that the 1st Defendant's address became known to him when he acted for them in the agreements in question. However, the court notes that paragraph 4 and 7 of the Affidavit by the Applicant sworn on 22nd July 2014 carry two different dates of service of the documents in issue, to wit, 2nd May 2014 and 6th May 2014, respectively. The contradiction is not resolved by the two affidavits of service, one by ELIAS NGUGI MWENDA and the other by the Plaintiff sworn on 8th May 2014 and 12th MAY 2014 respectively because they simply depose that the documents were delivered to the UPS collection point on 2nd May 2014 for purposes of effecting service by courier on the 1st Defendant at their registered office. No doubt that the Applicant was issued with official receipt and the "Shppers Copy" showing tracking number. But, one interesting deposition by the Applicant in the affidavit of service is at paragraph 7 of his Supporting Affidavit sworn on 22nd July 2014 that he confirmed with Messrs Africa Logistics Kenya Limited, the authorized agents for UPS in Kenya, who served the said documents on his behalf that the documents were received at the 1st Defendant's office at *Dornhofstrasse 38, Neu-Isenburg 63263, Offenbach am Main in the Federal Republic of Germany on 6th May 2014*. There is absolutely no document or affidavit by the said persons who delivered the parcel to show the parcel so transmitted was delivered to the 1st Defendant's registered office on 6th May 2014 and that it was received by a Mr Sistas as claimed by the Applicant. Courier service is a specialized method of delivery of parcels and ordinarily retains an acknowledgement of delivery of the parcel delivered. That ought to have been the case on delivery of the documents addressed to the 1st Defendant and it would certainly show the place, date and time of delivery. It is worth repeating that the delivery note is always retained by and easily obtainable from the courier. In the absence of that vital piece of evidence, the court is unable to test the veracity or otherwise of the statements by way of depositions in the affidavit of Mr Gathinji or by Mrs Otoba in her address to court on the place, actual date and time of service of the documents in question. It is important to note also that, Mr Gathinji and Mrs Otoba positively averred that the information on service was received from Dr Zilles, and the said Dr Zilles has not filed any affidavit. It is, therefore, indispensably important that evidence of delivery of the documents in question on the 1st Defendant should be clear if at all it should be a basis for granting permission to initiate contempt proceedings for making false statements on the service thereof. Whereas date and place of service is the only most important aspects of and foundation of this application, it is plainly not clear when and the office on which service was done.

[25] In light of the foregoing finding, all legal possibilities of granting permission to the Applicant to institute contempt proceedings on any of the grounds cited, or to call upon any of the intended contemnors to be cross-examined on depositions contained in affidavits filed or to shed light on the statements they made in court or through instructions to counsels acting for them or the 1st Defendant, are dimmed or blown away. Perjury cannot also arise in the circumstances against Mr Gathinji. The application, in so far as it based on the service of the application as directed by the court, lacks a foot on which to stand. And it fails. I should make one thing clear, nonetheless, my reading of the application dated 22nd July 2014 is that summons or notice of summons which were sought to be served outside the

jurisdiction is not notice of or summons on the suit on the 1st Defendant. They were notices of or summons to call upon the individuals who reside outside the jurisdiction of the court and who were believed to have given false information or were guilty of contempt of court or of interference with the administration of justice to appear for cross-examination and eventual committal for contempt. Given my finding above, that request is also not tenable and is denied. But, the court takes great exception that matters which have been alleged especially against Mr Gathinji and Mrs Otaba are grave and if they are proved would have great repercussions on the two who are advocates and, therefore, officer of this court; they are also bound by the overriding objective. Accordingly, I will not shut the door on the Applicant, and should it be necessary and tenable, nothing prevents them from providing the court with the relevant evidence of perjury and making of false information by any or both of these officers or any other person on the matters in issue. The upshot, however, is that I decline to grant leave to institute contempt proceedings as sought in the application dated 22nd July 2014.

Discovery, inspection and production of documents

[25] But, this ruling will not be complete without a determination on the request for discovery, inspection and production of documents made in the application dated 22nd July 2014. Discovery of documents as a means of disclosure has its basis in Article 35 of the Constitution, section 20 of the Civil Procedure Act and Order 11 rule 3(2) (d) of the Civil Procedure Rules. The disclosure is sometimes referred to as compulsory disclosure as the law empowers the court, at any time, either on its own motion or on application by a party, to make orders which are necessary or reasonable in relation to discovery, production and inspection of documents. It is also worth of note that; although discovery typically comes from parties, under the Constitution and the general law, courts may also allow limited discovery from non-parties; it is now also not impossible to order pre-suit discovery. But, orders for discovery, production, inspection, impounding and return of documents are better made at the pre-trial conference after parties have filed all their documents and statements. An application for discovery, production or inspection of documents which is made too early may be putting the cart before the horse as the other party may file statements and documents which will render such application otiose. The parties are yet to comply with pre-trial requirements and I do not wish to duplicate efforts, I reserve the request for discovery, inspection, and production of documents and any other objects producible as evidence for the pre-trial directions under the applicable rules of practice and procedure. And, given the nature of matters complained of, I direct the parties to file all the necessary papers within 21 days so that this case can be set down for hearing without delay. It is so ordered.

Dated, signed and delivered in court at Nairobi this 19th day of January 2015

F. GIKONYO

JUDGE