



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC CIVIL SUIT NO. 404 OF 2014

FOREST GUMP INTERNATIONAL LIMITEDPLAINTIFF

VERSUS

MITCHELL COTTS FREIGHT KENYA LIMITEDDEFENDANT

RULING

The Applications

The Plaintiff and Defendant have each filed an application that they agreed be heard and determined together. The Plaintiff's application is by way of a Notice of Motion dated 9th September 2014 in which it is seeking an order for committal to civil jail of Daniel Tanui and Geoffrey Matianyi, the Managing Director and Group Commercial Manager respectively of the Defendant herein, for disobeying and violating the Court Order made on the 14th October 2013.

The Defendant's application is in a Notice of Motion dated 6th November 2014 in which it is seeking that the orders granted by this Court on 14th October 2013 and issued on 1st September, 2014 be set aside, and that the costs of the application be borne by the Plaintiff. The grounds for the application are that on 14th October 2013 this Court gave orders restraining the Defendant from undertaking any further constructions on, or interfering with the quiet and peaceful engagement and free and unhindered use and access by the Plaintiff of the property known as Godown Number 4 situated at Nairobi Land Reference Number 19141.

However, that the Plaintiff extracted the order on 1st September, 2014, over ten months after it was issued and has tendered no explanation as to why they took an inordinately long period of time to extract the order. Further, that the lease for the suit premises expired on 15th September 2013 and as it stands there is no subsisting lease. The Defendant also averred that under order 40 Rule 6 of the Civil Procedure Rules where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve 12 months from the date of the grant, the injunction shall lapse unless for any sufficient reasons the court orders otherwise.

The Plaintiff's Arguments

The Plaintiff stated in its supporting affidavit sworn on 9th September 2014 by its Director, Evans Kibia Kamau, that on the 25th September 2012 it was granted an order restraining the Defendant from carrying on construction on L.R No. 19141 along Mombasa Road, Nairobi, and further allowed the Plaintiff free and unhindered use of Godowns Numbers 4 and 5 on the said property. Further, that the Order and the pleadings were served on the Defendant on the same date. The deponent annexed a copy of the said

Order.

However, that rather than comply with the order, the Defendant filed an Application dated 28th September 2012 seeking the setting aside of the order granted on the 25th September 2012 and the striking out of the Suit. Thereafter, that the Defendant filed a suit under the name Seven Stars limited against the Plaintiff in Suit No. ELC No. 828 of 2012 seeking orders compelling the Plaintiff to vacate Godown No. 4 situated within L.R No. 19141. Further, that the order granted on the 25th September, 2012 had not been discharged nor had it been complied with by the Defendant, who has refused to give the Plaintiff free and unhindered use of the godowns.

The Plaintiff stated that this Court confirmed its orders on 14th October 2013 which were extracted on the 1st day of September 2014 and served on the Defendant on the 2nd September 2014, and that the delay in service of the order was occasioned by the non-availability of the court file herein despite reasonable efforts to trace the same. However, that the Defendant officials have continued disregarding and ignoring the said orders, and action should be taken against them for the contemptuous manner in which they continue dealing with the courts authority and dignity.

As regards the Defendant's application, the Plaintiff filed a replying affidavit sworn on 3rd February 2015 by Evans Kibia Kamau, a director of the Plaintiff. He stated that the ruling by this Court was delivered on the 14th October 2013 in the absence of both parties, and that from the court record, it is clear that the parties were unable to access the court file. The deponent averred that the Plaintiff wrote letters dated 15th November 2013, 6th March 2014, 13th March 2014 seeking to learn the position of the file. Further, that the Defendant has not offered a reason why they have failed to comply with the order of 25th September 2013 which was extended on numerous occasions in the presence of the Defendant's counsel culminating with the order of the 14th October 2013.

The deponent admitted that its lease with Seven Stars Limited was for a period of 5 years 3 months, and would therefore the have lapsed on the 15th September 2014 had there been no interruption of the same. Further, that the Defendant's action of barring the Plaintiff from accessing the suit premises since September 2013 amounts to unlawful termination of the lease, and that since the Defendant did not have access to the premises or its property since September, 2012, the running of the time of the lease can be said to have been suspended.

The Defendant's Arguments

The Defendant's response to the Plaintiff's application for committal for contempt of court of its officials was in two replying affidavits sworn by David Matianyi on 27th October 2014, and Daniel Tanui on 3rd November 2014. David Matianyi deponed that he is the Commercial Manager of the Defendant and that he was not served with the orders issued on 25th September, 2012 and 14th October, 2013 respectively. He averred that the Plaintiff claimed that the order was served on 2nd September, 2014 but does not state or name the person who was allegedly served and the place where service was effected. Further, that the Plaintiff has not tendered any affidavit of service of the said Orders which is a prerequisite in contempt proceedings.

The deponent also contended that the order issued on 25th September 2012 was to subsist until 3rd October, 2012 and relates to L.R No. 19141 and not godown Number 4. It was his view that the Plaintiff is abusing court process and that its application was filed solely to embarrass him and subject him into ridicule.

Daniel Tanui on his part deponed that he is the Managing Director of the Defendant, and also reiterated that he was not served with the orders issued on 25th September, 2012 and 14th October, 2013 respectively, and that the Plaintiff has not filed any affidavit of service nor named the person who was allegedly served and the place where service was effected. He also reiterated that the Plaintiff's application is in abuse of the process of court and intended to embarrass and ridicule him.

It was the said deponent's averments that the Plaintiff extracted the order issued on 14th October, 2013 on 1st September 2014, 10 months after it was issued by the Court, and alleged that the Court file was missing, yet it has not tendered any correspondence to support the allegations. Further, that this was done after the Defendant's Advocates had served it with a notice on 1st September 2014, advising that the lease to the suit property would expire on 15th September 2014, and he attached a copy of the said notice.

The deponent further averred that prior and during the subsistence of this suit, the Plaintiff has all through locked the suit premises and have never paid any rent, and that the lease to the suit premises expired on 15th September, 2014, thus there is no legally subsisting lease between the Plaintiff and the owner of the premises which are registered in the name of Seven Stars Limited. Further, that the Defendant is only a shareholder of Seven Stars Limited.

The Issues and Determination

The two applications before the Court were canvassed by way of written submissions. The Plaintiff's Advocates filed submissions dated 3rd February 2015, while the Defendants Advocate filed submissions dated 29th January 2015.

The Application for Committal for Contempt Of Court

On the application for committal of the Defendant's officials for contempt of court, the Plaintiff's Advocates argued that there is on record an affidavit of service sworn on 9th September 2014 by a process server named Bedan Mwangi Chege attesting to the personal service of the orders on the officials of the Defendant.

Further, that the officials of the Defendant had personal knowledge of the orders, as it was given in open court. The Plaintiff relied on the decision in **Justus Nyaribo vs Clerk to Nyamira County Council (2013) eKLR** in this regard. It was also submitted that the Plaintiff had met the required standard of proof, as it had been shown that the Defendant through its officials has refused to comply with the orders of the court.

The Defendant's Advocates on the other hand submitted that the Plaintiff did not seek leave to file the application for contempt of court which is mandatory, and is therefore an abuse of the process of Court. They relied on Order 52 of the Supreme Court Rules of England as applied by section 5 of the Judicature Act, and the decisions in **Jacob Zedekiah Ochino & Another vs George Aura Okombo, Civil Appeal No.36 of 1989** and several other cited cases in this regard.

There are three issues before the court for determination as regards the Plaintiff's application to commit the named Defendant's officials for contempt of Court. The first is whether there was personal service of the orders granted by the court on 25th February 2013 and 14th October 2013. Secondly, if there was such service, whether the said officials of the Defendant are culpable for contempt of court. The last issue is if the said officials are found culpable, whether the Plaintiff can be granted the remedies sought.

A brief summary of the law applicable to these issues is as follows. Order 40 Rule 3 of the Civil Procedure Rules provides for the consequences of breach of an order of injunction, and states that 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.

The substantive law that applies is the English law on committal for contempt of court by virtue of section 5(1) of the Judicature Act which provides that:

“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 that

power shall extend to upholding the authority and dignity of subordinate courts.”

The applicable English Law in this respect is Part 81 of the English Civil Procedure Rules of 1998 as variously amended, which part repealed in most part the Rules of the Supreme Court that previously applied, including Order 52 and parts of Order 45 of the Rules of the Supreme Court. It is notable that one of the sections of Order 52 of the Rules of the Supreme Court that was repealed is that requiring leave before an application for committal for contempt of Court can be made, and such leave is now no longer necessary.

This position was confirmed by the Court of Appeal in its decision in **Christine Wangari Gachege V Elizabeth Wanjiru Evans & 11 Others [2014] eKLR** where the Court held as follows:-

“We find on the basis of the new Civil Procedure Rules (of England) which are now contained in the Second Supplement to the 2012 White Book that no leave is required before bringing an application like the one before us, for committal for contempt relating to breach of this court's order ---”

The law on the personal service of court orders is now found in Rule 81.8 of the English Civil Procedure Rules. The said rule provides that unless the court dispenses with service, a judgment or order may not be enforced by way of an order for committal unless a copy of it has been served on the person required to do or not do the act in question. Rule 81.6 of the English Civil Procedure Rules specifically provides that the method of service shall be personal service, which is effected by leaving the order with the person to be served.

Rule 81.9 (1) of the English Civil Procedure Rules of 1998 is also clear that a judgment or order to do or not do an act may not be enforced unless there is a prominently displayed a warning to the person that disobedience to the order would be a contempt of court punishable by imprisonment, a fine or sequestration of assets. Under sub-rule (2) of the said Rule, it is only in the case of an undertaking to do or not to do an act which is contained in a judgment or order where the notice of penal consequences may be dispensed with.

This Court notes that Kenyan courts have also held that personal service of orders and a penal notice is a requirement in contempt of court proceedings, and reference is made to the Court of Appeal decisions in **Nyamogo & Another v Kenya Posts and Telecommunications Corporation, (1994) KLR 1**, and **Ochino & Another v Okombo & 4 others (1989) KLR 165** in this respect.

It has also been held in several judicial decisions that if personal awareness of the court orders by the alleged contemnors is demonstrated, they will be found culpable of contempt even though they had not been personally served with the penal notice. See in this regard the decisions in **Kenya Tea Growers Association vs Francis Atwoli & Others**, Nairobi High Court Constitutional Petition No 64 of 2010, **Husson v Husson, (1962) 3 All E.R. 1056**, **Ronson Products Ltd v Ronson Furniture Ltd (1966) RPC 497**, and **Davy International Ltd vs Tazyman (1997) 1 WLR 1256**.

For this court to dispense with personal service of the orders issued on 13th June 2014 and to find that the Defendant's officials was aware of the court's order, the Plaintiff must show that the said officials were personally aware of the court order through some other means other than personal service. The notification and awareness of the orders required is personal to the person sought to committed for contempt of court.

Coming back to the facts of the present application, the personal service of the order alleged to have been disobeyed has been disputed. I have perused the affidavit of service sworn on 9th September 2014 by Bedan Mwangi Chege, and note that he states at paragraphs 2-12 as follows:

2. “That on the 2nd September 2014, I received an Order issued on 1st September, 2014 from M/s Nduati Charagu & Company Advocates with instructions to effect service of the same on the defendant and their Advocates on record.

3. That on the same date, I proceeded to the defendant's offices located along Mombasa Road, Nairobi.
4. That I reported at the Security Office at the entry gate to the complex where I explained the purpose of my visit and requested to be directed to the Managing Director's Office.
5. That I was informed that the Managing Director was normally in the Defendant's Head Office in Mombasa. However, I was directed to the Office of Mr. Geoffrey Matianyi, the Group Commercial Manager of the defendant.
6. That I proceeded to the 3rd floor of the Building housing the defendant's Nairobi office where after introducing myself to the receptionist, I was escorted to Mr. Matianyi's Office.
7. That I introduced myself to Mr. Matianyi and explained the purpose of my visit. I tendered the Order to him. He asked me to sit in his office as he scanned the Order and sent it to Mr. Daniel Tanui, the defendant's Managing Director.
8. That after a period of about 10 minutes the said Mr. Tanui called Mr. Matianyi and authorised him to accept service of the order.
9. That Mr. Matianyi accepted service of the Order by affixing the official stamp of the defendant on the second page of the Order wrote his name and Designation and appended his signature.
10. That on the 4th September 2014, I visited the offices of M/s Kale Maina & Bundotich Advocates on record for the Defendant located Teleposta Tower, 13th floor, Wing B, along Kenyatta Avenue.
11. That on arrival, I introduced myself to the receptionist and explained the purpose of my visit. She directed me to their Court clerk who after reading the order sought instructions from the Counsel handling this matter.
12. That after a short while, the said clerk affixed the firm's official stamp and appended his signature on the face of the Order "

There is a name and signature on the reverse of the court copy of the served order, which states that it was received by one Geoffrey Matianyi, as well as a stamp of the Defendant. Arising from the foregoing, I find that that Mr. Geoffrey Matianyi was personally served by the orders of this Court on 2nd September 2012. However there was no personal service on Daniel Tanui as is evident from the said affidavit of service. In addition, this Court cannot find the said Daniel Tanui to be personally aware of the court orders, as the Plaintiff did not bring any evidence to show that he was in court on the days of granting of the orders as alleged.

The next issue for determination is whether Geoffrey Matianyi, having been found by this Court to have been personally served with the court orders, is culpable of disobeying the said orders. The applicable law as stated in **Mwangi H.C. Wangondu vs Nairobi City Commission, Nairobi Civil Appeal No. 95 of 1998** is that the threshold of proof required in contempt of Court is higher than that in normal civil cases, and one can only be committed to civil jail or otherwise penalized on the basis of evidence that leaves no doubt as to the contemnor's culpability.

The Plaintiff did not bring any evidence of how the alleged disobedience of the Court order took place, or of the role and/or participation of the said Geoffrey Matianyi in the said disobedience, who cannot in the circumstances be found culpable of disobeying the court orders.

The Application for Setting Aside of Orders

Coming to the application by the Defendant, the parties in their submissions reiterated the arguments made in their pleadings as stated in the foregoing. The issue raised by the application is whether the Court orders issued herein on 14th October 2014 are amenable to setting aside. The applicable law on setting aside of orders is in the provisions of section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules, which avail an opportunity to any person who feels aggrieved by a decree or order of the court to apply to have the said decree or order varied or set aside.

Order 45 Rule 1 (b) of the Civil Procedure Rules in addition spells out conditions that must be met in an application for review of a decree or order as follows:

1. There must be discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the applicants knowledge or could not be produced by him at the time when the decree was passed or the order made,
2. mistake or error apparent on the face of the record,
3. any other sufficient reason, and
4. the application must be made without unreasonable delay.

The Defendant cites the delay in the extracting of, and service of the impugned orders as the reason to have them set them aside. The provisions of the law as regards the service of orders of injunction relates to *ex parte* orders which under Order 40 Rule 4(3) of the Civil Procedure Rules are required to be served within three days of issue. Upon default of service the injunction shall automatically lapse. Order 40 Rule 7 of the Civil Procedure Rules also provides that an injunction order may be discharged, varied, or set aside by the court on application made thereto by any party dissatisfied with such order.

Lastly, it is provided in Order 40 Rule 6 of the Civil Procedure Rules that Where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months from the date of the grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise.

The *ex parte* orders of injunction granted by the Court on 25th September 2012 were extended *inter partes* on various dates after the first *inter partes* hearing held on 1st October 2012, and confirmed in the ruling delivered on 14th October 2013. The Defendant was represented by its counsel at the said *inter partes* hearings and did not object to or appeal the said orders. In addition. It has not been shown how the delay in the extraction of, and service of the said orders has prejudice to the Defendant. I therefore find that there is no sufficient reason shown for the setting aside of the said orders, which must be obeyed by the Defendant.

The upshot of the foregoing is that all the prayers sought in the Plaintiff's Notice of Motion dated 9th September 2014 and in the Defendant's Notice of Motion dated 6th November 2014 are accordingly declined for the foregoing reasons, and the each party shall meet the costs of their respective Notice of Motion. For the avoidance of doubt, the orders of injunction granted herein on 14th October 2013 are hereby extended for a period of twelve more months from the date of this ruling.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this _____23rd_____ day of _____February_____, 2015.

P. NYAMWEYA

JUDGE