



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ENVIRONMENTAL AND LAND DIVISION

ELC CIVIL NO. 931 OF 2013

SUPERIOR HOMES (K) LTD..... PLAINTIFF

VERSUS

EAST AFRICA PORTLAND CEMENT DEFENDANT

RULING

A consent decree settling this suit was given by the court on 14th December 2012 and the decree setting out the terms of the settlement was extracted and issued by the court on 17th December 2012. The parties under the terms of the decree bound themselves to comply with the terms of the decree and obtain completion of their respective obligations under the decree within a period of 145 days. As the parties did not meet their obligations within the 145 days window allowed under the decree the plaintiff by a Notice of motion application dated 30th July 2013 sought orders from the court to vary and/or review the terms of the decree so as to extend the completion period of 145 days by a further 365 days or any other reasonable period. The court after hearing the parties delivered a ruling on 11th March 2014 allowing the plaintiff's application in the following terms:

- 1. That the terms of the decree issued herein on 17th December 2012 be and is hereby reviewed only to the extent of extending the completion period stated in paragraph 6 of the said decree by a further one hundred and twenty (120) days with effect from the date of this ruling.**
- 2. That each party shall meet their own costs of the Notice of Motion.**

The plaintiff has consequent to the said court's ruling of 11th March 2014 filed a Notice of Motion dated 20th May 2014 which is the subject of this ruling expressed to be brought under the provisions of section 5(1) of the Judicature Act Cap 8 Laws of Kenya, part 81 of the Civil Procedure Rules of England, order 51 Rule 1 of the Civil Procedure Rules, 2010 and sections 1A, 1B, 3A and 63 (e) of the Civil Procedure Act, Cap 21 of the Laws of Kenya. The application seeks the following orders:

1. That this Application be and is hereby certified urgent and heard exparte on priority basis in view of its urgent nature and service of the same be dispensed with in the first instance.
2. That the Defendant/Respondent (herein after "**the Respondent**") be and is hereby compelled, ordered and/or directed to release to the Applicant immediately, the completion documents and/or any other relevant documents required and necessary to facilitate the transfer of three hundred and thirty seven (**337**) acres to be excised and/or hived off all that parcel of land known as Land Reference Number 8784/4.
3. That in default of order NO.(3) (should have been (2) above the Managing Director of the Respondent be and is hereby ordered to appear before this Honourable court immediately to show

cause why the completion documents cannot be released and also why he should not be committed to civil jail for failing to comply with the Ruling of this Honourable court of 11th March 2014 and the orders issued pursuant thereto on 14th March 2014 and amended on 4th April 2014.

4. That this Honourable court do issue any such further and appropriate orders in the circumstances of this matter as it deems fit and in the interest of justice.
5. That the costs of this Application be provided for.

The application is premised firstly on the grounds that are set out on the face of the application and secondly on the supporting affidavit sworn by **Ian Hazlitt Henderson** on 20th May 2014 and the annexures thereto. The Defendant opposes the plaintiffs application and has filed a replying affidavit in opposition thereto sworn by **Kephar Tande**, the Managing Director of the Respondent filed in court on 30th May 2014. The Respondent further filed a Notice of preliminary objection to the plaintiff's said application dated 30th May 2014 raising the following points:-

- i. That the application is misconceived, incurably defective, frivolous, vexatious and therefore incompetent and is an abuse of the process of the Honourable court.
- ii. That the Civil Procedure Act Cap 21 Laws of Kenya and the rules made thereunder only provide for the procedure and/or manner of filing contempt applications and proceedings.
- iii. That the said application for contempt of court is in breach of the mandatory provisions of the Judicature Act and the Civil Procedure Rules.

The court on 4th June 2014 gave directions to the effect that the plaintiff's Notice of Motion dated 20th May 2014 and the Defendant's preliminary objection dated 30th May 2014 be heard and determined together. The court also directed the parties to file and exchange written submissions respecting the application and the preliminary objection. The plaintiff filed its submissions dated 11th June 2014 on the same date while the Defendant/Respondent filed its submissions on the 17th June 2014.

The Respondent having taken a preliminary objection to the plaintiff's application both on points of law and procedure it is necessary to deal with and dispose of the preliminary objection first. The Respondent in its submissions in support of the preliminary objected faulted the plaintiff's Notice of Motion and stated that the same was not instituted in strict compliance with the law and/or the mandatory provisions of **section 5 (1) of the Judicature Act** as read with the current **Civil Procedure rules of England** and for that reason submitted that the application was incompetent and should be dismissed. In particular the Respondent submitted that the Applicant did not seek and obtain leave before filing the application for contempt. The Respondent placed reliance on Rule 81. 14 of the Civil Procedure Rules of England which in part provides that:-

- i. **The application for permission to make a committal application must be made by a part 8 claim form which must include or be accompanied by:-**
 - a. **A detailed statement of the Applicant's grounds for bringing the committal application, and**
 - b. **An affidavit setting out the facts and exhibiting all documents relied upon.**
- ii. **The claim form and the documents referred to in paragraph (i) must be served personally on the respondent unless the court otherwise directs.**

The reference to "**application for permission to make a committal application**" connotes a requirement to obtain that "**permission**" or "**leave**" as previously referred to.

In Kenya the power or jurisdiction of the courts to punish for contempt is derived from section 5 of the Judicature Act, Cap 8 Laws of Kenya. These provisions are reproduced hereunder:-

Section 5(1) Judicature Act provides as follows:-

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

Section 63 (c) Civil Procedure Act:-

63. “In order to prevent the ends of justice being defeated, the court may, if it is so prescribed;-

(a) -----

(b) -----

(c) Grant a temporary injunction and in case of disobedience convict the person guilty thereof to prison and order that his property be attached and sold”.

Section 63(c) is effectuated through the provisions of order 40 Rule 3 of the Civil Procedure Rules which sets out the procedure to be adopted in cases of breach of injunction granted by the courts.

Order 40 Rule (3) provides as follows:-

3.(1) In cases of disobedience, or breach of any such terms, the court granting the 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.

Thus although Advocates routinely apply for leave to file an application to punish a contemnor for breach of orders of injunction there is no such requirement under order 40 of the Civil Procedure Rules which clearly provides for punishment and the procedure to be followed in cases of disobedience or breach of orders of injunctions.

However where the provisions of section 5 of the Judicature Act is invoked as in the present case then the court has to be guided and exercise the jurisdiction and power to punish for contempt as is exercised “**for the time being**” by the High court of Justice in England and hence the procedure and process adopted in bringing the application for contempt would have to be the same as is practiced by the High Court of Justice in England at the time.

That section 5(1) of the Judicature Act imposes a duty on the court to first ascertain the law of contempt in England at the time of the trial or the application is made has repeatedly been upheld by the courts (see the cases of **Republic – vs- County Council of Nakuru Ex-parte Edward Alera t/a Genesis Reliable Equipment & 2 others (2011) eKLR**, **Basil Criticos –vs- Attorney General & 8 others (2012) e KLR**, **Hon. Mwangi Kiunjuri – vs- Wangethi Mwangi HCCC NO. 1833 OF 2003**, and **Ibrahim Haji Issak –vs- Kenya Meat Commission & Another (2013) eKLR** and **Econet wireless –vs- Minister for information & Communications & Another (2005) e KLR**).

The court of Appeal in the recent case of **Christine Wangari Gachege –vs- Elizabeth Wanjiru & 11 others (2014) eKLR** while considering the import and significance of section 5(1) & (2) of the Judicature Act observed that:-

“The emphasis imposes a duty on the High Court, the court of Appeal and law practitioners to

ascertain the applicable law of contempt in the High Court of Justice in England, at the time an application is brought. This duty was noted by H.G Platt Judge and D.C Porter, Ag J. (as they then were) in the matter of an Application by Gurbaresh Singh & Sons Ltd Misc. Civil case NO. 50 of 1983, where they said:-

“The second aspect concerns the words of section 5-“for the time being” which appear to mean that this court should endeavour to ascertain the law in England at the time of the trial, or application being made. Sometimes it is not known or may not be known exactly, what powers the court may have. It seems clear that the contempt of court Act 1981 of England is the prevailing law and that the procedure is still that set out in order 52 of the Supreme Court Rules”.

Until 2012 order 52 of the Supreme Court Rules provided the procedure of commencing contempt of court proceedings and such procedure as it related to the High Court of Justice included:-

- a. An application to the High Court of England for Committal contempt of court will not be granted unless leave to make such an application has been granted.
- b. An application for leave had to be *ex parte* to a Judge in chambers and had to be supported by a statement setting out the particulars of the applicant and the persons sought to be committed and the grounds on which the committal is sought and an affidavit verifying the facts relied on.
- c. An applicant had to give notice of the application for leave not later than the preceding day to the crown office.
- d. Where leave was refused by a judge in chambers the applicant could apply afresh to the divisional court within 8 days after the refusal by the judge.
- e. After grant of leave, the substantive application was required to be made to a divisional court within 14 days of the grant of leave and if not the leave would lapse.
- f. The motion together with the statement and affidavit was to be served personally on the person sought to be committed unless the court otherwise directed.

The foregoing rules have been applied in Kenya in varying degrees and as the court of Appeal observed in the case of **Christine Wangari Gachege –vs- Elizabeth Wanjiru & 11 others** (Supra) the only consistent feature in the decided cases was the requirement to obtain leave before the substantive committal application was brought. The court of appeal in the **Christine Wangari** case (Supra) went on to observe that the decided cases may no longer provide authority in terms of procedure in instituting an application for contempt as the law in England had changed. The Judges referred to the Kenyan court decisions in the cases of **John Mugo Gachuki –vs- New Nyamakima Co. Ltd HCC Civil case NO. 456 of 2011 Republic –vs- County Council of Nkuru ex parte Edward Alera H.C JR NO. 74 of 2010, National Bank of Kenya –vs- County Council of Olkajiado & others HC Civil Misc. (JR) NO. 5 of 2012 and Republic –vs- David Makali & others Cr. Application NO. 2 of 1994** where invariably the courts were applying order 52 Rules of the Supreme court before they were replaced.

“-----These decisions were rendered 15 and 20 years ago respectively. Today, 2014 in considering the question raised in this application, those cases may not provide authority in terms of procedure in instituting an application for contempt. We must therefore ascertain the prevailing state of the law of contempt in England today.

Following the implementation of the famous Lord Wolf’s “Access to Justice Report 1996”, The Rules of the Supreme Court of England are gradually being replaced with the Civil Procedure Rules, 1999. Recently, on 1st October 2012 the Civil Procedure (Amendment NO.2) Rules 2012 came into force and PART 81 thereof effectively replaced Order 52 RSC in its entirety. Part 81 (Applications and proceedings in Relation to contempt of court) provides different procedures for four different forms of violations.

Rules 81. 4 relates to committal for “breach of a judgment, order or undertaking to do or abstain from doing an act”.

81. 11- committal for “interference with the due administration of Justice” (applicable only in

criminal proceedings)

Rule 81.16- Committal for contempt “in the face of the court” and Rule 81-17- committal for “making false statement of truth or disclosure statement”.

An application under Rule 81.4 (breach of judgment, order or undertaking) now referred to as “application notice” (as opposed to a notice of motion) is the relevant one for the application before us. It is made in the proceedings in which the judgment or order was made or the undertaking given. The application notice must set out fully the grounds on which the committal application is made and must identify separately and numerically, each alleged act of contempt and be supported by affidavit (s) containing all the evidence relied upon.

The application notice and the affidavit or affidavits must be served personally on the respondent unless the court dispenses with service if it considers it just to do so or the court authorizes an alternative method or place of service.

It is clear from this summary that leave, now called “permission” is not required where committal proceedings relate to breach of a judgment order or undertaking. That position must be contrasted with the requirement in Rules 81.12- Committal “for interference with the due administration of Justice” and 81.17- committal “for making a false statement of truth or disclosure statement” where in the former it is expressly provided that:-

“The application for permission to make a committal application must be made by a part 8 claim form-----“

The court of appeal proceeded to make a finding on the basis of the new Civil Procedure Rules (of England) now contained in the second supplement to the 2012 white Book that no leave is required before bringing an application for committal for contempt relating to breach of the court order and proceeded to strike out the application that was before them for incompetency.

I have quoted at some length the decision of the court of Appeal in the **Catherine Wangari** case (**Supra**) because it exhaustively considered the application of the new Civil procedure rules (of England) as opposed to the previous order 52 of Supreme court Rules of England which hitherto was applicable to our court’s in as far as the law of contempt as imported to Kenya through section 5 of the Judicature Act was concerned. Now the current Civil Procedure Rules (of England) are applicable to court proceedings brought under section 5 (1) of our Judicature Act.

Rule 81.4 of the Rules relating to **“committal for breach of a judgment, order or undertaking to do or abstain from doing an act”** is the one applicable to the application before me and I am satisfied no leave is required to be give before committal proceedings for breach of judgment or order given by the court is initiated. Under Rule 81.4 an applicant is only required to make an **“application notice”** and no **“permission”** or leave is required before the application is made unlike under **Rules 81.11 and 81.17** relating to committal for interference with the due administration of justice and committal for making false statement of truth or disclosure statement respectively where **“permission”** to make the respective applications has to be obtained.

With respect the Respondent has submitted in regard to Rule 81.14 of the Civil Procedure Rules of England which sets out the procedure for applying for permission for a committal application but that relates to the applications that require permission to be given before the substantive committal application is filed. The present application by the Applicant is not such an application as it relates to committal for breach of judgment and/or order of the court that does not require permission/leave to be obtained before filing the application. The Respondent loudly complained about the direction by Hon. Lady Justice Nyamweya that he be served personally and went to the extent of casting aspersions on the Judge that she had pre determined that he was guilty of contempt before she had heard the application. I would only state that the Judge was following the law that damands that a contempt application be personally served on the person cited for contempt unless the court directs otherwise.

In the premises it is my finding that the Applicant's application is properly and procedurally before the court and that no leave was necessary to be obtained before it was filed. I therefore disallow and overrule the preliminary objection on the basis that it lacks merit.

Turning now to the merits of the plaintiff's application the issues for determination is whether the plaintiff is entitled to an order of specific performance whereby the Defendant/Respondent should be compelled to release the completion documents in the light of the ruling made by the court herein on 11th March 2014 and further whether the Respondent's and/or its Managing Director is in contempt of court and therefore liable to be punished by the court.

The parties hereto made an elaborate consent order whose terms were spelt out in a decree stemming from the consent approved and adopted by the court on 14th December 2012. The said decree was issued on 17th December 2012 and the salient terms of the Decree were that:-

1. **The Defendant was to transfer to the plaintiff a portion of land measuring 337 acres which were to be excised and/or hived off the parcel of land known as Land Reference Number 8784/4.**
2. **The purchase price for the entire parcel of land measuring 337 acres shall be Kenya Shillings seven hundred and fifty million (Kshs.750,000,000,-).**
3. **The plaintiff to pay Kshs.100,000,000/- deposit within 7 days of the date of the decree to be held on stake by the Defendant's Advocates and not to be released to the Defendant or any other party until completion.**
4. **That the completion documents to be released to the plaintiff's Advocates upon receipt of an acceptable Bank Guarantee issued on behalf of the plaintiff's Advocates or such other security as shall be agreed between the parties to secure the balance of the purchase price of Kshs.650,000,000/-.**
5. **That the balance of the purchase price of Kshs.650,000,000/- to be paid to the Defendant within 7 days of successful Transfer of the parcel of land measuring 337 acres to the plaintiff or its nominees,**
6. **That the agree completion period was 145 days from the date of the decree or 7 days of successful transfer of the parcel of land measuring 337 acres to the plaintiff or its Nominees whichever is earlier,**
7. -----
8. -----
9. **That the plaintiff shall be granted vacant possession without any encumbrances upon payment of the balance of the purchase price as stipulated in order (5) above.**
- 10.-----
- 11.-----
12. **That there be liberty to the parties herein to apply.**

The Applicant states that it complied with its obligations under the decree in that it paid the deposit of **Kshs.100,000,000/-** required of it under paragraph 3 of the Decree in terms therefore and further furnished a Facility Letter dated 5/4/2013 from I &M Bank Limited as security and guarantee for the balance of the purchase price of **Kshs.650,000,000/-** thereby fully discharging its obligations under the

Decree of 17th December 2012. The Applicant however states that the Respondent completely failed and/or refused to discharge its obligations under the said Decree as it blatantly refused to release the completion documents to facilitate the completion of the transaction in terms of the Decree. As a result of the Respondent's refusal to release the completion documents the 145 days completion period set under the Decree lapsed and that prompted the Applicant to make the application of 30th July 2013 seeking an extension of the completion period.

The court on 11th March 2014 delivered a ruling allowing the plaintiff's application dated 30th July 2013 and granted an extension of 120 days from the date of the ruling for the parties to complete the transaction.

The Respondent acknowledges the ruling by the court extending the completion period by a further 120 days but states that it has appealed the decision and has applied for a stay of the ruling/decision at the court of appeal and that the application is awaiting hearing. The Respondent's position as I understand it is that the present application by the Applicant is at any rate premature in view of the fact that following the ruling the completion date had been extended to 18th June 2014 which had not come by the time the application was filed. Thus the Respondent was still within time to comply with the orders of the court.

The more potent reason however that the Respondent gives for not releasing the completion documents, that the Applicant seeks to be released to facilitate completion of the transaction is that under clause 4 of the Decree the completion documents were to be released to the Applicant's Advocates in the transaction upon receipt of an acceptable bank guarantee. The Respondent states no suitable bank guarantee has to date been given to the Respondent and thus the Applicant ought not to seek enforcement of the consent Decree when it has not fulfilled its obligations under the consent order.

I have read and reviewed the ruling of 11th March 2014 by my sister **Hon. Lady Justice Pauline Nyamweya** and it is apparent that she considered the Facility Letter from **I & M Bank Limited** dated 5th April, 2013 and found that the same constituted sufficient evidence of an "acceptable Bank guarantee or such other security" as envisaged under clause 4 of the Decree. Having made this finding it followed that the court was of the view that the Applicant had discharged its obligations under the Decree and that an extension of time was merited to enable the parties to complete the transaction.

I have reviewed the said facility letter headlined "**credit facilities for A/C of Superior Homes (Kenya) Limited**" and the letter affirms that I & M Bank Limited had sanctioned credit facilities to the Applicant under the following heads:-

TERM LOAN 1- TL1 Kshs.650,000,000/-

TERM LOAN 2- TL2 Kshs.200,000,000/-

The purpose of the loans are indicated thus-

TL1 – Term loan 1 facility shall be used to finance purchase of property known as L.R. NO. 8784/4 Athi River, Machakos (hereinafter referred to as the property) by the borrower.

TL2- Term Loan 2 facility shall be used to finance the construction of 250 residential units of a project known as Green Park by the Borrower.

Under clause 5(c) of the facility letter among the securities to be taken to secure the facilities included:-

5(c) first legal charge/mortgage for an amount of Kshs.850,000,000/- over the property to be registered in the name of the Borrower together with the original Title Deed and all other related documents. (The first legal charge /mortgage shall be drawn and registered supplemental to the debenture).

From the foregoing it is clear I&M Bank Ltd had agreed to advance the Respondent a sum of **Kshs.650,000,000/-** to pay the balance of the purchase price but that could only be possible after they had perfected their securities in terms of clause 5 of the Facility Letter which inter alia included taking a charge over the property that the Applicant was purchasing.

In Commercial Conveying parlance, Commercial transactions are consummated on the basis of professional undertakings and in the instant case it would have been expected that the Advocates of **I&M Bank Limited** would have given their professional undertaking on behalf of **I&M Bank Limited** to pay the sum of **Kshs.650,000,000/-** once the securities for the facilities mentioned under clause 5 of the facility letter were perfected. Thus the guarantee by the Bank would be backed by the securities that it was taking. No bank will give a guarantee that is not backed by security and the security in the present case would have to be the property the Applicant is purchasing. In the circumstances I would agree with **Hon. Lady Justice Nyamweya's** view that the Facility Letter sufficed as an acceptable bank guarantee or other sufficient security.

I note that **Hon. Lady Justice Nyamweya** on 11th March 2014 upon delivering her ruling granted the Respondent a stay of execution for **60 days** to enable the Respondent to file a formal application for stay of execution in the court of Appeal. The Respondent has since lodged in the court of Appeal an application for stay of execution which is yet to be heard and determined (see annexure "**KT-1**" of the Respondent's replying affidavit). This court having granted a temporary stay of execution for 60 days and the Respondent having complied with the court's direction to file a formal application for stay in the court of Appeal within the period of 60 days I am not persuaded that the Respondent has deliberately disobeyed the court order and/or has deliberately refused to honour the terms of the decree requiring it to release to the Applicant the completion documents. The Appeal that the Respondent intends to lodge is to challenge the decision by **Hon. Lady Justice Nyamweya's** to extend the time for completion, if successful the remedy of specific performance would not be available to the Applicant. The court of Appeal in the application for stay is being invited to consider whether the Respondent has any grounds to have the decision by this court made on 11th March 2014 stayed. This court determined to give the Respondent the opportunity to make that application in the court of Appeal and I think the justice of the matter would demand that the parties await the decision of the court of appeal in the application for stay. Of course it is rather unfortunate that parties who had voluntarily entered a consent judgment cannot agree on how to end the impasse and that so much resources would remain locked up as the parties tussle on whether or not the transaction should be completed. The courts regrettably can only play the role of an impartial arbiter and in the process every party has to be afforded a fair opportunity to ventilate and agitate their rights. The process of adjudicating the parties rights may appear cumbersome dilatory and expensive but that is the price parties have to pay for having robust justice system where the rule of law must reign supreme.

Having come to the conclusion that there is at the present moment no basis to hold the Respondent to be in contempt and/or to make an order compelling the Respondent to release the completion documents as urged by the Applicant I would extend the temporary stay granted by the court up to the date the court of Appeal gives its ruling on the application for stay now pending before it. In the event the application for stay is not granted the period of extension of 120 days granted by **Hon. Lady Justice Nyamweya** will start to run from the date of the said court of Appeal ruling and the Respondent will be obligated to release the completion documents to the Applicant during that extended period and failure to do so for no justifiable cause could yet again invite a compelling order and the Respondent being exposed to an application for contempt.

The Applicant's Notice of Motion application under prayer (4) invited the court to "**issue any such further and appropriate orders in the circumstances of this matter as it deems fit and in the interest of Justice**". I have invoked that prayer to issue the directions/orders that I have given in the penultimate last paragraph so that there is no lacuna in the eventuality of the situation referred to occurring.

For the reasons that I have addressed in this ruling and subject to the directions I have given hereinabove the Plaintiff/Applicant's Notice of Motion dated 20th May 2014 is disallowed.

I direct that each party meets their own costs for the Notice of Motion.

Ruling dated, signed and delivered this 27th day of August 2014.

J. M. MUTUNGI

JUDGE

In presence of:

..... For the Plaintiff

..... For the Defendant