



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL CASE NO. 389 OF 2014**

**CORNERSTONE SECURITY SERVICES (K) LIMITED..... PLAINTIFF**

**- VERSUS -**

**NATIONAL CEREALS & PRODUCE BOARD..... DEFENDANT**

**R U L I N G**

1. The Notice of Motion before the court is dated 22nd September 2014. It is filed under **Sections 3, 3A & 63 (c)** of the **Civil Procedure Act** and **Order 40 Rule 3** of the **Civil Procedure Rules**. The applications seeks the following orders:-

1. ***Mr. Newton K. Terer, Col (Rtd) Geoffrey King'angi, Dr. Ahmed Ferey, Daniel Damocha Dibo, Abdullahi Haji Abdi, Geoffrey Gitamo Obure and Patrick M. Karanja being the board members and agents of the Defendant herein, be committed to prison for such period of time as this Honourable Court may deem fit.***
2. ***That costs and/or occasioned by this motion to be paid by the Defendant/Respondent.***

2. The application is premised on the grounds set out therein and is supported by the affidavit of Basil Tonto dated 22nd September 2014.

3. The Plaintiff's case is that by an order of this court issued on 10th September 2014 the Defendant was restrained from effecting or acting upon the notice of termination dated 1st September 2014 terminating the security contract dated 29th May 2013 between the Plaintiff and the Defendant. The said order was extracted and served upon the Defendant's Officer Mr. Patrick Karanja who accepted the service of the same on behalf of the Defendants on 12th September 2014. The Defendant in partial obedience of the orders allowed the Plaintiff to perform its obligations as per the contract dated 29th May 2013 in selected depots assigned to the Plaintiff under the contract. However, on 18th September 2014 the Defendant, in complete disregard and disobedience of the Court order denied the Plaintiff access to all the depots assigned to it in the contract. By this act of disobedience, the Defendant is alleged to have disparaged the authority and dignity of this Court, and is in contempt of the Court, hence these contempt of court proceedings.

4. The application is opposed vide a replying affidavit of **Patrick Karanja** dated **26th September 2014**. The Defendant's case is that by the time the Court issued orders on the subject matter of this application on **10th September 2014** the contract, the subject matter herein, had already been terminated and new service providers appointed, and therefore the order of this Court was incapable of being obeyed.

5. Parties made oral submissions before the Court. Mr. Sirima for the Plaintiff/Applicant submitted that the order was served upon a Mr. Patrick Karanja who is the Secretary of Defendant on 12th September 2014 and he acknowledged the receipt of service. The Defendant then partially obeyed the orders but changed its mind on 18th September 2014 when it disregarded and discarded the said order hence impugning the authority of this court. Mr. Sirima submitted that it is in the interest of justice and for the purposes of upholding the dignity of the court that the orders sought herein be granted.

6. In response, Mr. Gicheru for the contemnors did not dispute the fact that the Defendant was served through Mr. Patrick Karanja. Mr. Gicheru however submitted that service in contempt proceedings must be personal and so apart from Mr. Patrick Karanja, the other cited contemnors cannot be deemed to have been served. Mr. Gicheru further submitted that it is common ground that the Respondent by a letter dated 1st September, 2014 terminated the contract for the provision of security services between itself and the Plaintiff/Applicant. That following the termination of the said contract, the Defendant/Respondent immediately took steps to fill the void in the various depots previously assigned to the Plaintiff/Applicant. Through its Tender Committee, the Respondent awarded the Security Contract for the depots previously guarded or assigned to the Plaintiff/Applicant to two other security firms, to wit; M/s Inter Security Services Ltd and Total Surveillance Security Limited. Upon being advised of the decision of the Tender Committee, the new Security Service providers took up their assignments in the respective depots on 5th September 2014 and have been carrying out their contractual duties to date. Mr. Gicheru submitted that prior to the letter of termination dated 1st September 2014, the Respondent had set out a task force to assess the performance of Cornerstone Security Services Company (*the Applicant herein*) which taskforce recommended the termination of the existing contract on the basis of theft cases in various depots and non-payment of salaries to its guards by the Plaintiff/Applicant. He added that in any event, the security contract between the Respondent and the Applicant was terminated in accordance with clause 16.2 of the General Conditions of Contract, which entitles the Respondent to terminate the Contract immediately without notice where the security firm's guards are involved in theft, loss, or damage. It was submitted that since the commencement of the contract, several depots assigned to the Plaintiff/Applicant reported cases of theft, loss, and damage where the guards in charge were implicated and even charged in Court. From the foregoing, it was submitted, it is clear that the Plaintiff/Applicant sought, obtained, and served the said orders way after appropriate action had been taken by the Respondent to award the contract to other firms who had already taken up their respective assignments. Mr. Gicheru submitted that contempt of Court cannot arise where the orders sought have already been overtaken by events or actions done before the court intervention, and that the Respondent as a Corporation respects the dignity of this court and would not disobey orders flagrantly as alleged. He further submitted that the Plaintiff/Applicant has cited the Board members of the Respondent for contempt oblivious of the fact that the members of the board are not involved in the daily management of the Respondent Corporation.

7. I have carefully considered the application and the submissions of the parties herein. The most important issues for consideration in an application seeking to commit a party to jail for contempt are issues of service of the said order and if the same was disobeyed. From the submission of the parties and the facts of this matter, it is clear that service of the said order is not being disputed, especially as regards Mr. Patrick Karanja who received and acknowledged service on 12th September 2014. It is also the law that it is human agents who represent a Company, and its Secretary represents a Board of Directors. Therefore, the service, which was acknowledged by Patrick Karanja on behalf of the Company, was proper and will bind the company. In the Replying Affidavit sworn by the said Mr. Patrick Karanja, he described himself as "***the Acting Board Secretary of the Defendant/Respondent.***" He received the said order and therefore the Company and the entire board of directors of the Defendant Company is deemed to have received the order of the court aforesaid.

**8. Order 52 Rule 3 (1) of Supreme Court Practice Rules** makes it mandatory for the contemnor to be served but in its explanatory notes, the said order provides:-

***‘ . . . No order will normally be issued for the committal of a person unless he has been personally served with the order, disobedience to which it is said to constitute the contempt, or if the order is directed to a group of persons or a corporation, some appropriate member has been personally served.’***

In the case of **KENYA ANTI-CORRUPTION COMMISSION – VS – GEMINI PROPERTIES LTD. & OTHERS**, the court held that

**‘ . . . the court is satisfied that the directors of the 1<sup>st</sup> Defendant company have continued to disobey this court’s orders under the guise that the orders were incapable of being obeyed or that the orders were not personally served upon the two.’**

The court in the above case found the directors liable to a charge of contempt although they were not personally served with the court order. Further, in this case, the Board directors became aware of the Court Order as soon as their secretary, Patrick Karanja, had received the same.

In **MUTITIKA – VS – BAHARINI FARM [1982 – 88] 1 KAR 863 at page 867**, the Court of Appeal (Hancox J.A.) held that:-

**‘ . . . It is perfectly clear that anyone who knowing of an injunction or an order of stay, willfully does something, or causes others to do something, to break the injunction or interfere with the stay is liable to be committed for contempt. See Acrow (Automation) Limited – Vs – R. Chainbelt Inc [1971] 1175 at 1180. The reason is that by doing so he (or she) has conducted himself (or herself) so as to obstruct the course of justice and so has attempted to set the order of the court at naught.’**

9. The other issue is whether the said order was disobeyed by the Defendant. The order issued by this court restrained the Defendant/Respondent from:-

- a. **Effecting or acting upon the notice of termination dated 1st September 2014 terminating the security service contract dated 29th May 2013, and**
- b. **awarding any contract for the provision of security services of the specified depots in the contract dated 29th May 2013 pending inter-partes hearing of the application.**
- j. It does not require much effort to know that the Defendant flagrantly disobeyed the said order. In fact, the Defendant in the replying affidavit of the said Patrick Karanja and in the oral submissions of Mr. Gicheru for the Defendant admits that the Defendant disobeyed the court order. Instead, they have attempted to justify the disobedience. The Defendant submitted that they disobeyed the court order because the contract which was being protected by the court had already been terminated on 1st September 2014 vide a letter to that effect, and that indeed the Defendant had gone ahead to appoint other service providers. The Defendant’s case is that there was no contract existing by the time they were served with the court order on 12th September 2014.
- k. From the submissions of the Defendant on the issue, this court has two issues to raise. The first one is that it was not upon the Defendant to decide that the court order was already overtaken by events, and therefore that they were at liberty to disobey or disregard the same. No person or entity is so powerful that they can choose when and how to obey a lawful order. Even if the order had already been overtaken by events, which I personally do not think is correct, the Defendant still had a choice to come to court immediately and seek a review on the said grounds, and this court, if convinced would have issued appropriate review orders, or the same would have been set aside. That is the lawful procedure. A party before a court can never be allowed to choose when to obey a law. Can a party decide which part of the law is good for him to keep and which part to discard? This, if allowed, would lead to chaos and anarchy, which the court cannot condone. The second issue is the Defendant’s submission that the order had been overtaken by events. This court does not believe that submission. There are irregularities on the face of the record. The Defendant appeared to have been in a great hurry to terminate the said contract. Sample this:-
  - i. **On 1st September 2014, the Defendant gives notice of termination of contract effective the same day, being 1st September 2014. The letter is not sent by by e-mail. It is an ordinary letter, which is sent through the Plaintiff’s Postal address, but there is no evidence of posting. The Plaintiff received the said letter on 5th September 2014. There is the Plaintiff’s stamp to that effect. Since a copy of this letter is attached to the replying affidavit of Patrick Karanja, and it bears the stamp that it was received in the Plaintiff’s office on 5th September 2014, the inference is that the letter was physically served upon**

*the Plaintiff by the Defendant. If that is so, as I believe it is, the question then arises as to why the Defendant would give a Notice dated 1st September 2014, which is to take effect on the same day, and then have it served upon the Plaintiff on 5th September 2014. If we are to accept his notice then it cannot be the proper Notice to terminate the contract on 1st September 2014.*

- ii. *Secondly, on the same day 1st September 2014, the Defendant convenes a tender committee on procurement of security services which makes a decision to terminate the said contract – see “PK 2”.*
  - iii. *Thirdly, on the said same day, the Defendant appoints Total Security Surveillance Limited as security service providers.*
- l. All the above activities took place on the same day, yet the Plaintiff is notified on the 5th day. Clearly, there was an attempt by the Defendant to keep the Plaintiff in the dark as decisions were being made to terminate the said contract and to appoint new service providers. The Plaintiff is served with such a notice of termination after the ground had been cleared for other service providers to take over.
  - m. However, if someone is still in doubt, I do believe the testimony of Basil Tonto who deponed on the supporting affidavit herein that when the Defendant received the said court order, the Defendant initially obeyed the same upto the 18th September 2014 when the Defendant changed its mind to be in contempt thereof. I say this because on 22nd September 2014, when the Plaintiff’s application for injunction was to be heard *inter-partes*, the Defendant sent a counsel by the name Ondieki. However, the matter did not appear on the cause list. The counsel nonetheless retrieved the file from the registry because Mr. Sirima for the Applicant intended to apply for the extension of the interim orders. Mr. Ondieki for the Defendant did not object to the extension of the interim orders. This was on 22nd September 2014. What this means is that the Defendant was aware of the orders, and that they were obeying the same. Otherwise, it would not have made any sense for Mr. Ondieki for the Defendant to state that he had no objection to the application to extend the said interim orders. If the contrary was true, this was the point at which the Defendant would have said that there are no orders capable of being obeyed, and that in fact, they had not been obeying any such orders. The conduct of the Defendant reveals that they are upto some mischief.
  - n. In the upshot, I am satisfied that the Defendant has flagrantly disobeyed orders of this court and that the cited contemnors are in contempt of orders of this court, and that their conduct brings to disrepute the authority and dignity of this court and that the same should be punished.
  - o. In **COMMERCIAL BANK OF AFRICA LTD. – VS – NDIRANGU [1990-1994] 1EA 69(CAK)**, the Court of Appeal had this to say on court orders:-

***“It is fundamental tenet of the rule of law that court orders must be obeyed . . .”***

In the case of **GATIMU FARMERS COMPANY LTD. – VS – GEOFFREY KAGIRI KIMANI & OTHERS (Nakuru HCCC No. 302 of 2004)**, Justice Kimaru held that:-

***‘ . . . The most important aspect of obedience of an order of the court is knowledge. If a person becomes aware of an order of the court, which binds him, he has no option but to obey it. Such person need not be party to the suit. If he chooses to disobey such order of the court, he shall be punished for being in contempt of the said order.’***

10. In this regard, I make the following orders:-

- a. ***Mr. Newton K. Terer, Col. (Rtd) Geoffrey King’angi, Dr. Ahmed Ferey, Daniel Damocha Dibo, Abdullahi Haji Abidi, Geoffrey Gitamo Obure and Patrick M. Karanja, being the board members and agents of the Defendant herein be and are hereby committed to prison for a period of ninety (90) days each from today.***
- b. ***Depending on their gender disposition, the above said contemnors shall be jailed at Kamiti Maximum Prison or at the Lang’ata Women Prison.***
- c. ***In the alternative to orders (a) and (b) above the said contemnors shall each pay a fine of Kshs.100,000/=.***

d. *Costs herein shall be for the Plaintiff.*

Orders accordingly.

**READ, DELIVERED AND DATED AT NAIROBI THIS 31ST DAY OF OCTOBER 2014**

**E. K. O. OGOLA**

**JUDGE**

**PRESENT:**

M/s Ng'ania for Plaintiff

Mr. Gicheru for Defendant

Irene – Court Clerk