



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENTAL AND LAND DIVISION
ELC CIVIL NO. 185 OF 2011

HUSEIN ALIBHAI PIRBHAI1ST PLAINTIFF

ZOHER HUSEIN PIRBHAI 2ND PLAINTIFF

VERSUS

NORTHWOOD DEVELOPMENT

COMPANY LTD.....1ST DEFENDANT

HOUSING FINANCE

COMPANY OF KENYA LTD.....2ND DEFENDANT

RULING

The Plaintiff's application dated 26/9/2013 stated to be brought under Order 52 Rule 2 (2) of the Supreme Court Rules of England and section 5 of the Judicature Act, section 1A, 1B and 3A, 63(c) and (e) of the Civil Procedure Act, Order 40 Rule 3(1) & (2) and Order 51 of the Civil Procedure Rules is before me for determination. In the application the Plaintiff/Applicant sought inter alia leave to commence contempt of court proceedings against the 1st Defendant's directors, **George Ngatia Mbau, & Anthony Mbau**. The application further sought the following orders:

1. That **George Ngatia Mbau & Anthony Mbau**, the directors of the 1st Defendant be cited for contempt of court and be punished by way of imprisonment for upto 6 months and fined by attachment of their personal properties until they purge their contempt.
2. The Honourable court does make an order directing the Deputy Registrar of the High Court of Kenya to execute and deliver to the plaintiff within 10 days a transfer and lease of property Town House NO. 8 on property **L.R. NO. 7336/44** in terms of the agreement for sale dated 29th May, 2008 as per clause 1 (iv) of the consent order dated 11th March 2013.

The grounds upon which committal of the Respondents is sought by the plaintiffs are *inter alia*:-

1. That the 1st Defendant's directors have blatantly disobeyed the court orders made by **Mutungi, J** on 11th March 2013 to wit that the 1st Defendant do specifically perform the agreement for sale of Town House NO.8 on property **L.R. NO. 7336/44** and transfer the property to the plaintiffs in terms of the agreement for sale dated 29th May 2008.

2. That the Advocates for both the plaintiffs and the Defendants appeared before **Mutungi J** on 11th March 2013 when it was ordered by consent as follows:-
3. That the plaintiffs claim in respect of Town House NO.8 on property **L.R. NO. 7336/44 Miotoni Lane Karen Nairobi** be and is hereby settled on the following terms:-
 - i. That the sum of **Kshs.10,000,000/-** be and is hereby released to the 2nd Defendant (**HFCK LTD**).
 - ii. That on receipt of the sum of **Kshs.10,000,000/-** the 2nd Defendant do execute and release to the plaintiffs a partial discharge of charge of property **L.R. NO. 7336/44**.
 - iii. That the 1st Defendant do give the Plaintiffs possession of Town House NO. 8 on property **L.R. NO. 7336/44** within 2 days of the date hereof.
 - iv. That the 1st Defendant do specifically perform the agreement for sale of Town House NO. 8 on property **L.R. NO. 7336/44** and transfer the property to the plaintiffs in terms of the agreement for sale dated 29th May 2008.
 - v. That all parties to bear their respective costs in respect of Town House NO. 8 on property **L.R. NO. 7336/44**.
 - vi. That there be liberty to apply.

The plaintiffs contend the 1st Defendant's directors were aware of these orders and had notice of the same and have in clear and willful defiance neglected and/or refused to abide with or obey the same. The 1st Defendant's directors have not executed a transfer and lease to effectuate the court order. The plaintiffs aver that in spite of repeated requests the 1st Defendant has neglected and/or refused to act in compliance of the court orders of 11th March 2013 to effect the transfer of Town House NO.8 on the suit property to the plaintiffs as ordered by the court.

The plaintiffs in the premises contend the 1st Defendant through its directors are in contempt of court and they ought to be punished otherwise the court will be brought into disrepute and will be subject of ridicule which will lower the dignity of the court.

The 1st Defendant filed grounds of opposition to the plaintiffs application on 4/11/13 and raises the following grounds:-

1. The application is fatally incompetent and ought to be struck out.
2. The application does not meet the requirements of section 5 of the Judicature Act read with **part 81** of the Civil Procedure Rules 1988 of England.
3. The alleged contemnors were not served with the order.
4. The alleged contemnors were not served with a penal notice.
5. There can be no contempt in respect of an order directing a party to do something, as opposed to one restraining a party from doing something, unless there is a time limit set out in the order for the action to be undertaken.
6. There is therefore no contempt.
7. The application is an abuse of the court process.
8. The parties have been discussing and looking for an amicable resolution on ambiguity in the order.
9. The proper course is to resolve if there is ambiguity in the order first before enforcing compliance through contempt of court proceedings.

The parties filed written submissions as directed by the court. The plaintiffs submissions dated 20th January 2014 were filed on 21st January 2014 while the Defendant/Respondents submissions dated 14th February 2014 were filed on 26th February 2014. I have reviewed and considered the plaintiff's application, the grounds of opposition and the submissions filed by the parties, and the issues for determination are, firstly, whether the plaintiffs application for contempt is properly before the court, secondly, whether there was a breach of the court order dated 11th March 2013, and, thirdly, whether the 1st Defendant and its directors are in contempt of the court order and therefore liable to be punished for being in contempt of court.

Whether application is properly before the court.

The 1st Defendant has contended that the plaintiffs application is fatally incompetent and the same ought to be struck out and further that the application does not meet the requirements of section 5 of the Judicature Act read with part 81 of the Civil Procedure Rules 1988 of England. Where an applicant invokes section 5 of the Judicature Act to institute proceedings to punish for contempt the law requires that the application and the proceedings be in conformity with the law of contempt for the time being in force and being practiced by the High Court of Justice in England.

Section 5(1) of the 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.

In Kenya in order to initiate proceedings for contempt under the provisions of section 5(1) of the Judicature Act it is obligatory for the courts and the law practitioners to establish what for the time being of the law applicable in England is as under the Judicature Act our courts 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.....**” over time the law of contempt in England has changed such that the courts in England no longer apply Order 52 of the Rules of the Supreme Court of England. The Kenya Court of Appeal in the case of **Christine Wangari Gachage –vs- Elizabeth Wanjiru & 11 others (2014) eKLR** considered the application of section 5 (1) and 2 of the Judicature Act where held that the provision 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 so as to determine the applicable law relating to contempt of court proceedings.

The Court of Appeal in the **Christine Wangari** case (supra) noted the law of contempt in England had undergone some changes following the amendment of the England Civil Procedure Rules in October 2012 (**Amendment NO. 2**) which brought into force **PART 81** of the Rules which effectively replaced Order 52 of the Rules of the Supreme court which hitherto was the operative procedural law in regard to contempt proceedings. Following the aforesaid amendment, applications and proceedings relating to contempt of court now have to be brought under part 81 of the Civil Procedure Rules of England.

The relevant rule under part 81 in the circumstances of the present application would be rule 81.4 which relates to committal for breach of a judgment, order or undertaking to do or abstain from doing an act. In a recent ruling of this court in the case of **Superior Homes (K) Ltd –vs- East African Portland Cement (HC ELC NO. 931 of 2013)** unreported delivered on 28th August 2014 the court while relying on the Court of Appeal decision in **Christine Wangari Gachege – vs- Elizabeth Wanjiru & 11 others (Supra)** stated as follows:-

“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 given 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”.

In a further ruling by this court in the case of **Kitangila Limited –vs- Keziah Mumbi Paul & 5 others (HC ELC NO. 2316 of 2007)** delivered on 30th September 2014 after referring to the **Christine Wangari Gachege –vs- Elizabeth Wanjiru & 11 others** case (supra) and the **Superior Homes (K) Ltd –vs- East African Portland Cement** case (supra) 1 observed as follows:-

“I have made reference to the authorities to illustrate the current procedure and practice in

commencing committal proceedings for contempt of court in the High Court of Justice in England and to dispel the notion that an applicant in proceedings for contempt of court in an application grounded under section 5(1) of the Judicature Act needs to obtain leave before commencing contempt of court proceedings related to breach of a judgment, order of undertaking. No such leave is required. Equally for applications under order 40 Rule 3(1) relating to breach or disobedience of injunction orders no leave would be required to be obtained before commencing contempt of court proceedings”.

Thus in the application before me though under prayer (1) in the notice of motion the plaintiff sought leave no such leave is now necessary. Of course under Order 52 Rule 2 of the Supreme Court Rules of England which as stated above has now been wholly replaced by Part 81 of the Civil Procedure Rules of England following the amendment, leave was a pre-requisite before commencing contempt of court proceedings. Not anymore. The substance of the application is contempt of court and I do not consider that failure to cite the appropriate provision of the applicable statute of the Laws of England renders the application fatally defective. Notice of the application has been given to the Respondents as presently required under part 81 of the Civil Procedure Rules of England and the issue for determination by the court is indeed whether contempt of court on the part of the Respondents has been established and proved to the required standard. My view therefore is that the application by the plaintiff is properly before the court and I now turn to consider whether there was breach of the court order and whether the Respondents are guilty of contempt of court.

Whether court order of 11th March 2013 was breached.

On 11th March 2013 the court gave various orders as per the extracted order issued and certified by the court on 12th March 2013. The orders that were directed at the 1st Defendant were orders 1 (iii) and 1(iv) which were in the following terms.

1.(iii) That the 1st Defendant do give the plaintiffs possession of Town House NO. 8 on property L.R. NO. 7336/44 within 2 days of the date hereof.

(iv) That the 1st Defendant do specifically perform the agreement for sale of Town House NO. 8 on property L.R.NO.7336/44 and transfer the property to the Plaintiffs in terms of the agreement for sale dated 29th May 2008.

The plaintiffs assert that the 1st Defendant has willfully and deliberately refused, failed and/or neglected to comply with the order clause 1(iv) requiring the 1st Defendant to transfer Town House **NO. 8 on L.R. NO. 7336/44** in terms of the agreement for sale dated 29th May 2008. The plaintiffs submit that every person has a duty and obligation to comply with and obey court orders notwithstanding whatever view they hold respecting the court order. Thus even where a person considers a court order to be unjustified and/or invalid there is an obligation to obey the order. The plaintiffs cite the cases of **Munyaka Building Company (2013) eKLR** and **Econet wireless Kenya Limited –vs- Minister of Information of Kenya & Another (2005) IKLR 828** to support their submission.

The Court of Appeal in the case of **Econet Wireless Kenya Ltd –vs- Minister of Information of Kenya & Another (Supra)** observed as follows:-

“it is essential for the maintenance of the rule of law and order that the authority and dignity of our courts are upheld at all times. The court will not condone deliberate disobedience of its order and will not shy away from its responsibility to deal firmly with proved contemnors”.

The courts are for the parties the last port of refuge where they come to in search of justice. It must therefore follow that unless the orders that emanate from the courts are respected and obeyed by the parties the courts are bound to lose their authority and dignity and fall into disrepute with the result that the rule of the jungle would take root. Such a situation must be frowned upon by the courts as parties will lose faith and confidence in the courts ability to administer justice.

Punishing for contempt is a serious indictment against the party sought to be held to be in contempt as the personal liberty of the alleged contemnor is placed in jeopardy as the contemnor risks a prison term if he/she is proved to be in contempt. Contempt of court proceedings are analogous to criminal proceedings and as in criminal proceedings the standard of proof is higher than on a balance of probabilities as is the case in civil cases and proof must be beyond a reasonable doubt. For the contemnor to be adjudged to be in contempt he must have been served with the order known the contents and the consequences for disobedience of the order and the order, must be clear and unambiguous.

The Court of Appeal in the case of **Ochino & Another –vs- Okombo & 4 others (1989) eKLR 165** considered the conditions to be satisfied for a person to be held to be in contempt and held that:-

- i. A copy of the order has to be personally served on the person required to do or abstain from doing the act in person.
- ii. The copy of the order served must be endorsed with a notice informing the person on whom the copy is served that if he disobeys the order he is liable to the process of execution to compel him to obey.
- iii. The court will only punish as a contempt a breach of injunction if it is satisfied the terms of the injunction are clear and unambiguous.
- iv. That the Defendant/contemnor has proper notice of the terms and the breach of the injunction must be proved beyond a reasonable doubt.

The court of Appeal in the case followed its earlier decision in the case of **Mwangi Magondu –vs- Nairobi City Commission (Civil Appeal NO. 95 of 1988)** where it stated as follows:

“This requirement is important because the court will only punish as a contempt a breach of injunction if satisfied that the terms of the injunction are clear and unambiguous, that the defendant has proper notice of the terms and that breach of injunction has been proved beyond a reasonable doubt”.

The Applicants have submitted that the contemnors were aware of the contents of the orders made by the court on 11th March 2013 as the orders were made by consent and in the presence of the 1st Defendant’s counsel. Further the Applicants contend that the contemnors must have been aware of the orders and the obligations placed upon them as they have complied with some aspects of the order save the one requiring that they effect transfer of Town house NO. 8 to the plaintiff. The plaintiffs argue the contemnors being fully aware of the terms of the orders are choosing the aspects of the orders to comply with and the ones they will not obey.

The emerging jurisprudence is to the effect that what is critical in applications for contempt is for the applicant to establish and prove that the contemnor was aware of the existence and had notice of the contents of the court order. Where the two elements are established, the courts will not insist that the order ought to have been personally served. In the case of **Africa Management communication International Ltd –vs- Joseph Mathenge Mugo & another (2013) eKLR Mabeya J** stated thus:-

“It is clear that the 1st Defendant was aware of the orders of the court as he complained that the plaintiff had run and advertisement concerning the same on the dailies----. To that extent, I find the 1st Defendant had knowledge of the existence of the order and the issue of personal service upon him does not therefore arise.. In any event the 1st Defendant did not contest knowledge of the existence of the order”.

Lenaola J, in the case of **Basil Criticos –vs- Attorney General & 8 others (2012) eKLR** while commenting on the issue of personal service in contempt of court proceedings stated as follows:-

“the law has changed and as it stands today knowledge supercedes personal service ----- where a party clearly acts and shows he had knowledge of a court order the strict requirement that personal service must be proved is rendered unnecessary”.

In the case of **Kitangila Limited –vs- Kezia Mumbi Paul & 5 others** (supra) while endorsing the positions held by **Mabeya J, and Lenaola J**, I stated as follows:-

“I approve of the position taken by both Mabeya J and Lenaola J and I agree that what is critical is that the Respondent has knowledge of the existence of the order and of its terms. A party may while knowing an order has been issued deliberately evade being served with the order personally particularly where he is determined to disobey the same only to come around to state that he was not personally served with the order and therefore he cannot be held to be in contempt. I do not suppose that would be an acceptable state of affairs”.

In the present case the order complained of was made by consent of the parties including the 1st Defendant. All counsel were present at the time the order was made and the same duly extracted and it is conceded by the 1st Defendant that certain aspects of the order were complied with. Thus though the order of 11th March 2013 may not have been personally served on the directors of the 1st defendant I do not entertain any doubt that they were aware of its existence and had notice of its contents and I so hold.

Having held that the 1st Defendant and its directors indeed were aware of the court order of 11th March 2013 and had notice of its contents the issue that remains to be determined is whether they were in breach of the same and if so whether they were therefore in contempt of court. As I understand it, the plaintiffs contention is that the 1st Defendant has not through its directors effected the transfer of Town House NO. 8 on property **L.R. NO. 7336/44** as directed by order 1 (iv) of 11th March 2013 and therefore the 1st Defendant and its directors are in breach and contempt of the court order. The plaintiffs submit that under the court order the 1st Defendant was obligated to effect the transfer of the property to the plaintiffs but rather than do so the Defendant chose what aspect of the order to obey and which not to and the 1st Defendant is liable for contempt as the choice was deliberate. The plaintiffs submit that a party cannot be allowed to choose what part of a court order to obey as the 1st Defendant has done.

The 1st Defendant in response stated that clause 1 (iv) of the court order was imprecise as it did not set a time limit for the action of the transfer contemplated to be undertaken but rather subjected the transfer to the terms of the agreement of sale dated 29th May 2008. In the premises I understand the 1st Defendant to say that even though the order directed the transfer of the Town House no.8 to the plaintiffs the full terms of the agreement of sale of 29th May 2008 had to be satisfied. The 1st Defendant has singled out clause 10 of the Agreement for sale which provided for payment of interest on any amount due and not paid. The clause further provided for the **“late payment rate”** which was defined as the **“rate per annum charged from time to time to the vendor by its bankers for an overdraft facility, plus a margin of 2%”**. It is therefore the submission of the 1st Defendant that the plaintiffs have not complied with the terms of the agreement for sale as they have not paid interest to the vendor at the late payment Rate. The 1st Defendant further argued that the order directing the transfer to be effected did not place a time frame within which the transfer was to be effected and therefore the 1st Defendant could not be guilty of contempt. The 1st Defendant in support of its assertion referred the court to **Halsbury’s Laws of England 4th Edition vol 9 paragraph 60** which states thus:-

60. Mandatory orders: As a general rule, a judgment or order which requires a person to do an act must specify the time after service of judgment or order or some other time, within which the act is to be done.----- where a judgment or order omits to specify a time within which an act is to be done, the court is empowered subsequently to make a supplemental order requiring the act to be done within such time after service of that order or such other time as may be specified”.

I have reviewed and considered submissions and the authorities referred to me and my view is that the consent order entered by the parties on 11th March 2013 before me was to finally settle the dispute in regard to town House NO. 8 on **L.R. NO. 7336/44** on the terms spelt out in the consent order. The preamble to the terms of the consent was clear on this. The consent order directed the release of Kshs.10,000,000/- that had been deposited in court on 7/3/2012 to the 2nd Defendant. The 2nd Defendant

upon receipt of the sum of Kshs.10,000,000/- was to execute and release a partial discharge in respect of Town House NO. 8 to facilitate the transfer envisaged under clause 1 (iv) of the consent order. The 1st Defendant under the terms of the consent order was required to give the plaintiffs possession of Town House NO. 8 on **L.R. NO. 7336/44** within 2 days of the date of the consent.

The contested order 1(iv) was in the following terms:-

1.(iv) The 1st Defendant do specifically perform the agreement for sale of Town House NO. 8 on property L.R. NO. 7336/44 and Transfer the property to the plaintiffs in terms of the Agreement for sale dated 29th May 2008.

During the court attendance by the parties on 11/3/2013 when the terms of settlement in regard to Town House NO. 8 on **L.R. NO. 7336/44** were reached there was no question of any payment of any interest for any late payment. The issues that were on the table were the release of the purchase funds that had been deposited in court, the issue of execution and release of a partial discharge in respect of Town House NO. 8 the issue of grant of possession and finally the issue of effecting the Transfer of Town House NO. 8, to the plaintiffs. If payment of any interest was to be a pre requisite before the Transfer was effected, the same would have certainly been a specific issue to be dealt with at the time the consent was entered. The court is of the view that payment of interest for late payment is being raised by the Defendant as an afterthought as there was no contemplation under the court order of 11th March 2013 that there would be any such interest payable. In the courts view the reference in court order 1(iv)-to---“ **transfer the property to the plaintiffs in terms of the agreement for sale dated 29th May 2008**” presupposed all the terms and conditions to enable the transfer to be effected had been met. The consent order of 11th March 2013 paved the way for the transfer to be effected to the plaintiffs and in my view the plaintiffs were not required to perform any other condition not specifically set out in the consent order.

Contempt of court has to be specifically proved and the court has to be satisfied the contemnor has deliberately disobeyed the court order. In the present case I am not able to say that it has been proved and demonstrated that the 1st Defendant and its directors willfully and deliberately disobeyed the court order. Clause 1 (iv) of the court order as couched was capable of being interpreted differently and thus had some measure of ambiguity. The order could as argued by the 1st Defendant be construed as inviting the plaintiffs to satisfy other terms than the ones set out in the consent order such as the issue of interest for late payment as the 1st Defendant sought to argue. The court has ruled that the consent order could not and did not invite such a construction. The order further fell short of fixing a time limitation within which the transfer had to be effected. I agree with the submission by the counsel of the 1st Defendant that without a time being fixed for the doing of the act of transfer the 1st Defendant cannot be held to be in contempt for not effecting the transfer.

In the premises I find and hold that the 1st Defendant and its directors are not in contempt of the court order of 11th March 2013. However, as the court is satisfied the court order was final as relates to the transfer of Town House NO. 8 on **L.R. NO. 7336/44** to the plaintiffs I hereby make a supplementary order requiring the 1st Defendant to comply with clause 1(iv) of the order of 11th March 2013 and to effect the transfer of Town House NO. 8 on **L.R. NO. 7336/44** to the plaintiffs within the next (60) days from the date of this ruling and in case the partial discharge for House No. 8 has not been executed and released by the 2nd Defendant this must also be executed and released to the Plaintiffs within the same period.

I make no order relating to the costs of this application and each party will bear their own costs.

Ruling dated, signed and delivered at Nairobi this **23rd** day of **October** 2014.

J. M. MUTUNGI

JUDGE

In the presence of:-

NA for the plaintiffs

MR. Ogunde for the 1st Defendant

M/S IBRAHIM for Issa for the 2nd Defendant