



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 160 of 2011

KYEVALUKI SERVICES LTD.: PLAINTIFF

- VERSUS -

TOTAL KENYA LTD.: DEFENDANT

RULING

1. This is a Ruling on the Notice of Motion application dated 27th January 2012 filed under Section 5 (1) of the Judicature Act, Sections 3, 3A, 63 (e) of the Civil Procedure Act and Order 52 Rule 2 (1) of the Supreme Court Practice of England 1999. The application seeks two orders:-

1) Mr. Alexis VOVK, Leah Njogu, Eric Okumu and Caleb Apungu, being the agents of the Defendant herein, be committed to prison for such period of time as this Honorable Court may deem fit.

2) The costs of and/or occasioned by this Motion and for obtaining leave thereto be paid by the Defendant.

2. The application is based on grounds namely:-

1) By a Consent Order recorded in the presence of the Defendant's Advocate and made before the Honourable lady Justice Mugo on 5th May, 2011, the learned Judge restrained the Defendant from terminating the transport contract made on 17th January 2008 and renewed on 1st November 2010 between the Defendant and the Plaintiff.

2) The Order was extracted by the Plaintiff's advocates, who then endorsed a Notice of Penal Consequences thereon and serve the same upon the Defendant and its Advocates on 25th May 2011 after being sealed and signed by the court.

3) Within hours of making the Order, the Plaintiff received a letter from the Defendant dated 4th May 2011, giving the Plaintiff one (1) month notice of termination of the contract.

4) On 2nd June 2011, the Defendant's agents at the Mombasa depot and the LPG Plant in Nairobi refused to load the Plaintiff's trucks.

5) A demand to comply with the Order was made to the Defendant on 3rd June, 2011 but the same has not been responded to or acted upon.

6) The Defendant has flagrantly disobeyed the entire order and has refused, neglected and/or

otherwise failed to comply with the same.

7) As a consequence thereof, the authority and dignity of this Honourable Court has been, and continues to be exposed to ridicule and disrepute.

8) The Defendant is in willful and blatant contempt of the order.

9) It is in the interest of justice and for the purposes of upholding the dignity and honour of this Honourable court that the orders sought herein ought to be granted.

10) The Plaintiff has no other means of enforcing the order.

3. The application is brought pursuant to the leave of this court granted on **25th January 2012** upon the hearing of the application for leave dated **7th June 2012**.

4. The application is supported by a Statement and Verifying Affidavit sworn on **7th June 2011** by **BENSON KANUI** vide an undated replying affidavit by **BONIFACE ABALA** filed in court on **14th March 2012** with its annexures "**BA1**" and "**BA2**".

5. The brief history of the application is that by a consent order recorded in the presence of the Defendant's Advocate by this court on **5th May 2011**, the Defendant was restrained from terminating the transport contract made on **17th January 2008** and renewed on **1st November 2010** between the Defendant and the Plaintiff. Within hours of making the Order the Plaintiff received a letter from the Defendant dated **4th May 2011**, giving the Plaintiff one month notice of termination of the said contract. On **June 2nd 2011**, the Defendant made good the termination by instructing its agent in the Mombasa Depot and the LPG Plant in Nairobi, to refuse to load the Plaintiff's trucks. This took place even after the said consent and consequential orders including the penal notice had been served upon the Defendant on **25th May 2011**. The Plaintiff now alleges that the Defendant is in flagrant, blatant and willful contempt of this court and is now seeking to have the officers of the Defendant jailed for contempt.

6. Mr. Havi for the Applicant submitted an order of this court was made on **5th May 2011** in the presence of counsels for both parties. The order was extracted and a penal notice attached to it. It was then served upon the Defendants and its advocates. In spite of the said service the Defendant flagrantly disobeyed the same and took steps to annul the contractual relationship, being a transport contract, between the parties by serving a notice of termination on the Applicant. This notice was compounded by a subsequent refusal to load the Applicant's motor vehicle as per the contract. The relevant part of the said order read thus:-

"The Defendant by itself or by its agents, servants or otherwise howsoever be and is hereby restrained from terminating the transport contract dated the 17th January 2008 between the Defendant and the Plaintiff and renewed on 1st day of November, 2010 before the expiry of the term thereof pending the *inter-partes* hearing."

The Penal Notice read:-

"NOTICE OF PENAL CONSEQUENCES

TAKE NOTICE that if you, Total Kenya Limited, the Defendant herein by yourselves, servants, representatives and/or agents or otherwise howsoever disobey this Court Order, you will be liable to the process of execution and/or committal to civil jail for the purposes of compelling you to obey the same."

7. The above order was served upon the Defendant on **25th May 2011** and an affidavit of service sworn by **ISAAC ADEDE OPANY**, the Process Service dated **26th May 2011** is attached to the

Applicant's verifying affidavit.

The Applicant submits that the said court order was disobeyed, and now submits that the contemnors be punished for such disobedience.

8. On their part counsel for the Respondents Mr. Nyawede submitted that they opposed the application on two grounds:-

- By the time the Order was being made the notice terminating the contractual relationship between the parties had been served upon the Applicant, and that the said injunction had been overtaken by events.
- Even though the Order was made in the presence of the Defendant's advocate, the notice to terminate the contract was already issued and could not be reversed and at the exact time the Respondent had no notice of the order and so they could not have disobeyed the same.
- The orders required to have been served personally and this was not done.

9. I have considered the application and the submission of the parties. Two things are not disputed:-

- That there was an order of this court issued on **5th May 2011** stopping the Respondent from terminating the existing contractual relationship between it and the Plaintiff.
- That the said order was disobeyed.

Rather the issue at hand is the factual and legal reasons why the Respondent feels justified to have disobeyed it.

- The first submission by the Respondent is that the alleged order was entered into by mistake and without the knowledge and/or authority of the Defendant and as such is irregular. To that end the Defendant promptly sought to set aside the same vide the Notice of Motion dated 8th June 2011, and the said consent order was varied on 14th June 2011 albeit to adopt the said order of 5th May 2011 as a unilateral order of the court.

In my view, while the above submissions could be factually correct, the order, whether a unilateral order of court or not, was still made in the presence of the Defendant's counsel.

- The second submission is that the Respondent said order was served with the said order on 25th May 2011, 3 weeks after the order had been made. The inference is that the Respondent had no notice of the same and so it could not obey it.
- Lastly, the Respondents submitted that personal service was necessary, and that not having happened this application should be dismissed.

10. To dispose off this application I have raised two issues for determination:-

- The place of a court order in legal jurisprudence.
- Whether the Respondents were properly served with the said court order.

11. To address the first issue, I will not delve into any details. Everybody agrees that a court order must be obeyed, even if, in the view of the Defendant, it is illegal. In the instant case, a court order was made in the presence of the Defendant's counsel. That court order may not have been by consent, but it

was nonetheless made in the presence of the counsel for the Defendant. It took effect immediately, and the counsel was deemed to have relayed its effects to the Respondent as soon as soon as it was made.

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 . . . Advocates who aid and abet their clients to disobey or circumvent court orders must understand that they are as much liable to be committed for contempt of court as their clients.”

In the same matter the court later on in the Ruling stated:-

“It is to be noted that the order was made in the presence of counsel for both parties. So I am entitled to hold as I do, that it’s meaning and import was clear to the advocates and the parties.”

12. The above position sums the case for the matter at hand. It is clear that the counsel for the Defendant informed the Defendant about the said order of the court. The Defendant’s attempt on the same day to serve the Applicant with a notice terminating the contract was obviously an attempt to circumvent the said court order. This court cannot allow that to happen. I hold that the Respondent was in contempt of court the moment it purported to issue the alleged notice to terminate the transport contract between the parties herein.

13. The second issue is whether the said notice was properly serviced. The Respondents had submitted that personal service was necessary due to the nature of the order being sought which are of a criminal nature. Although the orders sought herein are criminal in nature, they arise from civil proceedings. In **KOINANGE INVESTMENTS AND DEVELOPMENT LTD. – VS – NAIROBI CITY COUNCIL & OTHERS**, the court of appeal had this to say:-

“I reject the argument that the “formal” and extracted order of this court was not served on the 1st and 2nd interested parties and so they were not bound to obey the same. There is no dispute that they had knowledge of the fact that there was such an order. That was sufficient. They were bound to follow it . . . No person who is affected by the court order ought and who knows of its existence can do exactly the opposite simply because he was not personally “served”. To allow that would lead to an atrocious situation allowing people to get away ‘with murder’.”

14. However, citing the case of **OCHINO & ANOTHER - VS - OKOMBO & 4 OTHERS**, the Respondents submitted that for the orders sought herein to be granted, the Applicant must show that the contemnors were personally served with the said court order. In that case the court held *inter-a-alia* as follows:-

1. As a general rule, no order of court requiring a person to do or abstain from doing any act may be enforced (by committing him for contempt) unless a copy of the order has been served personally on the person required to do or abstain from doing the act in question.

2. The copy of the order served must be indorsed 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 it.

3. The court will only punish as a contempt a breach of injunction if it is satisfied that the terms of the injunction are clear and unambiguous.

4. That the Defendant has proper notice of the terms and the breach of the injunction must be proved beyond reasonable doubt.

15. On the necessity for personal service, Halsbury’s Laws of England renders itself thus:-

“As a general rule, no order of court requiring a person to do or abstain from doing any act may be enforced unless the copy of the order has been served personally on the person required to do or abstain from doing the act in question. In the case of an order requiring a person to do an act the copy must be so served before the expiration of the time within which he was required to do the act.

Where the order is made against a company, the order may only be enforced against an officer of the Company if the particular officer has been served personally to do an act within a specified time, the copy must be served on the officer before the expiration of that time.”

And on the service, the same legal text has this to say:-

“A copy of the order, duly indorsed must be served personally on the person required to do or refrain from doing a specified act. Personal service involves leaving a copy of the document with the person to be served. Personal service on a company may be effected by leaving the copy at the company’s registered office . . .

Personal service of an order upon an officer of a company must be proved before he can be committed for disobedience to an order against the company.”

16. The law cited above is English law. In our law, the power to deal with contempt of court is provided for under **Section 5** of the **Judicature Act** and **Order 40 2 (3)** of the **Civil Procedure Rules**. We have to follow the Procedure and Practice in England. The effect of the English Law is that personal service of an order upon an officer of a company must be proved before he can be committed for disobedience of an order against the company.

The affidavit of service dated **26th May 2011** clearly show that both the Defendant Company and its advocates were served with both the order of the court and the penal notice. What is missing, however, is the evidence that the Respondent contemnors Messrs. Alex VOVK, Leah Njogu, Eric Okumu and Caleb Apungu sought to be committed for contempt were ever served. Indeed they have denied service. From the record, however, what is certain to me is that the alleged contemnors were served or in the least were aware of the said court order.

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 1st 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 above case found the directors liable to a charge of contempt although they were not personally served with the court order.

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.”

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.”

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.’”

From the foregoing paragraphs I am satisfied that there were valid court orders which were blatantly disobeyed by the contemnors.

17. For the foregoing reasons, I allow the Notice of Motion application dated 27th January 2012 and make the following orders in related thereto:-

- (a) I commit each of the contemnors named in prayer 2 of the application to serve one (1) month jail term at the Industrial Area Prison in Nairobi or in the alternative pay a fine of Kshs.200,000/= each.
- (b) I direct and order that the Defendant shall not continue to participate in the proceedings before the court until the Defendant purges the said contempt from record.
- (c) Costs are allowed in terms of prayer 2 of the application.

It is so ordered.

DATED, READ AND DELIVERED AT NAIROBI

THIS 6TH DAY OF FEBRUARY 2013

E. K. O. OGOLA

JUDGE

PRESENT:

Toywa H/B for Havi for the Plaintiff

Gachoka & Kariuki for the Defendant

Teresia – Court Clerk