



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Suit 478 of 2010

TITUS MUSYOKI NZIOKA PLAINTIFF/ RESPONDENT

VERSUS

JOHN KIMATHI MAINGI 1ST DEFENDANT/APPLICANT

KINGS CARGO AGENCIES LTD 2ND DEFENDANT

R U L I N G

1. The application for determination by this Court is dated 20th February, 2012 filed by the 1st Defendant and brought under the provisions of **Section 5** of the *Judicature Act* and **3A** of the *Civil Procedure Act*. The applicant seeks for the Plaintiff to be cited for contempt of Court orders issued by Mutava, J on 21st November, 2011 and be sequestered and committed to civil jail. The application is predicated upon the grounds that the Respondent deliberately failed and neglected to comply with the Court Orders aforementioned and should be jailed for disregard of the same.

2. The application is supported by the Verifying Affidavit of **John Katiku** sworn on 8th February, 2012. The deponent contended that the Respondent was in blatant and flagrant disregard of the Orders of the Court issued on 21st November, 2011 and as such, in contempt of the Court. Those Orders were made under a Ruling in which the court discharged *ex-parte* injunction orders obtained by the Plaintiff herein and issued fresh Orders against the first Defendant restraining him from acting as a director or managing director of the second Defendant Company. It was further contended that the Applicant had made numerous attempts to get the first Defendant to comply with the Court's Orders, as evidenced by the annexed copies of letters marked as "**JK-3**" sent by the advocates representing him in the suit.

3. In opposing the application, the Respondent filed the Replying Affidavit of **Titus Musyoki Nzioka** on 28th February, 2012. The deponent contended that the Court's Order was never served upon him, but on one **Samuel Kirima Gitahi**, an accountant with the 2nd Defendant, on 22 December 2011, on which date he had not been in the second Defendant's offices. It was also the Respondent's contention that he has complied with the Court's Orders and it is the Applicant who has frustrated his efforts at amicably resolving any issues between them. He further contended that the Applicant did not invite him for a meeting of shareholders as per the order of the Court, and that any communication as regards any meeting

was handled by the Advocates. Further, in connection with the Order made by the Court that he should render to the first Defendant an account of the books and affairs of the second Defendant company for the period of the pendency of the injunction orders which had been discharged, the first Defendant had been availed of the computer of the second Defendant company by the said accountant Mr. Gitahi. He was as such unable to comply with the Court's said Order in regard to the provision of accounts.

4. The Respondent also filed Grounds of Opposition dated 2 March 2012 to the application dated 20 February 2012 in which the following grounds were detailed:

“1. THAT the order that is alleged to have been breached has never been served upon the Respondent.

2. THAT the Respondent as the alleged contemnor has not been served with the application.

3. THAT the order that is alleged to have been breached ought to have been served, and compliance sought, within a specified period of time which time passed before the service of the said order.

4. THAT the order that is alleged to have been breached is not in conformity with the ruling of 22nd November 2011, leaving the Respondent confused as to which should the Respondent comply with.

5. THAT the applicant has, through his advocates, frustrated efforts to hold a shareholders/directors meeting as envisaged in the ruling of the court of 22nd November 2011.

6. THAT the application is made in bad faith.

7. THAT the applicant has forcibly taken the company accounts and the said order even before the same was served has therefore been complied.

8. THAT the Respondent shall prior to the hearing of the application apply that the applicants advocate withdraws from acting for the applicant, for reasons of conflict of interest, and the court that has been hearing this case disqualifies itself for reason of likelihood of bias”.

Further the Respondent relied upon the authorities of Okoth v Wade & Another (2005) 1 KLR 399 and Victoria Pumps Ltd v Kenya Ports Authority & 4 Others (2002) 1 KLR 708 in support of his objection.

5. Having considered the application, the Replying Affidavit, the annexures thereto, the Grounds of Opposition and the parties' submissions, the issue for determination is whether the Respondent was in contempt of the Court by failing, as alleged, to comply with Orders of Court issued on 21st November, 2011. In the Applicant's submissions dated 31st July, 2012 and in reiterating the contents of its application, it was cited that the Respondent intentionally failed to comply with the Court Orders even after personal service was effected upon him. It was submitted, that this was evidenced by the Affidavit of Service dated **7th February, 2012**, in which one **Onesmus Kasyoka Masua**, a duly authorized process server, in which he had detailed that he had served upon the Respondent the Order issued, on 22nd December, 2011. The Order served is marked as **“JK-2”** in the Affidavit of **John Katiku**. The applicant followed up by sending letters marked as annexure **“JK-3”** in which the Respondent was invited for a meeting of shareholders. It was the Applicant's submissions that despite inviting the Respondent for shareholders' meetings, he neglected to avail himself.

6. The Respondent in his submissions dated 7th August, 2012 refutes the allegation that he was served with the Order and alleges that on that day, he was out of the office. In the Affidavit of Service dated 7th February, 2012 however, the process server alleges that he personally served the Respondent, who in turn instructed the accountant, one Samuel Kirima Gitahi, to receive and stamp copies of the Order on his

behalf. At paragraph 4 of the Affidavit of Service, the deponent avers:

“4. THAT after introducing myself to him (Titus Nzioka) and the purpose of my visit, I personally served him by tendering duplicate copies thereof and after reading and understanding the contents therein, the aforesaid Plaintiff/Respondent and the 2nd Defendant’s Managing Director of P.O Box 18498-00500 Nairobi accepted my service at around 10.45a.m. or thereabouts and acknowledged the same by retaining his copies thereof and instructing his officer one Mr. S.K Gitimbi to stamp and sign my copies on his behalf.

5. THAT the aforesaid Managing Director one Mr. Titus Musyoki Nzioka was personally known to me having served him with hearing Notice dated 8th April 2011 on 27th April 2011.”

7. On his part, the Respondent alleges that at the time of the purported service of the Order, he was out of the office, both in the morning and afternoon. He has however, not stated or provided any evidence as to where he was on that day. Against this, there is an affidavit on record by the Applicant showing that indeed the Respondent was personally served with the Order and any contrary allegations are unfounded and unsupported. The Respondent cannot substantiate his allegation or support his claims. In my opinion, it can be inferred, that the Respondent was served with the Order dated 21st November, 2011 on 22nd December, 2011 as per the Affidavit of Service dated 7th February, 2012. Having established that indeed the Respondent had been served with the Order, it is now for the Court to determine whether he was in contempt of the same. The first ambit of the order stated that:

2. THAT the 1st Defendant be restored to his previous position in the 2nd Defendant with immediate effect and that a meeting of the shareholders of the company be held within 14 days from today for the purpose of taking accounts and to discuss possible resolution of the dispute herein. (Underlining mine).

8. The Ruling by the Court was delivered on 22nd November, 2011 in the presence of advocates representing both the Applicant and Respondent. The Orders were extracted on 21st December, 2011, a calendar month after the Court’s Ruling. The Order was served upon the Respondent on 22nd December, 2011. In the Grounds of Opposition dated 2nd March, 2012, the Respondent contends that:

“3. THAT the order is alleged to have been breached ought to have been served and compliance sought, within a specified period of time which time passed before the service of the said order.” (Underlining mine).

From a reading of the Court’s Ruling of 22nd November, 2011, there is no Order that there should be a meeting of the shareholders convened within 14 days, as alleged in the extracted Order dated 21st December, 2011.

9. The Ruling issued the following orders to the parties:

“1. That the Defendant/Applicant’s application dated 21st October 2010 be and is hereby allowed with costs and the ex-parte injunction orders granted by this court on 26th July 2010 are discharged forthwith.

2. That as a consequence of the discharge of the injunction orders aforesaid, the 1st Defendant be and is hereby restored to his previous position as in the 2nd Defendant company with immediate effect.

3. That the Plaintiff do render to the 1st Defendant an account of the books and affairs of the 2nd Defendant company for the period of the pendency of the injunction orders now discharged, within 21 days from today.

4. That the 1st Defendant be at liberty to claim damages for the period he has been excluded from the directorship and management of the 2nd Defendant company.” (Underlining mine)

The Order extracted apart from the 1st paragraph and the 1st part of the 2nd paragraph thereof which reads:

“THAT the 1st Defendant be restored to his previous position in the 2nd Defendant with immediate effect...”

is not in conformity with the Court’s Ruling of 22nd November, 2011. The Ruling does not envisage a meeting of the shareholders neither does it give timelines within which the parties would seek redress in court for a claim of damages. There is no provision in the Ruling, as alleged in the Order, that any dispute be settled within 30 days from the date of the Ruling.

At paragraph 4 of the Grounds of Opposition, the Respondent contends:

“4. THAT the order that is alleged to have been breached is not in conformity with the ruling of 22nd November, 2011, leaving the Respondent confused as to which the Respondent should comply with.”

In my opinion, the Respondent is indeed right in his averments that the Order extracted is incapable of compliance as it is not in conformity with the said Ruling made by the Court.

10. An application for contempt of Court or its antecedent orders has to establish clearly and precisely exactly of what the Respondent was in contempt. The issue of contempt belittles and undermines the authority and powers of the Court that is why a party has to establish that the actual act of contempt took place in utter disregard and contempt of the Court and its Orders. The standard of proof that has to be established is beyond reasonable doubt, as was held in **Re Bramblevale Ltd [1970] Ch 128**. Further, Neil, LJ in his determination of standard of proof in **Dean v Dean [1987] 1 FLR 517** held *inter alia*:

“...it is to be remembered that contempt of court, whether civil or criminal, is a common law misdemeanor. Furthermore, there are many authorities, of which the decision in Re Bramblevale Ltd is an authoritative example, to the effect that proceedings for contempt of court are criminal or quasi criminal in nature and the standard of proof to be applied is the criminal standard.”

As it is clear that the standard of proof has to be one of “beyond reasonable doubt”, the Orders ought to be framed in an unambiguous and clear manner, in their context, so as to be in conformity and consonant with the ruling or judgment from which they emanate. This was illustrated in the case of **Redwing Ltd v Redwing Forest Products Ltd [1947] 64 RPC 67** where Jenkins, J held *inter alia*;

“...a defendant cannot be committed for contempt on the ground that upon one or two possible constructions of an undertaking being given he has broken that undertaking. For the purpose of relief of this character I think the undertaking must be clear and the breach must be clear beyond all question.”

I have already found that the Orders extracted by the Applicant were incapable of execution. It is clear that the party seeking to enforce and execute Court Orders, extracted Orders that were not in conformity or consonance with the Ruling delivered on 22nd November, 2011. That being the case, the Applicant has failed to satisfy the two crucial and critical pre-requisites for seeking orders for committal for contempt namely:

- (1) ***that the contempt has to be established beyond reasonable doubt; and***
- (2) ***precision and clarity in the orders so as to be unambiguous in nature.***

11. In conclusion, I find that the first Defendant/Applicant is not deserving of the contempt Orders

sought in his Notice of Motion dated 20 February 2012 and dismiss the same with costs to the Plaintiff.

DATED and delivered at Nairobi this 30th day of April 2013.

J. B. HAVELOCK
JUDGE