



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

MISC APPLICATION NO. 49 OF 2010

IN THE MATTER OF AN APPLICATION FOR COMMITTAL TO CIVIL JAIL FOR CONTEMPT OF COURT AGAINST STANLEY GITHUNGURI

AND

IN A MATTER OF BUSINESS PREMISES RENT TRIBUNAL CASES NOS 1122, 1123 AND 1125 OF 2009

- 1. MAMA MIKES ONLINE CO. LTD
- 2. GAB SERVICES LTD.....APPLICANTS

VERSUS

TASSIA COFFEE ESTATES LTD.....RESPONDENTS

R U L I N G

1. On 28th December 2009 the **Business Premises Rent Tribunal** (the Tribunal) in its Nairobi **Cases Nos. 1122, 1123 and 1125 of 2009** (Mama Mikes Online Ltd, Gab Services Ltd and John Njoroge t/a Wago Wago Car Rental & Safaris – vs – Tassia Coffee Estate Limited) issued the following order -

“1. ...

2. ...

3. The Landlord is hereby restrained from harassing, evicting the Tenants and or otherwise interfering with their business at LR No. 209/2469 – Kingsway House pending the hearing and determination of this application.

4. The Landlord is ordered to accept/receive rent and issue a receipt/record in the rent book pending the inter partes hearing.

5. The O.C.S. Central Police Station to ensure/assist in the compliance of this order.

6.”

2. The applicants before the Tribunal were the Tenants while the respondent was the Landlord. The application before the Tribunal was for the main orders –

(i) That the Landlord be prohibited from “interfering, harassing, intimidating and/or intercepting in any one way with the applicant’s business operation, use, occupation and quiet possession of suit premises located (on) LR No 209/2469-Kingsway House.....

(ii) That the Landlord do accept future rents from the Tenants or in the alternative the Tenants be permitted to deposit them with the Tribunal.

(iii) That the O.C.S. Central Police Station, Nairobi do assist in the execution of the orders if granted to ensure that peace prevails.

4. On 19th February 2010 this court (Mwera, J) granted the Applicants leave to bring contempt proceedings against Stanley Githunguri, a director of the Respondent upon the allegation that he was in contempt of the aforesaid order of 28th December 2009.

5 Such contempt proceedings were instituted by **notice of motion dated 23rd February 2010**. The specific order sought was -

“The Respondent herein, Mr Stanley Githunguri, be detained in prison for a period of six (6) months for being in contempt of orders of the (Tribunal) issued on 28th December 2009.”

6. The main ground for the application appearing on the face thereof if rendered as follows-

“...the Respondent through her director Stanley Githunguri has refused to comply with the court order, and further, that on the 3rd January 2010 the Respondent through its director Stanley Githunguri... proceeded to put a perimeter iron sheet (mabati) fence around the premises, thereby blocking the ingress and egress from the building, and further disconnected power to the building.”

7. The same allegation is repeated in paragraph 5 of the two verifying affidavits filed together with the application. It is further deponed in the affidavits at paragraph 6 that the Applicants are “in real danger of being evicted from the premises...”

8. The Respondent’s reaction to the application was to file a notice of preliminary objection dated 11th March 2010. The points taken were –

- i. That the order of 28th December 2009 and notice of penal consequences were never served upon Stanley Githunguri and/or upon any director of the Respondent.
- ii. That the application for leave to bring the contempt proceedings was never served upon Stanley Githunguri and/or upon any director of the Respondent.
- iii. That the order of 28th December 2009 “is illegal, erroneous on the face thereof, null and void *ab initio*.”

9. There is also a replying affidavit sworn by Stanley Munga Githunguri filed on 12th March 2010. He depones, *inter alia* –

- i. That he is one of the directors of the Respondents, Tassia Coffee Estates Ltd.
- ii. That immediately he became aware of the orders of the Tribunal (of 28th December 2009 he instructed his advocates to file an application “to vacate, vary or review” the said orders, and they did so vide notice of motion dated 1st February 2010 filed before the Tribunal.
- iii. That the Tribunal subsequently ordered on 2nd February 2010 as follows –

“1.

2. **Inspection of the premises known as LR 209/2469, Kingsway House, Nairobi... be done today to ascertain the position if the tenants are still in occupation.**

3. ...

4. ...

5. **Status quo to be maintained.**

6.”

(iv) That the inspector’s report was duly filed. That report is annexed to the replying affidavit.

(v) That the Tribunal subsequently ordered that both the Applicants’ application and the Respondent’s application be heard together, and that indeed they were heard by way of written submissions and ruling reserved for 17th March 2010.

(vi) That the present contempt proceedings were only intended to scuttle the decision of the Tribunal scheduled for 17th March 2010.

(vii) That it was not the Respondent or the dependent who erected the perimeter fence complained of.

(viii) That in fact it was the previous owner of the premises, Family Signatures Limited, who could have erected the perimeter fence as they had been permitted by the planning authority, the City Council of Nairobi, “to erect hoardings and scaffoldings on the premises”. He annexed the permission of the planning authority.

(ix) That the sale agreement between the Respondent and the previous owners, Family Signatures Limited, provided that the property was sold with vacant possession, and that therefore only the said previous owner could have removed the Applicants from the premises.

(x) That the application is frivolous and malicious.

10. The application was canvassed by way of written submissions. The Applicants’ submissions were filed on 27th February 2012 while those of the Respondent were filed on 15th March 2012. I have considered those submissions together with the authorities cited.

11. There cannot be any doubt that Stanley Githunguri is a director of the Respondent. He has stated so himself in the replying affidavit.

12. There is also no doubt that the order of the Tribunal alleged to have been disobeyed, together with a penal notice, were duly served upon the said Stanley Githunguri. In the replying affidavit he falls barely short of admitting that fact. In any event there is an affidavit of service annexed to the supporting affidavit. It is sworn by one DANIEL M MAITHYA a court process server. He has deponed that on 28th December 2009 he served Mr Githunguri with the order and penal notice at his Agib house office, and that he duly acknowledged service by signing on the documents.

13. The Respondent has argued that the order of the Tribunal alleged to have been disobeyed was illegal,

erroneous, null and void *ab initio*. That is a dangerous submission to make. The courts have repeatedly said that it is not within the purview of any party to make judgment regarding the validity, legality or otherwise of an order of the court as a basis for deciding whether or not to obey it. It can never work that way. No party would have such competence. What is open to a party is to apply to vary or set aside such orders; but before he succeeds in doing that he must obey the order. It cannot also be the function of the court in this application to interrogate the order concerned regarding its legality or validity. That is the function of an appellate court, and this is not an appeal that I am dealing with.

14. I will now examine the material before the court to see whether the contempt complained of was in fact committed.

15. The present contempt proceedings have been brought against Stanley Githunguri in his capacity as a director of the Respondent. They have not been brought against him on his personal capacity. The proceedings against Stanley Githunguri therefore ought to have been an adjunct to similar proceedings against the Respondent. This is because the order of the Tribunal was directed at the Respondent which was the Applicant's Landlord. It was not Stanley Githunguri who was the Applicant's Landlord. I therefore cannot understand why similar contempt proceedings were not instituted against the Respondent. Only if contempt was found on the party of the Respondent would similar contempt be found against any of its Directors. Without a similar contempt application against the Corporation (the Respondent), it means that the alleged contempt committed by Stanley Githunguri must be strictly proved against him. In other words, it must be established to a degree higher than a balance of probabilities but somewhat lower than the beyond reasonable doubt that he either personally himself erected the mabati fencing or that he personally authorized and/or directed the erection of the same. I have not found on the record any evidence that tempts to prove either of those two facts to the required standards.

16. In the event I find no merit in the contempt application. The same is dismissed with costs. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 28TH DAY OF AUGUST 2013

H. P. G. WAWERU

JUDGE

DELIVERED AT NAIROBI THIS 29TH DAY OF AUGUST 2013