



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ELC. CASE NO. 1720 OF 2002

KENYA POWER & LIGHTING COMPANY LIMITED PLAINTIFF

VERSUS

GIMALU HEALTH ESTATE LIMITED.....DEFENDANT

RULING

Coming up before me for determination is the Defendant/Applicant's Chamber Summons dated 5th March 2013 which seeks for the following orders:

1. Spent
2. That leave be granted to commence Contempt of Court Proceedings against Eliezar Ochieng Ocholla, Joseph K. Njoroge, Patrick M. Nyoike, Joseph Kinyua, Fidesius Muchira Nyaga, Theodorah Mallah-Kilukumi, Jacob Kabutu Mwirigi, Patrick E.O. Obath, Esau Kihumba Kioni, Macharia Kariuki who are Directors of Kenya Power (formerly Kenya Power & Lighting Company Limited) the Contemnors herein.
3. That a return date be granted for inter-partes hearing of the substantive application for committal.
4. That costs of this application be borne by the Contemnors in any event.

The said application is supported by the grounds appearing on the face of it and the Verifying Affidavit of Joan Njoki Ndungi sworn on 5th March 2013 in which she stated that she is a Director of the Defendant/Applicant. She further stated that she is aware that the Defendant filed an Application dated 29th October 2009 seeking inter alia an order of injunction restraining the Plaintiff/Respondent from entering and constructing heavy power pylons, electric posts and digging up the Defendant's parcel of land known as L.R. No. 167/9. She stated further that the said application was canvassed before Honourable Justice H.P.G. Waweru who issued the following order on 7th July 2011:

“That an order of injunction be and is hereby granted restraining the Plaintiff/Respondent by themselves, their agents and/or servants from entering and constructing heavy power pylons, electric posts, digging up the Defendant/applicant's parcel of land L. R. No. 167/9 and putting heavy tension electrical power cables on the Defendant's said parcel of land or in any other manner interfering with the Defendant's said parcel of land or the Defendant's quiet possession of the same pending the heading and disposal of the Defendant's counterclaim.”

Ms Ndungi further stated that the cited order was made in the presence of the Contemnor's Advocates on record and that the same have never been reviewed, varied and/or set aside and that the same were extracted and served upon the Contemnors. She further stated that the Contemnors ignored, disrespected and declined to obey the said order and have in fact further encroached on the Defendant's property where they have erected new heavy tension electric power cables, heavy power pylons and electric posts

and have also dug up holes on new areas thereon.

The application is contested. The Contemnors filed the Replying Affidavit of Beatrice Mugeni Meso, the Legal Services Manager of Kenya Power wherein she stated that apart from the 1st Contemnor, the 2nd to 11th Contemnors were not served personally with the instant application, the Court Order that is alleged to have been breached and the Penal Notice which is required to be endorsed on the Court Order. She further indicated that the court order sought to be relied on as having been disobeyed lapsed in July 2012, one year after the same was made. She also further stated that the instant application is futile as it does not have an Affidavit of Service for the Court Order and endorsed Penal Notice. The Contemnors also filed their Grounds of Objection dated 26th April 2013 where they raised similar issues as those raised in the above cited Replying Affidavit.

In response, the Defendant/Applicant filed a Replying Affidavit sworn by Joan Njoki Ndungu dated 2nd May 2013 in which she stated that the Court Order was duly served and received by the 1st Contemnor. They attached a copy of the Return of Service of James Mucheke Nganga. She further stated that the 2nd to 11th Contemnors ought to have passed a board resolution to obey and comply with the Court Order served upon the 1st Contemnor which they did not do. She further stated that the said Court Order had not lapsed as alleged, as the same was stated by the court to remain in force until the Defendant's Counterclaim is heard by this court.

In further response thereto, the Contemnors filed the Further Affidavit of Beatrice Mugeni Meso dated 6th May 2013 in which she stated that the Defendant was estopped from producing pleadings and evidence at this stage of the case, that the documents attached to the Replying Affidavit of Joan Njoki Ndungi cannot be considered by the court and that the Contemnors deny that there was service of the Court Order and Penal Notice as alleged by the Defendant/Applicant. She stated that attaching those documents was an afterthought intended to correct damage already caused. She also stated that the typing or computer font of the alleged Penal Notice is different from that of the Court Order and the Contemnors believe it is fake or a recent creation of the Defendant/Applicant.

Both Counsel for the Defendant and for the Contemnors made their oral submissions before this court on 5th June 2013.

I wish to cite and rely on the case of Anne Wanjiru Kabiru v. Bedan M. Chege (t/a Bedans Auctioneering Services) Misc. Appl. No. 114 of 2007 (2008) eKLR wherein it was stated as follows:

“It is now trite law that for an application for committal of anyone to prison for contempt of court to succeed, there must have been personal service of the order in question as well as a penal notice upon the alleged contemnor”

In the instant case, it is conceded by both parties that the Court Order was served upon the 1st Contemnor on 3rd August 2013. In fact, this court has seen the 1st Contemnor's stamp indicating receipt of the said Court Order on that date. However, the 1st Contemnor denies having been served the Penal Notice. True, the Penal Notice does not bear the same stamp of receipt from the 1st Contemnor. When it comes to the 2nd to 11th Contemnors, there is not proof whatsoever that they were served with both the Court Order and the Penal Notice. In brief, it can be stated that none of the 11 Contemnors concede to having been served with the Penal Notice. I have taken time to study the Penal Notice. It is printed on a separate piece of paper apart from the Court Order itself. It is true that it is typed in a different font as the Court Order. Further, I have observed that it is in capital letters. It bears the date 1st August 2011 but does not bear any stamp of receipt. Knowing how important the service of the Penal Notice is to contempt proceedings, why did the Defendant/Applicant not ensure that this document was also stamped to indicate receipt as it did with the Court Order?

Overall, my finding is that the Court Order was not served personally upon the 2nd to 11th Contemnors as

is required. My further finding is that the Penal Notice was not served upon any of the 11 Contemnors. With that in mind, I find that any contempt proceedings cannot succeed. It would therefore be futile to grant leave to bring such proceedings. The leave sought is therefore refused. The Chamber Summons dated 5th March 2013 is hereby dismissed with no order as to costs. It is so ordered.

SIGNED AND DELIVERED AT NAIROBI THIS 2ND

DAY OF AUGUST 2013.

MARY M. GITUMBI

JUDGE