



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
LAND AND ENVIRONMENTAL DIVISION
ELC CIVIL SUIT NO. 512 OF 2011

BERNARD ONDIEKI MOSETI.....1ST
PLAINTIFF/APPLICANT

JOAN ANGELA NUMA.....2ND
PLAINTIFF/APPLICANT

VERSUS

GHENGDU GUANGLING KENYA COMPANY LIMITED.....1ST
DEFENDANT/RESPONDENT

CITY COUNCIL OF NAIROBI2ND
DEFENDANT/RESPONDENT

RULING

The application before the Court is by way of Notice of Motion dated 28th October 2011 and is brought under the provisions of the Order 40 Rule 3 of the Civil Procedure Rules and sections 1A, 1B, and 3A of the Civil Procedure Act (Cap 21). The Applicants are seeking orders that the 1st Respondent's directors be committed to civil jail for 6 months for contempt of court, and that in the alternative attachment orders against the property of the 1st Respondent. The grounds for the application are that the 1st Respondent were on 27th September 2011 served with court orders dated 26th September 2011, and have continued to engage in construction of and sale of apartments on LR 330/433 and LR 330/432 (hereinafter referred to as the suit property), and to withdraw money from an account 0113601135500 held at Cooperative Bank of Kenya, Parliament Road Branch, Nairobi, in contravention of the orders of the court.

The Applicants provided as evidence of the said contempt a copy of the court order given on 26th September 2011 that was served on the 1st Respondent, a copy of the court orders granted on 26th October 2011, a copy of valuation transactions from the Ministry of Lands showing transactions made between 3rd October 2011 and 5th October 2011, and photographs taken of the suit property.

At the hearing of the application on 16th November 2011, Mr. Kwengu, the Counsel for the 1st Respondent, informed the Court that he had filed a Notice of Preliminary Objection dated 14th November 2011. The Court gave directions that the said Preliminary Objection and application be heard together.

I have carefully considered the pleadings, evidence and submissions made with regard to the preliminary objection and application before this Court. I will first address the Preliminary Objection raised by the 1st Respondent and I will in this respect confine myself to the points of law raised, which were primarily directed on Prayer 1 of the Application seeking committal of the 1st Respondent's Directors to civil jail for contempt of court. Counsel for the 1st Respondent submitted that firstly the Applicant has not obtained leave to commence the application to commit the Respondent's to civil jail, which is mandatory under section 5 of the Judicature Act (Cap 8). The counsel relied on the decision by Ouko J in **Godfrey Kilatya**

Kituku & 6 Others v Malindi Municipal Council HCCC (Malindi) No 45 of 2005 in this regard.

The second ground submitted by Counsel for the 1st Respondent is that the Attorney General has not been served with the Application, and Counsel relied on the authorities of the High Court of **Andalo & Another v James Gleen Russel (1990) KLR 54** and **Mohamed Yaslam Awadh v Dr. Peter Wilbur Marumbu H.C.C.Misc Appl. (Bungoma) No. 53 of 2004**. This requirement is also discussed by Ouko J in the previous case cited. The final point of law submitted by the 1st Respondent's Counsel is that there is no affidavit of service annexed to the application attesting to personal service of the court order on the alleged contemnors.

In reply to the points of law raised in the Preliminary Objection, the Applicants' Counsel submitted that they were not bound by section 5 of the Judicature Act, and had properly invoked the provisions of Order 40 Rule 3 of the Civil Procedure Rules which were the applicable provisions for contempt proceedings in cases of breach of injunctions. The counsel in this respect relied on the High Court decision of **Maryl Wanjiru Gitau v Margeret Wangechi Wachira (2004) eKLR**. The Counsel also submitted that there was an affidavit of service on record.

The main issue of law raised by the Preliminary Objection is whether this court has jurisdiction to hear the application dated 28th October 2011, in light of the procedures employed by the Applicant. The conflict occasioned by two separate procedures governing contempt of court proceedings has been extensively discussed in the various High Court decisions cited by the 1st Respondent's counsel. I hold the view that the jurisdiction and procedures provided for in the Judicature Act and Civil Procedure Act are separate, and either can apply so long as the proceedings fall within the Court's ambit. The difference is that while the jurisdiction conferred by section 5 of the Judicature Act is wide, and encompasses all forms of contempt of court proceedings, that of the Civil Procedure Act is limited to the circumstances laid down in the Act. The reasons for this view are that firstly that the Civil Procedure Act is a comprehensive procedural law governing civil cases, and any procedures properly applied under the Act will be valid. Secondly, the Civil Procedure Act and Rules have in the recent past been subjected to far-reaching review and amendment, and had it been found necessary to subject the procedure under Order 40 Rule 3 of the Civil Procedure Rules to the contempt of court procedures under section 5 of the Judicature Act, then this intention would have been expressly stated in the amended Civil Procedure Act and Rules of 2010.

My understanding is that the jurisdiction of this Court and procedures for contempt of court proceedings under the Civil Procedure Act and Rules is limited to instances where the civil contempt that is alleged is the breach of an injunction. Section 63(c) of the Civil Procedure Act is the substantive provision giving jurisdiction to the Court to punish civil contempt in cases of breach of injunction orders. Order 40 Rule 3 of the Civil Procedure Rules of 2010 is more specific as to the conditions that will apply for such a breach to be punished by way of contempt of court proceedings, which are that the application should be brought in the Court granting the injunction, and that an application for contempt of court proceedings should be by way of Notice of Motion. Order 51 of the Civil Procedure Rules provides the more detailed procedures on how Notices of Motion are presented to the Court.

In the present application, Justice Mbogholi Msagha sitting in the Environment and Land Division of the High Court did grant the injunction alleged to have been breached on 26th September 2011. This Court therefore has jurisdiction to entertain the contempt of court proceedings sought in the application. There are no requirements for leave to be obtained before the filing of the application, or for the Attorney General to be served with the application under Order 40 Rule 3 as read together with Order 51. There however a requirement as was submitted by the 1st Respondent's Counsel, that an Affidavit of service should be sworn and annexed to summons that have been served on parties. This requirement is found in section 20 of the Civil Procedure Act and Order 5 Rule 15 of the Civil Procedure Rules. Upon perusal of the court record, I found no affidavit of service filed by the Applicants attesting to service of the court orders on the 1st Respondent. I am however not inclined to find this default fatal to the proceedings before the court. Indeed Order 51 Rule 10(2) of the Civil Procedure Rules, following the provisions of Article 159(2) of the Constitution is clear that no application shall be defeated on a technicality or want of form

that does not affect the substance of the application.

I must here also observe that Order 51 gives wide discretion to the courts to impose such terms as to notice of, and the hearing of an application to ensure that the interests of justice are met. In the case of civil contempt, since the liberty of the alleged contemnor is at stake, courts are free to give such directions as are necessary to ensure that the contemnor has adequate notice of the charges made and an adequate opportunity to show cause why he or she should not be held in contempt. But while it is important that the rights of the contemnor should be safeguarded in the process, it is also equally important that the blatant contempt of the court should not go unpunished because of defects in the committal process. I therefore find that the procedure was properly followed in the bringing the application before the court, and that the 1st Respondent's Preliminary Objection on the therefore fails.

I will now proceed to consider the substantive aspects of the application. The Ist Respondent responded to the Applicants' prayer for committal to civil jail in a replying affidavit sworn on 12th November 2011 by Changwu Deng, its Managing Director. The Deponent stated in the said affidavit that he was never served with a copy of the court order, neither were the extended interim orders issued by the Court served. He also states that the served orders provided as evidence by the Applicants were signed by a third party whose identity is not disclosed. He further states that there was also no acknowledgement of service of the penal notice. In addition the 1st Respondent's Counsel submitted that the application relies on hearsay evidence, and no direct evidence is provided on the transactions involving the suit property.

On the prayer for attachment, Counsel for the 1st Respondent submitted that the order sought was incapable of enforcement because the property to be attached has not been identified or specified. I will at the outset agree with the Respondent's Counsel's submissions on prayer 2 of the application, on the ground that the Court cannot give orders that are either incapable of enforcement, or which will cause more uncertainties or disputes in the process of enforcement. Such orders are likely to hinder the expeditious disposal of cases which is an overriding objective in Article 159(2) of the Constitution and sections 1A and 1B of the Civil Procedure Act. Prayer 2 of the said application is accordingly denied.

The only issue left for the court to determine is whether the 1st Respondent's Directors are culpable for contempt of court. In this respect I will be guided by certain fundamental principles namely that alleged contemnors must be accorded full information of the allegations they face, and must also be given an adequate opportunity to answer the charges put to them. In addition the threshold of proof required is also higher than that in normal civil cases, and one can only be committed to jail or otherwise penalized on the basis of evidence that leaves no doubt as to the contemnor's culpability.

I find that there are certain gaps in the Applicants' application and evidence in relation to these principles. The initial orders that were served on the 1st Respondents Directors were served on a person not identified, and there is no evidence of the subsequent orders given by this court having been served on the 1st Respondent's directors. Secondly, the document evidencing the transactions at the lands office is not certified as a true copy of the original records. Thirdly, the photographic evidence provided by the Applicants has been controverted by the 1st Respondent in its Replying Affidavit, wherein it is stated that the persons shown in the said photographs are not its employees, but independent contractors engaged by purchasers of the apartments built on the suit property. There was no response by the Applicants to this averment. Finally, there is also no evidence provided by the Applicants of the withdrawals made by the 1st Respondent from account 0113601135500 held at Cooperative Bank of Kenya, Parliament Road Branch, Nairobi.

For the reasons given in the foregoing, I find that the Applicants have not proved the culpability of the 1st Respondent to warrant its committal to civil jail, and Prayer 1 of the application dated 28th October 2011 is hereby also denied

The costs of the application shall be in the cause.

Dated, signed and delivered in open court at Nairobi this 18th day of January 2012.

P. NYAMWEYA

JUDGE