REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

MILIMANI COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 289 OF 2010

NGINYO INVESTMENTS LIMITED……PLAINTIFF

VS

MOBILE PAY LIMITED……DEFENDANT

RULING

1. By way of a Notice of Motion dated 7th February 2012 and expressed to be brought under Section 5 of the Judicature Act, cap 8 of the Laws of Kenya, Order 52 Rule 2(2) of the Rules of the Supreme Court of England, 1965 and Section 3A of the Civil Procedure Act, the Plaintiff seeks orders of committal to prison of Oscar WambuguIkinu, Jonathan P. Savage and Gibson G. Wambugu, the directors of the Respondent for such period as the court may deem fit and just, principally on the ground that the said Oscar WambuguIkinu, Jonathan P. Savage and Gibson G. Wambugu are in breach of joint and several undertakings they filed in court on 11th May 2010 to pay rent and service charge due to the Applicant from the Respondent as and when due.

2. The application is further supported by a statement dated 17th August 2011, a verifying affidavit sworn by Lawrence NginyoKariuki on 17th August 2011 and a supporting affidavit sworn by the said NginyoKariuki on 7th February 2012.

3. The application is opposed through a replying affidavit of Oscar WambuguIkinu sworn on 30th September 2011.

4. Leave to bring the application was granted by Ogolla J through a ruling delivered on 14th November 2011.

5. The background to the application is at all times material to these proceedings, the Respondent, Mobile Pay Limited, was a tenant of the Plaintiff, Nginyo Investment Limited, at the plaintiff's building known as Nginyo Towers situate on Koinange Street. The Respondent occupied the 7th Floor of that building. On 5th May 2010, the Respondent moved out all its furniture, fittings and equipment from the

leased premises apparently without the authority of the plaintiff, prompting the plaintiff to apply to court by way of a Notice of Motion dated 6th May 2010, for an injunction to restrain the Respondent from unilaterally moving out of the demised premises in clear breach of the lease which was to run until year 2013. By consent of the parties dated 11th May 2010, the three directors of the Respondent Oscar WambuguIkinu, Jonathan P. Savage and Gibson G. Wambugu undertook to file a joint written undertaking with the court to the effect that they will be liable jointly and severally to pay rent as and when it fell due until the defendant handed over possession of the leased premises to the plaintiff. By a letter of undertaking dated 11th May 2010 and filed in court on 12th May 2010, the directors filed the undertaking duly signed by each of them, as per the consent order.

6. Upon the filing of the above undertaking, the Respondent to renovate the premises for purposes of handing over to the Plaintiff but the plaintiff insisted that the tenant had to continue to occupy the premises up to 1st March 2014 when the lease was scheduled to end. This dispute was canvassed before the court and in a ruling delivered on 14th June 2011, Njagi J. held that the tenant was not a prisoner and could as well move out to other premises subject to the plaintiff pursuing its rent under the lease. This ruling was amended on the application by counsel for the plaintiff to the effect that that the parties had in principle agreed to carry out a joint inspection of the premises and, subject to the plaintiff being satisfied as to the restoration, the premises could be handed over to the plaintiff subject to the plaintiff pursuing its rights under lease.

7. Thereafter, attempts to carry out joint inspection of the premises did not materialize as the Plaintiff's architect was never available on the scheduled time for the purpose.

8. It is the Applicant's case that the Respondents are still in possession of the premises as they have never handed over the keys to the premises. The Respondent is hence in rent arrears of Kshs. 3,562,895.00 as at the date of the present application. The directors of the Respondent are therefore in breach of their undertaking to pay rent of 11th May 2010 and should be committed to prison until they honor their joint personal undertakings.

9. In response to the application, the Respondent argues that the application is incompetent for the following reasons:

1) The order for punishment was not personally served upon the contemnors as required under Section 5 of the Judicature Act and Order 52 rule 2(2) of the Supreme Court of England, 1965. On the need for personal service, the Applicant relied on the authorities of **Civil Appeal No. 36 of 1989 – Jacob Zedekiah Ochino & 7 others vs. George Aura Okombo& 4 others at page 214 and Civil Appeal No. (NA1) 264 of 1993 – Nyamodin Ochiengn Nyamogo & another Vs. Kenya Posts & Telecommunication Corporation.** Counsel for the Respondents Mr. Kang'atta submitted that in the **Nyamodi case**, the court confirmed that absence of evidence of service made the application fatal and that the application had to be dismissed for lack of service. The court also held that failure of an endorsement of the penal consequences also rendered an application for contempt incoherent. The court emphasized the need for the court to follow the English law and procedure on the issue.

2) The order served was not endorsed with the penal consequences that would follow in the event of non-compliance.

10. The Respondent therefore argued that as the orders were never served on the alleged contemnors, and as the mandatory requirement of endorsement of the penal consequences was not met, the application for contempt incompetent and the application should be dismissed with costs.

11. On the substance of the application, the Respondents argue that the consent order was meant to sort out the situation then on the ground, namely removal of assets of the tenant from the ground floor of the building and restoration of the restoration of the premises to their original condition. The consent was therefore to last until the possession of the premises was handed over in the original condition. In that regard, the tenant was allowed to move out of the premises and to restore the property. The alleged

contemnors duly restored the premises and were ready to hand over the premises but the Plaintiff failed to send its architect for re-inspection of the premises. The guarantee by the contemnors was that rent would only be paid until restoration of the premises in their original condition. As attempts to re-inspect the premises for verification and hand over had been frustrated by the land lord, the Applicant was in breach of the consent order for re-inspection made before Njagi J. on 7th June 2010 requiring the parties to carry out joint inspection and verification of restoration. The Respondents could not therefore hand over the premises. Similarly, the Applicant could not therefore claim any rent thereafter and the defendant was deemed to have been released from its obligations to pay rent.

12. In response, Counsel for the Applicant Mr. Kihiko submitted that on 14th July 2011, the Respondent made an oral application to hand back the premises but that no order had been made to that effect. The tenant was therefore still in possession. He submitted that the Notice of Motion of 7th February 2012 was not incompetent as leave had been granted and the application was properly before the court. He told the court that Article 159 of the Constitution of Kenya 2010 required that judicial authority be exercised without undue regard to technicality. In that regard, lack of personal service or endorsement of penal consequences could not defeat the application.

13. I have considered the application, the affidavit evidence placed before the court and the submissions made by counsel for the parties.

14. Two issues arise for my determination, namely,

1) Whether the application is incompetent for want of personal service upon the would-be contemnors and endorsement of the penal consequences of disobedience and;

2) Whether the alleged contemnors are in breach of the undertaking to pay rent dated 11th May 2010 therefore whether they should be committed to prison for contempt.

15. With regard to the technical flaws of want of personal service and failure to indorse the penal consequences on the orders sought to be served upon the directors of the Respondent, the Respondent's position was that no orders of the court have ever been served personally or otherwise on the directors of the company. In response, counsel for the plaintiff took the view that under Article 159(3) of the Constitution of Kenya 2010, judicial authority should be exercised without undue regard to technicality. Lack of personal service and lack of endorsement of penal consequences were therefore technicalities which should not defeat the substance of the application. In any event, counsel for the Applicant argued that the orders had been served upon the advocates for the directors which service should be deemed as personal.

16. As failure to effect personal service and to endorse penal consequences on the orders forming the basis of the contempt proceedings is admitted by the Applicant, the question that the court should address itself to is whether lack of personal service of the orders on which the contempt proceedings are based as well as the appending of penal consequences are mere technicalities that this court should under Article 159 of the Constitution, excuse in the interest of substantive justice or whether the necessity for compliance with such requirements goes into the substance of committal proceedings as to render incompetent a non-compliant application, such as the present.

17. Section 5 of the Judicature Act grants the High Court and the Court of Appeal the power to punish for contempt of court through the procedure and jurisdiction the time being possessed by the High Court of Justice in England. The Judicature Act does not prescribe the procedural requirements of contempt proceedings and the Court is constrained to follow the procedure obtaining in the High Court of Justice of England. That procedure is prescribed in Order 52 Rule 2(2) of the Rules of the Supreme Court of England, 1965.

18. Order 52 (2) of the Rules of the Supreme Court of England (RSC) provides at paragraph 2.6 that if a committal application is commenced by the filing of an application notice:

"(1) the application notice together with copies of all written evidence in support must, unless the court otherwise directs, be served personally on the respondent;

(2) the application notice must set out in full the grounds on which the committal application is made and must identify, separately and numerically, each alleged act of contempt including, if known, the date of each of the alleged acts;

(3) an amendment to the application notice can be made with the permission of the court but not otherwise;

(4) the court may not dispose of the committal application without a hearing; and

(5) the application notice must contain a prominent notice stating the possible consequences of the court making a committal order and of the respondent not attending the hearing".

19. From the language of Order 52(2) of the RSC aforesaid, it is easily discernible that the procedural conditions that an Applicant is required to fulfill in committal proceedings are mandatory. Such conditions go into the fundamentals of legal validity of such proceedings. It must therefore follow that failure to fulfill any of the conditions carries the effect of rendering such proceedings incompetent.

20. The legal philosophy behind the mandatory nature of personal service in committal proceedings has been explained to be the nature of consequences that such proceedings visit upon the person sought to be committed. The consequences are penal in nature and have been said to go into the fundamental rights and freedoms of the person under committal. The Wikipedia Encyclopedia captures the consequences in the following manner:

"Orders for committal (to prison) are the most draconian remedy. They can be used in extreme circumstances. You would apply to commit if your opponent fails to do something which he has undertaken to the court to do, disobeyed a judgment or order to pay money or failed to do an act within a specified time, made a false statement in a court document verified by a statement of truth, or in some way scandalised the court".

21. A leading West African legal scholar Dr. Yusufali discusses the subject as follows:

"Since an application for committal for contempt is a criminal proceeding, it is submitted that all the steps that may lead to a conviction like filing of papers and service have to be scrupulously and strictly observed. It will indeed be mockery of the rule of law and justice if an Applicant for committal proceeding can have same as a matter of course, ***without fulfilling the basic rules of natural justice".***

(See www.yusufali.net)

It does therefore follow that the criminal nature of the consequences of committal proceedings obligate the party that moves the court to make a finding that a person should be committed to prison for contempt of court to show that he has himself complied strictly with the procedural requirements.

22. The above rationale has been underlined in the Kenyan jurisdiction, and courts have been vigilant in enforcing the said mandatory requirements of committal proceedings. Courts have not hesitated to declare fatal applications for committal that fail to comply with the mandatory requirements set out in Order 52(2) of the RSC. This is demonstrated in the following decisions of the Court of Appeal:

23. In ***Civil Application No. NAI. 264 of 1993 (NAI/93 UR) Nyamodi Ochieng- Nyamogo& Another vs. Kenya Posts & Telecommunications Corporation*** the Court of Appeal observed as follows at page 13 of the ruling of the court:

"The consequences of a finding of disobedience being penal, the party who calls upon the court to make such a finding must show that he has himself complied strictly with the procedural requirements

and his failure to so comply cannot be answered by merely saying that the other side was aware or ought to have been aware of what the order required him to do".

24. In the case of ***Mwangi H.C. Wang'ondu vs. Nairobi City Commission (Civil Appeal No. 95 of 1988 (UR)*** the Court of Appeal again held as follows:

"This requirement is important because the court will only punish as contempt a breach of injunction if satisfied that the terms of the injunction are clear and unambiguous, that the Defendant has proper notice of the terms and that breach of injunction has been proved beyond reasonable doubt".

25. Similarly, in the case of **Jacob Zedekiah Ochino& others vs. George Aura Okombo& 4others Civil Appeal No. 36 of 1989** which followed soon after the judgment in the **Wang'ondu case,** the Court of Appeal held as follows on the necessity of personal service and endorsement of penal consequences:

"We have to follow the procedure and practice in England. As we read the law, the effect of the English provisions is that 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. The copy of the served order 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".

26. On whether service of the orders and penal notice upon counsel for the persons intended to be punished would suffice as urged by counsel for the Applicant, this question was considered in the **Nyamodi Ochieng – Nyamogo & Another Case (supra*)*** where the Court of Appeal held not only that omission of personal service of the order was fatal in view of the position in law in relation to committal proceedings but that service of the order upon the advocates of the contemnors was not good service and was indeed a wasted effort. In the present case therefore, it would follow that service of the orders upon the advocates for the directors of the Respondent does not suffice to meet the mandatory requirement of personal service in proceedings seeking punishment of persons for contempt of court orders.

27. The upshot of the foregoing is that personal service is an integral process in the punishment of persons by the court for disobedience with court orders. So is the endorsement of penal consequences of such disobedience on the orders served. The necessity for compliance with these requirements stems directly from the penal nature of the punishment sought. The court has to be convinced that before any such punishment is meted out, the persons to be committed are personally made aware of the orders in respect of which obedience is required as well as the exact consequences of disobeying such orders. That way, such persons cannot be heard to contest the eventual punishment meted out by the court. For this reason, compliance with the two requirements cannot be wished away as mere technicalities as would allow the court to invoke Article 159(3) of the Constitution and dispense with their compliance.

28. I would therefore reiterate the well-trodden legal position that failure to effect personal service of the orders and to indorse the penal consequences of disobedience renders the present application incompetent and is, without more, fatal to the application as a whole.

29. While the above conclusion suffices to dispose of the entire application before me, it may well be necessary to consider the substantive grounds upon which the application for committal is grounded to establish if the Applicant had made out a case for committal of the three directors to prison.

30. It is common ground that on 11th May 2010, the three directors of the Respondent Oscar Wambugu Ikinu, Jonathan P. Savage and Gibson G. Wambugu undertook to pay rent as and when it fell due. From the proceedings of the court of 11th May 2010 pursuant to which the undertaking was agreed, it is clear to me that the undertaking was made within the context that the Respondent had removed its fittings, furniture and equipment from the leased premises on the 7th Floor of the building and had placed them on the ground floor thereby causing obstruction and impeding access to the building. The undertaking to pay rent was made in lieu of an undertaking that the tenant was not going to ferry away its said assets and equipment and hence undertaking was issued to allow the Respondent to take away its furniture. The

landlord had also been apprehensive that the premises were extensively damaged and required substantial repairs whose cost could not be met by the three months' deposit paid by the Respondent. It is also common ground that the undertaking was to last until "the defendant handed over vacant possession of the premises in the condition they were at the inception of the lease.

31. There is consensus that on 7th June 2010, the parties entered into a consent that they and their counsel would carry out joint inspection of the premises on 8th June 2010, which inspection was never carried out as the landlord's architect failed to turn up. This is discernible in the court's record of 8th May 2010. Thereafter, the parties decided to fix the Applicants application dated 6th May 2010 for hearing. This application sought to restrain the Respondent from breaching the terms of the lease until the full term of the lease had expired. The application was heard and a ruling delivered on 14th June 2011 in which Hon. Njagi J held that the tenant was not a prisoner of the landlord and could not be compelled to live in the leased premises against its will. However, the court held that Plaintiff was at liberty to pursue its rights under the lease against the Defendant for rent recovery.

32. On 1st July 2011, the parties entered into a fresh consent amending the ruling of the court in the following terms:

"… it is hereby agreed by consent that the said ruling be and is hereby amended to the effect that the parties had in principle agreed to carrying out of a joint inspection of the suit premises and subject to the Plaintiff (landlord) being satisfied with the restoration works, the premises would be handed over to the plaintiff".

33. After the above consent, none of the parties took any action towards implementation of the terms of the consent until the application by the Plaintiff dated 17th August 2011 for leave to apply for committal of the three directors to prison was made.

34. Having reviewed the chronology of events in this matter, I am convinced that the parties should not have permitted the matter to degenerate to the present undesirable destiny it finds itself in had they complied with the consent order of 7th June 2010 for the carrying out of joint inspection of the premises. The fixing of the application dated 6th May 2010 for hearing was done in complete disregard of the reasons why the consent order of 7th June 2010 was not implemented.

35. Having also reviewed the court record of 8th June 2010 in which the parties reported back on the joint inspections that they were to carry out that morning as per the consent order of 7th June 2010, it is clear to me that the reason why the joint inspection was not carried out is that the Plaintiff's architect did not show up. The Plaintiff did not explain to court why the architect was not available or even offer an indication of when such joint inspection could be carried out. In effect therefore, the reason for the ensuing stalemate and for the arrears that have built up since 7th June 2010 are attributable to the Plaintiff as the Defendants were ready and available for the joint inspection and possible hand over of the premises. It would therefore be unconscionable and indeed inequitable for the defendant to seek to benefit from its own breach by requesting this court to commit the directors of the Defendant to prison for breach of their undertaking to pay rent when accrual of the rent is attributable to the Plaintiff's breach of the consent order of 7th June 2010. It would also not be open for this court to entertain any illusion that the undertaking of 11th May 2010 was open-ended or was intended to last for the remainder of the term of the lease as that would be in direct contravention of the ruling of the court of 14th June 2011.

36. In the event, while this court cannot tell if the joint inspection of 8th June 2010 would have resulted in the hand-over of the premises or whether the landlord would have required further repairs, I do not find it feasible that that either way, the Plaintiff/Applicant would be entitled to demand rent for the whole span

of time that has since elapsed for the simple reason that the Defendant/Respondent was ready to hand over as of the said June 2010 and has indeed not been in occupation of the premises since. Similarly, it would in my view be stretching the limits of equity to suppose that the intervening period of over one year during which the parties have been litigating over the application dated 6th May 2010 can be deemed to be computable for purposes of calculating the rent arrears payable, given the court's ruling of 14th June 2011 that favored release of the Respondent from the premises, and from which no appeal has been preferred. My humble assessment is that any rent arrears payable by the plaintiff, if at all, would hardly exceed the rent payable for the quarter ending August 2010. However, this is a matter that the parties should agree upon or canvass fully at the hearing of the main suit.

37. Meanwhile, the present stalemate in which the parties have found themselves into does not serve the interests of either party and is, in my view, an exercise at flexing the parties' egos and pride. I do not see why the parties cannot immediately arrange the joint inspection of the premises for purposes of hand over to the Plaintiff, at least in answer to the previous orders of the court that a tenant cannot be compelled to occupy premises against its will and in view of the fact that the stalemate herein comes at a cost to the Plaintiff who is currently not yielding any rental income in respect of the space concerned.Again, that is for the parties to ponder.

38. For the present purposes, and for the reasons advanced above, I am unable to commit Oscar Wambugu Ikinu, Jonathan P. Savage and Gibson G. Wambugu to prison as prayed in the Notice of Motion dated 7th February 2012 and the same is hereby dismissed with costs.

IT IS SO ORDERED

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 3RD DAY OF MAY 2012.

J.M. MUTAVA

JUDGE