



REPUBLIC OF KENYA
IN THE HIGH OF KENYA AT MOMBASA

Civil Case 270 of 2004

GILBERTO AGOSTA.....PLAINTIFF

F

VERSUS

1. LICINUS INVESTMENTS LTD.....1ST
 DEFENDANT

2. CANOBBIO PIERO.....2ND DEFENDANT

RULING

1. This is the Plaintiff's application by Notice of Motion dated 1st February, 2005. It seeks the following orders:

"1. That an order of committal to prison for contempt of Court do issue and further or other and/or consequent orders as may deem just to the Court against the Second Respondent for willfully disobeying and/or continuing to disobey the Court's order issued on 14th December, 2004.

2. That this Honourable Court do issue warrants and produce before this Court the Second Respondent by way of committal to jail or by way of such other sentence as the Court may deem just to mete out of the Second Respondent open contempt of the aforesaid high Court Order issued on 14th December, 2004.

3. That the property of the second Respondent be attached until he ceases his disobedience of the Order of the Court dated 10th December, 2004 and issued on 14th December, 2004.

4. That the property of the Second Respondent be attached until he purges his contempt of court failing compliance by the Second Respondent the property be sold and the proceeds thereof be, used to defray the loss or damage resulting from his disobedience of the Order.

5. That the Second Respondent/Defendant be ordered to demolish or cause to be demolished all the construction work effected in breach of he orders of injunction herein.

6. That the Second Respondent/Defendant be condemned to pay the costs of this and the application for leave to institute this application."

2. The application is supported by the annexed affidavit of Gilberto Agosta. The grounds are summarised as follows: That a temporary injunction ordered by Justice Khaminwa on 10th December,

2004(issued on 14th December, 2004) restraining the Defendants from interfering in L.R. Number 5054/275/Kilifi was breached and disobeyed by the Defendant in numerous ways.

3. The said order of Honourable Lady Justice Khaminwa is set out hereunder in its essential parts:

"1...

2. Injunction be and is hereby granted restraining the First and Second Defendants by themselves, their agents or servants and/or any other person or otherwise howsoever acting on the authority or instructions of the Defendant from interfering or proceeding to dispose off and/or sell a portion (marked 'A' on the plan annexed to agreement of sale entered into on 30th May,2003) of LR Number 5054/275 (Kilifi) together with buildings or house and/or improvements standing thereon belonging to the Plaintiff until the hearing and determination of the suit.

3. A temporary injunction is granted to restrain the Defendants by themselves, their servants or agents or otherwise howsoever from interfering or preventing the Plaintiff from enjoying quiet possession, occupation and entry of the Plaintiff's house and/or improvements standing on a portion (marked 'A' on plan annexed to the agreement of sale entered into by the Plaintiff and the defendants on 30th May, 2003) of LR Number 50-54/275 Kilifi, until the hearing and determination of the suit.

4. A temporary injunctions granted for fourteen (14) days and the interpartes hearing on 20th December, 2004."

These orders were subsequently confirmed on 13th April 2005 pursuant to a Ruling by Honourable Justice Mwera.

4. The Applicant filed affidavits of service deponed on 10th February, 2005 by one Maurice Abuoro. He says he served the Attorney General on 3rd February, 2005 and the 2nd Defendant on 2nd February, 2005 at Kilifi in the presence of Mr. Patrick Ochwa, Advocate; that the 2nd Defendant chased him and slapped him, and used 15 workers to apply physical force on him and pushed him out of the compound. That notwithstanding, he avers that he served the 2nd Defendant who received the suit documents but refused to sign for them.

5. The Defendant filed a Replying Affidavit deponed on 9th February, 2005. Essentially, he deponed that

- the court orders were never served personally on him
- that they were served on his finance Aisha Abubakar
- that he was not in Kilifi when service was allegedly done.

6. The law is quite clear on contempt proceedings. In **Ringera & 2 others vs Muite & 10 others** HCC 1330 of 1991, the court stated:

"Where contempt proceedings are placed before a court for hearing, quite a number of legal issues and principles come to the fore; for eg. existence of the orders that ought to be obeyed or executed, service, proof of breach, penalties etc. These aspects (sic) of fact in committal for contempt proceedings includes fairly basic issues: eg were court orders in existence; did the Defendants know of them; were they indeed breached...."

7. After the filing of the present application, it is clear that there were other intervening applications heard. Amongst these was the *interpartes* hearing of an application by which Hon. Justice Mwera, in his ruling of 13th April, 2005, confirmed the interim orders of injunction that are the subject of the present

application for contempt. It is unnecessary to go into the applications and matters that occurred after the present application was filed, although the Applicant's counsel has dwelt on some such matters at length.

8. In my view, the application for contempt is specific to the orders issued by Hon. Lady Justice Khaminwa, dated 10th December, 2004 and issued on 14th December, 2004. It is against that order, and that order alone, that the contempt is alleged, as at 1st February, 2005. I have therefore sifted through all the submissions of both counsel separating the wheat from the chaff, and will deal here only with material relating to the aforesaid order.

9. I, therefore, find the key issue relevant to this application is as follows: **Whether the Respondent had notice of the said order by being served personally.**

In Mwangi Wangondu vs Nairobi City Commission, Nairobi HCCA 95 of 1988 it was held that:

"No order of court requiring a person to do or abstain from doing any act may be enforced unless a copy of the order has been served personally on the person required to do or abstain from doing the act in question."

10. The affidavit of service of Maurice Abuoro deposed on 17th December, 2004 states that the Respondent was served. On the other hand the Respondent has filed affidavits denying service as follows:

"i) In his own affidavit in which he says he was never served but instead his fiancée Aisha Abubakar was served.

ii) The Affidavit of Aisha Abubakar sworn on 8th February, 2005 annexed as 'CP 13' to Respondent's affidavit. There she states that she was served by the Process server accompanied by the Plaintiff in his car. She stated that her fiancée, the Respondent, had travelled to Mariakani that day,

iii) That Affidavit of Abdalla sworn on 8th February, 2005 annexed as 'CP 14' to the Respondent's Affidavit. In it he states that on the day of the alleged service on 14th December, 2004, he was in Mariakani from 6.30 a.m. to 7.15 p.m. where he had accompanied the Respondent.

11. I observe the principle applicable in the law of contempt, that the greatest restraint should be exercised by a court when dealing with contempt. In the Ringera case the court stated:

"...the power of committal clearly touches upon the liberty of the subject and to that extent the jurisdiction may be regarded as quasi-criminal. The greatest restraint amid discretion should be used by the court in dealing with contempt of court..."

12. The affidavits of the Respondent, his fiancée and Abdalla Ali were not expressly contested. Nor has there been any cross examination of the deponents to authenticate or discredit the truthfulness thereof.

On this ground of uncertainty of service, alone, I would be disinclined to commit the Respondent for contempt. I think it would be highly unsafe to do so.

13. The success or failure of the whole application turns upon the question of personal service of the Order of Lady Justice Khaminwa. I am not satisfied it was done. I am, therefore, inclined to dismiss the application for contempt, as I hereby do, without further consideration of other aspects. Any arguments that the Respondents disobeyed the injunctive orders after they had been confirmed are irrelevant to this application at this stage.

Dated, signed and delivered this 27th day of September, 2012

R.M. MWONGO

JUDGE

Read in open court

Coram:

1. Judge: Hon. R.M. Mwongo
2. Court clerk: R. Mwadime

In Presence of Parties/Representative as follows:

- a)
- b)
- c)
- d)