



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

Civil Case 33 of 2011

PAYLESS CAR HIRE AND TOURS LIMITED.....PLAINTIFF

VERSUS

IMPERIAL BANK LTDDEFENDANT

R U L I N G

1. On 12th October, 2012 this court made the following orders against the Defendant:-

- a) ***THAT the orders issued on 19th July 2011 by Hon. Mr. M.K. Kiema, Resident Magistrate, are hereby set aside.***
- b) ***THAT a temporary injunction do issue restraining the defendant, their agents and/or servants, the police and auctioneers from selling alienating, interfering and/or dealing in any manner whatsoever with motor vehicle registration numbers KAR 395N, KAS 028F, KAS 925J, KAN 112Y, KAR 394N, KAS 025F and KAS 029F until further orders of this court.***
- c) ***THAT motor vehicles registration numbers KAR 395N, KAS 028F, KAS 925J, KAN 112Y, KAR 394N, KAS 025F and KAS 029F be returned to the plaintiff forthwith and unconditionally.***
- d) ***THAT the parties do comply with the consent orders made by this court on 7/3/11. For avoidance of doubt, compliance shall be as follows:-***
 - i) ***The Plaintiff do file and serve the Affidavit set out in Prayer 1 of the order of 7/3/11 within 7 days of the date hereof setting out clearly the physical location and condition of the motor vehicles in question.***
 - ii) ***The valuation ordered in the order of 7/3/11 be carried out within 14 days after the filing of the Affidavit by the Plaintiff in (d) (i) above.***
 - iii) ***Accounts be taken within forty five (45) days of the date of this order.***
 - iv) ***Mention on 2nd December, 2011 for further directions.***
- (e) ***THAT the plaintiff do serve the Summons upon the Defendant within seven (7) days of the date hereof.***

(f.) ***THAT in the event the plaintiff defaults to comply with any of the directions given above, the injunctive orders granted herein shall stand discharged.***

(g.) ***THAT in the event the Defendant defaults and/or fails to facilitate compliance of this order, the injunctive order No. (b) above shall subsist until the hearing and determination of the suit.***

(h.) ***THAT there be liberty to apply.***

(i.) ***THAT costs in the cause.***

2. By a Notice of Motion dated 2nd November, 2011, the Plaintiff sought that Alnashir Papat, Abdulmalek Janmohamed, Anwar Hajee Vishnu Dhutia, Jinit Shah Mukesh Patel, Hanif Samji all who are directors of the Defendant and one Mr. G. Kariuki Trading as Direct “O” Services Auctioneers be cited for contempt of the said orders of 12th October, 2011, and consequently be committed to jail for a period to be determined by this court. That application was supported by the Affidavit of Jai Radia sworn on 2nd November, 2011.

3. On 24th November, 2011, the Defendant filed a Notice of Motion under Order 40 Rule 7 of the Civil Procedure Rules and Sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act seeking the setting aside of the orders of 12th October, 2011. The said application was supported by the Affidavit of Hilda Wanjiku sworn on 22nd November, 2011. Both applications were argued together and this ruling is in respect of both applications. I propose to first consider the application for committal.

4. In its application, the Plaintiff gave the factual background to this case culminating in the orders of 12th October, 2011. The Plaintiff contended that it complied with that part of that order that was directed at the Plaintiff, that the order with Penal Notice was duly served upon the Defendant and Mr. G. Kariuki trading as Direct “O” Services Auctioneers on 14th and 21st October, 2011, respectively, that despite being served as such, the Defendant and the said G. Kariuki had refused to obey the same. The Defendant filed a Replying Affidavit sworn by Hilda Wanjiku and contended that the Plaintiff had not complied with the order of 12th October, 2011 in that it had failed to disclose the physical location of certain motor vehicles as directed by the court, that as a result accounts were not taken within the 45 days ordered, that as such the injunctive orders made on 12th October, 2011 stood discharged that none of the persons sought to be committed had been personally served with the order, that Hilda Wanjiku was served as the legal officer of the Defendant and that upon service, the Defendant took steps to comply with the order, that as at the time of service of the order, motor vehicle registration No. KAS 925J, KAS028F, KAS 395N and KAS 029F had already been sold and therefore belonged to 3rd parties, that three (3) vehicles, to wit, KAR 394N, KAN 112Y and KAS 069F had already been released to the Plaintiff. The Defendant further contended that it had been willing to amicably resolve the dispute but the Plaintiff had frustrated such efforts, that save the Managing Director none of the directors sought to be cited is actively involved in the running of the Defendant. The Defendant urged that the application be dismissed.

5. I have considered the Affidavits on record the submissions of counsel and authorities relied on. In an application for contempt, an applicant must prove service of the order and show that despite such service, the party sought to be committed has disobeyed that order. In the case of **Ochino & Others –v-s Okombo & Others (1989) KLR 165**, the Court of Appeal stated at page 167:-

“The power to deal with contempt of court is provided for under Section 5 of the Judicature Act (Cap 8) and Order 39 Rules 2(3) of the Civil Procedure Rules. We have to follow the procedure and held that:-

.....the standard of proof in contempt proceedings must be higher than proof on a balance of probabilities, almost but not exactly beyond reasonable doubt.”

6. In this case, the persons alleged to have committed acts of contempt are the directors of the Defendant

named above and Mr. G. Kariuki of Direct “O” Services Auctioneers. They have denied having been served with the order in question. They have also denied being in contempt of the order. The issues therefore that fall for determination are, were the alleged contemnors served with the order of 12th October, 2012 and if so, have the alleged contemnors disobeyed the order.

7. I have seen the Affidavit of service of Kennedy M. Nyamweya sworn on 24th October, 2011. He states that on 14th October, 2011, he went to the offices of the Defendant and effected service of the order upon one Hilda Wanjiku, the company secretary legal department who acknowledged receipt of the same. He then served the order upon the Defendant’s Advocates on the same day. The Plaintiff has contended that Hilda Wanjiku was the authorized person to receive process on behalf of the Defendant and had done so previously, that the company was aware of the order and the contemnor should not be allowed to hide behind the issue of personal service to escape liability. The Defendant submitted otherwise.

8. Given that the Defendant is a company the question that arises is how is service of an order to be effected upon a company if the directors of such a company are to be committed for disobedience of an order. In **Arlidge & Smith on contempt Third edition Sweet & Maxwell 2005** at page 927 Paragraphs 12 -102 the learned authors observes:-

“As has already been pointed out, no one can be held for a breach of an order without knowledge that such an order has been made. Service of the order itself is also required, unless an order has been made to dispense with service. Therefore it would appear that in order to fix a corporation with liability for contempt, it will be necessary to show that it has been properly served or that service has been dispensed with on the basis that an appropriate officer of the company had knowledge of the order or for some other reason.”

And in paragraph 12-40 that:-

“Although in the case of a Corporation service of an order may generally be effected by servicing solicitors, special provisions apply where it is sought to enforce a judgment or order against a corporation by means of an order for committal of an officer or sequestration of his assets. Before either of these remedies may be obtained, it must be proved that personal service has been effected on the officer concerned” (Emphasis supplied).

9. In the case of **Loise Margaret Waweru –vs- Stephen Njuguna Githuri C.A No. 198 of 1998**, the Court of Appeal held:-

“There is evidence on record to prove that the person who received the documents from Wainaina claiming her servant was duly authorized by the appellant to accept service on her behalf. But whatever may be the position, service on her houseboy did not constitute personal service on the appellant. It was held in the case of Mander –vs- Falckie (1891) 3 Ch. 488 that the notice of motion must be served personally on the respondent (even if he has an address for service) unless the court dispenses with such service in this case it is clear that there was no such personal service on the appellant, and in the absence of this she could not be committed for contempt of court.”

Further, in the case of **Mwangi Wangondu –vs- Nairobi City Commission CA No.95/88 (UR)**, the Court of Appeal emphasized the importance of following the practice in England which makes service of the order mandatory.

10. I have seen the authorities relied on by the Plaintiff. These are:- **Emmanuel Waweru Lima Mathai –vs- HFCK & 4 others (2009) e KLR** and **Justus Wanjala Kisiangani & 2 others –vs- The City Council of Nairobi & 3 others (2002) e KLR** wherein Hon. Kimaru J held that where a party is proved to have knowledge of the order, such a party can still be committed for contempt notwithstanding that there was no personal service of the order. These decisions are persuasive. On my part, I hold the view that a party who has obtained an order of the court MUST ensure personal service of the same upon the party against whom such an order has been issued. Contempt proceedings should not at all be

commenced or entertained unless personal service of the order has been effected. In my view, the rule on Personal Service should be vigorously enforced and only be relaxed when it is shown that a party has made attempts to effect personal service but for some reason, such service was not possible. Only then should a court fall back on the issue of knowledge and disregard the requirement for personal service. My view is informed by the fact that contempt proceedings are akin to criminal proceedings. A person may be sent to prison thereby lose his liberty for that offence. For that reason, it is very important that he is shown to have had notice of the order and had the opportunity to obey the same but failed to do so. I am not alone on this. Lenaola J in the case of ***Kariuki & 2 others –vs- Minister for Gender, Sports, Culture and Social Services & 2 others Misc. CA No. 380 of 2004*** held that:-

“Service is higher than knowledge without service there cannot be contempt.”

In my view, knowledge is to be resorted to only when service has been attempted and has proved difficulty either due to evasion by the party sought to be served or any other good reason.

11. In the instant case, there is admission that none of the persons sought to be cited for contempt was ever served except one, all the rest are not involved in the day today running of the Defendant. Others are out of Nairobi. How are they expected to cause compliance of an order whose existence they may not know. They may be attending the company only once in a month or quarterly to attend board meetings. They are said to live and carry their own businesses out of Nairobi. With greatest respect, I do not think any a good case has been made for committing the alleged contemnors to civil jail.

12. Has there been deliberate and intentional non compliance of the order. This brings me to the Defendant’s application dated 22nd November, 2011. The Defendant has shown that four (4) of the motor vehicles that were subject of the order of 12th October, 2011 were sold before the order was made. The alleged sales took place on 25/8/11, 4/9/11, 4/10/11 and 6th October, 2011 respectively. Had the order of 12/10/2011 been properly served, I would have had issues with the sales since that fact was not disclosed to the court in the Replying Affidavit of Hilda Wanjiku of 16th September, 2011. At least by then since 2 motor vehicles had allegedly been sold. It was incumbent upon the Defendant to disclose that fact to the court before the subject order was made. Indeed, it was also the duty of counsel for the Defendant to have disclosed that fact to the court on 10th October, 2012 when the Plaintiff’s application was heard. I think counsel for the Defendant has fallen foul of Section 1B of the Civil Procedure Act. Advocates owe the court a duty to disclose all material necessary to enable the court deliver fair decisions to litigants.

13. Be that as it may, for the reason that, the order was not properly served I will take it that those motor vehicles cannot properly be part of the order of 12th October, 2012.

14. As regards the other motor vehicles, it seems that neither the Defendant nor the Plaintiff acted on the order of 12/10/2011. The said vehicles are still lying at Leakeys storage facilities. The Defendant allege that the order of 12/10/2011 was irregular as it was in breach of a consent of 7/3/2011. This court cannot countenance such a contention by a party who has not appealed against the same. It is a spurious argument. That does not and cannot help the Defendant! What has concerned me is that although the Plaintiff had the orders it did not seek to collect the said vehicles from the said storage facility. They have been accumulating storage charges on a daily basis ever since they were delivered there. Won’t it have been prudent to collect them after paying the little storage charges that might have been outstanding as at 12/10/2011 and thereafter claim the same? What happened to the principle of cutting off one’s losses or mitigating losses? It is alleged and not denied by the Plaintiff that the amount still outstanding in the facility it took form the Defendant still stands at over Kshs.16 million as at November, 2011. The Plaintiff has not been servicing the same. I note that the Defendant failed to pay the storage charges after the order of 12/10/11 probably to reduce on the losses it had already suffered.

15. Taking all the circumstances of this case into consideration, and for the interests of justice, this court dismisses the Plaintiff’s application dated 2nd November, 2011 and allows the Defendants application dated 22nd November, 2011 the court makes no orders as to costs.

Let the parties list the suit for full trial.

DATED and DELIVERED at Nairobi this 27th day of September, 2012.

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A. MABEYA

JUDGE