



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Petition 101 of 2010

DIPLOMATIC DUTY FREE LTD PETITIONER

VERSUS

THE HON. ATTORNEY GENERAL 1ST RESPONDENT

KENYA AIRPORTS AUTHORITY 2ND RESPONDENT

RULING

Introduction

1. In its application dated 13th June 2012, the petitioner seeks orders for the arrest and committal of the directors and officers of the 2nd respondent named in the application to civil jail for a period not exceeding six (6) months for contempt of court orders issued by Hon. Lady Justice Gacheche on 17th December 2010.
2. The petitioner also seeks orders for the sequestration of the properties of the 2nd respondent and those of its directors for the alleged contempt; that the 2nd respondent and its directors should not be heard by this court until they have purged the contempt, and it also prays that it should be awarded the costs of the application.
3. The application is supported by the affidavit of Abhimanyu Gharwal, a director of the petitioner/applicant, sworn on 13th June 2012.
4. The application is opposed. The 2nd respondent filed an affidavit sworn on 12th July 2012 by its Corporation Secretary, Ms. Joy Nyaga. Mr. Macharia Njeru a director of the 2nd respondent and one of the alleged contemnors, also filed an affidavit in opposition sworn on 12th July 2012. The petitioner, 2nd respondent and Mr. Njeru also filed written submissions which were highlighted before me on 28th September 2012.

Background

5. The petitioner had filed the petition dated 16th December 2010 together with a chamber summons application of the same date in which it sought various orders, among them conservatory mandatory orders directed at the respondents compelling them to forthwith vacate all the premises situated at Jomo Kenyatta International Airport previously occupied by the petitioner under its leases dated 5th

March and 14th September 2007 and to restore the petitioner to the said premises.

6. The application was heard by Justice Gacheche on the 17th of December 2010 when she granted the orders sought and directed that the petition and application be served for inter partes hearing on 24rd March 2011.

7. On 23rd March 2011, the court, on the ex parte application of Counsel for the petitioner, granted leave to the petitioner to commence contempt proceedings against the respondents within 14 days of that date for disobedience of the court orders. The application was to be heard on the 6th of April 2011.

8. When the matter came up for hearing as scheduled on the 24th of March 2011, the parties entered a consent order in the following terms:

‘By consent, this matter be removed from today’s list and that it be fixed for hearing late May 2011.

That the 1st respondent be at liberty to respond to the petition and serve within the next 21 days.

That the petitioners may respond to the responses and serve within 14 days of service.

That parties do next exchange their submissions and lists of authorities by 25.5. 2011.

Parties do colour code and paginate the said pleadings.’

9. The court record indicates that the consent order was read to the court by Mr. Adala, Counsel for the petitioner, and was signed by all the Counsel then appearing for the parties in the matter.

10. When the matter came up on 6th of April 2011, Counsel for the petitioner informed the court that parties were negotiating a settlement and the matter was stood over to 21st June 2011, when again the matter was taken out on the basis that the parties were still negotiating and needed a further two months. It was therefore stood over to 26th of September 2011.

11. On 13th March 2012, the petition was placed before the court for dismissal for want of prosecution but was not dismissed as the court noted that the matter was last in court on 21st June 2011 and had a hearing date for 7th May 2012.

12. On 6th June 2012, Counsel for the petitioner applied for extension of the leave to file contempt proceedings which had been granted on 23rd March 2011, and the leave was granted, leading to the filing of the present application for contempt.

13. On 25th September 2012, the petitioner filed an application by way of Notice of Motion seeking to re-instate the orders issued by Justice Gacheche on 17th December 2010 and sought to have the application heard prior to the application now before the court as the orders that the petitioner was seeking extension of form the basis of the application for contempt against the 2nd respondent and its directors.

The Petitioner's Submissions

14. The petitioner's case as presented by its Learned Counsel, Mr. Adala, is that despite service of the orders made on 17th December 2010, the 2nd respondent and its directors and principal officers disobeyed the orders by failing to vacate and or restore the applicant to the subject premises.

15. Mr. Adala submitted that the orders of 17th December 2010 were personally served on the

parties. He referred the court to the rulings of the court in **Mitu-Bell Welfare Society –v- Attorney General and 2 Others, Petition No. 164 of 2011** and **Mark Ole Karbolo & 4 Others –v- Acting Minister for Industrialization and Anor, Misc Application No. 337 of 2011** where the court observed that it was improper for a contemnor to hide behind legal technicalities, one of which is personal service and non-inclusion of a penal notice.

16. Mr. Adala submitted that the petitioner had applied for and obtained leave to file an application to cite the 2nd respondent and its directors for contempt of court on 23rd March 2011; that due to the ongoing out of court negotiations with the respondents the application for contempt was not filed as it would have been improper to soil the atmosphere for settlement, but that the leave to cite for contempt had been extended on 6th June 2012.

17. Mr. Adala argued that contempt proceedings are quasi criminal in nature and a corporation cannot act except through its officers. In this case, the officers were aware of the court orders, and the orders are still valid, subsisting and lawful in form of order No. 2 issued on 17th December 2010; that parties who have disobeyed a court order must be held accountable even if the main petition were to be struck out and dismissed. He therefore asked the court to cite the contemnors to show cause why they should not be held in contempt.

Submissions on Behalf of Mr. Macharia Njeru

18. Senior Counsel, Mr. Muite, presented the case for Mr. Macharia Njeru, one of the directors of the 2nd respondent whom the petitioner sought to commit for contempt and the only one who filed a replying affidavit and submissions. Mr. Muite took the position that since the orders issued on 17th December 2010 by the Court were not severable, the petitioner could not maintain its application, as it sought to do, on the basis of the second order; that the orders were issued pending *inter partes* hearing; that they would only last for 14 days in terms of Order 40(4)(2) and (4) of the Civil Procedure Code and would lapse if not extended, and had lapsed as they were not extended on 24th March 2011.

19. In the written submissions dated 18th September 2012, it is submitted on behalf of Mr. Njeru that he was not made a party to the proceedings and the orders of 17th December 2010 could not possibly be directed at a person who was not a party to the proceedings; that he had never been personally served with the said orders; that he could not be said to be in disobedience of a court order when the orders did not direct him to do or refrain from doing anything; that he had ceased to be a director of the respondent on or about 9th July 2012; that in any event under section 9 of the Kenya Airports Authority Act, Cap 395 Laws of Kenya, the control and management of the 2nd respondent was vested in the Managing Director and as a director, he had no power to act on any terms of the court order of 17th December 2010 even if it had been directed at him.

2nd Respondent's Submissions

20. The 2nd respondent's position as presented by Learned Counsel, Mr. Moya and as contained in the replying affidavit sworn by Ms. Joy Nyaga, the 2nd respondent's corporation secretary, falls in three parts.

21. Their first argument was that neither the 2nd respondent nor its directors or lawyers were served with the application dated 23rd March 2011. The actions of the petitioner are mischievous and in bad faith as the 2nd respondent's advocates were on record as at the 23rd of March 2011 and were in court with the petitioner's counsel when a consent order was recorded on 24th March 2011. The petitioner is therefore guilty of concealing material facts to the court and its application was therefore scandalous and an abuse of the court process.

22. The 2nd respondent also took the position that there are no orders in place capable of being

disobeyed; that the orders of 17th December 2010 were interim orders issued *ex parte* and which were to remain in force until 24th March 2011 when the chamber summons application dated 16th December 2010 was to be heard *inter partes*; that on 24th March 2011, the parties recorded a consent order with regard to the hearing of the application but there was no extension of the interim orders, and that therefore the interim orders of 17th December 2010 lapsed on 24th March 2012; that in any event, the orders could not be in force for longer than fourteen (14) days unless extended by the court. The 2nd respondent relied on the case of **National Social Security Fund -v- John Ochieng Opiyo Civil Appeal No. 510 of 2005** where Mutungi J held that a court cannot validate orders which have ceased to exist.

23. Finally, it was the 2nd respondent's contention that the orders made on 17th December 2010 were incapable of performance; that there is no conservatory order that is mandatory in nature and the orders sought to compel the 2nd respondent to undo what had already been done, namely that the subject premises had already been demolished, a fact which had been admitted by the petitioner in its affidavit in support of its petition, and the premises were occupied by members of the public and international visitors, and that Order No. 2 which the petitioner alleged had survived was part of a composite order which was incapable of being complied with in the absence of the other orders.

24. The 2nd respondent also took the position that the failure by the petitioner to prosecute its application which had been filed more than a year before under certificate of urgency was inexcusable. They relied on the decision of Kimaru, J in **Peris Wanjiku Njuguna -v- Kenya Commercial Bank Ltd & 3 Others Nakuru Civil Suit No. 399 of 2000**, where the court declined to commit the defendant to civil jail for contempt of court on the basis of *ex parte* orders obtained over one year earlier.

Determination

25. Mr. Adala for the petitioner based his application for contempt on order 2 of the orders issued on 17th December 2010, having in effect conceded, by his application dated 25th September 2012 seeking re-instatement of the orders of 17th December 2010, that the said orders had lapsed.

26. This application therefore turns, in my view, on whether order no. 2 in the orders of 17th December, 2010 was capable of severance and survival after the expiry of the period during which the orders were to be in force, and if it did survive, whether there is any basis for citing the 2nd respondent and its directors for contempt in the circumstances of this case and at this point in time.

27. The order which the petitioner bases its application on was issued on 17th December 2010 and was in the following terms:

(ii) That a conservatory order be and is hereby issued by way of mandatory injunction, directing and compelling the respondents whether by themselves, their officers, agents and/or servants or employees or any other government officers or authorities to forthwith vacate all the premises occupied by the petitioner under the petitioner's leases dated 5th March 2007 and 14th September 2007 that were seized, occupied and or demolished and or ruined areas which are shown in red in the plan annexed to the supporting affidavit as MN-8 being part of the petitioner's premises by the 2nd respondent on Saturday and Sunday, the 4th and 5th December 2010 at Jomo Kenyatta International Airport namely its Gold Shop at Unit 2, Club Class Shop Lounge at Unit 2, Unit 2 Main Shop, Crew Shop near Gate 4, Corner Shop at Unit 1, Unit 1 Main Shop, Feeder Warehouse near Gate 14 and Feeder Warehouse at arrivals Unit.'

28. It has been argued for the 2nd respondent and Mr. Macharia Njeru that the orders of 17th December 2010 were composite orders, that they stand together and were all issued pending *inter partes* hearing on 24th March 2011. Can it be properly said that all the other orders issued on 17th December 2010 lapsed but left order no. 2 standing?

29. No basis has been shown by the petitioner for this contention, but a consideration of the orders issued by the court leads to the inescapable conclusion that they were composite orders, and one could not properly argue that the 2nd respondent could be compelled to obey one and not the others. Order no. 3 required re-instatement of the petitioner to the subject premises, while orders no. 4 and 5 prohibited the carrying out of further demolition of the premises or termination of the petitioner's leases respectively.

30. While the orders are termed '**conservatory orders**', (and this court has grave reservations about issuance ex parte, of mandatory conservatory orders which are, in effect, final in nature) they are, in my view, mandatory injunctions which, when considered against the provisions of Order 40 rule 4(2) of the Civil Procedure Rules, make the petitioner's contention that order 2 survived and can be the basis of contempt proceedings untenable. The rule provides as follows:

'an ex parte injunction may be granted only once for not more than fourteen days and shall not be extended thereafter except once by consent of parties or by the order of the court for a period not exceeding fourteen days'.

31. The petitioner has conceded that the orders were not extended. It has attempted to argue at paragraph 9-11 of its submissions dated 25th September 2012 that its Counsel had orally applied for the extension of the orders but that the court had inadvertently failed to record the extension.

32. With respect to Learned Counsel for the petitioner, the court record does not bear this out. I have set out elsewhere in this ruling the consent orders recorded on the 24th of March 2011. I note from the court record that it was Mr. Adala who told the court that "**We have a consent to record**" and then proceeded to read the consent, which the court recorded. The consent order is then signed by Mr. O.M.T. Adala for the Petitioner, Mr. Bosire Peter, State Counsel, and Mr. Paul Wanga for the 2nd respondent. Had there been an intention to extend the orders, nothing would have been easier than for Mr. Adala to have ended the consent order with an order for extension of the orders of 17th December 2010.

33. I cannot therefore find any basis for the application dated 13th June 2012 to cite the 2nd respondent and its directors for contempt. As the orders had lapsed and not been extended, there was no basis on which the application for contempt could be brought. Further, the petitioner had no interest in prosecuting its application *inter partes*, and its application dated 13th June 2012, coming more than a year after the alleged orders were issued and lapsed, seems to me to be an abuse of the court process similar to the situation in **Peris Wanjiku Njuguna –v- Kenya Commercial Bank Ltd & 3 Others (supra)**

34. In the circumstances, I find no merit in the application dated 13th June 2012 and the same is hereby dismissed with costs to the 2nd respondent and Mr. Macharia Njeru.

Dated Delivered and Signed at Nairobi this 22nd day of November 2012.

**MUMBI NGUGI
JUDGE**

Ruling delivered in open Court in the presence of

Kazungu – Court Clerk

Mr. Adala instructed by Odhiambo M.T Adala Advocates for the petitioner

Mr. Moya instructed by the firm of Waweru Gatonye Advocates for the 2nd respondent

Mr. Muite SC instructed by the firm of Macharia Njeru & co. Advocates for the interested party

**MUMBI NGUGI
JUDGE**