



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

CIVIL CASE NO. 23 OF 1999

**ROY M. GONTIER (T/A LIGHT AVIATION
ENGINEERING).....PLAINTIFF**

V E R S U S

KENYA AIRPORTS

AUTHORITY.....DEFENDANT

R U L I N G

This is an old suit filed in 1999. The Plaintiff pleaded that he was the Defendant's month-to-month tenant in the business premises the subject of the suit. He further pleaded that the Defendant unilaterally and arbitrarily increased the monthly rent. The Plaintiff refused to pay the increased rent and insisted on paying the old rent. On its part the Defendant refused to accept the old rent. The Plaintiff therefore complained to the Business Premises Tribunal.

The Plaintiff further pleaded that before the tribunal could hear his case the Defendant locked up the premises, prompting the Plaintiff to come to this court. He sought various reliefs in the plaint, including mandatory injunction to compel the Defendant to open the premises, an appropriate permanent injunction and damages.

Together with the plaint, the Plaintiff filed an application for various orders, including temporary mandatory injunction. That application was heard by Mboghli-Msagha, J. In a ruling dated and delivered on 11th March, 1999, the prayer for mandatory injunction was allowed. The learned judge was satisfied that there were exceptional circumstances to justify the mandatory order sought. He stated as follows:-

“And so, the status quo that should be in place is that which existed before the dispute was referred to the Tribunal. That is so to say, the Plaintiff shall take possession of the suit premises in line with the terms then existing until the dispute is resolved.

In the end the Plaintiff's application succeeds. Possession shall be handed over within 7 days of service of this order upon the Defendant. The Plaintiff shall have the costs of this application. Order accordingly. "

The record of the court shows that not much happened thereafter towards hearing of the suit until 29th November, 2010 when hearing commenced before Sitati, J. It appears that the Plaintiff was still under cross-examination when hearing was adjourned to 24th and 25th January, 2011. In the meantime Sitati, J proceeded on transfer to another station and further hearing did not take place.

On 10th February, 2011 the Plaintiff filed an application by **notice of motion of the same date** seeking the main order that the Defendant's statement of defence be struck out and judgment be entered for the Plaintiff as prayed. The application was opposed by the Defendant by **replying affidavit sworn by one Joy Nyaga filed on 25th February, 2011**. That application has not yet been prosecuted.

Then on 2nd March, 2011 the Plaintiff filed yet another application by **notice of motion dated 25th February, 2011**. That application is the subject of this ruling. Three main orders are sought as follows:-

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2. THAT the current Directors of the Defendant/Respondents herein be arrested and committed to Civil Jail forthwith for a period of not more than 6 months together with a fine for disobeying the orders of the Hon. Mr. Justice Mbogholi Msagha, given in favour of the Plaintiff herein on the 11th march, 1999 to the detriment of the Plaintiff/Applicant.

3. THAT the Defendant/Respondent herein be fined heavily as punishment for disobeying the orders of the Honourable court given in favour of the Plaintiff/Applicant on the 11th March, 1999.

4. THAT the Commissioner of Police be ordered to assist the court in arresting the Directors of the Defendant for purposes of committal to jail for being the contempt of court.

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The application is stated to be brought under **sections 3A, 1A and 1B** of the **Civil Procedure Act, Cap 21** and **Order 40, rules 3 and 5** of the **Civil Procedure Rules. Article 159** of the Constitution has also been invoked. There is a supporting affidavit sworn by the Plaintiff.

The Defendant has opposed the application as set out in a replying affidavit sworn by one **Joy Nyaga** and filed on 9th March, 2011.

At the hearing of the application there was no appearance for the Defendant despite service. Only the Plaintiff was thus heard upon the application.

I have read the supporting and replying affidavits. I have also given due consideration to the submissions of learned counsel for the Plaintiff. No authorities were cited.

There is an immediate problem that presents itself regarding this application. The order alleged to have been disobeyed was granted on **11th March, 1999**. That is **more than more than 12 years ago**. The injunction granted in that order was mandatory. It required the Defendant to restore the Plaintiff into the suit premises immediately. The material now before the court indicates that there was no such restoration of the Plaintiff into possession.

But why has it taken 12 years for the Plaintiff to come to court and complain of disobedience of the order?

Learned counsel for the Plaintiff, Mr. Ngoge, in answer to a question asked by the court, stated that there was no explanation in the supporting affidavit for the very long delay in complaining about the alleged contempt. He further stated that there was no need for such explanation because the contempt was “continuing”.

Surely, if an order of the court is being flouted, and which order was issued in your favour, does it not behove you to immediately report to court the contempt in order to uphold the authority and dignity of the court? If you wait for twelve years, it must mean one or two things. Either there was no contempt as alleged, or that you condoned or acquiesced in the contempt, in which case you would be no better than the contemnor!

In the replying affidavit the Defendant says that it is the Plaintiff who has consistently failed to take possession of the premises. It denies that it is in contempt of the order of the court. The Defendant complains that all these years the premises have remained unoccupied and it is losing income by way of rent.

The Plaintiff’s position is that the Defendant has tried to impose a condition for restoring him into possession, that condition being that it demands that the parties do execute a new lease.

The net effect of the long passage of time is that the Plaintiff has not benefited from the order issued in his favour twelve years ago. He has waited, without satisfactory explanation, twelve years to come back to court to enforce the order. In the meantime the Defendant’s premises have remained unoccupied, and it is not earning any income from it which otherwise it ought to be earning.

This stand-off cannot be left to fester forever. It will not be of benefit to any of the parties in the end. The best way forward is for the suit to be heard to conclusion so that the respective rights of the parties can be finally determined and the matter closed. The parties themselves appear to have adopted this approach; that must be why they commenced hearing of the action before Sitati, J.

It will be retrogressive and not in the interests of justice to revisit a temporary mandatory injunction that was issued twelve years ago, and which the Plaintiff has not bothered to enforce all that time.

Sections 1A and 1B of the Civil Procedure Act, Cap 21 demand that I make such order as will further the overriding objective of the Act and rules made thereunder. That objective is **to facilitate the just, expeditious, proportionate and affordable resolution of the dispute** in this suit. I must point out that under subsection (3) of section 1A the parties herein and their counsels are under a duty to assist the court to further the aforesaid overriding objective.

I hold that the overriding objective stated above will not be served by trying to enforce a temporary order

made twelve years ago in favour of the Plaintiff, and which order the Plaintiff has not bothered to enforce until now.

I do not deem it necessary to dwell on the other issues raised in this application.

In the circumstances, I will refuse the application. The same is hereby dismissed with no orders to costs. It is so ordered.

DATED AT NAIROBI THIS 26TH DAY OF MAY, 2011

H.P.G. WAWERU
JUDGE

SIGNED AND DELIVERED THIS 27TH DAY OF MAY, 2011