



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

(Coram: Ojwang, J.)

CIVIL CASE NO. 278 OF 2010

GLOBAL OUTDOOR SYSTEMS (K) LTD.....PLAINTIFF/APPLICANT

VERSUS

THE MUNICIPAL COUNCIL OF MOMBASA.....DEFENDANT/RESPONDENT

RULING

The plaintiff came before the Court by Notice of Motion dated and filed on **14th December, 2010**, brought under s.5(1) of the Judicature Act (Cap. 8, Laws of Kenya), and Orders XXXIX, Rules 2A (2) & 9 and L, Rule 1 of the Civil Procedure Rules.

The relevant prayers were thus set out:

- (i) the Town Clerk of the respondent, who for the time being is one Tubmun Otieno, be cited for contempt of Court, as the respondent has blatantly disobeyed the Orders made by the Honourable Justice Fred Ochieng on 12th August, 2010 and later extended by this Court from time to time and which orders are still in force;***
- (ii) the Honourable Court be pleased to order that the said Town Clerk of the respondent be appropriately punished for contempt, including by being detained in prison for such term as is deemed fit;***
- (iii) in the alternative, this Court do order that the property of the respondent be attached for such period as it may deem fit and thereafter, sold if the disobedience of the Court's order persists at the end of the attachment period;***
- (iv) the Court be pleased to make any other order as it deems fit and just, to punish the blatant contempt and disregard of its orders by the respondent;***
- (v) the applicant be awarded costs;***

(vi) the applicant be granted any other relief such as this Court may deem fit.

The applicant has set out the grounds that found the application, and attached supporting evidence in the form of an affidavit sworn by **Graham Martin Nundy**, the General Manager of the plaintiff, on **14th December, 2010**. The said grounds run as follows:

(i) pursuant to the applicant's application by Chamber Summons dated 12th August, 2010 Mr. Justice Fred Ochieng issued interim injunctive Orders on 12th August, 2010 and these have been extended from time to time, and remain in force to-date;

(ii) the said Orders inter alia restrained the respondent by injunction from tearing down or in any way interfering with the applicant's billboards within its jurisdiction, one such billboard being located at the Buxton-Nyali Bridge area, which billboard measured 6 metres by 12 metres;

(iii) the Court's Orders were duly extracted by the Court, and indorsed with a penal notice and: a certified copy thereof duly served upon the respondent, duly acknowledged by the Town Clerk's Registry on 12th August, 2010; the respondent entered appearance in this suit, and the Town Clerk of the respondent, one Tubmun Otieno on 23rd September, 2010 in full knowledge of the Orders, swore a replying affidavit in opposition to the application of 12th August, 2010 and the said application is pending hearing and determination before this Court;

(iv) notwithstanding the foregoing, the respondent has alienated the applicant's billboard at Buxton-Nyali Bridge to a third party who has constructed a billboard at the said location and rendered it impossible for the applicant to sustain a 6 metre by 12 metre billboard upon the site;

(v) the respondent is well aware of the effect of its actions, and this is a blatant defiance of the orders of the Court;

(vi) in the result, the respondent is in wilful and blatant contempt of the Court's orders;

(vii) the Town Clerk of the respondent, for the time being, one Tubmun Otieno, is fully responsible for the actions of the respondent including its contemptuous disregard of the Court's Orders;

(viii) as a result of the aforesaid wilful disobedience and contempt of the Orders, the applicant is faced with enormous loss and damage;

(ix) the applicant has no other means of enforcing this Court's Orders and, unless the Court intervenes and enforces its own Orders, the applicant will continue to be greatly prejudiced, and to suffer incalculable loss and damage;

(x) in the interests of justice, and for the purpose of upholding the dignity and honour of this Court, the Orders sought herein ought to be granted.

When this matter came up before me on **25th March, 2011** learned counsel, **Mr. Marete** stated that, during an earlier appearance, on **4th March, 2011** before **Mr. Justice Ibrahim** counsel for the respondent, **Mr. Lumatete** had intimated that his client was willing to co-operate in finding a solution to the problem at the root of the contempt application; and the Court gave an opportunity for such a solution to be arrived at. Counsel for the applicant, upon apprehending failure in initiatives towards a solution, had requested a date for the hearing of the contempt application. **Mr. Marete** indicated that the state of contempt of Court orders was continuing; and so he asked for his client's application to be heard.

Ms. Wanjeri, who on that occasion represented the respondent, indicated that there had been an agreement for the parties to make a joint - visit to the *locus in quo*, and the respondent was still ready for the visit to be made. **Mr. Marete**, on the contrary, expressed concern that the respondent was causing delay, by not making proper arrangements for the scene visit.

The application was heard before me on **6th April, 2011**, **Mr. Marete** urging that the respondent be punished for contempt of the orders of the Court. Counsel showed an example of the said contempt by referring to the applicant's billboard at the Buxton/Nyali Bridge area: the billboard, which measured 12 metres by 6 metres, was being torn down. Counsel urged that, as **Mr. Tubmun Otieno**, the Chief Officer of the respondent had sworn an affidavit in reply to the applicant's initial application, leading to the Court Orders of **12th August, 2010** it followed that the respondent was aware of the Orders made; but the respondent thereafter allowed third parties to encroach upon or alienate the plaintiff's billboard space which was already the subject of injunctive orders.

Counsel relied on a decision of this Court on a contempt matter, **Wildlife Lodges Ltd. v. County Council of Narok & Another** [2005] 2E.A. 344 in which it was held (at p. 344) that "*the whole purpose of litigation as a process of judicial administration is lost if Court orders are not complied with*".

Learned counsel submitted that, under Order 40, rule 3 of the new Civil Procedure Rules, 2010 the Court which grants injunction may order attachment of the property of any person found guilty of disobedience, and may order imprisonment for up to six months.

Learned counsel urged that the plaintiff had established its case, and invited the Court to make a visit to the *locus in quo* for the purpose of verifying the state of affairs.

In his response, learned counsel, **Mr. Lumatete** contested the averment that the defendant had disobeyed the Court order of **12th August, 2010**, and urged that there was "*no need to punish the defendant/respondent for contempt*". Counsel stated that "*the defendant is ready and willing to ensure they [the plaintiff] have the [billboard] space*". Counsel urged that the application be dismissed, for "*it is a very simple matter that can be solved by the parties going to the site, and thereafter a report can be filed in Court, and the matter rests*".

Upon hearing both counsel, this Court made orders on **6th April, 2011** for a visit to be made to the *locus in quo* in the presence of the High Court's Deputy Registrar and attended by the Town Clerk, Mombasa and counsel on both sides. The purpose of the visit was stated as, to inspect the billboard, ascertain its condition and take a record regarding any violation of the applicant's space.

The visit was conducted as scheduled, on **12th April, 2011** in the presence of the Deputy Registrar, **Mr. T. M. Gesora**, and attended by: **Mr. Kithindi Marete** (Counsel for the plaintiff); **Mr. Lumatete Muchai** (counsel for the defendant); **Mr. Graham Nundy** (plaintiff's General Manager); **Mr. Tubmun Otieno** (respondent's Town Clerk); **Mr. Nahashon Kimuyu** (Mombasa Municipal Surveyor); **Mr. Martin Odhiambo** (Mombasa Municipal Valuer); **Mr. Venant Mwashuma** (Advertisements officer, Mombasa Municipal Council); **Mr. S. Wasamu** (Court Clerk); **Mr. Said Khamis** (Audit Department, Mombasa Municipal Council); **Mr. Johari Juma** (Audit Department, Municipal Council of Mombasa).

The Deputy Registrar filed his Report, the material part of which reads as follows:

“I.....[made] a visit to the place [where] the plaintiff’s billboard had been. The location is at the junction of the road from the general direction of Coast Provincial General Hospital that joins the main Mombasa - Malindi Highway just before the Nyali Bridge.....”

“At the site, I observed as follows:

- 1. where the plaintiff’s billboard is said to have stood, three thick metal stumps, i.e. the pillars said to have been holding the billboard, were cut, about ½ ft above the ground, and stumps left in the ground.***

- 2. There is a billboard to the left of these stumps, as one faces the Tudor Area, that overhung the last stump by a distance of 1.6 metres (measurement was done by tape-measure supplied by the Municipal Surveyor).***

- 3. Between the stump on the left and the middle stump, there is a hole, about 1 x 1 x 2 metre, and another between the middle stump and the one on the right.***

- 4. There are also other stumps behind the first ones also said to have been for a previous billboard.***

- 5. Between the billboard to the left of the stumps and the one on the right, there is a space of about 12.5 metres.***

“After all these observations were [recorded], parties were satisfied and we left the location”.

Thereafter, on **14th April, 2011** learned counsel, **Mr. Marete** and **Mr. Lumatete** appeared before me, and acknowledged the said visit at the **locus in quo** to have taken place as directed by the Court. **Mr. Lumatete** said: ***“The report from the scene represents the correct position”***; to which **Mr. Marete** responded: ***“I have no problem with the factual findings”***.

Mr. Marete submitted that the first finding made by the learned Deputy Registrar, vindicates the plaintiff’s assertion: the applicant’s billboard has been encroached; there is a third-party billboard overhanging the previous one; and the Court’s order protecting the earlier billboard was to be obeyed. Learned counsel, **Mr. Lumatete**, by contrast submitted that the respondent had given space to the applicant but not a right to land; and consequently, the billboards said to be encroaching, were not evidence of failure of duty on the part of the respondent.

Mr. Marete submitted that the respondent had unlawfully torn down the applicant’s billboard at the Buxton-Nyali Bridge site, and this billboard was covered by the Court’s Orders of **12th August, 2010**. After the Orders of **12th August, 2010** together with the relevant application had been served upon the respondent’s Town Clerk, the respondent entered appearance, and the Town Clerk personally swore a replying affidavit on **23rd September, 2010**. Counsel urged that, ***“as though to mock any eventual outcome of the 1st application or the underlying suit, and in complete disregard of the Order of Justice Ochieng, the respondent has allowed a third party to erect a billboard at the Buxton-Nyali Site, which used up the entire site previously occupied by the applicant’s Buxton-Nyali billboard”***.

Counsel submitted that the respondent has not only disobeyed Court orders, but has rendered ongoing proceedings moot, because “*regardless of the outcome of the same, even in the event ...the Buxton-Nyali billboard is to be restored, there will be no space to erect it and hence the Court will have acted in vain*”.

Counsel submitted that all that the applicant must do under Order XXXIX, rule 2A (now **Order 40, rule 3(2)**) of the Civil Procedure Rules is to demonstrate that the injunction issued by the Court has been breached, or disobeyed; and in this case the disobedience is manifest.

Learned counsel, **Mr. Lumatete’s** submissions were focused on the **merits of the respondent’s action** of tearing down the plaintiff’s billboard, which matter is the subject of the Town Clerk’s affidavit of **23rd September, 2010**. The deponent, in those depositions, avers:

“THAT contrary to the allegations made in its said affidavit the plaintiff has not complied with the terms and conditions pertaining to issuance of permits for putting up the billboards and in particular the plaintiff is highly irregular in paying the annual fees payable in respect of the said billboards”.

Counsel, on that score, submitted: “*The defendant avers and contends that it was entitled to remove the plaintiff’s advertisement if [the plaintiff] owed it money in licence-fees arrears*”, in the terms of the permit-application regulations. Counsel further urged: “[*The defendant*] had every right as per the said clause 8 of the terms/conditions of the permit granted by it to the plaintiff, to remove the contested billboard”. The plaintiff had not, it was urged, met the principles set out in **Giella v. Cassman Brown & Co. Ltd.** [1973] E.A. 358 for the grant of an interlocutory injunction. Counsel further urged:

“.....in view of [the] non-payment of due licence fees for the said 2nd and 3rd quarters of year 2010 the plaintiff had no inkling of a right to seek restraining orders against the defendant, more so when the defendant was acting within its right as per the terms of the permit in removing the said billboard (for non-payment of fees); thus the plaintiff’s application is brought with tainted and unclean hands and in bad faith contrary to principles governing [the] grant of equitable relief”.

Counsel have argued this matter at cross-purposes: the plaintiff arguing its later application (Notice of Motion of **14th December, 2010**), concerned solely with the question of **contempt of Court**; the defendant arguing the plaintiff’s earlier application (of **12th August, 2010**) which led to the **ex parte** orders made by **Mr. Justice Ochieng**, in favour of the plaintiff, during the Court Vacation session of **12th August, 2010**.

The said Orders of **12th August, 2010** were duly made; and so, the plaintiff urges that *if the evidence shows non-compliance with the same, then this Court ought to commit the Town Clerk of the defendant to jail, or exact some equivalent penalty from the defendant, or make some other punitive order.*

This goes to the **strict principle** of the law of contempt, which this Court had the occasion to discuss at length in **Wildlife Lodges Ltd v. County Council of Narok & Another** [2005] 2EA 344-358. The relevant tenor-statement, in that regard, appears at p.354:

“Against this background, I would take the position that consistent obedience to court orders is required, and parties should not take it upon themselves to decide on their own which court orders are to be obeyed and which ones overlooked, in the supposition that [the selective] oversight will not impede the process of justice.”

Counsel for the plaintiff is, in effect, telling this Court: “*On 12th August, 2010 the Court, in an ex parte session, made an Order against the defendant; the defendant was duly served with the Order; the*

defendant is in breach, and so, **must be punished**".

The Order in question, which was subsequently extended from time to time, is brief, and thus states:

"Until 26th August, 2010 the defendant shall be restrained by injunction from tearing down or in any way interfering with such of the applicant's billboards as the applicant has been duly authorized to erect, and for which the applicant has made all the requisite payments".

By focusing his submissions on the merits of the original application (of **12th August, 2010**), **Mr. Lumatete** for the defendant is avoiding the plaintiff's position that, **so long as** the Order of **12th August, 2010** remained on record, the defendant must remain restrained.

I have examined again the Order of **12th August, 2010** and I find it to express itself in **conditional terms**: the defendant is restrained in respect of structures for which **"the applicant has made all the requisite payments"**. The effect, logically, is that the said Order **accords the defendant exception**, if the applicant has not made all the requisite payments.

Has the plaintiff made **"all the requisite payments"**? On this point, the parties have **different accounts**; and since these are matters of **fact**, the Court must hear the **evidence** – a matter that belongs to the **full trial**. This would explain, I think, the defendant's preoccupation with the **merits of the case**, as these emerge from the plaint and from the substantive application of **12th August, 2010**.

It is against this background that the plaintiff's application on the basis of perceived contempt, must be seen. So long as the Court has not arrived at clear perceptions on **fact and merit**, it means the foundation of the contempt application is not secure; and since contempt orders have their impacts on **personal liberties**, it is to be held that committal orders cannot, in this instance, be made. The current primary source of this Court's jurisdiction is the **Constitution of Kenya, 2010**, Article 20 of which thus provides:

"(1) The Bill of Rights applies to all law and binds all State organs and all persons.

.....

(3) In applying a provision of the Bill of Rights, a court shall –

(a) develop the law to the extent that it does not give effect to a right or fundamental freedom;

and

(b) adopt the interpretation that most favours the enforcement of a right or fundamental freedom."

It is not only **personal freedoms** that are protected under the Constitution; but **property rights** too, are protected.

Although it is clear that the Court is a core agency in the fulfilment of the rights provided for in the Constitution, and so the law of contempt is essential for guaranteeing its binding authority, the assertion of its authority must be founded on a consideration of the **merits of each case**.

Merits, in the instant case, will ultimately emerge from a hearing of the suit-by-plaint dated **12th August**,

2010; though at the interlocutory stage, the plaintiff's Chamber Summons of **12th August, 2010** shall be listed for ***inter partes*** hearing on the basis of priority.

The costs of the Notice of Motion of **14th December, 2010** shall be borne by the plaintiff/applicant.

Orders accordingly.

SIGNED at MOMBASA

J. B. OJWANG

JUDGE

DATED and DELIVERED at MOMBASA this 1st day of *July, 2011.*

M. A. ODERO

JUDGE