



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Case 551 of 2009

KENYA ANTI-CORRUPTION COMMISSION.....PLAINTIFF/APPLICANT

VERSUS

GEMINI PROPERTIES LTD.....1ST DEFENDANT/RESPONDENT

JAMES RAYMOND NJENGA.....2ND DEFENDANT/RESPONDENT

ZABLON AGWATA MABEA.....3RD DEFENDANT/RESPONDENT

BARCLAYS BANK OF KENYA.....4TH DEFENDANT/RESPONDENT

RULING

1. This ruling is in respect of the Plaintiff's Notice of Motion application dated 13/01/2010. The application which is expressed to be brought under Sections 3A and 63(c) of the Civil Procedure Act and Order XXXIX Rules 2A(1) and (2) of the Civil Procedure Rules seeks orders, inter alia that the 1st Defendant's Directors and or officers to wit Madatali Chatur and Hussein Chatur and Rahim Chatur, be detained in prison for six months or for any other period that this Honourable Court deems fit. The Applicant also prays that costs of the application be in the cause.
2. The application is based on the grounds, inter alia, that the 1st Defendants Directors are in contempt of this court's temporary order issued on 17/12/2009 which order restrained the 1st and 4th Defendants and/or their servants from dealing with the suit property in any manner whatsoever until 31/12/2009 when the application dated 15/12/2009 was to be heard interpartes. The Plaintiff says that in defiance of the said order of 17/12/2009, the 1st Defendant's directors have since leased two shops to tenants, and that the 1st Defendant's directors have continued to disobey this court's order from the moment they were served to date.
3. The application is also premised on the supporting affidavit sworn by **John Wainaina Muturi**, an investigator with the Plaintiff herein. The deponent says he is a gazetted police photographer pursuant to the provisions of the Evidence Act, Cap 80 Laws of Kenya. Mr. Muturi says in his affidavit that he visited the suit premises on 23/12/2009 in the company of other investigators and found people carrying out construction thereon and that on enquiring from the people who were working on site, he (Mr. Muturi) was informed that it was the named directors of the 1st Defendant who had given the instructions to the construction workers to carry out the construction.

Mr. Muturi depones as follows at paragraph 7 of his supporting affidavit –

*“7. **THAT** I, together with my colleagues walked in the whole building and confirmed that no tenant had taken up the over 70 spaces in the suit property. That the only prospective tenant whom we found on the suit property was putting up shelves for intended supermarket.”*

4. Mr. Muturi has also deponed at paragraph 10 of his supporting affidavit that Mr. Derek K. Ndonge, advocate for the 1st Defendant confirmed to him (Mr. Muturi) that it was the said Mr. Ndonge who had advised the 1st Defendant to

continue with the partitioning of the building and leasing of the suit property. Mr. Muturi also deponed that on 12/01/2010 and 13/01/2010 he confirmed that the "intended supermarket" spoken of in paragraph 7 of the affidavit (above) was now operational under the style and name of **Fun and Shop**.

5. The background to the instant application is found in the filing of this suit on 30/10/2009. Apart from an application filed contemporaneously with the plaint on 30/10/2009, the Plaintiff filed another application dated 15/12/2009 seeking interim orders of injunction pending the hearing interpartes of the main application dated 29/10/2009. The said application was fixed for hearing on 14/12/2009. The court issued the interim order prayed for on the 17/12/2009. The interim order was to last until 31/12/2009; but on the 31/12/2009, the interim order of injunction granted on the 17/12/2009 was extended to 19/01/2010 when the matter was slated for mention before this court.
6. The application is opposed. The Respondents filed three (3) Replying Affidavits by Madatali Chatur, Derek K. Ndonge and Hussein Chatur, all of which affidavits are dated 20/01/2010. Mr. Hussein Chatur denies that he is a Director or officer of the 1st Defendant. He also says that he was never served with the court order which he is alleged to be in contempt of. Mr. Derek K. Ndonge avers that he never visited the suit property on 23/12/2009 as alleged by Mr. Muturi in the supporting affidavit and that he only met some two gentlemen at the offices of Mr. Madatali Chatur at Diamond Plaza on that same 23/12/2009. He says that the two gentlemen were accompanied by one of the 1st Defendant's tenants whose business had apparently been closed by the two gentlemen. Mr. Madatali Chatur depones that Hussein Chatur is neither a director nor officer of the 1st Defendant. Mr. Madatali also denies that he has disobeyed any court order. Paragraph 6 – 10 of Mr. Madatali Replying Affidavit read as follows:-
 6. ***THAT*** upon service of the Plaintiff's application dated 15/1/2010 upon the 1st Defendant, I realized that the orders which were similar to the orders earlier obtained by the plaintiff on 2/11/2009 and were incapable of compliance due to what had had taken place on the suit property since the year 1978, when the 1st Defendant took possession of the property.
 7. ***THAT*** for the reason that the 1st Defendant was already in possession, of the suit property, had leased out, had let out, charged and was in place dealing with the property as lawful owner, I instructed the advocates on record to proceed urgently and seeking the discharge of such orders.
 8. ***THAT*** I am aware that an application was made on behalf of the 1st Defendant on 24.12.2009, seeking to discharge the said orders and was certified urgent by the court. The same is scheduled for hearing on the 19.1.2010.
 9. ***THAT*** both my co-directors and I respect court orders of whatever kind and cannot willingly disobey the orders herein, if the same are capable of being complied with on our part.
 10. ***THAT*** the Applicant having conceded that the suit premises is already charged, leased and the 1st Defendant is already in possession even before it filed this suit cannot turn around and purport that the events complained of have occurred between 17.12.2009 and 13.1.2010.
7. In essence, Mr. Madatali Chatur says that the orders of 17/12/2009 could not be obeyed by him and his co-director because those orders were similar to earlier orders made on 2/11/2009, and secondly because of what Mr. Madatali says had taken place on the suit premises. Mr. Madatali also says that the deponent of the supporting affidavit lied when he said that there were no tenants in the suit premises as at 23/12/2009.
8. Counsel appearing for both sides made oral submissions. Mr. Angote reiterated the averments in the supporting affidavit by Mr. Muturi and the grounds on the face of the application. M/s Mwangi Kigotho and Mr. Kioko appeared for the Respondents. Learned counsel for the 1st Defendant cross examined Mr. Muturi on his supporting affidavit. The following points came out of the cross examination:-
 - that Mr. Muturi swore his affidavit before Mr. Angote, counsel for the Plaintiff and not before Mr. Caleb Jaoko who, Mr. Muturi said he has never met
 - that the 2nd set of photographs referred to in Mr. Muturi's supporting affidavit were taken by some unnamed New Muthaiga Residents
 - that the Affidavit in Support by Dedan Okwama does not say that the 3 directors of the 1st Defendant were personally served.
9. The Respondents counsel raised the following points in opposition to the Plaintiff's application:-

- (a) that the application giving rise to the orders of 17/12/2009 was incompetent as the same had been brought under the wrong procedure, namely bringing the application as a Notice of Motion instead of bringing it as a Chamber Summons
- (b) that the instant application is supported by an invalid affidavit sworn by Mr. Muturi who admitted that he did not swear the affidavit before Mr. Caleb Jaoko as indicated thereon but that he (Muturi) swore the affidavit before Mr. Victor A. Angote, counsel for the Plaintiff
- (c) that Mr. Muturi's affidavit is invalid in that he (Muturi) cited no law giving him authority to take photographs to be used in civil matters
- (d) that service of the court order complained of was not effected upon the directors sought to be punished for contempt
- (e) that the service, if any, that was allegedly effected on 19/12/2009, which date fell on a Saturday was no service at all pursuant to order 49 Rule 8(2) of the Civil Procedure Rules which reads:-

“8(2). Service shall **normally** be effected on a weekday other than Saturday and before the hour of five in the afternoon.” (emphasis provided)

- (f) that there is no evidence on record to show when the purported disobedience took place.

10. Just like Mr. Angote for the Plaintiff/Applicant, counsel for the Respondents cited a number of authorities which have been considered by the court. In reply to submissions by counsel for the Respondents, Mr. Angote submitted as follows:-

- (i) that there is no anomaly with the application dated 15/12/2009 because the order granted by this Honourable Court on 17/12/2009 was pursuant to prayer number 2 of the Plaintiff's application dated 29/10/2009, which application was brought correctly under O 39 of the Civil Procedure Rules
- (ii) that Mr. Muturi's affidavit is properly commissioned since there is no denial by Mr. Caleb Jaoko, advocate that he (Jaoko) signed the affidavit. Mr. Angote urged the court to consider order XVIII Rule 7 of the Civil Procedure Rules and to accept Mr. Muturi's affidavit “notwithstanding any defect by misdescription of the parties or otherwise in the title or other irregularity in the form thereof” or in the alternative the court should accept the sworn evidence given by Mr. Muturi under section 62 of the Evidence Act, Cap 80 Laws of Kenya
- (iii) that it is admitted by the Respondents that service was effected, and that in light of the holding in the case of **Dina Bhoke Makini –vs- Jackson Ngechu Makini t/a Makini Herbal Clinic – Nrb HCCC No. 608 of 2004** (unreported), once a party is aware of the orders of the court, and notwithstanding lack of personal service, the Respondents should be found liable in contempt and appropriately punished. (Also see **Moses P.N. Njoroge & Others vs Reverend Musa Njuguna & Others – Nkr HCCC No. 247 of 2004**)
- (iv) that all that is required in terms of personal service is knowledge of the existence of the court order by the contemnor (see **Leonard Njoroge Kariuki –vs- Muoroto Thuita Investment – Nrb HCCC No. 1872 of 2001**).
- (v) that there is no rule prohibiting service on a Saturday, and that pursuant to order XLIX Rule 8(3) of the Civil Procedure Rules, the service on Saturday could be deemed to have been effected on the following Monday.

11. I have now considered the various objections raised by the Respondents against the Applicants application. The first objection is that the order which is the subject of the Plaintiff's application dated 13/01/2010 is invalid because the application giving rise to the said order was incompetent. The application being referred to by the Respondents is the Plaintiffs Notice of Motion dated 15/12/2009. The Respondents contend that the said application ought to have been brought by way of a Chamber Summons and not by way of Notice of Motion.

12. In response to the first objection, counsel for the Plaintiff contend that there is no anomaly with the application dated 15/12/2009 since the order issued by the court on 17/12/2009 was pursuant to prayer 2 of the Plaintiffs earlier application dated 29/10/2009 which application was brought correctly by way of Chamber Summons under Order XXXIX of the Civil Procedure Rules. The view of the court on this objection is that the provisions of Orders VI Rule 12 and Order L Rule 12 of the Civil Procedure Rules and Section 1A of the Civil Procedure Act would and do come to the aid of the Plaintiff in this case. Orders VI Rule 12 and L Rule 12 recognize the overriding objective of the Civil Procedure Act and the duty of the court in this regard is to deal with the real issues in controversy between the parties. The real issue in this instant dispute is whether, firstly there was a valid order issued by this honourable court and secondly whether that order has been disobeyed. For these reasons, the Respondents first point of objection is rejected.

13. The second limb of the Respondent's objection is that the application dated 13/01/2010 is supported by an invalid affidavit sworn by Mr. Muturi, on the ground that the Commissioner of Oaths shown to have commissioned the said affidavit did

not in fact do so. During cross-examination, Mr. Muturi admitted that he signed the affidavit in the presence of Mr. Victor Angote, counsel for the Plaintiff. Counsel for the Respondents argued that the fact of the affidavit not having been sworn before the alleged Commissioner for Oaths renders the affidavit invalid and incompetent and that the same ought to be expunged from the record.

14. Learned counsel for the Plaintiff argued that the Respondent's argument holds no water. He contended that the Respondents have not placed any evidence before the court from Mr. Caleb Jaoko denying that he signed the affidavit as indicated. Citing Order XVIII Rule 7 of the Civil Procedure Rules, Mr. Angote urged the court to accept Mr. Muturi's affidavit "notwithstanding any defect by misdescription of the parties or otherwise in the title or other irregularity in the form thereof". Alternatively, Mr. Angote urged the court to accept Mr. Muturi's sworn evidence under the provisions of Section 62 of the Evidence Act, Cap 80 Laws of Kenya. The considered view of the court is that Rule 7 of Order XVIII of the Civil Procedure Rules provides a wide berth for the court to accept affidavit, evidence, so that an affidavit being used in any suit shall not be rejected by the court because of defects brought about by

(a) *misdescription of the parties*

(b) *misdescription otherwise in the title or*

(c) *other irregularity in the form thereof.*

15. Section 5 of the Oaths and Statutory Declarations Act, Cap 15 Laws of Kenya, states the particulars to be stated in the jurat or attestation clause of any affidavit "which is taken or made" under the Act. The word "take" means among other things to "understand or accept as valid" (see Concise Oxford Dictionary, Eleventh Edition), while the word "make" from which the past tense "made" is derived means, among other things "form by putting parts together or combining substances". In the case of Mr. Muturi's affidavit, the same was "made" before Mr. Jaoko after Mr. Muturi's signature had been witnessed by Mr. Angote, so that on the overall, Mr. Muturi's affidavit is in compliance with the provisions of section 5 of Cap 15 Laws of Kenya and thus qualifies to be accepted by this court in accordance with the provisions of rule 7 of Order XVIII of the Civil Procedure Rules. For these reasons, I find no merit in the second limb of the Respondents objections. The same is dismissed.

16. The third and final and perhaps the most critical objection by the Respondents is that the court order of 17/12/2009 was never served upon the directors sought to be punished for contempt, and in the alternative the Respondents argued that service, if any, effected on 19/12/2009 was no service at all because the 19/12/2009 was a Saturday. The Plaintiff's response to this argument by the Respondents is that the Respondents have admitted by their own affidavits that the orders of 17/12/2009 were served upon them, and that by this admission and on the basis of the holding in the case of **Dina Bhoke Makini –vs- Jackson Ngechu Makini t/a Makini Herbal Clinic – Nrb HCCC No. 608 of 2004** (unreported), once a party is aware of the orders of the court, such a party is presumed to have been served, the lack of personal service notwithstanding Mr. Angote thus urged the court to find that the Respondents were duly served.

17. Regarding the allegedly defective Saturday service, Mr. Angote submitted that there is upon rule under the Civil Procedure Rules prohibiting service, and that in any event, under the provisions of rule 8(3) of Order XLIX of the Civil Procedure Rules, service on a Saturday could be presumed to have been effected on the following Monday.

18. The court has considered the Respondents contention that there was no or no proper service on the Respondents. The authorities that have been cited to court, and in particular the case of **Mitikita –vs- Baharini Farm [1982-1988] 1 KAR 863**, are to the effect that even where there is lack of personal service, a party who is aware of the existence of a court order "should not be allowed to trample this court's orders under the guise of lack of personal service."

19. In the instant case, service of the order is admitted. The only reasons given by Mr. Madatali Chatur for not obeying the order are that –

(i) *the order was similar to an earlier order made on 2/11/2009 and*

(ii) *the order could not be obeyed because of what Mr. Madatali Chatur alleges had taken place on the suit property since the year 1978, when the 1st Defendant took possession*

20. The considered view of the court on this matter of service is that once the directors of the 1st Defendant became aware of

the court order of 17/12/2009, they were under a duty to obey it, whether the order bore resemblance to an earlier order or not and regardless of any other excuses that have been put forward by the Respondents. The directors were to obey the order whether the order was defective or not. It is trite law that a court order must be obeyed until and unless it is set aside. In the supporting Affidavit to the 1st Defendant's application dated 23/12/2009, Mr. Madatali Chatur states at paragraphs 2 and 5 thereof thus:-

("2). THAT the 1st Defendant/Applicant was served with orders granted to the Plaintiff by this Honourable Court on 17/12/2009 restraining the 1st Defendant from alienating, transferring, entering, charging, letting, leasing or taking possession of the property known as LR No. 209/9295 (hereinafter referred to as "the suit property").

"(5). THAT the orders as obtained as against the 1st Defendant are overtaken by events, because just like the first time the Plaintiff obtained orders, events sought to be restrained have already taken place."

In **Halsbury's Laws of England 4th Edition Volume 9** paragraph 65 the authors state the following on enforcement of an order of court

"Where an order requires a person to abstain from doing an act, it may be enforced, notwithstanding that service of a duly indorsed copy of the order has not been served, if the court is satisfied that, pending such service, the person against whom enforcement is sought has had notice of the terms of the order either by being present when the order was made or by being notified of the term of the order, whether by telephone, telegram or otherwise."

21. In this case, I am satisfied that the Questions of the 1st Defendant had notice of the order and they were also admittedly served. The Respondents also contended that the service of the order effected on a Saturday was invalid. My reading of Order XLIX Rule 8 as a whole seems to suggest that service effected on a Saturday could be equated to service effected outside the hours allowed for service, and that the same could be deemed to have been effected on the following Monday. I therefore do not accept submissions by counsel for the Respondents that the service effected on 19/12/2009 was invalid.
22. As regards the inclusion of Mr. Hussein Chatur in the proceedings for contempt, I think that the same is misplaced. There is evidence on record from the Respondents, which evidence is not rebutted by the Plaintiff that Hussein Chatur is neither a director nor an officer of the 1st Defendant. The said Hussein Chatur ought not to have been included in the application for contempt.
23. From the above, the court is satisfied that the directors of the 1st Defendant company, namely M/s Madatali Chatur and Rahim Chatur have continued to disobey this Honourable Court's orders of 17/12/2009 under the guise that the orders were incapable of being obeyed or that the orders were not personally served upon the two.
24. Accordingly, I find the two directors of the 1st Defendant, namely Madatali Chatur and Rahim Chatur in breach of the orders of 17/12/2009. The mere fact that the 1st Defendant had applied, vide the Chamber Summons application dated 23/12/2009 to set aside the said orders of 17/12/2009 did not mean that the orders were not to be obeyed. Those orders were to be obeyed until and unless set aside or vacated by this Honourable Court. The two directors are in contempt of court orders, and the court finds that both directors have undermined the authority and dignity of this court. The court will punish the two directors as follows:-

1. *Each of the two directors, namely Madatali Chatur and Rahim Chatur shall pay a fine of Kshs.300,000/= (Kshs. Three Hundred Thousand Only) in default each will serve a jail term of three (3) months imprisonment in civil jail. The said fines to be paid by 11.00 a on the Monday, 1/02/2010.*
2. *The OCS/OCPC of Muthaiga Police Station to assist the court bailiffs in effecting this order.*
3. *Once the above sentences have been served and/or fines paid, the main application and/or suit to resume for hearing.*
4. *The 1st Defendant shall pay the costs of this application.*

Orders accordingly.

Dated and delivered at Nairobi this 29th day of January, 2010.

R.N. SITATI

JUDGE

Delivered in the presence of:-

Mr. V. Angote (present) For the Plaintiff/Applicant

M/s Mwangi Kigotho with Mr. Kioko (present) For the 1st Defendant/Respondent

Weche - court clerk