



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Miscellaneous Application 1038 of 2008

JOHN KINOTI SAMMY T/A

KIN INTEGRATED SOLUTIONSPLAINTIFF
VERSUS
INNSCOR KENYA LIMITED1ST DEFENDANT
MORNE DEETLETS 2ND DEFENDANT
CHURCHILL MUINDE 3RD DEFENDANT

RULING

1. By a ruling rendered by this court on 31st July 2009 the defendants were found in contempt of the orders made by **Hon. Miss Mokaya** Principal Magistrate on 1st July 2008. Thus the court made the following orders.

“1. That the 1st Defendant is guilty of contempt and a fine of Ksh.100,000/- be and is hereby imposed to be paid within the next 7 days and in default attachment of the 1st defendant's property be effected in accordance with Order XXXIX Rule 2(a) 3 of the Civil Procedure Rules.

2. That the defendants to comply with the orders issued on 24th July 2008 within 7 (seven) days of this order in default the court bailiffs with the assistance of the OCS Central Police station be and are hereby authorized to reinstate the Plaintiff in possession of the suit premises on the ground floor Plot No. L.R. 209/8523 Union Towers Moi Avenue Nairobi as per the Court Order.

3. That this order be served upon the Directors of the 1st defendant i.e. Morne Deetlets and Churchill Muinde to ensure compliance in default the said directors would be personally liable.

4. That the matter be mentioned on 16th of September 2009 to ensure compliance.

5. That the defendants shall pay the costs of this application.

2. These are the orders that triggered the filing of the notice of motion by the defendants/applicants dated the 6th August 2008. The applicants are principally seeking

for an order of stay of execution of the above orders and the court do review vary or set aside the above orders. This application is predicated on the grounds stipulated on the body thereto, and elaborated in greater details by the matters deposed to in the supporting affidavit of **Churchill Muinde** sworn on 6th August 2009.

3. Briefly stated, it is the applicant's case that the above orders made by this court are a nullity because the notice of motion which the court determined was bad in law. There was no competent amended notice of motion which was filed, thus the court could not have made an appropriate order committing the applicants for contempt. Secondly, the orders which the applicants were found to be in contempt of were vacated by the subordinate court which had made them on the same day.

4. The applicants had moved the subordinate court seeking for the review of the orders, by an application filed on 19th December 2008, and argued on 17th July 2009. The ruling was reserved for 31st July 2009, and the court set aside the orders which the applicants were found to be in contempt. Thus had this court been informed of the ruling by the Hon. Miss Mokaya the orders committing the applicants for contempt could not have been made. It was further argued that the applicants were unable to comply with the orders by the lower court and thus they moved the court for review and setting aside. The subordinate court appreciated the reasons advanced by the applicants and vacated the orders of 1st July 2008. Counsel cited some decided cases to support his arguments.

5. This application was opposed by the Plaintiff; his Counsel relied on the replying affidavit sworn by one **John Kinotu Sammy** 14th August 2009. According to counsel for the respondent, an applicant seeking for review of an order under the provisions of order **XLIV of the Civil Procedure Rules** is supposed to show an error on the face of the record. In this case an order was made by the subordinate court on 1st July 2008 which required compliance on the part of the plaintiff and the defendant. The plaintiff complied on their part but due to non compliance on the part of the defendants the plaintiff took the steps to enforce compliance and filed a notice of motion on 14th November 2008, seeking to commit the defendants to civil jail.

6. It is after the contempt proceedings were filed that the defendants deemed it necessary to file an application for review. Counsel for the plaintiff urged the court to find that the defendants did not intend to comply with the court orders. More so, the defendants failed to attend court during the hearing of the notice of motion despite having been notified and having participated in the matter before. Thus the defendants

cannot come to court to argue about the competence of the application for committal for contempt after the court had considered it and made a ruling.

7. By challenging the notice of motion after it was determined, the defendants are now trying to argue the matters that they should have argued before the ruling of 31st July 2009. That is tantamount to asking this court to sit on its appeal on the court's own ruling. The court having considered and ruled on the notice of motion, the issue is not an error on the face of the record but a matter of law which can only be agitated before the Court of Appeal.

8. The orders made on 31st July 2009, was in the morning while the orders by the subordinate court vacating the subject orders was made the same day in the afternoon. Counsel for the applicant had a duty to inform this court of the position. It cannot be the duty of the plaintiff's counsel to argue a case on behalf of the defendants. Finally it was argued that the defendants willfully, and callously disregarded the orders of the court for almost one year and now that the court had found them in contempt on an order which was in existence for most a year, the court should not exercise its discretion in their favor but dismiss the application.

9. As stated above this application principally seeks for an order of review. A court can review its orders under the provisions of section 80 of the Civil Procedure Act and under order **XLIV of the Civil Procedure Rules** which provides :-

“1. (1) any person considering himself aggrieved-

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; preferred or

(b) By a decree or order from which no appeal is hereby allowed.

and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reasons, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

10. From the above provisions of the law, it is trite that an applicant seeking to review an order must show discovery of new and important matter or evidence which after due diligence was not within his/her knowledge or could not be produced at the time when the decree was

passed. The applicants may also show a mistake or error apparent on the face of the record or if there is any other sufficient reason.

11. The grounds relied upon by the applicants in this matter are two fold. Firstly, the notice of motion that the court determined is faulted for failure to comply with the procedural requirements which the applicants cited as non payment of court fees and failure to annex documents referred to in the affidavit. Secondly, the order the subject matter of the contempt proceedings was vacated and set aside the same day and the court was not informed by the plaintiff.
12. In my opinion, those are not valid grounds for review for reasons that the defendants were aware of the notice of motion seeking their committal to civil jail. Their counsel attended court on 28th April 2009. The parties took the hearing dates of the chamber summons dated 27th March 2009 by consent and the same was fixed for hearing on 3rd July 2009. There was no appearance by the defendants when the matter came up for hearing and the chamber summons was allowed and the plaintiff's notice of motion was fixed for hearing on 30th July 2009.
13. Counsel for the defendants was served with the hearing notice and there are no justifiable reasons why they failed to attend court to challenge the competence of the said notice of motion and to inform the court of the impending ruling by the subordinate court. I note the order by the subordinate court was issued on 24th July 2008. The applicants deliberately disobeyed a court order for almost a year until the contempt proceedings were filed, which is when they filed an application seeking to vacate the orders that they were disobeying.
14. A court of law is supposed to follow the law and the laid down procedures in the law to determine a matter, and also the court must protect its integrity especially from parties who are bent to twist, manipulate and subvert the cause of justice. In this regard I fail to comprehend how an order is made by a court, the plaintiff complies with the order, the defendants fail to comply on their part, and almost one year down the line, after contempt proceedings are taken out, the defendants find reasons to move the court to set aside the orders. Most interestingly the defendants fail even to defend the contempt proceedings perhaps while knowing they will set aside the orders by arguing there that there was an error on the face of the record.
15. The dignity and authority of the court must at all times be respected and upheld. I do not find any reasons for reviewing or setting aside the orders made by this court on 31st July 2009. The defendants should in the first place have purged themselves of the contempt of the

orders they had failed to obey before being given audience to argue the application to review those orders. Accordingly, I decline to grant the orders sought in notice of motion which is hereby dismissed with costs to the plaintiff/respondent.

RULING READ AND SIGNED ON 5TH MARCH 2010 AT NAIROBI.

M.K. KOOME
JUDGE