



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

Civil Case 58 of 1999

SANITAM SERVICES (E.A.) LTD PLAINTIFF/APPLICANT

VERSUS

RENTOKIL INITIAL (K) LTD1ST DEFENDANT/RESPONDENT

KENTAINERS (K) LTD2ND DEFENDANT/RESPONDENT

RULING

1This suit was filed in January 1999, it was heard and determined by **Onyango Otieno J** (as he then was) however that judgment was set aside by the Court of Appeal and substituted with the following orders:

(I) Permanent injunction to restrain the defendant from manufacturing and or using the foot operated sanitary bin and or holding out to consumers the use of the bin.

(ii) Trading in

Kenya in any manner likely to cause the business of the defendants to be confused with the business of the plaintiff.

(iii) Trading in any manner which does not sufficiently differentiate or distinguish the defendants business from that of the plaintiffs.

(iv) Using the Patent registered under Certificate Number AP773 hereof or any other calculated to confuse the goods sold by the defendants as being goods manufactured or provided by and on behalf of the plaintiffs or otherwise infringing any of the plaintiffs registered patent.

(v) Otherwise passing off the business of the defendants as or the plaintiffs business.

2. The plaintiff filed a notice of motion dated 29th May 2009 seeking for orders that the 1st respondent and its directors and senior management be held in contempt of the orders of the Court of Appeal issued on 28th July 2006. The applicant in particular sought for orders that the 1st defendant's directors **F.K. Nyagah and S. W. Mwangi** be held in contempt. Also the 1st defendant be fined and all the foot operated Sanitary Bins provided by the 1st defendant be repossessed and destroyed in situ and the costs of destruction be borne by the 1st defendant.

3. This application is supported by the affidavit of **Samson Nganga** sworn on 29th May 2009 and a further affidavit sworn on 2nd October 2009. According to the applicant, the orders by the Court of Appeal were served **upon** the respondents as per the affidavit of service by **Josphat Simon Mutunga** sworn on 22nd November 2006. It is particularly stated under paragraph 3 of that affidavit that he served the copy of the court order upon the 1st defendant's manager a Mr. Simon who acknowledged receipt of the order but refused to sign and acknowledge receipt. Despite that service of the orders, it is alleged the respondents have continued to commercially sell, supply and deal with the foot operated sanitary bins thereby deceiving consumers and the general public in believing the patent belongs to them thus depriving the applicant the gains of its innovation and the fruits of the judgment.

4. The applicant annexed the photocopies of the recent photographs of the bins being offered by the respondents for sale. It is further alleged that the respondent brought a suit against the plaintiff over the same subject matter in **MILIMANI HCCC NO. 702 OF 2008** and the application for injunction were dismissed on 18th February 2009. The respondents have not obeyed the court order, thus undermining the dignity of this court. The court was urged to punish the respondent while being guided by several authorities of this court and the **Court of Appeal** especially the following cases; **Onesmus Muchai Waweru Waithanua vs Barclays Bank of Kenya Ltd Milimani H.C.C.C. No. 709 of 2008** and **Milimani HCCC No. 608 of 2004 Dina Bhoke Makini and Another vs Willis Wanjala** (unreported).

5. On the part of the respondent, this application was opposed; Counsel relied on the replying affidavit of **Patrick Nyaga** sworn on 26th June 2009 and a further affidavit sworn on 14th October 2009. It is contended that the application for contempt is misplaced because the defendant's products are not locally manufactured but imported. The provisions of the Industrial Property Act No. 3 of 2001 Section 58(2) it provides that:-

“ . . . The rights under the patent shall not extend to acts in respect of articles which have been put on the market in Kenya or in any other country or imported into Kenya.”

6. There is also no evidence to support the allegation by the plaintiff that there has been infringement and disobedient of the court order. The plaintiff merely exhibited photocopies of the products allegedly supplied by the defendant but there is no credible evidence to show which products have been supplied. The respondent also denied that the letters purportedly written to customers did not emanate from them. The respondent wrote to their customers explaining that their products were different from the applicants. The respondents also took issue with the service of the order and the penal notice.

7. A person cannot be committed for breach of the court order if it has not been personally served together with the penal notice and there is evidence of service. The 1st affidavit of service only states that the order was served on a Manager by the name Simon. It is not indicated whether Simon had authority to accept service on behalf of the respondent. An affidavit sworn by **Patrick Nyaga** indicated that Simon Mwangi had no authority to accept summons on behalf of the respondents. As regards the service upon Patrick Nyaga there is no mention of any attempt to serve him with the order and the accompanying penal notice. For this proposition counsel relied on the case of **Loise Margaret Waweru vs Stephen Njuguna Githuri C.A. No. 198 of 1998** (unreported).

8. Counsel also relied on the provisions of Order 52 Rule 3 (3) of the Supreme Court Practice 1999 page 12 which makes a mandatory provision that the notice of motion also ought to have been served upon the person being sought to be committed for contempt. The application was further faulted for failure to demonstrate that leave to bring these proceedings was not served upon the Attorney General as required under the Supreme Court Practices Rules. In this regard counsel referred to the case of **ENG Kenya Ltd vs Magnate Ventures Ltd HCCC NO. 572 OF 2008** (unreported).

9. The first point to determine in this matter is whether this application is properly before the court. Proceedings governing contempt proceedings in Kenya according to section 5(1) of the Judicature Act it is provided as follows:-

“the High court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate courts.”

The jurisdiction of the High Court of justice in England to punish matters of contempt is found in the rules of Supreme Court in particular Order 52 rule (2) which provides:-

“(1) No application to a Divisional Court for an order or committal against any person may be made unless leave to make such an application has been granted in accordance with this rule.”

(2) An application for such leave must be made ex parte to a Divisional Court, except in vacation when it may be made to a judge in chambers, and must be supported by a statement setting out the name and description of the applicant, the name, description and address of the person sought to be committed and the grounds on which his committal is sought, and by an affidavit, to be filed before the application is made, verifying the facts relied on.

(3) The applicant must give notice of the application for leave not later than the preceding day to the Crown Office and must at the same time lodge in that office copies of the statement and affidavit.

10. The records of proceedings and the court documents in this matter are in a state of disarray. I have gone through the records; it is not easy to tell whether the applicant was granted leave to institute these proceedings. There is no affidavit to show that the order for leave was served upon the Attorney General as required under the Supreme Court Rules. That is not the only dilemma I have, the service of the Order of injunction by the Court of Appeal and the Penal notice is also not clear. The process server who effected the service has sworn two affidavits. In the first affidavit sworn

on 22nd November 2006 the process server indicated that he served the order upon one Mr. Simon. The order served is not endorsed with the penal notice. The process server filled another affidavit on 24th September 2009 indicating that he served the firms of advocates representing the 1st and 2nd defendants. There is no indication that the directors of the company against whom the orders are sought were personally served.

11. It is trite law that the standard of prove on whether a respondent has committed contempt is higher than prove on a balance of probability and almost but not exactly beyond reasonable doubt as in a criminal case. An offence of contempt is treated as a *quasi criminal case*; the guilt of the contemnor has to be subjected to higher test.

12. This leads me to the last issue of whether the applicants have met that standard of prove. The documents annexed to the application especially the photocopies marked SS/4 being the photographs of the foot operated sanitary bins are faint. It is not easy to decipher their make or to whom they were sold. The respondents deny having infringed upon the plaintiff patents. The material before court does not meet the threshold of the tests set out above. This application perhaps would have been heard by way of *viva voca* evidence which could have clarified the matters.

13. For the aforesaid reasons, the application fails. Due to the nature of this application I order each party to bear their own costs.

RULING READ AND SIGNED ON 16TH JULY 2010 AT NAIROBI.

M.K. KOOME

JUDGE