



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
(MILIMANI COMMERCIAL COURTS COMMERCIAL AND TAX DIVISION)
CIVIL CASE 850 OF 2009

KING'S CASTLE LIMITED PLAINTIFF

VERSUS

FAITH WAITHIEGENI KAMWARO DEFENDANT

RULING

1. On 20th November 2009 the plaintiff applicant was granted ex parte orders of injunction in the following terms;

- 1) *That the matter be and is hereby Certified urgent*
- 2) *That the application dated 19th November be heard inter-parties on 3rd December 2009*
- 3) *That pending the hearing of this application inter-parties, the defendant be and is hereby restrained whether by herself or by her servants, agents or otherwise howsoever, from selling, alienating or disposing off the machinery, tools and stone located at the Workshop building and the some quarry, all locate don LR No. 25468 Thika, or from interfering with or impeding the plaintiff's rights of access to the said property.*
- 4) *That the officer Commanding Police Division be and is hereby directed to ensure the compliance of the defendant with the orders issued by this Honorable Court.*

2. Those orders were subsequently extended on 3rd and 17th December 2009, by consent of counsel for the plaintiff and the defendant. On 21st January 2010, the applicant filed a notice of motion which is brought under the provisions of section 3A and 63 (c) of the Civil Procedure Act (Cap 21 of the Laws of Kenya), Order XXXIX Rule 2A (2) and Order L Rule 1 of the Civil Procedure Rules.

The applicant is seeking for the following orders:

2. *This Honorable Court be pleased to find that Faith Waithiengi Kamwaro, the defendant Respondent herein, is guilty of flagrantly disobeying the injunctive orders that were issued ex parte by this*

Honorable Court on 20th November 2009 and subsequently extended by consent of the parties on 3rd and 17th December 2009.

3. This Honorable Court be pleased to order that Faith Waithiegeni Kamwaro, the defendant/respondent herein, be detained in prison for a term not exceeding six months.

3. This application is supported by the grounds that the defendant/ respondent was duly served with the ex parte orders of injunction. Those orders were subsequently extended by the consent of the parties on 3rd and 17th December 2009, and the defendant was also present in court. In breach of the orders, it is contended that the defendant by herself or servants or agents on 9th, 11th and 14th December forcefully removed the padlocks, securing the gates of the compound and replaced them with her own padlocks. The respondent then removed the machinery namely a caterpillar tractor and a stone cutting machine in blatant disobedience of the court order and has continued to use them.

4. It is further alleged, in further breach of the orders between the 16th December 2009, and 19th January 2010, the defendant/ her servants acting on her instructions and authority quarried removed cut, carted away, alienated and disposed of stones from a stone quarry. The defendant used the stone cutting machine, a caterpillar tractor, registration number **KAV 911L** which are owned by the plaintiff to cut the stones and cut them away. According to the applicant this was in flagrant breach of the orders of this court.

5. The application is supported by the affidavits of **Sean Omondi, Dabaso Ali Kule, Elijah Monari Mandere and Peter Nyachura**. Those affidavits reiterate what is stated in the body of the application. The affidavit of **Dabasso Ali Kule** an employee of the plaintiff as a day guard on the suit premises confirmed that the respondent used to be guarded by Swift Watch Services on a 24 hour basis on the respondent's workshop. He was at the suit premises between 24th October 2009 and 13th January 2010. On 9th December 2009 the defendant is alleged to have come to the premises with body guards. She ordered the workshop to be broken into. She was in the company of a van full of hooligans who cut the workshop door. They opened the workshop and replaced the padlocks. The respondent also stationed another security firm called Straight Security Limited.

6. From the 15th December 2009 the defendant started using the Caterpillar registration number KAV 911L. The respondent and her group of people also moved the stone cutting machine from the workshop and took it to a quarry where it has been cutting stones and they were being removed by several other Lorries. This is also confirmed by **Elijah Munari Mandere** the Operations Manager of Swift Watch Service who was contracted by the plaintiff to provide security at the suit premises. This matter was also reported to Junja Police station. It was recorded in the Occurrence Book. Mandere

and inspector **Nayabocha** from Junja Police Station also visited the quarry where the plaintiff's stone cutting machine was being used. They took photographs of the stone cutter, the caterpillar tractor and the Lorries that were ferrying the stones. Those photographs are annexed to this affidavit.

7. The same matters stated in the affidavits of Kule and Mandere are also supported by the affidavit of **Peter Nyachuba** who is the Managing Director of **Swift Watch Service** the security firm that was contracted by the plaintiff. This is the person who took the photographs of the stone cutting machines being used at a quarry. The Lorries being loaded with the stones and the caterpillar tractor was clearing the quarry. Those photographs were taken on 27th December 2009. Counsel for the applicant submitted that the defendant has filed two affidavits but she has not denied the fact that she was served with the order and in breach of the orders she has continued to interfere with the plaintiffs assets. Counsel urged the court to consider several authorities.

The case of Mutitika v Baharini Farm Limited [1985] KLR

Hadkinson v Hadkinson ALL England Reports Vol.2 1952 page 569. And Pius **Joseph Masika v Samuel Njiru & 3 Others HCCC NO 403 OF 1995, Ringera, J** (as he then was).

8. This application was opposed by the respondent who relied on the replying affidavits sworn by the defendant on 2nd February 2010 and a reply to the supplementary affidavit sworn on 23rd April 2010. In addition to the replying affidavit, the defendant also raised points of law challenging the jurisdiction of this court to entertain the suit on the grounds that there was no proper meeting or the resolution of the company in which the plaintiff was authorized to fill this suit. Thus the entire suit is a non starter and should be struck out. In the replying affidavit the defendant contends that she is a majority shareholder and director of the plaintiff company thus there was no resolution which was sanctioned by the company to file the suit.

9. This suit was also filed by one director who is trying to steal a match against the respondent by refusing to address issues involving the company through the laid down procedure. There are internal wrangles following the death of one of the directors. The defendant annexed documents from the Registrar of Companies which show that she is the majority share holder having 350 shares. The company's Act provides how matters can be resolved involving a company through a general meeting. Since the suit is a non starter, the application for contempt cannot also succeed. Moreover, it is supported by an affidavit sworn by an advocate who has deposed on contentious matters. That affidavit is incompetent and should be struck out. Moreover the application is supported by a multiplicity of affidavits which is contrary to the provisions of **Order 50 Rule 3 of CPR** which provides that all motions should be supported by an affidavit and if a party wishes to file a further affidavit they are supposed to seek leave of the court.

10. Counsel in further argument submitted that the standard of proof in contempt cases is higher than the test of civil matters which is on a balance of probabilities. The orders sought will take away the defendants liberty by imprisoning her. The Supplementary affidavit of **Anne Twite** sworn on 7th April 2010 was faulted for relying on hearsay material. She was further faulted for writing letters to Top Government officials in which she discussed a matter which is **sub judice**. This was in respect of a letter dated 20th February 2010 addressed to His Excellency President Kibaki. Counsel for the respondent relied on the case of **Anspar Beverages Limited vs. Development Bank of Kenya & another HCCC NO. 1155 OF 2002.**

11. The respondent challenged the jurisdiction of this court on the grounds that this suit cannot stand because it was filed without the resolution by the Board. Further the respondent contended that it is Anne Twite who is undermining the authority of this court by writing to the High Government officials on matters that are **subjudice**. The points raised by the respondent regarding the competency of this suit which was allegedly filed by the plaintiff without resolution are issues for determination later. The respondent claims that she is the majority shareholder of the plaintiff's company holding 350 shares while Anne Twite who is behind the institution of this suit owns 50 shares. She exhibited a copy a letter dated 26th February 2008 by the Registrar of Companies showing the directors and shareholders of the plaintiff. The shareholding by the defendant is also denied by Anne Twite who is the party behind the filling of this suit. In my opinion all these issues are valid and triable issues at an appropriate time. Anne Twite has also attached a resolution signed by herself and Victoria Alice Smeath who claim to be directors of the company; those are all triable issues for determination at an appropriate time, for now this court is dealing with an application for contempt.

12. In the case of **Mutitika case (supra)** the Court of Appeal held that;

“A person who knowing of an injunction or an order of stay will willfully does something or causes others to do something to break the injunction or interfere with the stay is liable to be committed for contempt of court as such a person has by his or her conduct obstructed justice.”

At the moment this court is presented with an application to determine whether the respondent has committed contempt of court by disobeying a court order. The elements to consider in an application for contempt of court are also discussed in an English case of **Hadkinson (supra)** where it was held;

“It was the plain and unqualified obligations of every person against, or in respect of, whom an order was made by a court of competent jurisdiction to obey it unless and until it was discharged, and disobedience of such an order would, as a general rule, result in the person disobeying it being in contempt and punishable by committal or attachment and in an application to the court by him not being entertained until he had purged on its due observance, for

such an order was made in the interest of the welfare of the child, and the court would not tolerate any interference with or disregard of its decisions on those matters, and least of all would permit disobedience of an order that a child should not be removed outside its jurisdiction; in the present case the mother was not entitled to prosecute or be heard in support of her appeal until she had taken the first and essential step towards purging her contempt of returning the child within the jurisdiction”.

13. There is ample jurisprudence from our courts and the principles to guide the court when dealing with the issue of contempt are well settled. It is trite that an order of the court must be obeyed with utmost obedience; disobedience of a court order is taken seriously. The court is the custodian and guardian angel of the law. Thus disobedience of the court order strikes at the very root of the rule of the law. In that it undermines the authority of the court and also the rule of the law which would otherwise allow the rule of the jungle to reign in place of the legal law. The courts have always punished swiftly and severely persons found to have willfully disobeyed the court orders.

14. The standard of prove is also set out to be higher than proof on balance of probability and almost but not exactly beyond reasonable doubt as in a criminal case. Although an offence of contempt is treated as a *quasi criminal case*. The guilt of the contemnor has to be subjected to higher test. In this case there is no dispute that the respondent was served with the court order together with the penal notice as stated in the affidavit of service. The issue raised is that the acts complained about which were restrained by the court order were not committed by the respondent but by the company which was not restrained from carrying out the acts complained about. On the same breath the respondent claims that she is the majority share holder holding 350 shares in the company.

15. The other share holder is allegedly Anne Twite who is behind the filing of this suit by the Company. It is obvious that Anne Twite is not the one ordering the activities that are in breach of the court order. It is the respondent, who claims to hold 350 shares who is directing the company to carry out activities in breach of the court order. The respondent did not tell the court who is directing the company to carry on the activities that are contrary to the court order. Moreover the respondent claims to be the majority shareholder, she was served with the court order, and she must be aiding and abetting the breach of the order by allowing the activities to continue in the face of a court order.

16. In sum the orders have not been complied with, and all the respondent has done is to challenge the legality of those orders while there is continued disobedience either by herself, agents or sarverts. Under order 39 of the Civil Procedure Rules. the Court may punish for contempt if:

“In cases of disobedience, or of breach of any such terms, the court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the court directs his release.”

The respondent has not apologized or offered any explanation why the court order has not been obeyed. She has been in flagrant, disobedience of the order that undermines the authority and integrity of this court and also the rule of the law. Accordingly, I find the respondent is in contempt of this court's order issued on 20th November 2009 and extended by consent on 3rd and 17th December 2009.

17. The respondent **Faith Waithiegi Kamwaro** is hereby ordered to pay a fine of **Ksh.500,000/-** in default the respondent to be committed to serve a prison term of three (3) months. The respondent will also pay the cost of this application.

RULING READ AND SIGNED ON 2ND JULY 2010 AT NAIROBI.

M.K. KOOME
JUDGE