



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ELC CIVIL SUIT NO.255 OF 2009

SKY AFRICA HODLINGS LTD.....PLAINTIFF
VERSUS

BELLWAYS VILLAS LTD.....1ST DEFENDANT
NAIROBI WATER & SEWERAGE COMPANY.....2ND DEFENDANT
IN THE MATTER OF THE JUDICATURE ACT CAP.8 LAWS OF KENYA

AND

IN THE MATTER OF AN APPLICATION FOR CONTEMPT OF COURT PROCEEDINGS BY BELLWAYS VILLAS LTD.

AND

IN THE MATTER OF CONTEMPT OF COURT OF THE ORDER GIVEN ON 15TH OCTOBER, 2009 IN HCCC ELC NO.255 OF
2009

BETWEEN

BELLWAYS VILLAS LTD.....APPLICANT

AND

BIPIN MAUJEE.....CONTEMNOR

RULING

On 15th October, 2009 this court issued an order in favour of the 1st defendant against the plaintiff of a mandatory injunction directed to the plaintiff ordering and or compelling the plaintiff to give and or allow the 1st defendant and or its authorized representatives and or its agents, and or the main service provider for water and sewerage in the City of Nairobi, the 2nd defendant herein, entry for purposes of accessing the main manhole for water and sewerage pipe that is on the plaintiff's property LR.N.22842, for purposes of extending thereof the said water and sewerage line to the property of the 1st defendant known LR.209/7938.

The said order carried a penal notice to the effect that if the plaintiff failed to comply therewith as ordered by the court, it will be subjected to the penal consequences including, but not limited to, personal committal to civil jail.

It is the 1st defendant's case that the order was served upon Bipin Maujee, a director of the plaintiff who however, did not comply therewith and therefore by an application by way on Notice of Motion dated 5th February, 2010 the 1st defendant has applied to have the said Bipin Maujee committed to prison for a period of 6 months or such other period as the court may deem fit and that, he purges the said contempt and that his property be attached until the alleged contempt is purged.

The application is opposed and both learned counsel have filed affidavits and submissions to advance their respective positions. The position of the 2nd defendant is that, it supports the application by the 1st defendant and that the said orders should be issued against the plaintiff.

It is now established law that, no order of court requiring a person to do or abstain from doing any act can be enforced unless a copy of the order has been personally served on the person required to do or abstain from doing the act in question. The copy of the order must be endorsed with a notice informing the person on whom the copy is served that, if he disobeys the order he is liable to the process of execution to compel him to obey it. *See Civil Appeal No.95 of 1988 Mwangi Wang'ondu vs – Nairobi City Commission and Civil Appeal No.36 of 1989 Jacob Zedekiah Ochino and Another – vs – George Aura Okumbo and Others.*

Proof of service is not on a balance of probability but at the higher level but need not be beyond reasonable doubt. This requirement is deliberate because, the penalty of non compliance may lead to deprivation of one's freedom if proved. In the instant case, the Process Server one Benson M. Shichoro swore an affidavit dated and filed 26th February, 2010 where he depones that he served the contemnor one Bipin Maujee with the order and the notice endorsed thereon.

This is disputed by the contemnor aforesaid in his affidavit sworn on 25th February, 2010. In the said affidavit in reply, Mr. Maujee admits that he is a Director of the plaintiff company. The identity of a Limited Liability Company in matters of this nature is placed on the face of its directors and therefore it cannot be advanced that the said Bipin Maujee is not a party to these proceedings.

There is an affidavit also by one Anthony M. Mutua sworn on 25th February, 2010 which also disputes service upon the plaintiff. This deponent admits that he knew of the existence of litigation between the parties herein. It is instructive to note that the Process Server was not required by the person disputing service to appear in court to be cross-examined on the issues of service. Order V Rule 2A of the Civil Procedure Rules provides that, service on any corporation may be on the Secretary, Director or other Principal Officer of the Corporation.

It would appear from the averments of the replying affidavit by Bipin Maujee in his affidavit sworn on 25th February, 2010 that, the only reason he is contesting the order is that he is not liable to comply with the said order but the plaintiff company.

As at the time of swearing the said affidavit, the plaintiff company had moved the court to set aside the said order and this is confirmed by the paragraph 5 of the said affidavit. That notwithstanding even at the time of hearing this application, the contemnor had not complied with the said order. I find that he was aware of the court order, that he did not obey that court order, that order is still in place and has not been reviewed or set aside. Court orders are there to be obeyed. Indeed, the authority of the court is anchored on the obedience of its orders. If this were not to be, then the law of the jungle would be applied and this may lead to total breakdown of the rule of law.

I know that the orders sought are drastic but where the law states an obvious state of affairs, that must be followed. Where a judgment or order is against a body corporate a director or other officer of the body may be committed. The company itself cannot be committed but it can be fined. In the instant case, I find that Mr. Bipin Maujee is in contempt of the court order made on 15th October, 2009 and must be punished for it. I order that he shall pay a fine of Kshs.100,000/= to be paid within seven days of this ruling in default to serve three months imprisonment. Additionally, he must purge the contempt within 14 days of this order failure of which he shall serve three months imprisonment.

Orders accordingly.

Dated, signed and delivered at Nairobi this 19th day of October, 2010.

A. MBOGHOLI MSAGHA
JUDGE