



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

Civil Case 583 of 2008

ACHIENG & ACHIENG COMMUNICATIONS LTDPLAINTIFF

VERSUS

SAFARICOM LTD.....DEFENDANT

RULING NO.2

The plaintiff/applicant had moved to this court, vide a plaint dated 15th day of December 2008 and filed the same date. The prayers sought were as follows:-

- (a) *An injunction to restrain the defendant either by itself, its agents or servants or any other person howsoever from effecting the termination of the Dealer Agreement dated 11/06/2007 on 05/01/2009 or nay other day pursuant to the notice of termination dated 21/11/2008 or through any other notice whatsoever or in any manner howsoever terminating the Dealer Agreement.*
- (b) *A mandatory injunction to compel the defendants either by itself, its agents or servants forth with, allow the plaintiff to purchase and sell airtime and other products and services from the defendants and to effect its rights and carry out its obligations under the Dealer Agreement dated 11/06/2007.*
- (c) *A mandatory injunction to compel the defendant either by itself, its agents or servants to forthwith allow the plaintiff to sell the stock of 1,000 lines already purchased or alternatively to pay the plaintiff of their value of Kshs 100,000/= plus interest at court rate.*
- (d) *A mandatory injunction to compel the defendant either by itself its agents or servants to forthwith pay the residuals currently withheld of Kshs 150,000/= per month from 21/11/2008 till payment in full.*
- (e) *Costs of this suit and interest at court rates.*
- (f) *Any other relief that the court may deem fit and proper to grant.*

The plaint was accompanied by an interim chamber summons also dated and filed the same 15th December 2008. 7 prayers were sought. For purpose of the record these are the prayers:-

- *prayer 2 & 3 the defendant herein either by itself, its agents or servants or any other person however be restrained from effecting the termination of the Dealer Agreement dated 11/06/2007 on 05/01/2009 pursuant to the notice of termination dated 21/11/2008 or through any other notice whatsoever or in any manner how so ever terminating the Dealer Agreement pending the hearing and determination of this application as per prayer 2 and pending the hearing and determination of the suit as per prayer 3.*

(4) the defendant either by itself, its agents or servants be compelled to forth with allow the plaintiff to purchase and sell airtime and other products and services from the defendant pursuant to the Dealer Agreement dated 11/06/2007 pending the disposal of this suit.

(5) The defendant either by itself, its agents or servants be compelled to forthwith pay the plaintiff the residuals currently withheld of Ksh. 150,000/= per month from 21/11/2008 and to continue doing so pending the disposal of this suit.

(6) the defendant either by itself, its agents or servants be compelled to forthwith allow the plaintiff to sell the stock of 1,000 lines worth Ksh 100,000/= already purchased pending the disposal of this suit.

(7) costs of the application be provided for.

It is on record that the defendant filed papers in opposition and both parties canvassed the application. That canvassing gave rise to this courts ruling delivered a ruling on the 16th day of 7 February 2009. The orders made by this court, are as follows:

(1) Prayers 3, 4 of the application dated 15/12/2008 are granted pending the hearing and disposal of the suit or the expiring of the dealership agreement by effluxion of time whichever is earlier in time.

(2) Prayer 5 is dismissed.

(3) Prayer 6 is granted limited to the lines that the plaintiff had namely 1,000 lines that it had before commencing the proceedings.

(4) The usual undertaking as to damages to be furnished to the tune of Kshs 100,000.00 as per provision of clause 17.3. The same to be furnished within 30 days from the date of the reading of the ruling.

(5) The defendant who was brought to court, by the plaintiff will have costs of the application.”

Against the afore set out information, the plaintiff has come back to this court, by way of a notice of motion dated 1st day of April 2009 and filed on 2nd day of April 2009. The application is brought under section 3, 3A and 63 (c) of the CPA, order XXXIX rule 2A (2 and 3 of the CPR and all enabling provision of the law. 5 prayers are sought.

(1) Spent.

(2) This honourable court, be pleased to find that the defendant/respondent is in contempt of the court, order made on 16/02.2009 and issued on 17/02/2009

(3) This honourable court, be pleased to summon the directors/officers of the defendant/respondent namely:-

(1) Michael Joseph Chief Executive officer/Director.

(2) Nzioka Walta (head legal and Regulatory Affairs) to show cause why they should not be committed to civil jail for a period not exceeding six months or to have the defendant/respondents properties at its head quarters at Safaricom House be attached for disobeying a court order.

(4) This honourable court, be pleased to cite the above named persons for contempt and punish them accordingly.

(5) The costs of this application be provided for.

The grounds in support set out in the body of the application, supporting affidavit, skeleton arguments

and oral highlights in court. The major points are as follows:-

- That this court made orders herein on 16/2/2009 in respect of the interim application filed herein.
- The said orders are still in place and as such they demand obedience.
- They applicant extracted the said orders and served the same along side the notice of penal consequences.
- The defendants are not denied service of the same more so when the orders were made in the presence of their counsel.
- The plaintiff/applicants have come back to the court, complaining because the defendants have not complied with the order to sell and purchase airtime products and other related products from them.
- They applicants have advanced a reason that the reason as to why no purchases have been made from them by the applicant was because, no orders had been made by the applicant.
- The applicant concedes that indeed no orders have been placed because the defendant has placed a 2,000,000.00 million debit on the plaintiffs trading account making it impossible for orders to be placed when the account is in its debit.
- They agree that the debit was introduced before the suit but that does not confer a right to disobey a court order.
- The court, is urged to hold that the defendant should not be allowed to place a barrier in their path so that they can escape their obligation towards the plaintiff/applicant
- Regarding the order to continue selling lines, they have been doing so but the source of complaint is that the defendant does not want to pay for them. It is with holding the funds and then paying the proceeds into the debit account.
- The court, is urged to be guided by case law relied upon by them.
- They have distinguished the case law cited by the defendant in which applications for committal for contempt of court, were dismissed because circumstances leading to dismissal, do not prevail herein, such as the court order failing to describe the land and simply referring to it as "suit land," failure to serve the order, failure to serve the penal notice. And a misconception on the part of the court, that the standard of proof in contempt proceedings is beyond reasonable doubt and yet the correct position in law is that the standard of proof is above a balance of probability but not beyond reasonable doubt.

The defendant/respondent has opposed the application for contempt on the basis of a replying affidavit sworn by one Justin Ogwapit on 14th April 2009, and filed on 15th April 2009 annexures, Oral highlights in court, and case law. The major points put forward are.

- concedes this court, made orders on 16/12/2009.
- Concede that they were indeed served with the extracted order and notice of penal consequence.
- Concede that indeed they moved to the court, of appeal and filed a notice of appeal, followed by an application for stay under certificate of urgency. The certificate of urgency was declined but the application for stay pending appeal is still pending disposal.
- Concede that orders of court, have to be obeyed.
- They deny breaching the said orders on the following grounds:

(a) There has been no order received from the plaintiff for airtime cards and other products as per the dealer agreement which the defendant has refused to Honour. It is their stand that supply of the said products can only be initiated by placing of an order in terms of clause 7.1

(b) The said placement had to be accompanied by payment for the goods comprised in the order placed. It is their stand that at no time had the plaintiff made payment for any products which have not been supplied as receipt of payment is a precondition to the supply of goods in terms of clause 7.4 of the dealer agreement.

(c) There is no proof that the plaintiff placed any orders in due compliance with the dealership agreement and the defendant refused and or neglected to honour the same.

(d) Since the plaintiff has been in possession of the 1,000 lines and which lines have also been under his control, they have all along been at liberty to sell the same.

- proof of lack of breach of the said orders is evidenced by the fact that the plaintiff/applicant has not:-

(a) provided details of the manner in which the defendant has breached the said order,

(b) how the defendant has prevented the plaintiff from purchasing and selling airtime cards and other products,

(c) details of products ordered, paid for but not delivered,

(d) details of when, where and to whom orders were presented,

(e) dates when refused to supply were made,

(f) details when payments were made, to whom made, how much made for what products made.

- Deny that one of their employees namely Nzioka Waita has stated that they will not obey the said court, orders.

- - Deny that the content of ACC06 and ACC07 amount to disobedience of this courts said orders when in fact all that they intended to convey to the plaintiffs counsel was that they were not aware of how the said orders had been breached.

- Existence of a debit account does not amount to a disobedience, because it existed before the orders alleged to be breached were obtained.

- Refusal to pay cash to the plaintiffs for the sale of the 1,000 lines does not amount to contempt because the order of the court, was to allow the sale and not the manner of application of the proceeds of sale.

- The said orders did not disallow set off of the plaintiffs indebtedness to the defendant.

On case law, the court, was referred to the case of **MWENJA NGURE VERSUS SERUSAM INVESTMENTS COMMISSIONER OF LANDS A.G AND SAMMY SERONEY NAIROBI HCCC NO 155 OF 2002**. In this case the injunctive order simply restrained the addressees by themselves and or their servants by way of a temporary injunction from disposing of, alienating, transferring, wasting or in any manner howsoever interfering with the suit land or any part thereof. Application for contempt was facilitated by Musinga J on 30/9/2004 because the injunctive order had not specified the property in question but had only described it as "the suit land".

The case of **CLEMENT AORIU KABBIS VERSUS ANDREW BWIRE OBARA NAIROBI HCCC NO MISC APPL NO 1742 OF 2005** decided by Kubo J as he then was (now retired) on the 25th

day of October 2006. At page 5 of the ruling line 5 from the bottom it is observed thus:- *“there is no doubt in my mind that court, orders are sacrosanct and must be obeyed. For disobedience of such orders to warrant the committal of a contemnor to civil jail, it must be proved beyond reasonable doubt that the contemnor was personally served with the order in question”*

In this case the application for contempt was faulted because there was no proof of service of the order alleged to have been breached.

The case of **LOICE MARGARET WAWERU VERSUS STEPHEN NJUGUNA GITHIRI NAIROBI CA 198 OF 1998** decided by the Court of Appeal on the 21st day of May 1999. At page 4 of the judgement, line 12 from the bottom it was observed that:- *“...he served a copy of the order and a penal notice on the appellant by living it with a young man who came to the gate when he went to the appellants house at Sunrise Estate, Nairobi.”* At page 5 line 7 from the top, the Court of Appeal quoted with approval the case of **MANDER VERSUS FAICKE (1891) 3CH 488** where it was held that *“the notice of motion must be served personally on the respondent even if he has an address for service unless the court dispenses with such service on an ex parte application or at the hearing of the notice of motion. The attendance of the contemnor at the hearing does not of itself waive the necessity for service. If the order is to restrain from doing an act or requires a positive act to be done, evidence must be led to prove service on the respondent of the order alleged to have been disobeyed along with a personal notice”*

In the case quoted contempt of court proceedings were faulted because there was no proof of personal service on the alleged contemnor.

The case of **WANGONDU VERSUS NAIROBI CITY COMMISSION (1988) KLR 1919 (CAK)**. At page 3 of the judgement there is quoted with approval Halisbury laws of England volume 9 (4th Edition) under the heading *“contempt of court”* It is stated that: *“Briefly the effect of these provisions is that as a general rule, no order of court requiring a person to do or abstain from doing any act may be enforced unless a copy of the order has been served personally on the person required to do or abstain from doing the act in question. The copy of the order served must be endorsed with a notice in forming 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. This requirement is important because the court, will only punish as contempt of breach of injunction if satisfied that the terms of the injunction are clear and, unambiguous, that the defendant has proper notice of the terms and that breach of the injunction has been proved beyond reasonable doubt.”* In this case the CA faulted contempt proceedings because service was faulted.

Due consideration has been made by this court, of the rival arguments set out above and considered in the light of principles of case law on the subject and in this courts' opinion the following question have arisen for determination by this court:-

1. Were there orders issued by this court?
2. To whom were they addressed?
3. What were the addressees expected to do in so far as the said orders were concerned?
4. Did the addressees of the said orders comply with the said orders?
5. Is there a genuine complaint by the plaintiff/applicant?
6. What are the final orders herein?

Concerning issuance of orders herein, it is common ground that indeed orders were issued herein on 16/2/09. The addressees of the said orders were the defendants. What the addressees of the said orders were expected to do is firstly to conduct themselves towards the said orders within the ambit of principles of law established by case law on the subject both the case law relied upon by the disputants, as well as that which this court, has judicial notice of. For purposes of the record these are:-

(i). Contempt does not lie where orders have lapsed. Herein it is common ground that orders sought to be vindicated have not lapsed. These are non other than the orders issued by this court, on 16/2/09

(ii). The orders must be clear and un ambiguous. Neither party has claimed that the orders issued are ambiguous as non has applied for interpretation.

(iii). The orders must have been extracted and served on the addressees, with an endorsement of what is popularly known as “a notice of penal consequences” warning the addressee that if they do not obey the orders, they will face penal consequences of being punished for contempt of the said orders. Herein the plaintiff/applicant asserted service of the extracted order along side notice of penal consequences, which has been conceded by the defence.

(iv). Having been so addressed, and served, the said orders demanded the following from the addressees

(a) The principle of law in the Mawani case (1977) KLR 159 whose centrol theme is that:-“ *It is the duty of every one in respect of whom a court, order, is made to obey such an order unless and until it is discharged, and disobedience of such an order results in the person disobeying it being in contempt and on an application to the court, by him not being entertained until he purges the contempt.*”

(b) The principle in the case of HadKinson versus HadKinson (1952) ALLER 567 whose principles are

- *Unless and until a court order, is discharged it ought to be obeyed.*
- *As long as the orders are not discharged they are valid.*
- *Since they are valid, they should be obeyed in observance and not in breach*
- *The only way in which a reprieve from obeying a court order, before it is discharged, is by applying for and obtained a temporary stay.*
- As long the order is not stayed, and is not yet discharged, then a litigant who disobeys it does so at the pain of commuting a contempt of court.
- The principle in the case of **GORDON VERSUS GORDON (1940-7) AER 707** whose centrol theme is that, “*a litigant may also have a reprieve where he demonstrates that the orders alleged to have been disobeyed should not have been made as the court, had no jurisdiction to do so*”.

The above set out principles demonstrates observance and or disobedience depends on what the addressees who are the defendants herein, were required to do or not to do. What the addressees were expected to do or not to do is what was set out in the orders granted. These are already set out herein, namely prayer 2, 3, and 4. Prayer 2 and 3 is simply one, save that in the first instance, it was to last, till the hearing of the application, and then the suit or the expiry of the dealership agreement by effluxion of time. This is what the addressee was required to do and not to do.

(a) Restrained from effecting of the determination of the dealership agreement dated 11/06/2007 on 05/01/2009. It is common ground that by reason of the existence of the interim relief, the dealership agreement did not terminate on 05/01/2009. These orders were confirmed by the order of 26/2/09 and are still in force. This being the case, it is the finding of this court, that there is no breach in so far as the dealership agreement is concerned

(b) The defendant was not to give effect to the notice of termination dated 21/11/08 which was to take effect on 05/01/09. It is common ground that this has not been effected by reason of what has been stated above in (a)

(c) The defendant was required not to terminate the said dealership agreement through any other notice

whatsoever. It is common ground that the defendant has not issued any termination notice of the said dealership agreement.

(d) The defendant was not to terminate the said dealership agreement in any manner what so ever. It is common ground that the defendant has not attempted and or terminated the said dealership agreement in any manner what so ever.

Turning to prayer 4, the defendant was required to do or not to do the following.

1. The defendant by itself, its agents or servants were to be compelled to forth with allow the plaintiff to purchase and sell airtime and other products from the defendants pursuant to the Dealership Agreement dated 11/06/2007. In order to fault the defendant on this, it has to be demonstrated that the plaintiff initiated the resumption of the trading transactions which were thwarted by the defendants.

From the exhibits exhibited by the applicants, there is traced annexure ACCO6 dated 17/03/09 in which complaints had been raised by the applicant that the defence had thwarted the applicants move to purchase stock, as submitted by the defence. In the absence of proof that the client placed orders, on particular dates, which were turned down, there is nothing to prove that indeed orders were placed, and not honoured by the defendants. In fact what has emerged from the argument is that, the placing of the orders by the plaintiff in order to commence trading transactions in terms of the dealership agreement, were hampered by the defendant placing a debit of 2 million shillings into the plaintiffs' trading account with the defendant, rendering trading impossible, meaning that no orders could be placed because there was no funds to cover any order that may be placed.

The applicant has submitted that this was pushed into the path of the applicants, by the defendant to prevent the applicant from benefiting from the grant of prayer 4. The defendants' response is that the debit had been placed even before the suit was filed, and infact it contributed to the filing of the suit. As such this action which was taken before the filing of the suit cannot be taken to be part of the orders granted on 16/2/09 by implication. More so when the plaintiff did not seek a mandatory injunction to compel the defendant to recall the debit and prevent them from operating it. In the absence of that, the court cannot be called upon to vindicate it as a breach.

The other complaint is that relating to prayer 6. In this prayer 6, the defendant was to be compelled to allow the plaintiff to sell the 1,000 lines worth Kshs. 100,000.00 already purchased. This prayer was allowed. Infact what is gathered from the argument is that, indeed the applicant is not complaining that they were not allowed to sell the lines, but that after selling, the proceeds of the sales were not paid to the plaintiff, but deposited into the debited trading account, and swallowed up leaving nothing on the basis of which the applicant could place orders and receive supplies of air time and other products from the defendant.

It has been the argument of the applicant that, by taking money forming the proceeds of sale of 1,000 lines, the defendant was in effect frustrating the enjoyment of the order permitting the sale of the said lines. The Respondent has countered that by saying that what was allowed by the court, was simply the sale of 1,000 lines. That no order was made as regards the application of the proceeds of sale of these lines. This courts, findings on this is that indeed the court, simply made an order permitting the sale of the 1,000 lines, but made no order or gave no directions as regards application of the proceeds of the said sale. As such the defendant cannot be faulted in their manner of application of those proceeds.

For the reasons given above in the assessment, there has been no breach of the orders granted by this court, on 16/2/09 in respect of application dated 15/12/08 because of the following reasons:-

1. The order granted to the applicant vide prayer 3 of the said application thereof has not been breached in any way because it is common ground to both sides that, the dealership agreement is still in place and has not in any way been determined and or terminated by the defendant.
2. The order granted in favour of the plaintiff/applicant in respect to prayer 4 of the application, has not

also been Breached, because failure and or inability of the plaintiff/applicant to place orders, and make purchase of air time and other products, from the defendant, in furtherance of the dealership agreement, has been occasioned by the existence of a debit, having been placed into or onto the trading account of the plaintiff with the defendant. It is on record and it has been not been contested by the plaintiff/applicant that this debit had been placed even before the commencement of the suit. It contributed largely to the move by the defendant to terminate the dealership agreement. It is on record that the debit involved 2 million which was a subject of investigation by the relevant authorities. It is on record that no interlocutory pronouncement was made on this debit, by this court. The reason given by the court, was because it needed adduction of evidence, production of documents and cross examination of witnesses. It there fore follows that in order for it to have been breached, the defendant must have been enjoined from calling it into play in the course of trading transactions with the plaintiff. It is on record that no such prayer was sought by the plaintiff/applicant and non was granted by this court.

3. As regards the 1,000 lines, what the plaintiff/applicant asked the court, to do for it, was simply to restrain the defendant from preventing it from selling those lines which order was granted and the plaintiff/applicant infact commenced the sale of the same. There was no prayer sought by the plaintiff/applicant as regards the application of the proceeds of the sale of those lines. The plaintiff/applicant complaint is that the proceeds of sale instead of being paid to the plaintiff as per the dealership agreement is being paid into the debited trading account and being swallowed up. As submitted by the defence, in the absence of a restraint order, restraining the defendant, from paying the proceeds of sale of the 1,000 lines into the debit account, in the first instance, and in the second instance, in the absence of an order that the proceeds from the sale of those lines be paid direct to the plaintiff/applicant, there is no way the defendant can be faulted in applying the said proceeds in the manner applied.

4. It has to be borne in mind that the restoration of the operation of the dealership agreement restored parties to their rights and obligations under the said contract, whereby the plaintiff/applicant was required to trade with the defendant upon meeting the attendant financial obligations as the trading was not for free.

By reasons of the findings in number 1,2,3 and 4 above, the plaintiff/applicants application dated 1st April 2009 be and is hereby dismissed with costs to the respondent.

DATED, READ AND DELIVERED AND NAIROBI THIS 29TH DAY OF MAY 2009.

R.N. NAMBUYE

JUDGE