

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MLIMANI COMMERCIAL COURTS)
CIVIL CASE 572 OF 2008

ENG KENYA LTD.....PLAINTIFF

VERSUS

MAGNATE VENTURES LTD.....DEFENDANT

RULING

On 29th January 2009, this court allowed the plaintiff's application which sought to restrain the defendant by itself or through its agents from using an industrial design then lodged for registration by the plaintiff. The court further granted mandatory injunction compelling the defendant to bring down or remove suburban signs that it had erected based on the industrial design of the plaintiff. The plaintiff claims that the defendant has been in breach of the said order of the court. On 20th March 2009, the plaintiff was granted leave by this court to institute contempt of court proceedings against the defendant. On 30th April 2009, the plaintiff filed a substantive motion seeking to commit the defendant's directors to civil jail for contempt of court. When the defendant was served, it filed notice of preliminary objection in opposition to the application. In the said notice, the defendant stated that the application was incompetent as it was filed outside the prescribed period of fourteen (14) days from the date leave was granted. The defendant denied having been served with the order of 29th January 2009 together with the mandatory notice of penal consequences. It was the defendant's case that the statement and the affidavit in support of the application for leave were never served upon the Attorney General before the same was presented to the court.

At the hearing of the application, the court directed the defendant to argue its preliminary objection in response to the plaintiff's application. I heard the rival submissions made by Mr. Obwayo on behalf of the plaintiff and by Mr.Havi on behalf of the defendant. There are two issues for determination by this court; the first issue is whether the plaintiff complied with the condition precedent before it could competently lodge an application seeking to commit the defendant's directors allegedly for being in contempt of the orders of the court. The second issue for determination is whether the plaintiff made sufficient basis for this court to require the directors of the defendant to show cause why they should not be committed to civil jail for being in contempt of the orders of this court.

On the first issue, under **Section 5 (1)** or the **Judicature Act**, 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. The power to punish for contempt of court by the High Court and the Court of Appeal in England is provided by **Order 52** of the **Rules of Supreme Court**. The said order also provides the procedure to be followed when a party seeks to cite any person for allegedly being in contempt of the orders of the court. Under **Order 52 Rule 2(2)** of the said rules, a party wishing to commence contempt of court proceedings must seek the leave of the court. **Rule 2(3)** of the said order requires that before the application for leave is filed in court, notice of the application is required to be lodged with the Crown Office (in our case the office of the Attorney General) at least on the preceding day.

Thereafter, if leave is granted, the applicant under **Rule 3(2)** of the said **Order 52 Rules of Supreme Court** is required to file the formal application for contempt of court within fourteen (14) days. The defendant raised a valid complaint that the substantive application seeking to punish the directors of the

defendant for being in contempt of the court is incompetent on two grounds i.e. that the application was filed outside the period of fourteen (14) days that is provided under the rules, and secondly, that the plaintiff had not served notice on the Attorney General at least a day before seeking the leave of court to institute contempt of court proceedings against the defendant. The plaintiff did not have a legitimate answer to the submissions made by the defendant in this regard.

It is therefore clear that the substantive notice of motion is incompetent as it was filed outside the fourteen (14) days period provided by the rules. The plaintiff was required to file the substantive motion seeking to institute contempt of court proceedings against the defendant within fourteen (14) days of 20th March 2009 when this court granted leave for the plaintiff to institute the said proceedings. The plaintiff was required by the rules to file the substantive motion by 3rd April 2009. In **Mucuha vs The Ripples Ltd [1998] LLR 3675**, the Court of Appeal held that where such an application is filed outside the stated period of fourteen (14) days, the same is incompetent. In that case, the Court of Appeal noted that:

*“No application to the court or to this court was made and no extension was sought or obtained to make an application outside the prescribed time of 14 days. It follows that the application and orders of the court made in proceedings consequent to such an application were a complete nullity and there was no application properly or legally before the superior court – see **John F Hogan and others vs Homi D Adrianwalla [1965] EA 594.**”*

It was also evident that the plaintiff had not served the Attorney General with notice a day before it sought leave of the court. This court is aware that contempt of court proceedings are quasi-criminal in nature and therefore all the procedural aspects of the application, including personal service on the alleged contemnor, must be complied with before the court can be said to have the requisite jurisdiction to punish for contempt of court. Cross J in the case of **Re B (JA) (an infant) [1965] 2 All ER 168** held at page 171 as follows in regard to contempt of court proceedings:

*“Committal is a very serious matter. The courts must proceed very carefully before they make an order to commit to prison; and rules have been laid down to secure that the alleged contemnor knows clearly what is being alleged against him and has every opportunity to meet the allegations. For example, it is provided that (6) there must be personal service of the motion on him even though he appears by solicitors, and that (7) the notice of motion must set out the grounds on which he is said to be in contempt; further (7) he must be served as well as with the motion with the affidavits which constitute the evidence in support of it. It is clear that if safeguards such as these have not been observed in any particular case, then the process is defective even though in the particular case no harm may have been done. For example, if the notice has not been personally served, the fact that the respondent knows all about it, and indeed attends the hearing of the motion, makes no difference. In the same way, as is shown by **Taylor vs Roe (8)**, if the notice of motion does not give the grounds of the alleged contempt or the affidavits are not served at the same time as the notice of the motion, that is a fatal defect, even though the defendant gets to know everything before the motion comes on, and indeed answers the affidavits.”*

In the present application, it was evident that the plaintiff's failure to issue the requisite notice to the Attorney General before seeking the leave of the court to institute contempt of court proceedings rendered the said proceedings untenable. Further, the filing of the substantive motion beyond the period of fourteen (14) days contemplated after the grant of leave, rendered the said proceedings a nullity.

In the premises therefore, I hold that the substantive motion filed by the plaintiff is fatally defective for the reasons stated above. I will not at this stage delve into the merits of whether the defendant was in contempt of the orders of this court. The plaintiff must retrace its steps and file competent proceedings before this court can consider the substantive motion on whether or not there has been contempt of the orders of this court by the defendant. The notice of motion dated 30th April 2009 being incompetent is hereby struck out with costs to the defendant.

The plaintiff shall be at liberty to institute other proceedings upon complying with the procedural aspects of the law. It is so ordered.

DATED AT NAIROBI THIS 25TH DAY OF JUNE 2009.

L. KIMARU

JUDGE