



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI Civil Case 39 of 2007

FULVIO COSSU

PAOLA BUFALINI.....PLAINTIFFS

VERSUS

SAID ALI BWANAMKUU

IBRAHIM SAID T/A TIKIWOODWORKS.....DEFENDANTS

R U L I N G

The Notice of Motion application dated 19-11-08 is made under Order L rule 1, XXXIX rule 2A (2) and 9 of the Civil Procedure Rules and Order 63 Civil Procedure Act. It seeks that:

- (1) The Court do issue a committal order against Ali Bwanamkuu and Ibrahim Said both trading as Tiki Woodworks for a period of six months or any other period that the court may deem appropriate, for the disobedience of an order made on 28-2-08.
- (2) In the alternative and without prejudice, this court do issue orders to punish the named persons for contempt of the court orders referred to.
- (3) In the alternative and without prejudice, orders do issue for attachment of the properties of the two named individuals for disobedience of the said court orders.

It is premised on grounds that, the defendants were served with orders issued by this court, which contained a Penal Notice. However respondents have disregarded the court order and continue to violate the court's orders in that:

- (a) Between 1st April 2008 – 16th April 2008 the defendants ran their Woodworking machines in contravention of the said court order
- (b) On 24th September 2008 between 10.00am – 12.00pm, the defendants ran their woodworking machines in contravention of the court order
- (c) On 2-10-08 between 2.45pm – 3.00pm and between 3.10pm and 3.30pm, the defendants ran their woodworking machines
- (d) On 3rd October 2008 between 9.50am – 10.00am, 10.38am -11.00am, 12.00pm – 12.30pm for the defendants ran their woodworking machines

(e) On 4-10-08 between 8.08am – 8.30am, 10.20am – 10.50am, the defendant ran the wood work machines

(f) On 6-10-08 between 12.30pm to 12.50pm, on 11-10-08 between 10.30am – 11.07am, on 13-10-08 between 10.20am – 10.45am and 10.50am – 10.58am and between 11.00am – 11.15am. On 15-10-08 between 8.55am to 9.05am, on 16-10-08 between 9.00am to 9.58am, between 10.00am – 10.47am and 10.50am to 10.05am, on 18-10-08 between 2.10pm to 2.45pm and on 22-11-08 between 3.20pm and 4.30pm, the defendants ran the woodworking machine thereby contravening the existing court orders.

In the affidavit in support of the application, it is deponed that, the court had issued an order of injunction restraining the defendants from carrying on their workshop activity pending the production of an Environmental Report, however on the dates referred to, the Respondents carried out work using the machines. Applicant explains that the defendants maintain the main door and gate to the workshop locked, nonetheless engage in active violation of the order by running the wood machines, as and when they please. Applicant states that one Japheth Ibrahim Salim, a resident employee of the plaintiff has phoned him on several occasions and applicant has heard the squeal and din arising from the use of the machines over the telephone and the deponent Hamza, has personally visited the property and noted that the noise and vibrations were unreasonably high.

Deponent retained the services of Salim Seuf, a photographer who made a recording of the noise and which was audible in the plaintiff/applicant's compound. Japheth Ibrahim Salim, then kept a record of the frequency with which respondent violated the court's orders.

The application is opposed, and the respondents in the replying affidavit states that although applicants allege violation has been ongoing since 1st April 2008, they did not take any reasonable steps until 27th October 2008. Further that it is only when the Respondents filed an application for review of the court orders that applicant moved to court. Respondents deny being in breach of the court orders and explains that the only times that the machines were operated was when the consulting firm known as Ecolife Consultants who were instructed by NEMA were to do an environmental assessment of the workshop.

Respondents contest the allegations made by applicants saying it is coming from information by a third party.

At the hearing of the application, the counsel for applicants, Mr. Ole Kina submitted that the respondents were aware of the existence of the court order and their admission that the machines ran for a limited period to enable a firm carrying out environmental assessment to carry out its duties was a violation of the court orders as those orders prohibited any activities and it does not matter whether the activities were on for one hour or one minute.

Further, that if the assessment was to be carried out then orders ought to have been obtained for permitting limited operations – that was not done and so the respondents must be punished.

In response, Mr. Kupalia for the respondents submits that there was no violation of the court order as the respondents have explained why the machines were set on and that this was not done by the defendants or other employees, but by officials of the firm sent by NEMA to carry out an environmental assessment as the main suit is based on noise pollution. It is also pointed out that Hamza who swore the supporting affidavit on behalf of applicants (having obtained power of attorney) does not even reside in Watamu where the suit premises is situated.

The status of Japheth Ibrahim in swearing the supporting affidavit is also questioned as he is a stranger in this matter.

Mr. Kupalia further states that the respondents were not barred from operating the machines, what they were told was to file an assessment report to enable them operate.

Mr. Ole Kina in response contest the explanation saying it is the respondents who engaged Ecolife

Consultants not NEMA and that the problem is not in the undertaking of the report, rather it has with running of the woodwork machines without the court's permission.

As for Hamza, Mr. Ole Kina asks the court to note that he has come to court courtesy of a Power of Attorney donated to him by the applicants and that Japheth Ibrahim is an employee of the applicant who is swearing the affidavit at the request of applicant – I cannot fault that explanation.

The main issue here is whether respondents acted in contempt of the court orders issued on 28-2-08. The order which is annexed read as follows:

“That pending the hearing and determination of the suit herein, the defendant, the defendants officers, hirelings, servants, and/or agents or any one of them be and are hereby restrained by order of injunction from carrying on with their workshop activity pending the production of an Environmental report in accordance with Section 58(1) of the Environmental Management and Co-ordination Act, Act No. 8 of 1999”

At the foot of the extracted order which was served on the respondents was a Penal Notice. The respondents do not deny being served with that order. It is out of place for Mr. Kupalia to submit that the order did not bar the respondents from operating the machines and that it simply required them to produce the report then carry on with the machines. The order is couched in very simple and clear language as to what the defendants/respondents were restrained from doing and I only hope that what Mr. Kupali submits in court does not reflect the advise he gave the respondents.

The respondents do not deny that on various dates, the machines were operated but they seek to be excused on two grounds:-

(1) That the machines ran over a long period of time without applicant taking any steps and thus acquiesced any as it were to their activities – that does not alter what the terms of the order were, in any event it was not a proviso to the order that in the event of the respondents operating the woodwork machines after service of the order, and with the knowledge of the applicants, then that order would be vacated.

(2) That the machines were ran, not by themselves or their employees but by officers of Ecolife Consultants who had been commissioned by NEMA to carry out the environmental assessment process.

The order did not give exception but perhaps before going into that, let me address the question as to who had allowed Ecolife to operate the machines. The applicants annexed a supporting affidavit marked HM4, and to which Mr. Ole Kina has drawn this court's attention with reference to paragraph 3 where the respondents stated:

“the defendants' company engaged the services of Ecolife Consultants to carry out the improvement to comply with the law...”

It is certainly not NEMA who instructed Ecolife to carry out the exercise, respondents have themselves acknowledged that they are the ones who engaged Ecolife, so as to meet the legal requirements. It is apparent that their action was propelled by the terms of the order issued by the court on 28-2-08 – for that purpose then, Ecolife was an agent of the defendant/respondent. However even without reference to HM4, there is nothing on record to show that it is NEMA which directed Ecolife to operate the machines. If the operation of the machines was necessary for carrying out the assessment, then applicant ought to have come to court to seek the necessary directions and to that extent they were in breach of court order. It is not even clear how many times Ecolife went to operate to the machines.

Order XXXIX Rule 2 A(2) provides:

“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 term not exceeding six months, unless in the meantime the court directs otherwise”

Respondents are not being candid – did Ecolife go to operate the machines on all those multiple dates listed by applicant that respondents have specifically omitted reference as to the dates when the said assessing firm visited the premises and operated the machines and I construe this to be done deliberately and in bad faith.

I recognize that contempt of court proceedings being quasi criminal in nature require higher standards of proof as the liberty of a citizen is at stake and indeed the applicable standard was set in the case of Gaithria K. Mutitika and 2 others V Baharini Farm ltd 1982-88 KLR 863, to this effect.

“...a standard which is higher than proof on a balance of probability but not as high beyond all reasonable doubt”

The applicant has discharged that burden albeit by default, such respondent admit that the machines did run. Was the action excusable....if they had annexed an affidavit sworn by an official from Ecolife clarifying to this court how many times its officials went to run the machine so as to enable them make an assessment and compile a report – the explanation would have been acceptable, as it is I think respondents are being impudent, deciding that they would chart the course of events without recourse to court – that was contemptuous.

Order XXXIX and by extension Section 63 of the Civil Procedure Act applies where the breach relates to injunction – this has been recognized in several court decisions and disused in the publication by Githu Muigai and Ongoya Z. Elisha.

“The Law of Contempt of Court in Kenya”

It is also recognized that under Order XXXIX there is no requirement for leave to bring an application for contempt of court, but an applicant is obliged to show that the injunction order was served on the person bound by it – that has been fulfilled this instance. 2nd respondent opted not to respond at all to the application. Consequently my finding is that this court must punish the respondents for being in breach of the court order and do direct that both respondents be arrested and be committed to civil jail for a period of one (1) month.

Delivered, dated and signed by me in open court this 10th day of June 2009 at Malindi.

H. A. OMONDI

JUDGE

Mr. Ole Kina for applicant

No appearance for respondent at 9.08am