



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Case 60 of 2009**

**GOVERNMENT OF THE REPUBLIC OF LIBERIA.....PLAINTIFF/APPLICANT**

**VERSUS**

**IBRAHIM S. ZAKHEM.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**SAFE HAVEN LIMITED.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**R U L I N G**

The Plaintiff instituted this suit by a plaint dated 15<sup>th</sup> December 2008 and filed in court on 27<sup>th</sup> January, 2009. The suit was against the 1<sup>st</sup> Defendant, a person the Plaintiff had appointed as its Honorary Consul-General to the Republic of Kenya on or about 22<sup>nd</sup> February, 1989. That appointment was revoked on or about 8<sup>th</sup> August, 2009. The 1<sup>st</sup> Defendant acknowledged receipt of the revocation by a letter dated 13<sup>th</sup> August, 2007. The Plaintiffs sued the 1<sup>st</sup> Defendant on grounds that without capacity to lease or deal with the Plaintiff's property, he entered into a Lease Agreement with the 2<sup>nd</sup> Defendant on the 31<sup>st</sup> December 2007, fraudulently and or fraudulently misrepresented himself as being in the capacity and or authority to enter into the said Lease Agreement on behalf of the Plaintiff.

Simultaneously with the plaint, the Plaintiff filed a Notice of Motion application dated 15<sup>th</sup> December 2008. In that application the Plaintiff sought various injunctive reliefs against both the 1<sup>st</sup> and the 2<sup>nd</sup> Defendant. On the 27<sup>th</sup> January, 2009 the court granted various interim orders and temporary injunction pending interpartes hearing of the application in terms of orders 2 to 5 of the application. The extracted orders read as follows:

2. **THAT a temporary injunction be and is hereby issued restraining the 1<sup>st</sup> Defendant/Respondent and 2<sup>nd</sup> defendant/respondent by itself or through its officers or agents from developing, further developing, transforming or in any other way making material changes to, leasing, sub-leasing, charging, transferring or in any manner dealing with ALL THOSE two pieces of land known as Land Reference Numbers 3734/728 and 3737/729 (hereinafter referred to as the "the suit property") pending the hearing and determination of the application.**

3. **THAT a temporary injunction be and is hereby issued restraining the 2<sup>nd</sup> Defendant/Respondent by itself or through its officers or agents from occupying using, abusing, developing, leasing, sub-leasing, charging, transferring or in any way dealing with the suit property pending the hearing and determination of the application.**

4. **THAT a temporary injunction be and is hereby issued restraining the 1<sup>st</sup>**

**Defendant/respondent by himself or through his agents from leasing, selling, transferring, charging disposing or in any way dealing with the suit property and/or any property owned by the Plaintiff pending the hearing and determination of the application.**

**5. THAT a temporary injunction be and is hereby issued restraining the 1<sup>st</sup> Defendant/Respondent by himself or through his agents from holding himself out and/or representing himself as having any form of authority to enter into transactions on behalf of or bind the Plaintiff in any way whatsoever.**

The orders were however varied on 30<sup>th</sup> January, 2009 by the Advocates for the Plaintiff and the 2<sup>nd</sup> Defendant by a consent order dictated to court in the following terms:

***“By Consent interim orders granted in the application dated 15/12/08 in terms of prayer 3 thereof is hereby varied in terms of prayer 4 of the application by the 2<sup>nd</sup> Defendant dated 29/1/09.***

***Prayers 2 and 3 of application dated 15/12/08 are granted as against the 2<sup>nd</sup> Defendant as varied pending the hearing and determination of the suit.”***

The 2<sup>nd</sup> Defendant’s Notice of Motion application dated 29<sup>th</sup> January 2009 sought the following orders in terms of prayers 2, 3 and 4

***“2. Service of this application on the Plaintiff/respondent be dispensed with all together;***

***3. That there be a stay of the Order restraining the 2<sup>nd</sup> defendant from occupying all those properties known as Land Reference Numbers 3734/772 and 3734/729 until the hearing and determination of the Plaintiff’s application herein.***

***4. The Court may be pleased to vary the Order herein of 27<sup>th</sup> January 2009 by deleting the word” from Order No. 3.***

The Plaintiff subsequently filed the current application, a Chamber Summons dated 30<sup>th</sup> June, 2009 in which it seeks various orders against the 1<sup>st</sup> and 2<sup>nd</sup> Defendant. The application is expressed to be brought under Order XXXIX rule 2A (2) and 9 of the Civil Procedure Rules section 3A and section 63(e) of the Civil Procedure Rules and Section 5 of the Judicature Act. It seeks the following orders:

**2. THAT since the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Defendant have disobeyed and defied the Court Order issued by this Honourable Court on 27<sup>th</sup> January, 2009, as varied on 30<sup>th</sup> January, 2009, this Court be pleased to issue the following orders against the said 1<sup>st</sup> and 2<sup>nd</sup> Defendants: -**

**a) That the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Defendant, respectively be fined such sums of money as this Honourable Court may direct and that the same be paid in Court forthwith.**

**b) That there be an Order for the attachment of property belonging to the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Defendant and/or the Directors of the company and specifically one Radhika Thayill Muralee to the extent of such value as this Honourable Court may direct.**

**c) That the 1<sup>st</sup> Defendant, Ibrahim S. Zakhem and the said Radhika Thayill Muralee be each committed to and/or detained in prison for a term of six (6) months.**

**3. THAT the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Defendant be denied audience before this Honourable Court until such time as they shall have purged their contempt.**

The application is based on grounds on the face of the application as follows:

1. **THAT this Honourable Court (Lesiit, J.) made an Order on 27<sup>th</sup> January 2009 by which the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were jointly and severally restrained from *inter alia* dealing with all those two pieces of land known as L.R. Nos. 3734/728 and 3734/729 (“the suit property”). The 1<sup>st</sup> Defendant was also restrained either by himself or through his agent, from holding himself out and/or representing himself as having any form of authority to enter into transactions on behalf of or bind the Plaintiff in any way whatsoever.**
2. **THAT the said Court Order has been defied.**
3. **THAT in particular, the 1<sup>st</sup> Defendant has continued to represent himself as having the authority to transact business on behalf of the Plaintiff and is still holding himself out as Liberia’s Honorary Consul-General to Kenya.**
4. **THAT further, the 2<sup>nd</sup> Defendant and specifically through one Radhika Thayill Muralee has defiantly continued to pay rent due on the suit property to the 1<sup>st</sup> Defendant. In particular, on 7<sup>th</sup> April 2009 the said 2<sup>nd</sup> Defendant paid rent of Kshs. 405,000.00/- to the 1<sup>st</sup> Defendant who in turn issued a purported receipt from the Honorary Consulate of Republic of Liberia.**
5. **THAT disobedience of Court Orders threatens the very foundations of the administration of justice and paints our Courts as weak, powerless and ineffective, particularly in the eyes of the International Community in this case.**
6. **THAT parties who disobey court orders must be punished.**
7. **THAT it is in the interest of justice that the Court do issues the Orders herein.**

The application is supported by the affidavit of Kimani Mathu of even date. Mr. Kimani Mathu has identified himself as Liberia’s Honorary Consul to Kenya. The same deponent swore a further affidavit dated 12<sup>th</sup> July, 2009. There is also further affidavit sworn by One Ambassador Prof. Francis B. S. Johnson, a resident of Monrovia and the Inspector General of Foreign Service in the Ministry of Foreign Affairs, Republic of Liberia. The affidavit is sworn in reply to the replying affidavit sworn by one Radhika Thayill Muralee on behalf of the 2<sup>nd</sup> Defendant.

The 2<sup>nd</sup> Defendant has filed one replying affidavit as mentioned hereinabove. Mr. Mungu on behalf of the 2<sup>nd</sup> Defendant has also filed grounds of opposition dated 10<sup>th</sup> July 2009 in which the following grounds are listed.

1. **THAT the application is bad in law and incurably defective both in form and substance and ought to be dismissed with costs;**
2. **THAT the application is an abuse of the Court process and is made in bad faith;**
3. **THAT the order that was stated to have been violated was not served on the 2<sup>nd</sup> Defendant nor was a Penal Notice served thus rendering the application untenable.**
4. **THAT the order the subject matter of this application was unclear and ambiguous.**
5. **THAT the entire application does not disclose any cause of action in respect of contempt of court.**

On behalf of the 1<sup>st</sup> Defendant, Mr. Rao Advocate filed a Notice of Preliminary Objection dated 9<sup>th</sup> July, 2009 in which the following objection was set out.

**“TAKE NOTICE that the 1<sup>st</sup> Defendant/Respondent shall object to the Plaintiff/Applicant’s**

***application filed on 1<sup>st</sup> July 2009, on the grounds that the Order of the High Court issued by this Honourable Court on 27<sup>th</sup> January, 2009 as varied on 30<sup>th</sup> January, 2009, the subject matter of the application for contempt, was not served on the 1<sup>st</sup> Defendant/Respondent, and therefore the application filed herein is a nullity or otherwise invalid.”***

The 1<sup>st</sup> Defendant has also sworn a replying affidavit dated 6<sup>th</sup> July 2009 and filed in court on 19<sup>th</sup> July 2009.

I have considered the application, all affidavits sworn by each of the parties to the application, the grounds of opposition and preliminary objection raised by the Defendants. I have also carefully considered submissions by all counsels together with the authorities cited.

The Plaintiff's contention is that the two Defendants have blatantly and in contempt of this court dealt with the suit property contrary to the restraining order. The restraining order is annexed as Exhibit 1 to the supporting affidavit. A Penal Notice was issued together with the order against both the 1<sup>st</sup> Defendant and 2<sup>nd</sup> Defendant. The Plaintiff seeks an order fining the two Defendants such sums as the court may direct, and further that an order of attachment of property belonging to the 1<sup>st</sup> and the 2<sup>nd</sup> Defendant, and in the case of the latter the order in particular one Radhilla Thayill Muralee to the extent of such value as this court may direct and an order committing both as above to civil jail for a term of six months. The Plaintiff also seeks that this court deny the Defendants any audience.

The Plaintiff has to prove that the Defendants were served with the injunctive order requiring them not to deal with the suit property. Two issues have arisen in regard to service, one whether service should be personal to the Defendants and secondly which order ought to have been served the one issued on 27<sup>th</sup> January, 2009 or the one of 30<sup>th</sup> January 2009. Mr. Regeru for the Plaintiff has drawn the courts attention to the back of the order served upon the Defendants. Counsel submitted that Mr. Rao, Advocate for the 1<sup>st</sup> Defendant acknowledged receipt of the order on 6<sup>th</sup> February 2009, on behalf of the 1<sup>st</sup> Defendant. As to the 2<sup>nd</sup> Defendant, Counsel submitted that Ms. Muralee acknowledged receipt of the order signing at the back of the order on behalf of the 2<sup>nd</sup> Defendant.

Mr. Rao does not dispute that he was served with the order in question. Counsel submitted that for contempt proceedings to succeed, service of the order had to have been effected upon the contemnor, in this case the 1<sup>st</sup> Defendant himself and contended that service upon an advocate of the party to be served was not recognized. For this preposition counsel relied on the case of **Nyamodi Ochieng Nyamogo & Another vs. KP&TC CA No. 264 of 1993** where it was held:

***“The law on the question of service of order stresses the necessity of personal service. In Halsbury's Laws of England (4<sup>th</sup> ed.) Vol. 9 on p.37 para 61 it is stated:***

***“61 Necessity of Personal Service. 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....***

***Where the order is made against a company, the order may only be enforced against an officer of the company if this particular officer has been served personally with a copy of the order.***

***Keeping the importance of personal service of the order in mind we now take a look at the aforesaid two copies of the order both of which bear the stamp of Wetangula & Co. Advocates, in acknowledgment of receipt of the said orders. Service on Wetangula & Co. does not constitute personals service on any of three officers. It is a personal service on each one of them that is required to be effected by law. Service of the two orders on Wetangula & Co., Advocates, on 25<sup>th</sup> October, 1993, and 1<sup>st</sup> November, 1993, therefore, is a wasted effort.”***

Mr. Regeru for the Plaintiff submitted that personal service was only required for mandatory orders and that for prohibitory orders such as one issued by this Court, there was no such requirement. Counsel relied on the case of **Ochino & Anor. v. Okombo & 4 others (1989) KLR 165** for the general principles regarding service.

Counsel relied on the case **of Husson & Husson [1962] 3 All ER 1056** where court held:

***“The court would order the husband to be committed to prison forthwith, since the order of which he was in breach was a prohibitory, not a mandatory, order and, therefore, it was sufficient to show that he had notice of the injunction by his presence in court when it was granted.”***

Counsel also relied on **M v P and Others [1992] 4 All ER 833** where the English Court found that personal service of the order on the Plaintiff in the case was not required since the Plaintiff’s solicitors had received a copy of the order from the court.

Mr. Regeru also relied on a Court of Appeal decision in an Election petition **Mohamed v Bakeri & 2 Others [2005] 2 KLR 196** where Court held if personal service which is the least form of service in all areas of litigation is not possible other forms of service may be resorted to and that no man can be allowed to rely on his own wrong to defeat the otherwise valid claim of another man.

Mr. Mungu on his part made no contribution on the issue of service but has urged the court to note that the signature alleged to be by his client did not have the name of Ms. Muralee written on it.

I will consider the issue whether there ought to have been personal service or not at a later stage in this ruling.

Mr. Rao urged that the order served upon him was the one made by the court *ex parte* in the first instance on 27<sup>th</sup> January 2009. Counsel urged that since the order was varied by the consent order of 30<sup>th</sup> January 2009, the Plaintiff’s advocate ought to have extracted that order and served it as the effect of the variation was to replace the earlier order with the latter and therefore the only order the Defendants could be in contempt of was the second one.

Mr. Mungu for the 2<sup>nd</sup> Defendant agreed with Mr. Rao. Mr. Mungu submitted that following the variation of the Court order by the consent order, there ought to have been a fresh order served. Mr. Mungu further submitted that the Plaintiff needed to prove service by filing a return of service by the process server who effected the service and annexing the order or document served.

Both Mr. Rao and Mr. Mungu submitted that in line with the **Nyamodi Nyamogo** case, *supra*, the standard of proof required was one beyond reasonable doubt.

Mr. Regeru urged that in respect of the 2<sup>nd</sup> Defendant, her advocate was present and participated in the variation of the order and so she was aware of the order. Mr. Regeru also submitted that variation of the Court order did not affect the order made by the court on 27<sup>th</sup> January, 2009 as the variation merely removed the provision requiring the 2<sup>nd</sup> Defendant to be evicted from the suit premises, which was included in the prayers inadvertently.

Mr. Regeru submitted that neither Mr. Rao nor Mrs. Lee had filed any affidavit challenging service to either of them and that the court should find their arguments in regard to service as having been made out of desperation.

On the issue of service I have certified that there is enough proof before the court to find that Mr. Muralee received personal service of the order extracted from this court made on 27<sup>th</sup> January 2009 on behalf of the 2<sup>nd</sup> Defendant. I am satisfied that there is proof beyond any reasonable doubt that the 2<sup>nd</sup> defendant was properly served with the order of the court of 27<sup>th</sup> January 2009. In regard to the order varied on 30<sup>th</sup> January 2009 I do find that there was no need of personal service of 2<sup>nd</sup> defendant because the variation

was done by its counsel on its behalf. It cannot therefore fail ignorance of that order in any event it is my view that the variation though significant was a very minor alteration in that only one word, i.e. occupying, was deleted from the earlier order.

In regard to the 1<sup>st</sup> Defendant there is no dispute that there was no personal service of either of the two orders because the 1<sup>st</sup> Defendant was out of the country at the time and has remained out of the country ever since.

The other issue raised is whether there has in fact been any contempt. Mr. Rao has urged that the Plaintiff has not proved to whose favour the payment cheque issued by the 2<sup>nd</sup> Defendant was drawn. Counsel urged the court to note that no averment was included in the supporting affidavit touching on that aspect and that neither was there any averment that the Plaintiff did not receive the payment. Mr. Rao urged the court to note that the 1<sup>st</sup> Defendant position was that he had authority to receive the rent and that in his defence, he had included a counter claim for that sum. Counsel also urged that the Plaintiff was exaggerating by stating the 1<sup>st</sup> Defendant had continued receiving rent when in fact the payment in issue was only one made on 7<sup>th</sup> April 2009.

Mr. Mungu on his part urged the court to note that the Plaintiff had not disclosed whether its office at Maendeleo ya Wanawake House, where the 2<sup>nd</sup> Defendant paid the rent in issue, was ever closed, nor has it disclosed where its new offices are. Mr. Mungu urged that the 2<sup>nd</sup> Defendant averred that she paid rent to the Consular offices which are the offices the 2<sup>nd</sup> Defendant has always dealt with.

Mr. Regeru in response to issue of proof of payment drew the courts attention to paragraph 20 of Mr. Mathu's affidavit where receipt of rent is specifically denied. I agree that the issue of receipt of payment by the defendant has been denied and the same is a contentious matter which should be dealt with in this case.

In regard to the Plaintiff's presence in the country, Mr. Regeru submitted that the Plaintiff appointed Mr. Kimani Mathu on the 27<sup>th</sup> March 2009 and that since the 2<sup>nd</sup> Defendant's advocate and the Plaintiff's advocate had been coming to court, the 2<sup>nd</sup> Defendant was aware that the Plaintiff had disowned the 1<sup>st</sup> Defendant as its agent and had no excuse for continuing to deal with him subsequent to the court order.

In regard to the issue whether there has in fact been any contempt of court by either of the parties. The Plaintiff has to prove that there has been contempt of court on a standard above mere balance of probabilities. The standard of proof required is the one beyond reasonable doubt. While considering the issue of service in respect of the 1<sup>st</sup> Defendant I did not deal with the issue whether personal service was required and reason is because I did not think it was necessary to go to that issue. The simple reason for that view is the fact that the evidence before the court is clear that the 1<sup>st</sup> Defendant was out of the country when the orders in question were made and that he has remained out of the country ever since. Contempt of court cannot be committed through proxy. The Plaintiff's case is that because the 2<sup>nd</sup> Defendant walked into an office where the 1<sup>st</sup> Defendant sat as an Honorary Consul General of the Plaintiff, in the absence of the 1<sup>st</sup> Defendant, that therefore the 1<sup>st</sup> Defendant was in contempt of the court order. I find that since the 1<sup>st</sup> Defendant was not within the country when the offending visit to 'his' office was made, the circumstances are rather remote to hold the 1<sup>st</sup> Defendant in contempt. The Plaintiff needed to adduce evidence to show that the 1<sup>st</sup> and the 2<sup>nd</sup> Defendant colluded for the latter to pay the former the sums of money in question. There was no evidence of collusion adduced in court. In absence of that evidence and in the circumstance of this case I do find that contempt of court has not been proved in respect of the 1<sup>st</sup> Defendant.

In regard to the 2<sup>nd</sup> Defendant I have considered the fact that no evidence has been adduced to show that after the appointment of the 1<sup>st</sup> Defendant as Honorary Consul General of the Plaintiff was revoked, that the Plaintiff moved offices. It is common knowledge that a change in personality does not necessarily mean a change of the location of the office where the personality worked. It was incumbent upon the

Plaintiff to adduce evidence to show that after revoking the appointment of the 1<sup>st</sup> Defendant it also changed the location of its Consulate. There was no such evidence before me. I do find that in respect of the 2<sup>nd</sup> Defendant contempt of court has also not been proved.

Mr. Rao challenged the veracity of the affidavits sworn by Mr. Kimani Mathu on grounds one was sworn before he was made a Consul-General while the other deposed to matters of personal knowledge which are doubtful. In view of my findings on the issue of contempt I do not think it is necessary to deal with this issue.

Mr. Mungu has raised issue with the generality of the term “dealing” used in the order. Counsel urged that the term “dealing” is very wide and urged that the word be interpreted to mean physical dealing with the property, which was the information preceding the said word. Mr. Mungu submitted that in the circumstances, payment of rent does not qualify as one of the acts which the Defendants were prohibited from doing under the order served. . In view of my finding on the issue of contempt it is not very necessary to deal with this issue in detail. However, I must point out that if there was any doubt as to the meaning of the word dealing, Mr. Mungu should have come to court to clarify that point before the offending act was committed by his client.

**Having come to the conclusion I have of this application I will dismiss the application dated 30<sup>th</sup> June 2009. However I order that each party should bear their own costs of application.**

**Dated at Nairobi this 24<sup>th</sup> day of July, 2009.**

**LESIIT, J.**

**JUDGE**

***Read and signed in presence of:***

Mbaluto holding brief Mr. Regeru for the Applicant

Areba holding brief Mr. Rao for the 1<sup>st</sup> Respondent

Mr. Mungu for the 2<sup>nd</sup> Respondent

**LESIIT, J.**

**JUDGE**

By consent application dated 15<sup>th</sup> December 2008 be heard on 26<sup>th</sup> October, 2009. Interim orders extended.

By consent parties to file and exchange skeletal arguments. Plaintiff to file and serve within 21 days. Defendants to file and serve theirs within 21 days from date of service with Plaintiff.

**LESIIT, J.**

**JUDGE**