REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 1604 of 1998

KAMAU PATRICK NJUGUNA…….PLAINTIFF

VERSUS

ANN MUMBI HINGA…….DEFENDANT

RULING

There appears to have been orders made on the 26/10/03 which this court, has failed to trace on the record, which was allegedly disobeyed leading to the orders made by Ransley J on 13/4/05, in respect of which a warrant of a rest, was issued for the arrest of the applicant herein for reasons of contempt of the said orders. The orders of Ransley J of 13/4/05 read as follows:

"*warrant of arrest to issue for the arrest of the defendant Ann Mumbi Hinga who should appear before me to answer the charge against her*"

Those are the orders which have grieved the applicant prompting him to file the application subject of this ruling, brought by way of notice of motion dated 7th day of April 2008 and filed the same date. It is brought under order XXXIX rules 4 and 9, order L rule 1 of the CPR and sections 3A and 63 (e) of the CPR. Four (4) prayers are sought namely:-

1. That the honourable court, be pleased to certify this application urgent, and that the same be heard exparte in the first instance.

2. That the honourable court, be pleased to stay execution of the warrant of arrest against the defendant on the 13th April 2005 pending the hearing and determination of this application.

3. That the Honourable court, be pleased to discharge or set aside the warrant of arrest issued against the defendant on the 13th April 2005 as well as the order issued on the 17th April 2002.

4. That costs be provided for.

The grounds in support are set out in the body of the application, supporting affidavit, written skeleton arguments and case law. The background information herein can be SOURCED from the pleadings. There is an original plaint dated the 17th day of July 1998 and filed on the 21st July 1998. Appearance is dated 24th day of August 1998, and filed on the 25th august 1998. Whereas the defence is dated 10th day of September 1998 and filed on 14th day of September 1998. Both were filed by counsel. Reply to defence is undated but filed on 26th November 1998. The application for leave to amend is dated 12th day of October 2000, and filed the same date. It is brought under the same usual provisions of order VI rule

3(1) and 8 of the CPR. The orders read thus:-

1. *The plaintiff be granted leave to amend its plaint.*

2. *The annexed draft amended plaint be deemed filed and served upon the defendant.*

3. *That costs of this application be costs in the cause.*

The said application went before the SPDR on the same 12/10/2000 and the following orders were made:

"***Order*** *I grant orders in terms of prayer 1 of application dated 12/10/2000. Such amended plaint be filed and be served within 14 days from today. Liberty to defendant Mumbi to file amended defence within 14 days from the date of service of the amended plaint costs in the cause.*

The amended plaint on the record is indicated to have been amended on the 21st day of September 2000, and filed on the 8th day of December 2000. 14 days from 12/10/2000, fell on the 25/10/200 which should be the last date for filing the same. There is no harm in scheming through the same since it is on the record. Those relevant to the application are as follows:-

- On or about 14th day of April 1993 the plaintiff entered into a sale agreement with the defendant for purchase of one acre portion of L.R. NO 3994/11 i.e L.R. NO. 399/11/5 (sub plot No. 2) new LR No. 18082 for a sum of Kshs 900,000.00 for which the plaintiff was the registered owner of plot number 18082.

- The plaintiffs' plot was a sub division of the parent title, whose one of the conditions for the subdivisions was that there was to be a provision of a 12 metre wide access road finished to adoptive standards, application of water supply to each plot and comprehensive water reticulation.

- That the said proposed road was clearly demarcated and approved by the Director, City planning and architecture, Nairobi city council, in accordance with the safety regulations. But in breach thereof, the defendant purported to relocate the road of access on Gong road, at a dangerous black spot corner near the Shade Hotel with total disregard to the safety of the road users and in particular the plaintiff. In addition failed to provide water supply to the plaintiffs plot.

In consequences thereof, the plaintiff sought

(a) A declaration that the defendant is in beach of the conditions of subdivision approved by the commissioner of lands in connection with the purchase of L.R. NO. 18082.

(b) An order for mandatory injunction to issue against the defendant to compel her to provide a 12 metre wide road access finished to adaptive standard as set out in the said conditions of the subdivision. And or in the alternative.

(c) An order restraining the defendant from interfering or in any other way dealing with the plaintiff's present road of access.

(d) Costs of the suit.

(e) General damages, for breach of contract.

(f) Interest on (d) and (e)

(g) Any other relief the court deem fit.

On the said amended plaint, the plaintiff anchored an application by way of chamber summons dated 6th

day of January 2001 and filed on the 29th June 2001. The main prayers were 2 and 3 and they read:-

"*2 the defendant by herself, agents and or servants be compelled by an order of mandatory injunction to construct and or provide the plaintiff/applicant with a 12 metre wide road of access constructed to adaptive standard to the plaintiffs' premises in Karen Estate, Nairobi being LR 18082 in accordance with the condition for subdivision dated 27th February 1992.*

4. *Pending the determination of this Application, the defendant by herself, servants, and or agents be restrained by a prohibitory injunction from barricading or threatening to barricade or in any way interfering with the plaintiff guiet use of his current road of access identified on the annexed sketch plans and marked in blue ink."* The same was allowed exparte on 19/4/2002 due to non appearance of the defendant.

The record reveals that the order was extracted and sealed on 3/6/2002. There is an R/S sworn by one Hudson Ongadi Mbogan on the 2nd day of June 2003. Paragraph 2, 3, and 4 depone that he had instructions to serve the defendant at Karen Chief's office. He proceeded there, on 28th day of march 2003, and served the same in the presence of chief Philip Kingong, and that the defendant was pointed out to the process server by the plaintiff. It is on record that the orders were not allegedly obeyed, leading to the plaintiff putting in an application for leave to apply for committal proceedings, which application was dated 23/5/2003 and filed on 17/7/2003 and allowed on 18/7/2003. The granting of those orders is what led to the filing of the committal proceedings vide an application dated 22/10/2003 and filed on the 19th day of December 2003. 2 prayers are sought namely:-

1. This honourable court, may commit for contempt the Respondent herein Ann Mumbi Hinga for having failed and or neglected to comply with the following order issued by this Honourable court on the 3rd day of June 2002.

(a) A mandatory injunction compelling her to construct and or provide the applicant with 12 metre wide road of access constructed to adaptive standards to the Applicants premises in Karen Estate Nairobi being L.R. 18082 in accordance to the conditions for subdivision dated 27th February 1992.

2. The costs of this application be in the cause.

This is the application which came up on 13/4/2005 and warrant of arrest issued although the learned judge as he then was mistakenly stated that the application was dated 26/10/2003. No such application has been traced on the record. The orders were issued on the strength of an R/S sworn by the same Hudson Ongadi Mbogan on the same 13th day of April 2005. Vide paragraph 5, the process server alleges to have served the defendant at Karen where she resides, but there is no mention as to whether he had prior knowledge of the place where the defendant was traced or not.

The above are the sequence of events that led to the filing of the application already set out herein subject of this ruling. The grounds in support are as follows:-

- Previously she was represented by Mutiso and company advocates who never brought to her attention the process and pleadings leading to the issuance of the orders of warrant of arrest sought to be upset herein. The proceedings herein were unearned during the proceedings in HCCC Misc application **No. 617 of 2000. VICTORIA NJOKI GATHAARA VERSUS ANN MUMBI HINGA.**

- She was never served with the application or orders.

- She has been in and out of the country.

- Denied refusing to construct the access road, but says that the road shifted to another area.

- The plans that the plaintiff relied upon to obtain the orders that led to her arrest have not received the

sanction of the commissioner of lands. The provisional subdivisions that the plaintiff relied upon were later amended.

- She has designed a road of access in line with the approvals from the city council and commissioner of lands annexture AMH3.

- It is her stand that where the plaintiff wants her to construct a road has not received any approval from the relevant authorities and construction of the road will thus be in breach of the law.

- On the basis of the advice received from her counsel, she contends that there was no pleadings on the basis of which the application giving rise to both the orders alleged to have been disobeyed and the warrant of arrest could be anchored.

In the written skeleton arguments dated 30th day of June 2009, and filed on the 1st day of July 2009, counsel reiterated the content of the supporting affidavit and then stressed the following:-

-Reiterated the applicant stand that she was never served with the application dated 21/10/03 (22/10/03) hearing notice dated 29/1/05 and orders issued on 13/04/05.

(ii) The orders were issued on the strength of an amended pleading, sub division relied upon by the court, was not the actual subdivision that had been approved, the plaintiff suppressed material facts when applying for an injunction, the injunction is incapable of performance, the order did not specify the time frame within which to comply with the demands, the sale of the property was subject to other conditions not disclosed by the plaintiff when seeking the said orders, and that it is just and proper and reasonable to set aside the said orders.

-Still maintained that the sub divisional plans that the plaintiff had shown to the court, were provisional and underwent changes where by the road shifted to another area. The change was to facilitate the amalgamation of subdivisions to add up to 5 acres, as a condition to facilitate the burial of the defendants husband on the suit plot.

- Maintains that the road the plaintiff wants to built is no longer available. Instead there is a court order requiring the maintenance of the road objected to, pending the hearing and the determination of the judicial review proceedings.

- As conceded by the plaintiff, indeed the applicant experienced certain problems which made her flee the country and only come in and off but did not stay at home but in various undisclosed Hotels.

-If the road passes where the plaintiff wants it to pass, it will reduce the 5 acres reserved for the tomb making it successtible to removal.

- Maintains they have placed sufficient material before this court, to warrant the setting aside and or varying the order sought to be varied because:

(i). She has moved to apply for its removal as soon as she become aware of it.

(ii). The same was not opposed, heard exparte and the same issued without her knowledge.

(iii). She is being compelled to construct a road on a site not approved and if effected, this will expose her and make her liable to prosecution.

(iv). The construction will reduce the burial site for her husband making it susceptible for removal.

(v). Contend that the order was issued in excess of jurisdiction in that:-

(i) The plaint dated 17/07/98 did not seek an injunctive relief. This was brought out in the amended

plaint amended on 21/09/00.

(ii) Application for amendment was heard on 12/10/00 and amended plaint ordered to be filed within 14 days but the one on which the application was anchored was filed 57 days later without leave and as such the said order to amend introducing the injunctive relief ceased to exists in terms of order VIA rule 6 CPR

(iii) The above being the position, it is clear that the court, was misled into granting the injunctive relief on the basis of a flawed pleading.

(iv) By reason of the above, the plaintiff does not enjoy a valid injunctive relief and a warrant of arrest.

- It is their stand that the facts disclosed herein did not call for the granting of a mandatory injunction.

- The orders of the court, have been subject of abuse in that the injunctive orders were granted in 2002, whereas the warrant of arrest was issued in 2005 three years later.

- Further evidence of abuse is the fact that, since filing the same, the plaintiff has not taken any steps to prosecute the same giving an impression that all that the plaintiff wanted to do was to obtain an injunctive relief, arrest, and detain the defendant in jail and then that would be it.

- There will be no prejudice to the plaintiff if the injunctive relief is set aside.

The plaintiff/ respondent on the other hand opposed the application on the basis of a replying affidavit sworn by the plaintiff Kamau Patrick Njuguna on the 20th day of May 2008 and filed the same date. The salient features of the same are as follows:-

- Concede filed an application dated 29/6/01 seeking a mandatory relief which application was served on the defendants counsel then on record on the 3rd July 2001, and an affidavit of service was filed in court, to that effect on 2nd October 2001, agued on 17/4/02 and allowed and order served on the defendant at the chiefs office on the 28th day of March 2003.

- Upon failure to obey the orders, leave to apply for contempt proceedings was filed and allowed, which allowing led to the filing of the application for contempt which was also served, heard exparte and orders made on 13/4/05, which orders have ever been treated with contempt by the applicant.

- The plaintiff also put in supplementary affidavit sworn on the 11th March 2009 in response to the defendants supplementary affidavit sworn on 3rd day of may 2009, and filed the same date. For purposes of the record, the content of the defendants supplementary affidavit to which the plaintiff responded simply contained what has been set out above. In response to the said content the plaintiff stated.

- The defendant/applicant had knowledge of the contempt proceeding because she swore an affidavit in reply marked PKA.

- -Maintains the Access road net work to the respective plots was demarcated in 1989 and 1993 and in corporated in the wider Karen/Longata structural plan as shown by annexture PKB1, B2 and B3.

- Does not agree that what the defendant has proposed to reopen as an access road is the correct access road as the chief engineer roads has tried to block the same severally as shown by annexture PCF 1-4.

- Disputes pendence of judicial review application as the stay orders granted therein lapsed and the substantive application was filed out of time.

- He is a stranger to the wild allegations contained in paragraph 12, 13 and 14 of the supplementary

affidavit and the same should be struck out.

- The approval relied upon by the applicant for the alternative access road in highly suspicious.

- Does not agree that original subdivisions were cancelled as no gazettement of the said cancellation was done.

- The approval of the relocation of the access road by the same office of the chief Engineer roads is a contradiction and on apparent misrepresentation of the correct fact.

- It is his stand that the road, the community has been using is 50 meters away from the tomb, and has all along been used without any interference with the rights of the dead.

- Still maintains the access road opened by the defendant is at a well known block spot next to the Shade Hotel irrespective of whether it has been listed as a black spot by traffic police or not.

- The court, is urged not to hear the defendant before she purges her contempt because she was aware of the some evidenced by the fact that she filed a replying affidavit in opposition to the application to institute contempt proceedings. As such her allegation that neither her nor her advocates were served with the order and application cannot hold.

- The allegation that the order was obtained exparte and irregularly cannot hold as it is now trite that once a court order has been issued, it has to be obeyed until the same has been discharged and or set a side.

- Concede the power of the court, to set aside an exparte order is discretionary. However in the circumstances of this case, the defendant is not worth of the exercise of the court's discretion in her favour because:-

(i) The application seeking the injunctive relief was served, the defendants then advocate appeared and sought an adjournment to enable the client file a replying affidavit, which was granted to another date, which date was rescheduled to the date on which it was heard by consent, but the defendant's counsels failed to turn up and the same was disposed off on merit.

(ii) The court, is urged to believe the R/S on record that service was effected on the 28th day of March 2003.

(iii) Proof that she was aware of the orders is shown by the fact that she filed a replying affidavit to the application for leave to institute contempt proceedings.

(iv) Application to punish for contempt was filed and served on the defendant's counsel who chose to ignore the same.

(v) The court, is urged to ignore as an after thought the allegation of the amended plaint being irregular.

(vi) Allegation that the deed plan relied upon by the plaintiff are provisional does not hold because the defendant/applicant has not produced the provisional deed plan, the plaintiff has exhibited the deed plans which formed the basis for the 1992 subdivision after the surrender of the deed plan to the government. The land leased to belong to the defendant and any transactions actions in respect thereof after such surrender was illegal and void abinitio, there is no demonstary by way of documentation proof that there were amendments effected on to the original deed plan, alleged amendments are doubtful as there was no gazettment of the same as it is required by law, the orders in HCCC Misc application 114 of 2009 do not operate to the benefit of the applicant as the same were obtained through material non disclosure as these was no disclosure of the existence of there proceedings or the naming of the plaintiff herein as an interested party. Further the said order was temporary and the same has lapsed. The issue of interference

with the tomb does not aid the applicant as the same was constructed after the surrender of the deed plan to the government. As such the applicant is the author of her own misfortune as the deceased died in 1997 after the deed plan had been surrendered in 1992 and the defendant should have avoided siting the tomb on the access road as that was to her knowledge public land.

-Maintains setting aside the orders sought to be set aside will course hardship to the plaintiff as the same were made 6 years ago and will also delay the final conclusion of the main case.

- Still maintains that the access road which the defendant has opened is located at black spot, a move which has been opposed by the chief engineer roads to the knowledge of the Applicant.

On case law, the defendant/applicant referred the court, to the case of **MUTITIKA VERSUS BAHARINI FARM LIMITED (1985) KLR 227 a CA** decision where it was held interalia that:-

1. A person, one who knowing of an injunction or an order of stay willfully does something or causes others to do something to break the injunction or interfere with the stay, is liable to be committed for contempt of court, as such a person has by his conduct obstructed justice.

2. The standard of proof in contempt proceedings must be higher than proof on a balance of probability, and almost but not exactly beyond reasonable doubt as it is not safe to extend the latters standard to an offence which is quasi criminal in nature. The guilt of contemnor has to be proved with such strictness of proof as is consistent with the gravity of the charge.

3. The principle must be borne in mind that the jurisdiction to convict for contempt should be fully exercised with the greatest reluctance and anxiety on the part of the court, to see whether there is no other mode which can be brought to bear on the contemnor.

The case of **BELLE MAISON LIMITED VERSUS YAYA TOWERS** decided by Bosire J as he then was (now JA) on the 25th May 1992. At page 4 of the ruling, the learned judge as he then was (now JA) quoted with approval the case of **NOOR MOHAMED JAN MOHAMED VERSUS KASSAMALI VIRJI MADHANI (1953) 20 EACA 8** where it had been held that "*a mandatory injunction should not be granted where innocent third parties are likely to be affected."* And the case of **PRISCILLA WAMBUI DANSON VERUS NAIROBII CITY COMMISSION NAI HCCC NO. 837 OF 1984** that "*nor should it be granted (mandatory injunction) where damages are adequate or where the defendant is not capable of complying"* (at page 7 last paragraph) "……*A mandatory interlocutory injunction ought and must be invoked to aid the law. It offends public policy to flagrantly disobey the law….."*

The plaintiff/respondent on the other hand referred the court, to the case of **SHAH VERUS MBOGO AND ANOTHER (1967) EA 116** whose relevant principles to this ruling is the holding that:- "*The courts', discretion to set aside an exparte judgement is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion of otherwise to obstruct or delay the cause of justice".*

The case of **SHAH AND ANOTHER t/a LENTO AGENCIES VERSUS NATIONAL INDUSTRIAL CREDIT BANK LIMITED (2005) IKLR 300** decided by Njagi J where it was held interalia that:-

1. Unless and until a court, order is discharged, it ought to be obeyed. The only way in which a litigant can obtain reprieve from obeying a court, order before it is discharged is by applying for and obtaining of temporary stay.

2. The general rule that a party in contempt cannot be heard or take any proceedings in the same cause until he has purged his contempt applies to proceedings voluntarily instituted by himself in which he makes some claim and not a cause where all he seeks is to be heard in respect of some matter of defence or where he appeals against an order in the cause which he alleges to be illegal as having been made without jurisdiction.

3. It is a strong thing for a court, to refuse to hear a party to a cause and it is only to be justified by grave considerations of public policies. It is a step which a court, will only take when the contempt itself implies the cause of justice and there is no other effective means of securing his compliance."

The case of **NDERU VERSUS KENYA CHAMBER OF COMMERCE AND INDUSTRY AND ANOTHER (2003) KLR 160** decided by Onyango Otieno J as he then was (now JA) where it was held interalia that:-

1. A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and only in clear cases where the court thinks that the matter ought to be decided at once or where the injunction is directed at a simple and summary act which can easily be remedied.

2. A mandatory injunction at an interlocutory stage is rarely granted only when the plaintiff's case is clear and uncontrovertible.

3. A party ought not to be allowed to retain a position of advantage that it entertained through a blatant unlawful act……"

On the courts', assessment of the rival arguments herein, it is clear that the rival arguments herein have presented arguments on both technical and merit fronts for determination by this court. The technical front arises for determination as to whether the application which gave rise to the orders in respect of which the warrant of arrest of the defendant/applicant was issued, was anchored on a regular pleading on the part of the defendant/applicants, and whether the defendant/applicant ought to be heard before she purges the contempt in respect of which the warrant of arrest sought to be set aside was issued. Whereas on the merits side issue arises as to whether there is sufficient demonstration made by the applicant to warrant, this court, to exercise its discretion in her favour.

Starting with the technical fronts, the following facts do not appear to be in contest namely:-

(a) That the plaintiff is the party who first moved to this court, and instituted the current proceedings.

(b) That the initial plaint, did not make provision for issuance of an injunctive relief.

(c) That indeed leave to amend the plaint was sought by the plaintiff which amendment sought to introduce a plea for an injunctive relief.

(d) Indeed the leave to amend was granted and the plaintiff then applicant was given 14 days from the date of the order to file and serve the amended plaint.

(e) There is no dispute that 14 days from 12/10/000 fell on 24/10/00.

(f) There is no dispute that the amended plaint was filed on 8th December 2000 a period of 57 days away.

(g) There is no dispute that the application which gave rise to the issuance of the injunctive relief was anchored on the amended plaint.

(h) There is no dispute that the injunctive application sought and granted was mandatory in nature in that it required the defendant/applicant to reopen the initial access road.

(i) There is no dispute that the said orders are still in place and have not yet been discharged and or varied.

(j) There is no dispute that the defendant/applicant has now been heard on her application seeking the setting aside of both the warrant of arrest and the injunctive orders themselves.

Due consideration has been made by this court, in so far as the technical front is concerned in relation to the principles of law applicable and the court, is satisfied that the applicant/defendant as the addressee of the said orders what she was expected to do is that which is dictated in the decision of **HADKINS ON VERSUS HADKINSON (1952) ALL ER 567** where it was held interalia that:-

"*It is the plain and unqualified obligation of every person against or in respect of whom an order is made to obey it, unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void"*

Applying this to the facts herein, it is clear that although, the defendant/applicant alleges not to have been made aware of the injunctive orders at the early stages, and alleges only to have been made aware of the same later on, it is evident that she did not move to obey them. Instead she has moved not only to upset the resultant benefit from it, but the orders themselves as well. It is on this basis that the plaintiff/respondent has submitted that she be made to face the consequences set out in the decision in the case of **GORDON VERSUS GORDON (1904-7) ALL ER 702** where it was held interalia that:- " *the general rule is that a party in contempt cannot be heard, or take any proceeding in the same cause, until he has purged his contempt, which applies to proceedings voluntarily instituted by himself in which he makes some claim and not a cause where all he seeks is to be heard in respect of some matter of defence or where he appeals against an order in the cause which he alleges to be illegal as having been made without jurisdiction"*

The addressee of this plea is the court, which is called upon to shut the applicant from these proceedings until she purges the contempt. The guiding principle is found in the decision by the CA in the case of **GULA BCHAND POP ATLA SHAH AND ANOTHER CIVIL APPLICATION NUMBER 38 OF (1990) UR** .The CA held thus:-

"*It is essential for the maintenance of the rule of law and good order that the authority and dignity of our courts', are upheld at all times. This court, will not condone deliberate disobedience of its orders and will not shy away from its responsibilities to deal firmly with proved contemnors"*

Applying this to the facts herein, it is clear that this court, has jurisdiction to demand observance to those orders, unless the demonstrated facts are within the exception or alternatively there are other special circumstances.

Due consideration has been made by this court, on the facts herein and the court, is satisfied that this is not a proper case for denying the applicant a right to be heard because of the following:-

(a) This should have been raised as a preliminary objection before representations were made on the application. Now that representations have been made, denying the applicant a decision on the merits will be tantamount to denying a constitutional right to a decision on her cause in a competent court of law.

(b) The second reason is that because a denial will shut her out from attacking the regularity of the said orders. For these two reasons the applicant is entitled to a decision on the merits.

Having ruled that the applicant is entitled to a ruling on the merits, the court, proceeds to determine the second technical front namely the regularity of the orders set to be upset. As mentioned earlier on the plaintiff/respondent sought.

(i). Leave to amend the plaint.

(ii). The leave to amend was granted on condition that the plaint was to be filed and served within 14 days from the date of the order granting leave.

(iii). The amended plaint is the one which introduced the injunctive relief.

(iv). The plaintiff /respondent did not comply with the 14 days order granted. They do not dispute that the same was filed in December 2000, 57 days later.

By reason of this, the amended plaint, thus offends the provision of order VIA rule 6 CPR which provides:-

"*Where the court, has made an order giving any party leave to amend unless that party amends within the period specified or if no period is specified within fourteen days, the order shall cease to have effect, without prejudice to the power of the court, to extend the period."*

It is on record that no leave of court, was sought to extend that period. In the absence of the extention, it follows that the order to grant leave to amend ceased to have effect. Upon ceasing to have effect, meant that the amended plaint ceased to have effect, and the original plaint reverted. Upon the reverting of the original plaint, there was no base on the basis of which an application for an injunctive relief could be anchored. For this reason the orders made in pursuance of the injunctive relief application have been faulted.

This finding alone could have disposed off the application but since the other merits of the application were argued, there is no harm in ruling on the same on their merits. The question for determination now is whether there are other reasons for granting the defendant/applicant the relief sought. In order to determine in the affirmative or the negative the court, has to determine whether the applicant has brought herself within the ambit of earning the courts', discretion to set aside the exparte order. The principles that this court, is to apply are the usual ones that the court, has judicial notice of established by decisions of the CA and as dutifully followed by the superior courts. These are:-

(i). The courts, exercise of its discretion is unfettered with the only fetter being that it has to be exercised judiciously and with a reason.

(ii). It is to be exercised to avoid injustice or hardship resulting from accident, in advertence, or excusable mistake or error but not to assist a person who has deliberately sought whether by avasion or otherwise to obstruct or delay the cause of justice.

Applying these to the facts herein, it is clear that the exparte orders were granted on the basis of Return of service filed herein already set out herein. In one, the defendant/applicant is alleged to have been served at the chief's office. There is however no demonstration as to how the process server came to know that the defendant/applicant was at the chief office, or why she was there. In the second one, it is alleged that she was served at Karen but it is not indicated which location in Karen or how the process server located her at Karen. The Return of service has therefore been faulted.

There was also issue as to the delay in seeking relief. This has been explained by the undisputed explanation of absence from the country and lack of interest by the former counsel then on record for the applicant in following up the proceedings on behalf of his client.

Besides the above, the other reason for earning the exercise of the courts', discretion is because there is demonstration that there appears to be contribution by government Agencies as to whether the access road should be sited at the original siting or at the current siting. This cannot be addressed unless the applicant is allowed an opportunity to attack the injunctive relief orders. Because if they are left to stand, the applicant will have no alternative but to site the access road at the original siting.

Lastly issue was also raised as to whether there was justification for the granting of the mandatory injunction. It is now trite and this court, has judicial notice of, that, the relief is only available in plain and clear cases. from the arguments on both sides, and perusal of the documentations exhibited herein, demonstrates that the issues in controversy herein were not plain and clear in view of the presence of conflicting documents from the relevant government Agencies with one set siting the access road at the original siting, while another siting at the current siting. It was therefore a proper case whereby the interlocutory relief could be withheld until the really issues are determined by the full trial.

For the reasons given in the assessment the court, is inclined to grant prayer 3 of the defendant/applicant's application dated and filed on the 7th day of April 2008 for the following reasons:-

1. The original plaint dated 17th July 1998 and filed on 21st July 1998 had no provision for an injunctive relief.

2. The injunctive relief was introduced by the amended plaint, amended by orders of 12/10/2000, by which order the amended plaint was to be filed and served within 14 days from that date of 2/10/2000.

3. It is on record that the amended plaint was not filed and served within 14 days from 12/10/2000 but on 8th December 2000, a period of 57 days from the date the leave to amend was granted.

4. There was no extention of period within which to file the same by the court.

5. By reason of the failure to file and serve the amended plaint within 14 days from 12/10/2000 and in the absence of leave to extend that period granted by court, the amended plaint ceased to have effect from the date of expiry of the 14 days allowed.

6. By reason of the amended plaint ceasing to have effect, the interim application on which the interim mandatory injunction giving rise to the arrest warrant was issued had no base on which to anchor.

7. In the absence of an anchor for the interim application, the same could not be an anchor for any relief. Therefore the injunctive relief that was granted on the basis of which the warrant of arrest was issued was granted in vain and is therefore of no consequence.

8. What has been stated in number 1-6 above not with standing this court, would still have been inclined to allow the application because:-

(i). The Return of service has been faulted by reasons given in the assessment.

(ii). The documentation exhibited by both sides herein demonstrate that this was not a clear and plain case in which a mandatory injunction could be granted.

(iii). The explanation given for failure to move swiftly to seek relief has been satisfactorily explained.

(iv). The defendant/applicant could not be denied a chance of being heard on account of being in competent of court orders because the objection was raised after representations had been made and a ruling on the merits could not be with held in the first instance. In the second instance denying a chance of being heard or a ruling on the merits would have made it impossible for the defendant/applicant to attack the irregularity of the orders which had formed the basis for the granting of the order for the arrest.

9. The defendant/applicant will have costs of the application because she has a genuine complaint.

DATED, READ AND DELIVERED AT NAIROBI THIS 18TH DAY OF SEPTEMBER 2009.

R.N. NAMBUYE

JUDGE