



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 313 of 2009

GABABA ENTERPRISES LIMITED.....PLAINTIFF/APPLICANT

VERSUS

HARBANAS SINGH.....1ST DEFENDANTRESPONDENT

DESIGN & DEVELOPMENT LIMITED.....2ND DEFENDANT/RESPONDENT

R U L I N G

The Application

1. The application that is the subject matter of this ruling is the Plaintiff's Chamber Summons dated 14/07/2009 and filed herein on 15/07/2009. The Plaintiff is praying for Orders:-

1. *THAT the 1st and 2nd Defendants/Respondents be fined and in default of payments its assets or properties be sold for contempt of this Honourable Court.*

2. *THAT the 1st and 2nd Defendants/Respondents be committed to prison for contempt of this Honourable Court.*

3. *THAT the Police Commissioner Major General Hussein Ali Mohammed be summoned to appear before this Honourable Court to explain the interests his officers and or himself have over the Land Parcel L.R. No.3734/958 the suit premises herein.*

4. *THAT court do grant such further or other consequential orders as may seem just to grant.*

5. *THAT cost of this application be borne by the Defendants/Respondents.*

2. The application is premised on 7 grounds on the face of the record and is also supported by the affidavit sworn by Mahat Adan Abdirahma on 14/07/2009. The grounds on the face of the application

are:-

(a) *THAT the Defendants/Respondents have contravened, violated and or failed to comply with a court order given on 1st July 2009 and issued on the 2nd July 2009.*

(b) *THAT the Officer Commanding Muthangari Police Station (OCS) and the officer Commanding Police Division (OCPD) Kilimani Division caused forceful entry of the Defendants/Respondents into the suit premises and have evicted the Plaintiffs/Applicants agents and or servants by removing the guards who had been stationed by the Auctioneer to guard the suit premises.*

(c) *THAT the Defendants/Respondents have contravened, violated and or failed to comply with court orders given on 1st July 2009 with the help of Officer Commanding Muthangari Police Station (OCS) and Officer Commanding Police Division (OCPD), acting on orders from the Police Commissioner Major General Hussein Mohamed.*

(d) *THAT the Defendants/Respondents have displayed total contempt and disregard for orders and or decrees issued by a competent courts of law. (sic)*

(e) *THAT the police have no known proprietary interest in the suit premises herein.*

(f) *THAT the Defendants/Respondents have put the administration of justice into ridicule and thereby pose a real threat to the rule of law.*

(g) *THAT its trite law that courts do not issue orders in vain.*

3. The application dated 14/07/2009 emanates from the orders issued by court on 1/07/2009 in respect of the Plaintiffs application dated 1/07/2009. The application of 1/07/2009 was for orders:-

1. *THAT service of this application be dispensed with in the first instance and the same be certified urgent and heard exparte in the first instance.*

2. *THAT the Defendant/Respondent, by himself, his servants, agents or otherwise howsoever be restrained from harassing, threatening, detaining, arresting or any other manner whatsoever interfering with the Plaintiff/Applicant, its agents or servants occupation and possession of the suit property being L.R. No. 3734/958 pending the hearing and determination of this suit.*

3. *THAT the Defendant/Respondent by himself, his servants, agents or otherwise however be restrained from interfering with the Plaintiff's/Applicant's quiet and peaceful enjoyment of the suit property being L.R. No.3734 and interfering with the Plaintiffs/Applicants quiet and peaceful enjoyment of their property including free and unhindered use and access of the said property pending the hearing and determination*

of this suit.

4. *THAT in the event that the Plaintiff will have been evicted from the suit premises prior to or by the time this application is heard mandatory injunction orders do issue compelling the Defendant jointly or any of them their servants, agents, auctioneers or any one claiming under them or any of them to reinstate and allow the Plaintiff back to the premises.*

5. *THAT service of summons in this suit and any orders and/or directions issued by the court be effected through advertisement in one Daily Newspaper with a wide circulation.*

6. *THAT the costs of this application be awarded to the Plaintiffs/Applicants.*

4. At the exparte hearing on 1/07/2009, the court issued the following orders:-

1. *THAT this application be and is hereby certified urgent.*

2. *THAT the Defendant/Respondent by himself, his servants, agents or otherwise howsoever be and is hereby restrained from harassing, threatening, detaining, arresting or any other manner whatsoever interfering with the Plaintiff/Applicant, its agents or servants occupation and possession of the suit property being L.R. No. 3734/958 for 14 days.*

3. *THAT service of summons in this suit and any orders and/or directions issued by the court be effected through advertisement in one Daily Newspaper with a wide circulation.*

4. *THAT this matter be heard interpartes on 15th July 2009.*

5. *THAT costs be in the cause.*

The Submissions

5. The application dated 14/07/2009 was canvassed before court on 23/09/2009. Mr. Letangule, appearing for the Plaintiff/Applicant submitted that the orders issued on 1/07/2009 were served and received personally in addition to the said orders being served through the press. He also submitted that the police have consistently prevented the Plaintiff from accessing the suit premises. He urged the court to punish the Defendants for impunity and for flagrant breach of court orders. The Plaintiff's counsel cited two authorities, that is to say, **Mawani –vs- Mawani [1976-80] KLR 159** and **Hadkinson –vs- Hadkinson [1952] 2 All ER 567**. Mr. Letangule urged the court not to give the Defendants audience because they were in contempt. In the **Hadkinson case** (above) it was held that a party who is in contempt of court orders should not be heard until the contempt is purged or “good cause was shown why it should not be removed.” Mr. Letangule also urged the court to order the police to keep off the suit premises.

6. The application was opposed. Mr. D. Oyatsi appearing for the Defendants filed Notice of Preliminary Objection dated 16/09/2009 citing the following grounds in opposition:-

1. *That the said application is incurably defective.*
2. *That the order of 1st July 2009 lapsed on 3rd July 2009 and was invalid after the said date.*
3. *That by the time the said order was served upon the Defendants on 6th July 2009, it was invalid and of no legal effect.*
4. *There is no obligation in law to obey an invalid order or an order that does not exist.*
5. *That the Defendants cannot be in contempt of an order that did not exist and/or had expired and was an invalid order at the material time of the alleged contempt.*
6. *That the present application is in itself an abuse of the court process and in contempt of court.*

7. In addition to the grounds above stated, Mr. Oyatsi submitted that though the *ex parte* order issued on 1/07/2009 was served by advertisement in the daily newspaper, there was no personal service of the order until 7/07/2009; Mr. Oyatsi also submitted that the Plaintiff was clearly in breach of Order XXXIX Rule 3(3) of the Civil Procedure Rules when he failed to serve the order issued by the court on 1/07/2009 within three days of the said date. The rule provides :-

“3(3) In any case where the court grants an *ex parte* injunction the applicant shall within three days from the date of the order, serve the order, the application and the pleading on the party sought to be restrained.”

8. Mr. Oyatsi submitted that the *ex parte* order of injunction granted on 1/07/2009 ought to have been served by 4/07/2009 at the very latest, so that by 6/07/2009 when the first service was effected through the press and 7/07/2009 when personal service was effected, the order had lapsed as far as the Defendants are concerned. Mr. Oyatsi relied on the case of **Omega Enterprises (Kenya) Ltd. –vs- Kenya Tourist Development Corporation & 2 Others (UR) – Civil Appeal No. 59 of 1993**. In the judgment of Tunoi JA, the learned Judge of Appeal referred to the case of **Macfoy –vs- United Africa Co. Ltd. [1961] 3 AII ER 1169**, where “Lord Denning delivering the opinion of the Privy Council at page 1172(1) said

“If an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

9. Regarding ground 2 of the Grounds of objection, Mr. Oyatsi submitted that the Plaintiff has all along tried to mislead the court and to pervert the course of justice. He submitted that the Plaintiff and his counsel should have known that as of 14/07/2009, no valid order of the court had been served upon the Defendants. Mr. Oyatsi cited the case of **R –vs- Weisz [1951] 2 AII ER 408** and urged the court to find and hold that the application dated 14/07/2009 was prepared and filed by counsel for the Plaintiff in an attempt to feign contempt by the Defendants. In Mr. Oyatsi’s view, the application is not genuine. In the Weisz case (above) at page 412 letters D & E, the court said,

“We do not think it necessary to go through the many cases cited in argument dealing with contempt of different kinds, nor is it necessary to remind the court that the summary jurisdiction to punish contempts is one to be exercised with caution. It is, in our opinion, beyond question, that to disguise a cause of action so as to conceal its true nature, when in truth, it is one prohibited by statute, is a contempt, and as the endorsement here was signed in the name of Mr. Martin’s firm, and he admits that he was the partner having charge of the proceedings, he must take responsibility and be held guilty of contempt.”

10. On the basis of the above remarks in the **Weisz case** (above) Mr. Oyatsi submitted that Mr. Letangule should be found to be in contempt of court and be punished accordingly. Mr. Oyatsi's position on behalf of the Defendants is that the Defendants could not breach an order that had lapsed and that by filing the instant application, counsel for the Plaintiff was trying to subvert the course of justice.

11. Finally, Mr. Oyatsi submitted that the Plaintiff's application dated 14/07/2009 is an abuse of the process of the court and urged the court to dismiss the application and not to allow itself to be misused by litigants the likes of the Plaintiff to bend the course of justice.

12. Miss Gathaara, counsel for the interested party, Major General Hussein Ali Mohammed, (the Major) agreed with Mr. Oyatsi's submissions. She also submitted that there was no evidence on record to support the Plaintiff's allegations against her client. She also submitted that to make matters worse, the Plaintiff did not seek leave of the court to serve her client, the Major, with the contempt application. Finally, Miss Gathaara submitted that the order sought under prayer 3 of the Plaintiff's application is aimed at harassing the major and the same should not be allowed.

13. In reply Mr. Letangule submitted that the orders granted on 1/07/2009 were to be served upon all parties to be cited. Mr. Letangule accused Mr. Oyatsi of misapprehending the law on contempt and as a result missing out on providing clear rebuttals of the Plaintiff's allegations. On whether or not the *ex parte* injunction order lapsed for failure by Plaintiff to serve the order within the 3 days, Mr. Letangule submitted that an *ex parte* order of injunction, once issued remains valid for 14 days whether or not the order is served as provided by Rule 3(3) of Order XXXIX of the Civil Procedure Rules. Mr. Letangule also submitted that the authorities cited by Defendants' counsel were irrelevant to the issue in hand.

Issues and Findings

14. I have now considered the opposing opinions in this matter. From the pleadings and the submissions, there is no dispute that the *ex parte* order of injunction issued on 1/07/2009 was first served through the press on 6/07/2009 and personally served on the Defendants on 7/07/2009. The issue that has arisen is whether by virtue of the provisions of Order XXXIX Rule 3(3) of the Civil Procedure Rules, the *ex parte* order of injunction issued on 1/07/2009 had lapsed by the time it was served upon the Defendants. In other words, had the said order become invalid and therefore placing no obligation on the Defendants to obey it?

15. On the basis of the provisions of Order XXXIX Rule 3(3) of the Civil Procedure Rules the *ex parte* order of injunction served on the Defendants on 6/07/2009 and 7/07/2009 was of no effect. Rule 3(3) of Order XXXIX is couched in mandatory terms. It leaves no room for service of such an order beyond the 3 days. How else would a party know there are orders against it unless it is properly served with such orders? In my view, the drafters of the rule must have aimed at stopping the caprice of malicious litigants who would obtain orders, sleep on them and then ambush the person sought to be restrained with contempt proceedings. Further I have also carefully studied the submissions made on behalf of the Plaintiff and the Applicant's complaint is not against the Defendants but it is against the police who are not parties to this suit. It is therefore not clear from the Plaintiff's submissions and the application itself why the Major should be required to explain his interests in the matter when he is not a party to the suit. The Major against whom the complaint of contempt is addressed was not even served with the order because he was not a party to the suit. The consequence of that is that the Plaintiff's application dated 14/10/2009 which is based on the order of 1/07/2009 is so bad and incurably defective, that it should not and cannot be allowed to stand. Although service was ordered to be through the press, the Plaintiff was not expressly exempted from the provision of Order XXXIX Rule 3(3) of the Civil Procedure Rules.

16. In the result, I find merit in the Defendants' objection to the application dated 14/07/2009. The objection is upheld. The application is hereby dismissed with costs to the Defendants and the Interested Party.

Orders accordingly.

Dated and delivered at Nairobi this 23rd day of October, 2009.

R.N. SITATI

JUDGE

Delivered in the presence of:-

Miss Kituko holding brief for Letangule (present) For the Plaintiff/Applicant

Mr. Wananda holding brief for Mr. Oyatsi (present) for the Defendant

Mr. Omondi for Mr. Monari (present) For Interested Party

Weche – court clerk