REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE 153 OF 2009

AMOS ANYASI t/a ANA & ASSOCIATES……..……..…PLAINTIFF

VERSUS

1. MUHAMMED RAMAZANI……..…1ST DEFENDANT

2. FRANK CHABASSEUR (sued in their capacities as officials of ALLICANCE FRANCAISE DE MOMBASA)…….2ND DEFENDANT

RULING

On 27th May 2009, the applicant, Amos Anyasi, obtained an order of injunction against the respondents Muhammed Ramazani and Frank Chabasseur. The injunction restrained the defendants by themselves, their servants or agents or otherwise howsoever from terminating the plaintiff's sub-lease in respect of premises situate on plot No. Mombasa/Block XX/1 (hereinafter "*the suit premises*") or from evicting the plaintiff therefrom pending the hearing and determination of the plaintiff's application dated 26th May 2009. The order was extracted on 29th May 2009.

On the date the order was issued, one Peter Simiyu, a process server swore, in an affidavit of service, that he served the said order, the application and Summons to Enter Appearance upon the second defendant Frank Chabasseur on the same date namely 29th May 2009.

On 9th June 2009, M/S Apollo Muinde & Associates Advocates entered appearance for both defendants and also filed a replying affidavit sworn by the 1st defendant.

On 8th June, 2009, the plaintiff lodged this application seeking one main order that the defendants be detained in prison for a term not exceeding six (6) months for disobeying and breaching the said order of injunction. The application is based on the principal grounds that the said order was served on 29th May 2009 and as it was endorsed with a penal notice, the defendants were aware of the effect of disobedience. Yet, on or about 1st June 2009, they proceeded to secure the suit premises thereby effectively denying the plaintiffs access to the same. In the premises, the plaintiff contends that defendants are in clear and deliberate breach of the said order and should be punished for the same. In support of the application, the plaintiff has sworn an affidavit in which he has deposed, among other things, that the actions of the defendants were in contempt of court and should be punished accordingly. Annexed to the application are a copy of the said order and the said affidavit of service.

In response to the application, the defendants have sworn replying affidavits which, in the main, deny disobeying the said order. The 1st defendant has further deposed that he was not served with the said order and cannot be held liable for the alleged disobedience of the court order. Both defendants further contend that they served the plaintiff with a notice to surrender the suit premises for only a short while on 2nd June 2009 but not permanently. The 2nd defendant on his part has deponed, *inter alia*, that there is no way they would lock up the premises because there are other activities which take place on the suit premises and the common entrance must be kept open. In the premises, the defendants contend that they are not in breach of the said order. Annexed to the 2nd defendant's affidavit is, *inter alia*, the sub-lease agreement between them and the plaintiff.

The application came up before me for hearing on 16th July 2009. Mr. Lumatete, Learned counsel represented the plaintiff while Mr. Ngigi, Learned counsel, represented the defendants. Counsel restated the stand-points taken by their clients in their respective affidavits. I have considered the application, the said affidavits together with the annextures and the submissions of both counsel. Having done so, I take the following view of the matter. Over time our courts have laid down certain prerequisites before a finding of contempt may be made. In Mutitika – v – Bahanini Farm Limited [1985] KLR 227, the Court of Appeal held, *inter alia*, that the standard of proof in contempt proceedings must be higher than proof on a balance of probabilities and almost but not exactly beyond reasonable doubt and that the guilt of the contemnor has to be proved with such strictness of proof as is consistent with the gravity of the charge.

In Ochino & Another – v Okombo and 4 others [1989] KLR 165, the same court held, *inter alia*, that as a general rule, no order of court requiring a person to do or abstain from doing any act may be enforced by committing him for contempt unless a copy of the order has been served personally on the person required to do or abstain from doing the act in question and that a copy of the order served must be endorsed with a notice informing the person on whom the copy is served that if he disobeys the order, he is liable to the process of execution to compel him to obey it.

So, has the plaintiff demonstrated those prerequisites? With respect to the 1st defendant, the plaintiff has not placed before the court evidence that the order allegedly disobeyed was served upon him. The 1st defendant has categorically denied being served with the said order. The affidavit of service sworn by Peter Simiyu, the process server, does not depose that he served the 1st defendant at all. The plaintiff has therefore failed to establish one of the prerequisites for the grant of the order sought. That failure in my view is fatal to the application against the 1st defendant.

How about the 2nd defendant? With regard to this defendant, the process server has deposed that he indeed served the said order together with other suit papers. The 2nd defendant has not disputed the service. In the premises, the requirement of service of the order allegedly disobeyed has been satisfactorily demonstrated. The said order is exhibited by the plaintiff. The order is endorsed with a penal notice. The endorsement is further not denied by the 2nd defendant. In the premises, the requirement that the copy of the order served be endorsed with a notice informing him of consequences of disobedience has been satisfactorily demonstrated. But was the order disobeyed? The order was in the following terms:-

"2. An injunction do and is hereby issued restraining the defendants by themselves, their servants or agents or otherwise howsoever from terminating the plaintiff's sub-lease in respect of business premises situate on plot No. Mombasa/Block XX/51 ("the premises") or from evicting the plaintiff therefrom pending the hearing and final determination of this application inter partes for fourteen (14) days."

The plaintiff complains of breach of the said order in paragraph 9 of his supporting affidavit which reads as follows:-

"9. That in utter disobedience of the said court order issued herein on 27th May 2009 come the 1st day of June 2009, the defendants locked up the suit premises thereby effectively denying me access thereto."

In response to this deposition, the 2nd defendant has deposed in paragraph 9, 10 and 12 of his replying affidavit as follows:-

"9. That further under clause 2 (4) of the agreement between us and the plaintiff, the plaintiff was required to surrender the subject premises to us upon being given a reasonable notice to create room for the colleges cultural activities……..

10. That on 25th May 2009, I served the plaintiff with a

notice requesting him to surrender the premises on 2nd June 2009 so that the college would hold a function for the opening of the 4th European Film Festival.

12. That it is therefore not true that we evicted the

plaintiff from the subject premises, contrary to the plaintiff's allegations. there is no way we would lock up the premises while it is a college and students are still attending college, the main entrance is a common one and again the plaintiff had been notified of our intention to house the aforesaid big event as per our agreement."

The said averment s specifically deny the actions complained of by the plaintiff. The plaintiff did not see it fit to deny or rebut, or in any other way explain them in a subsequent affidavit. The failure to file a responding further/or supplementary affidavit left the plaintiff's complaint unproven to the required standard. A finding of contempt can lead to the loss of liberty of a respondent, at least temporarily. Such a loss can only be ordered when disobedience is satisfactorily demonstrated. As stated in the Mutitika case (supra), "the principle to be borne in mind is that the jurisdiction to commit for contempt should be carefully exercised with the greatest reluctance and anxiety on the part of the court……."

The upshot is that the plaintiff's application is declined. This is however, not a licence to the defendants to assume that they can treat the sub-lease between them and the plaintiff as having been determined and is also not a bar to the plaintiff moving the court again if his rights under the sub-lease are violated or threatened with violation by the unlawful acts of the defendants.

In the circumstances of this case, I made no order as to costs in these contempt proceedings. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 9TH DAY OF OCTOBER 2009.

F. AZANGALALA

JUDGE

Read in the presence of:-

Kawere holding brief for Lumatete for the Applicant and Ngigi for the Respondent.

F. AZANGALALA

JUDGE

9TH OCTOBER 2009