



**REPUBLIC OF KENYA
IN THE HIGH COURT
AT NAIROBI
MILIMANI LAW COURTS**

Civil Appeal 637 of 2008

**SONY AUDIO CORNER LTD.....1ST APPELLANT/APPLICANT
PARKAR RADIO HOUSE.....2ND APPELLANT
JOYLAND CO. LTD.....3RD APPELLANT
WATAALAMU CO. LTD.....4TH APPELLANT
INDO COMPANY LTD.....5TH APPELLANT**

-VERSUS-

**JOSEPH MUCHOKI MUGO.....RESPONDENT
CITY COUNCIL OF NAIROBI.....INTERESTED PARTY**

R U L I N G

1. By a Notice of Motion dated 23rd June, 2009, the applicant, Sony Audio Corner Limited, who is the 1st appellant in this appeal, seeks orders as follows:

(i) That the respondent be committed to civil jail for a term not exceeding six months for contempt of the orders of this Honourable Court issued on the 11th day of March, 2009.

(ii) That the assets of the respondent be attached for contempt of Court.

(iii) That the costs of this application be provided for.

2. The respondent to the application is Joseph Muchoki Mugo. The application is brought pursuant to leave which was granted by this Court on 15th June, 2009. It is anchored on grounds stated on the face of the application as follows:

(a) On the 11th day of March, 2009, this Honourable Court granted orders *inter alia* restraining the respondent from proceeding with further demolition of the building pending the delivery of a ruling.

(b) The aforesaid orders were made in the presence of the respondent's advocate.

(c) The respondent has been personally served with the aforesaid order.

(d) In total disregard to the aforesaid order, on the 11th day of April, 2009, the respondent demolished the suit premises.

(e) The respondent's aforesaid acts are an affront to the dignity of this Honourable Court and are done maliciously and recklessly and in total disregard of the orders of this Court.

3. The application is also supported by an affidavit sworn by Mukhtar Ahmed (Mukhtar), a director of the applicant. Mukhtar swears that the order of the Court restraining the respondent from proceeding further with the demolition of the suit premises, was extracted and personally served on the respondent, on the 13th day of March, 2009. In total disregard to that order, the respondent on the 11th April 2009 demolished the suit premises. Mukhtar swears that as a result of the respondent's action, the 1st appellant suffered loss of stocks and fixtures, amounting to about Kshs.14 million. Annexed to the affidavit of Mukhtar is an affidavit of service sworn by Joel Mwanzia, who swears that he served the respondent with the order, (copy of which is also annexed) on the 13th March, 2009. Copies of photographs showing the demolished building is also annexed.

4. In support of the application, Mr. Odera who appeared for the applicant submitted that the mistake in the application for leave, in the name of the person served, cannot defeat the application. He maintained that the test was whether the person served, and the one sought to be committed, were one and the same person. Mr. Odera further submitted that the jurisdiction to commit for contempt is exercisable, notwithstanding the non service of a notice of penal consequences. He reiterated that if there was evidence that the person sought to be committed was aware of the order, and still went ahead to commit the contempt, he could be committed for the said contempt.

5. In support of his submission, Mr. Odera relied on the following authorities:

• ***Commercial Bank of Africa Ltd. vs. Isaac Kamau Ndirangu, Civil Appeal No. 157 of 1991,***

· ***R. vs. Governor of Central Bank of Kenya, Rose Detho, Charter House Bank ex parte, Raitlal Automobiles and 3 Others, Misc. Appl. No. 649 of 2006,***

· ***Justus Wanjala Kisiangani & 2 Others vs. City Council of Nairobi, Misc. Appl. 1299 of 2007.***

6. Mr. Odera maintained that in this case, it was clear that the respondent was aware of the order, because the advocate who is an agent for the respondent was present when the order was made. He urged the Court to grant the orders sought in order to preserve the dignity of the Court.

7. In response to the application, the respondent swore a replying affidavit. The respondent deponed that there was no proper evidence of service upon him of the order alleged to have been disobeyed. He averred that there were two varying affidavits of service which were filed. He deponed that there was no penal notice accompanying any of the purported service. He swore that he was never personally served with the Court order. He denied being the Stephen Muchoki Mugo alleged to have been served by the process server. He maintained that the applicant's action was actuated by malice or ill will, and that this was evident from attempts made by the applicant to stop the respondent from developing the suit property through an unsuccessful suit which sought injunctive orders.

8. Mr. Mwangi who appeared for the respondent drew the Court's attention to the two affidavits of service which were sworn by the process server. The first affidavit sworn on 15th April, 2009, identified the person served as Stephen Muchoki Mugo, while the second affidavit sworn on 23rd June, 2009, identified the person served as Joseph Muchoki Mugo. Mr. Mwangi maintained that there was no averment by the process server that the two affidavits of service referred to one and the same person. He submitted that the process server was not a credible or truthful person who could be relied upon as his affidavit of service exhibited perjury.

9. Mr. Mwangi further submitted that there were no notices of penal consequence attached to any of the orders served, as is required. With regard to the allegation that the respondent carted away the applicant's goods, it was submitted that, that was subject of a claim for general damages, an issue which was pending before another Court.

10. Mr. Mwangi distinguished the authorities which were cited by Mr. Odera. He submitted that in ***Commercial Bank of Africa Ltd vs. Isaac Kamau Ndirangu, and Koinange Investments Ltd. vs. Nairobi City Council and 3 Others***, there was no issue of service, the orders alleged to be contravened having been entered into by consent. While in ***R. vs. Governor Central Bank of Kenya*** (supra); ***Total Security Surveillance Ltd. vs. Telkom Kenya Limited*** and ***Justus Wanjala Kisiangani & 2 Others vs. City Council of Nairobi*** (supra), there was clear evidence of service of the order alleged to have been contravened.

11. Referring to ***Bedrock Holdings Ltd vs. Eric Okeyo, HCCA No. 23 of 2004***, and a previous ruling of this Court in this particular appeal, Mr. Mwangi submitted that knowledge of the notice cannot be presumed, and a party must of necessity be served. The Court was therefore urged to rule in favour of the respondent, as there was doubt regarding the service.

12. I have given due consideration to this application, the affidavit in support and in reply, as well as the submissions made by counsel, and the authorities cited. It is clear from the records that this Court did issue an order on 11th March, 2009 restraining the respondent from proceeding with further demolition of the suit property, pending delivery of the Court ruling which was reserved to 27th April, 2009.

13. That order was made in the presence of both parties' advocates following the hearing of a Notice of Motion dated 2nd March, 2009. The issue before me is whether the respondent was properly served with the order which was made on 11th March, 2009, if not, whether the knowledge of the order by the respondent can be inferred from the knowledge of the respondent's counsel. There is also an issue as to whether the respondent deliberately contravened the Court order.

14. In considering this matter, I have taken note of ***Mutikika vs. Baharini Farm Limited [1985] KLR 227***, wherein the Court of Appeal held, 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 a contemnor has to be proved with such strictness of proof, as is consistent with the gravity of the charge.

15. A little background to this application is necessary. The applicant has been a tenant of the respondent in respect of a shop situated in a building standing on premises known as L.R. No. 209/2523 Luthuli Avenue, hereinafter referred to as the suit premises. The respondent served the applicants and other tenants with statutory notices seeking to terminate their tenancies on the ground that he wanted to demolish the existing building so that he could construct a new building in its place. The applicant and other tenants filed a reference in the Business Premises Rent Tribunal, which reference was heard and a ruling delivered on 14th November, 2008, allowing the respondent's termination notices and ordering the applicant and other tenants to vacate the premises by 1st January, 2009.

16. Being aggrieved by the decision of the Tribunal, the applicant and the other tenants filed a memorandum of appeal in this Court on 24th November, 2008. Filed simultaneously with the memorandum of appeal was a Notice of Motion brought under Order XLI Rule 4(1) of the Civil Procedure Rules, in which the applicants and other tenants sought orders of stay of execution of the Tribunal Orders made on 14th November, 2008 pending the hearing and final determination of the appeal. On 3rd December 2008 the motion was heard *inter partes* and the Court thereafter issued an interim order of stay of execution pending delivery of the ruling which was reserved to 23rd January, 2009.

17. On that date, the ruling was not delivered as the Court was not sitting. However the applicant appeared before another Judge with an application under certificate of urgency seeking *inter alia*, leave to apply for contempt proceedings against the respondent and extension of the interim orders which were issued on 3rd December, 2008. Both orders were granted and interim orders extended to 28th January, 2009.

18. Subsequently, pursuant to leave granted on 23rd January, 2009 by Waweru, J., the 1st applicant filed a motion dated 29th January, 2009 under Section 5 of the Judicature Act, and Order 52 of the Rules of Supreme Court of England, seeking to have the respondent committed to civil jail for contempt of Court orders issued by the Court on 3rd December, 2009.

19. Ruling in respect of the application for stay of execution pending appeal was delivered on the 4th February, 2009, and orders issued as follows:

(i) The order of the Business Premises Rent Tribunal made on 14th November, 2008 shall be stayed pending the hearing and final determination of this appeal.

(ii) The applicants shall each provide security by way of cash or bank guarantee for Kshs.500,000/= within 15 days from the date hereof.

(iii) The applicants shall file and serve a record of appeal within 60 days from the date hereof and take

all necessary action to facilitate the speedy disposal of this appeal.

(iv) In the event of the applicants failing to comply with (ii) or (iii) above the order for stay of execution shall lapse.

(v) In the event that the appeal is not disposed off within 90 months from the date hereof the order of stay of execution shall be discharged unless otherwise extended by the Court.

20. On the 11th February, 2009, the respondent filed an application under Order XLIV and Order L Rule 1 of the Civil Procedure Rules, and section 80(a) of the Civil Procedure Act, seeking to have the ruling delivered on 4th February, 2009 reviewed, and or set aside, on the grounds that new and important matters had come up, which were not within the knowledge of the respondent at the time of hearing the application. The new information being that the 2nd, 3rd, 4th and 5th appellants had in fact vacated the premises out of their own volition and that out of the original 11 tenants who were occupying the respondent's premises, only the 1st applicant remained in the premises.

21. In an affidavit which was sworn on 11th February, 2009, the respondent deponed that the 2nd, 3rd, 4th and 5th appellants vacated the premises on the 29th December, 2008 and that he had already commenced demolition of part of the premises which had been vacated. The respondent deponed that he needed to demolish the entire premises to enable him commence construction. He swore that he was suffering substantial loss because of the 1st applicant's continued occupation of the suit premises.

22. On the 19th February 2009, the two applications came for hearing and this Court directed that the 1st applicant's application dated 29th January, 2009 be heard first. A preliminary objection was then raised to the hearing of the 1st applicant's motion, on the ground that the order alleged to have been contravened, was never extracted or served on the respondent. That objection was heard by the Court and a ruling reserved for 10th March, 2009.

23. On 2nd March, 2009, the 1st applicant filed another Notice of Motion, under section 3A and 63e of the Civil Procedure Act seeking *inter alia*, orders restraining the respondent, his servants, or agents from conducting any further demolition and/or alteration to the suit property, pending the hearing and determination of the intended appeal. On the same date, the applicant swore a supporting affidavit, in which he swore that he was still in occupation of the suit premises, but that the respondent had commenced demolition of the suit premises in utter disregard of orders of this Court made on 4th February, 2009; and that the illegal demolition was causing a serious hazard to the safety of the 1st applicant and his customers. The respondent's actions had the further undesirable consequences of rendering the intended appeal nugatory.

24. On the 3rd March, 2009, the matter came up before the Duty Judge who certified the application dated 2nd March, 2009 as urgent, and set it down for *inter partes* hearing on 11th March, 2009. In the meantime, on the 10th March, 2009 this Court delivered its ruling in respect of the preliminary objection. The Court found that the respondent was not properly served with the order or notice of penal consequences. It therefore upheld the preliminary objection and struck out the application dated 29th January, 2009.

25. On the 11th March, 2009, the parties appeared before the Court through their counsel, for hearing of the Notice of Motion dated 2nd March, 2009. During the hearing of that motion, it was

conceded that the applicant was still occupying the suit premises and enjoying possession although part of the premises had been demolished. It was on that basis, that the Court reserved its ruling, but ordered that the respondent be restrained from proceeding with further demolition of the building pending the delivery of the ruling. It is this order which was issued on 11th March, 2009 in the presence of both parties' counsel, that is alleged to have been contravened, and the entire premises demolished.

26. In arguing the application, counsel for the applicant maintained that the mistake in the name of the person served was not fatal, the test being whether the person served and the one sought to be committed, was one and the same person. Relying on *Commercial Bank of Africa Ltd vs. Isaac Kamau Ndirangu Civil Appeal No. 157 of 1991*, and *R. vs. Governor of Central Bank of Kenya, Rose Ndeho, Charter House Bank ex parte Ratilal Automobiles & 3 Others, Misc. Appl. No. 649 of 2006*, counsel submitted that if there was evidence that the person sought to be committed was aware of the orders, and still went ahead to contravene it, he can be committed for contempt. He maintained that in this case it was clear that the respondent was aware of the order, because the advocate for the respondent was present when the order was made, and the advocate was an agent of the respondent.

27. In response to the application, the respondent swore a replying affidavit in which, he denied having been served nor being aware of the order alleged to have been contravened. The respondent pointed out that the process server who allegedly served him with the order, swore two affidavits one showing that he effected service on Stephen Muchoki Mugo, and the other showing that he effected service on Joseph Muchoki Mugo. The respondent pointed out that there was no averment by the process server that the two persons named were one and the same persons. The respondent further denied having been served with any notice of penal consequences.

28. Counsel for the respondent submitted that all the authorities relied upon by the applicant were distinguishable as either relating to a consent order which was presumed to be within the knowledge of the parties, or there was actual personal service of the order. Counsel maintained that the knowledge of the advocate could not be transferred to the client. He maintained that personal service of the order and notice of penal consequences being mandatory, the application could not succeed.

29. I have given due consideration to this application, submissions made and all the authorities which were cited before me. Generally the authorities are agreed that for contempt of Court to arise, firstly, the order alleged to have been contravened must have been in existence and it must be clear in its terms. Secondly, the alleged contemnor must have been served with the order and notice of penal consequences. Thirdly, there must be evidence that the alleged contemnor has deliberately disobeyed the order.

30. There is however a proviso to that general rule. That proviso comes out clearly in Order 45 Rule 7 (6) of the Supreme Court Practice Rules 1999, which states as follows:

“6. An order requiring a person to abstain from doing an act may be enforced under rule 5 notwithstanding that service of a copy of the order has not been effected in accordance with this rule if the Court is satisfied that pending such service the person against whom or against whose property is sought to enforce the order has had notice thereof either;

- (a) By being present when the order was made;
- (b) By being notified of the terms of the order whether by telephone, telegram or otherwise,

7. Without prejudice to its powers under Order 65 rule 4, the court may dispense with service with a copy of an order under this rule if it thinks just to do so.”

31. Order 65 Rule 4 of the Supreme Court Practice Rules 1999 refers to substituted service where it is impracticable to serve the document in the manner prescribed. Therefore, the Court may dispense with service of the order where there is evidence that the alleged contemnor has had notice of the order and is evading service.

32. In this case the applicant is alleging the contravention of the order issued on 11th March, 2009. It is clear from the record that, that order was issued in the presence of both parties' advocates, following the hearing of the Notice of Motion dated 2nd March, 2009. It is also clear that the order of 11th March, 2009, restrained the respondent from proceeding with further demolition of the premises. The question is whether the respondent was duly served with the order of 11th March, 2009.

33. Two affidavits of service were sworn by Joel Mwanzia a process server. In the first affidavit, the process server deponed that service of the order of 11th March, 2009 was effected upon Stephen Muchoki Mugo. In the second affidavit, the process server swears that service of the same order was effected upon Joseph Muchoki Mugo. I concur with the respondent's counsel that in the absence of any explanation by the process server regarding this apparent contradiction, it is difficult to know whether service was effected on "Stephen" or "Joseph" or whether the two persons named were one and the same person, and if so whether that person was the respondent.

34. Further the process server has not mentioned having served any notice of penal consequences. Therefore even assuming that a copy of the order was indeed served on the respondent by the process server as alleged, then the service was defective as there was no notice of penal consequences attached to the order.

35. As I have stated hereinabove, the legal position is clear that no order of the Court requiring any person to do or abstain from doing any act may be enforced by committing the person for contempt, unless a copy of the order endorsed with a notice of penal consequences has been served on the person. However, that being only the general position, the question is whether there are any exceptional circumstances in this case to justify dispensation with service of the order of 11th March, 2009.

36. In his replying affidavit sworn on 8th September, 2009, the respondent has not denied demolishing the suit premises which were occupied by the applicant. Thus it is evident that the demolition took place after the orders of 11th March, 2009 were issued. The respondent's only defence is that he was not served with the order alleged to have been contravened, and that in any case, even the alleged service was not proper as no notice of penal consequences was served with the order.

37. The order of 4th February, 2009 stayed during the pendency of appeal, the orders of the Tribunal which were issued on 14th November, 2008, allowing the respondent's termination notice to take effect, and the applicant to vacate the premises. The respondent appears to have been alive to the orders of 4th February, 2009, hence his application dated 11th February, 2009, in which the respondent sought to have the orders which were issued on 4th February, 2009 reviewed and/or set aside under Order XLIV Rule 1 of the Civil Procedure Rules.

38. In paragraph 9 and 10 of the respondent's affidavit sworn on the 11th February, 2009, the respondent deponed that the 1st appellant was still in the suit premises and that he could not commence construction on the said portion because he needed to demolish the entire premises for purposes of building a basement in the plot. The respondent's application is still pending and therefore the Court has not set aside the orders which were issued on the 4th February, 2009.

39. Although the respondent is feigning ignorance of the order which was issued on the 11th March, 2009, it is clear that the respondent was aware that there was an order issued on 4th February,

2009 staying execution of the Tribunal orders issued on 14th November, 2008. In demolishing the premises which were occupied by the applicant, the respondent deliberately acted in contravention of the order of 4th February, 2009.

40. Nonetheless the applicant has not sought to have the respondent committed for contravening the order of 4th February, 2009, but specifically seeks to have the respondent committed for contravening the order of 11th March, 2009. Further, there is no evidence or indeed any suggestion that the respondent tried to evade service of the order of 11th March, 2009. The failure or irregular attempt to serve the respondent with the order of 11th March, 2009 coming immediately after this Court had struck out an application for leave for contempt proceedings to issue against the respondent precisely due to lack of service of the order alleged to have been contravened, is mischievous and inexcusable.

41. Although the order of 11th March, 2009 was made in the presence of both parties' counsel, knowledge of the order cannot be inferred upon the respondent from the knowledge of the counsel, as the order of 11th March, 2009 was not a consent order in respect of which the respondent's counsel would be assumed to have obtained the respondent's instructions. In this regard the circumstances of this case are distinguishable from *Commercial Bank of Africa Limited vs. Isaac Kamau Ndirangu* (supra) in which the order contravened was a consent order.

42. As I stated earlier the standard of proof required in cases of contempt of Court is generally much higher than in normal civil cases. It was therefore necessary that proof of the necessary prerequisites as noted in paragraph 29 of this ruling, be established. Although it is evident to me that the respondent has not given the orders issued by this Court the due respect required, the applicant has provided an escape route to the respondent. Firstly, by seeking to commit him for contravention of the order of 11th March, 2009 instead of 4th February, 2009. Secondly, by failing to properly serve the order of 11th March 2009 together with a notice of penal consequences.

43. In the circumstances, the application for committal of the respondent fails. It is accordingly, dismissed. In view of the conduct of the respondent I do not find it appropriate to award him any costs.

Those shall be the orders of this Court.

Dated and delivered this 25th day of November, 2009

H. M. OKWENGU

JUDGE

In the presence of: -

Ms. Migiro holding brief for Odera for the appellant

Mwangi for the respondent

Eric, court clerk