



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
Civil Suit 263 of 2006

SIFA INTERNATIONAL LIMITED.....PLAINTIFF

VERSUS

NATIONAL SOCIAL SECURITY FUND

BOARD OF DIRECTORS.....DEFENDANT

1. RACHEL LUMBASYO

2. SAID CHITEMBWE

3. J.K. MUCHINA.....CITED PARTIES

R U L I N G

This ruling is the offshoot of two applications. The first is the Chamber Summons dated 21st February 2007 and secondly is the summons dated 29th February 2008. In the Chamber Summons dated 21st February 2007, Sifa International Ltd, the plaintiff herein seeks for the following orders inter alia:

i) *The properties of the National Social Security Fund Board of Trustees, the defendant herein namely subdivision numbers 982, 2535, 2537, 2538, 2539 an 2540 Section 1 Mainland North to be attached for the disobedience and breach by the defendant of this court's order of 21st November 2006.*

ii) *That the Managing Trustee of the Defendant, one Rachel Lumbasyo be detained in prison for a term not exceeding six (6) months for disobeying and breaching the order of this court granted on 21.11.2006.*

In the Chamber Summons dated 29th February 2008 the plaintiff prayed for the following orders:

(i) **The summons dated 21.2.2007 to be consolidated with this summons dated 29.2.2008.**

(ii) **The following persons namely:**

(a) **Rachel Lumbasyo, the Managing Trustee of the Defendant.**

(b) **Said Chitembwe the corporation secretary of the Defendant.**

(c) **J.K. Muchina, the Managing Director of Kajos Enterprises to be detained in prison for a term not exceeding six (6) months for disobeying and breaching this court's order issued on 21st November 2006.**

(d) **The bulldozer registration No. KAP 27E used by the Defendant to disobey the orders of this court on 8th August 2007 be impounded and detained in police custody for 6 months.**

(e) **The orders be enforced by the Commissioner of Police.**

In both applications, Lennah Catherine Koinange, the Managing Director of Sifa International Ltd filed an affidavit she swore in support of the summonses.

When served with the applications, the defendant resisted the same by filing replying affidavits sworn by Said Chitembwe, the defendant's Corporation Secretary.

The plaintiff's Managing Director in her affidavit sworn on 21st February 2007 avers that the plaintiff obtained an *ex parte* order of injunction which restrained the defendant, its agents, servants or assignees from offering for sale, advertising, selling, transferring or in any manner alienating the suit properties to any third party or in any way interfering with the peaceful and quiet enjoyment and possession of the suit premises pending the hearing and determination of the summons dated 21.2.2007. It is said that the same was extracted with a penal notice appended thereto. A copy of the aforesaid order is annexed to the aforesaid affidavit. The order is said to have been served upon the Defendant's legal officer one Mrs. Mwashumbe on 24th November 2006 at about 16.29 p.m. as per the affidavit of service of Kennedy Musyoka Malombe sworn on 6th December 2006 a copy of which is annexed to the affidavit of Lennah Catherine Koinange. It is stated by the plaintiff that when the defendant was served, negotiations to have the dispute settle out of court commenced but have so far borne no fruits. It is said through the negotiations the defendant was aware of the existence of the *ex parte* orders of injunction issued by this court on 21.11.2006. It is alleged by the plaintiff that while negotiations were going on, the defendant in breach of the aforesaid sent its officers with a delegation of prospective buyers of Libyan descent using motor vehicle registration number KAQ 873F, a motor vehicle owned by the defendant whereupon they forcefully entered the suit premises on 20.1.2007. It is the averment of the plaintiff that her hotel Manager, Mr. Gachanja approached the visitors and upon making inquiries one Mr. Ruto and a Mr. Mbuvi identified themselves Managers of the defendant duly instructed to take foreign investors to view the property and other properties owned by the defendant for purposes of sale. The plaintiff's Manager is said to have booked a report with Bamburi Police Station on the same day. A copy of the occurrence book is attached to the affidavit of Lennah Catherine Koinange. It would appear statements were recorded after the police visited the scene and advising the parties to pursue their rights in this suit. Photographs of the motor vehicles and the visitors were taken and annexed to affidavit filed in support of the summons.

The defendant filed the replying affidavit of Said Chitembwe sworn on 28th May 2007 to controvert the averments of Lennah Catherine Koinange. Mr. Chitembwe denied that there were negotiations over the matter between the parties. He also denied that the visitors who paid a visit to the suit premises were prospective buyers of the property but were being taken round to view the defendant's properties in Nairobi and Mombasa. It is Mr. Chitembwe's averment that since the defendant's Managing Trustee has not visited the suit premises she should not be cited for contempt.

In the Chamber Summons dated 29th February 2008, the plaintiff's complaint is that on the 8th day of August, 2007 in disobedience of this court's order and while a ruling on a preliminary objection raised by the Defendant was still pending the defendant descended on the plaintiff's premises with armed police officers and a private contractor and demolished the plaintiff's structures, threatened the peace and disrupted the plaintiff's business thereby occasioning untold anguish, loss and damage. Photographs have been annexed to the affidavit of Lennah Catherine Koinange sworn on 29th February 2008 to show the demolition which took place. Apparently it appears the destruction was were coordinated where bulldozers were used with armed police keeping vigil. The plaintiff was unable to have her complaint recorded at the Bamburi Police Station as the police are said to have refused to offer her any assistance. It is said that it is only when the Commissioner of Police intervened that the criminal investigation department officers visited the scene under OB No. 85/3/12/2007. The results of investigations are yet to be released. Lennah Catherine Koinange attached to her affidavit copies of correspondences showing that J.K. Muchina executed the instructions of the Managing Trustee of the Defendant to demolish the plaintiff's structures on 8th August 2008. In fact he had presented to her a bill of Kshs.2,175,000/- for settlement. It is the submission of the plaintiff that Mrs. Rachel Lumbasyo had knowledge of the intended demolition and destruction of the plaintiff's property as there was evidence that she instructed the J.K. Muchina t/a Kajos Enterprises to carry out the demolitions. It has also been said that Said Chitembwe, has at all times been aware of the existence of the court order of injunction but he deliberately authored and signed the letter instructing J.K. Muchina to disobey the court order while knowing the consequences thereof. It is also the averment of the plaintiff that J.K. Muchina was shown the court order but he deliberately refused to obey and resorted to the use of the gun to execute his unlawful acts even when there was no resistance. In his replying affidavit of 3rd April 2008, Said Chitembwe denies having disobeyed the court order. He said that the *ex parte* injunctive orders did not exist by dint of order XXXIX rule 3 (2) of the Civil Procedure rules. Mr. Chitembwe admits that the defendant demolished some unauthorized and illegal structures standing on the suit premises. The defendant also admits that the lease it signed with the plaintiff permitted the plaintiff to put up permanent and semi-permanent structures on the suit premises on conditions.

Mr. Mutuli and Mr. Lumatete learned advocates for the plaintiff and the defendant respectively each made oral submissions in support of their positions in the matter. I have considered those submissions plus the material placed before me. It is not in dispute that this court issued an *ex parte* order of injunction on 21st November 2006. It is also not in dispute that the order was served upon the defendant. The question which must be answered is whether or not the

order was breached. Before dealing with that issue it is important to note that the ex parte order of injunction given on 21st November 2006 was to last for 14 days. But the same was extended on various occasions by the court. Hence the averments of Mr. Said Chitembwe that the orders did not exist by dint of order XXXIX rule 3(2) of the civil procedure rules cannot stand. In any case such extensions were at times done by consent of the parties and sometimes by the court in exercise of its inherent power. In short, it is in my humble view that Mr. Said Chitembwe could be having a valid point, but the same cannot be sustained because the extended orders have not been challenged so that one can comfortably say that there was no order. In the end I hold that there was and there is a valid court order. What did that order restrain? This question can be answered by reproducing the relevant part of the order as follows:

“That a temporary injunction do issue upon the defendant restraining itself, or through its agents, servants or assigns from offering for sale, advertising selling, transferring or in any manner alienating the suit properties namely subdivision No. 982, 2535, 2537, 2538, 2539 and 2540 situate in section Number 1 (Mainland North) Mombasa to any third party or in any third party or in any way interfering with the peaceful and quiet enjoyment and possession of the suit properties pending the hearing and determination of this application.”

A close perusal of the aforesaid order will reveal that the same is clear and unambiguous. The plaintiff has complained that the defendant breached and disobeyed the order on 21.1.2007. It is not denied that the defendant's officers with some visitors visited the plaintiff's premises on 20th January 2007. What is disputed is that the visitors had not gone there to view the property with the intention of purchasing. It is casually stated by Mr. Chitembwe that they were just being taken round to see the defendant's properties situate in Nairobi and Mombasa. There is no denial that the defendant's Managers and their visitors caused a commotion until police had to be called to intervene. It is admitted in paragraphs 10 and 12 of Said Chitembwe's replying affidavit sworn on 28th May 2007 that the defendant had instructed its Managers and visitors to enter into the plaintiff's premises. No doubt they caused a commotion thus interfering with the plaintiff's quiet and peaceful enjoyment and possession of the suit premises. I find that the defendant was in contempt of the court orders issued on 21.11.2006.

Those to blame squarely for this breach are Said Chitembwe, the corporation secretary, his boss, Rachel Lumbasyo, the plaintiff's Managing Trustee.

What happened on 8th August, 2007 is sad and should not have been allowed to happen. Mr. Said Chitembwe admits that the defendant authorized the demolitions of the plaintiff's premises. They knew there was a court order barring the defendant from interfering with the plaintiff's possession of the suit premises. I am convinced that Said Chitembwe, Rachel Lumbasyo and J.K. Muchina are in contempt of the court orders issued on 21.11.2006. They all knew they were restrained from carrying out the demolitions but they opted to act with impunity. Mrs. Rachel Lumbasyo being the Chief Officer of the Defendant had knowledge of the intended demolition and she even participated in giving instructions to J.K. Muchina t/a Kajos Enterprises to carry out the demolitions in disregard of the existing court order. J.K. Muchina was shown the court order but he instead opted to obey his master and disregarded the court order yet the same clearly barred him from doing what he did as an agent for the defendant. Said Chitembwe on the other hand was the one who authored and signed the letter instructing J.K. Muchina to disobey the court order by demolishing the plaintiff's structures.

In the end I find Rachel Lumbasyo, Said Chitembwe, J.K. Muchina and the Defendant guilty of contempt of court. Having convicted them for contempt of court, I sentence each of those cited namely:

- (i) Rachel Lumbasyo
- (ii) Said Chitembwe
- (iii) J.K. Muchina

to pay a fine of Kshs.300,000/- within 7 days from the date hereof in default to serve 3 months imprisonment.

Costs of the application to the plaintiff. Mention on 27.05.2008 to confirm compliance of the order.

Dated and delivered at Mombasa this 19th day of May 2008.

J.K. SERGON

J U D G E

In the presence of Mr. Mutuli for plaintiff and Mr. Lumatete for the Defendant. Wahome for the 3rd cited party.