

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

Civil Case 260 of 2006

KIRUMA INTERNATIONAL CO. LTD.....PLAINTIFF

VERSUS

CITY COUNCIL OF NAIROBI AND ANOTHER.....DEFENDANT

RULING

The Plaintiffs' Complaint dated and filed on 15.3.2006 was accompanied by a Chamber Summons under Order 39 rules 2,3 and 9 of the Civil Procedure Rules, the Environment Management and Co-ordination Act 1999, Part II, Sections 3 and Part VI and Section 3A of the Civil Procedure Act Cap.21 of the Laws of Kenya.

The application sought restraint orders against the Defendants restraining them from illegally constructing or proceeding with the construction of the proposed matatu terminal and/or in any other way interfere with the Plaintiff's right to clean and healthy environment over LR. No.1870/X/5 pending hearing and determination of the application in the first instance and pending hearing and determination of the suit in the second instance.

From the record *ex parte* orders were not granted. The offending orders were those granted in respect of inter parties hearing on 26.10.2006 in default after the 1st Defendant's Counsel failed to turn up for the hearing. These were ordered to remain in force pending the hearing of the suit.

The Defendant/Applicant has come by way of Notice of Motion under order 39 Rule 4 Civil Procedure Rules seeking to have those orders discharged. The main ground in support is that the Plaintiff Respondent failed to disclose to the Court the fact that as at 26.10.2006 the said matatus terminus had been completed and was operational, that by the Respondent failing to disclose this fact the court was thus misled and it granted orders in vain because had the court been made aware that the terminus had already been completed and was now operational it would not have granted those orders. They maintain the plaintiff was aware of this fact and he therefore abused the court process. They rely on annexures 2,3 and 4.

Annexure 2 is a letter dated 2.11.2006 from the Defendant to their advocates forwarding the completion certificate. This letter is not copied to the Plaintiff's Advocates. The copy of the certificate is also annexed. It was addressed to Trapez contractors Ltd. It shows that the works were certified as being substantially completed as at 17th May 2006. Annexure 3 is a photograph of the alleged terminus with vehicles in the parking lots. While annexure 4 is a letter from the Respondents' Advocates to the Applicants impressing upon them the importance of obeying of court orders.

The Plaintiff/Respondent has countered that submission by stating that the hearing date was taken by consent, their client had no knowledge of the existence of the documents that the applicant relies on as they were within the knowledge of the 1st Defendant who chose not to disclose them to the plaintiff and therefore the Plaintiff cannot be stated to have concealed or misrepresented what he did not have and had no knowledge of. They maintain the orders were properly issued and should not be disturbed. That the applicant should not be granted the relief sought because they are in contempt of the said orders as they are using the terminus when they are not supposed to.

They rely on the case of **MAWANI –V- MAWANII [1977] KLR 159** where it was observed at pg 159 PV – H – 1 that:-

“I am of the opinion that the fact that a party to a cause has disobeyed an order of the court is not of itself a bar to his being heard, but if his disobedience is such that, so long as it continues, it impedes the cause of justice in the cause, by making it more difficult for the court to ascertain the truth or to enforce the orders which it may make, then the court may in its discretion refuse to hear him until the impediment is removed or good reason is shown why it should not be removed” The case of **ANDALO AND ANOTHER –V- JAMES GLEEN RUSSEL LTD [1990] KLR 54 – 55** where it was held *inter lia* that disobedience of a court order is a form of contempt of court.

In reply Counsel for the applicant, maintained that by the time the orders were issued the subject matter had been overtaken by events.

In the Courts assessment of the facts herein it is clear that the basis of the applicants application is annexure 2, 3 and 4. As observed earlier on in this ruling, these documents were not copied to the plaintiff and so the basis of their knowledge and concealment has not been shown. This finding is confirmed by existence of annexure 4 where the Respondent was alerting the defendant applicant that they were breaching the court orders. The Defendant has not exhibited any document to the effect that they replied that letter bringing to the Plaintiffs attention that they, plaintiffs were aware of the completion of the terminus and therefore obtained the orders through concealment and misrepresentation.

As at the time the application was fixed for hearing inter parties on 27.9.2006 annexure 2 was already in existence. Nothing prevented the applicant from seeking leave of Court to file a further replying affidavit to annex those documents. Had he done so the court could have taken note of them and the story would be different. The fault of non-disclosure was with them and not the Plaintiff. That ground fails.

Turning to disobedience, the ingredients of the prayer granted is that the order sought to restrain construction (before starting) proceeding with construction (if already started) or any other way (benefiting from construction). It therefore follows that use of the terminus after construction offends the orders. Applicants have therefore come to Court with unclean hands and on this basis too, they cannot get the relief sought.

For the reasons given the applicants application dated 17.11.2006 and filed on 22.11.2006 be and is hereby dismissed with costs to the Respondents.

DATED READ AND DELIVERED AT NAIROBI this 23RD DAY OF FEBRUARY 2007.

R. NAMBUYE

JUDGE