REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Misc. Appli. 637 of 2007

KENDATA SYSTEMS LIMITED……...…….APPLICANT

VERSUS

ESTHER N. NGIGE……RESPONDENT

R U L I N G

Before me is an application by way of Notice of Motion dated 16th September, 2007 brought under Section 5(1) of the Judicature Act (Cap 8), Sections 3, 3A, 63(c) & (e) and 89 of Civil Procedure Act and orders XXXIX Rule 2A (2) of the Civil Procedure Rules, Order 52 Rule 2 of the Rules of Supreme Court of England 1999 and all other enabling provisions of the Law.

Although there were other prayers asked for in the said application, at the time of hearing thereof only the order on prayer No. 1 was sought for.

It states:-

"*The Respondent Ms Esther N. Ngige be committed to prison for a period of 6 months and/or her property be attached and sequestrated for disobedience of the orders of the Business Premises Rent Tribunal issued on 16th August 2007 and 22nd August, 2007*"

Of course the costs of the application is also asked during the proceedings.

Section 5(1) of the Judicature Act stipulates

"*5(1) The High Court and Court of Appeal shall have the same powers to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate courts*".

The Act came into force on 1st August 1967. The said section has been interpreted by the Court of Appeal in the case of Republic v Tony Gachoka & Another Civil Application No. Nai 4 of 1999 (unreported).

In the said case Hon. Amolo J.A. has observed:-

"*By section 5(1) of the Judicature Act, we are obliged to apply the Law which was being applied by the High Court of England, in 1967 when that Act was passed.*"

Thus as per Court of Appeal the Law in England existing only as at 1st august 1967 is applicable to our courts.

I may even observe that from the wordings of section 5(1) of the Judicature Act, our courts have the same powers to punish for contempt of court as is possessed by the High Court of Justice in England. I may pause a question whether in exercise of that power even the procedure adopted by the courts in England was to be followed or only the jurisdiction (power) to punish. Over the years, our courts have established law as to procedure of contempt proceedings and also procedural law as to service of the order of the court along with Penal Notice.

There are uncertainties and ambiguities in the provisions of the Judicature Act as regards contempt proceedings and the powers of the courts (i.e. High Court and Court of Appeal) to punish the contempt of court.

I shall for the purposes of this matter, follow the procedure well established in our jurisdiction and also the observations made by the Court of Appeal in Tony Gachoka's case (supra). I do so to preserve the consistency in jurisprudence as well as my deference to the rightly settled law and procedure.

With the aforesaid back-drop I shall deal with the merits of the application.

Mr. Gikandi the learned counsel for the Applicant contended that he would rely on the grounds set forth in the Notice of Motion dated 10th September, 2007 and verifying affidavit sworn by the Executive Director of the Applicant company on 4th September, 2007.

The order in question restraining Njugi properties Ltd. in BPRT case No. 379 of 2007 was issued on 16th August 2007. It was served on the said company. The undated extracted order (ANN. LGM1) was served on the Secretary of the Company's office on 17th August 2007. It is alleged that despite the service the said company "*continued locking the premises"*. Thereupon the applicant appeared once again before the Tribunal and the Chairman on 22nd August, 2007 issued an order directing the O.C.S. Central Police Station to assist the tenant to gain access to the premises and ensure peace prevails (sic) till hearing interparte. The said order was served on the OCS and on 23rd August 2007 the premises were opened and the applicant locked the same. But the same was once again made inaccessible when an antigen on the key hole was placed.

Thereupon on 28th August, 2007 the Applicant served, as averred, the present respondent Esther N. Ngige with the order and Penal Notice. Despite the said service the Applicant continued to be barred having access to the suit premises.

The Applicant has annexed an affidavit sworn by the present Respondent on 3rd September, 2007, without its annextures, which refer to the letter of offer sent to the Applicant which was not responded to by the Applicant.

Be that as it may, as per that affidavit and also as contended in the replying affidavit herein, the Applicant surrendered the premises voluntarily and thus the Applicant was neither in occupation nor in possession, and that a new tenant was in possession of the suit premises as at the date of the order.

I also do note that the averments in the replying affidavit and the annextures showing the written note of 6th August 2007 signed by the Director of the Applicant, Leslie Mwachiro and the Goods Acceptance Form from the storage company dated 13th August 2007 (Ann EN 3 and EN4) have not been responded at all.

In view of the said evidence which is not contravened by the Applicant, its lame effort to take shelter on a ruling which was made on an issue of costs after the proceedings were terminated, cannot help the Applicant.

In the premises of these facts both counsel submitted their respective contentions.

According to Mr. Gikandi, the Respondent is cited as a Managing Director of the Company which was the Respondent in the case filed before Business Premises Rent Tribunal. The order of the Tribunal was severed first at the company's premises and thereafter with the Penal Notice on the 28th August 2007.

As per the replying affidavit of the Respondent, she just became aware of the order on 23rd August, 2007 when the police officer showed her a copy thereof. By that time the order was incapable of being obeyed because from 13th August 2007 the Applicant had fully vacated the premises when some of the goods left were moved to a storage. It is also denied that she was personally served with an order annexing a Penal Notice on 28th August 2007. Her averments to this effect has been confirmed by an affidavit of Njoki Ndungu sworn on 30th August 2007 who is a Secretary/Receptionist to the company Njengi Properties Ltd who has averred that she was alone in the office on all the three days ie 17th August, 2007, 23rd August 2007 and 28th August 2007 and that the documents were left with her after she confirmed that she worked for the said company.

Portions from a Text Book titled Borrie & Lowe's Law of contempt 1983 Edition at Page 397 and 398 were cited which in effect states that personal service is not required when the order is prohibitory. It referred to provisions of Order 45 Rule 76 of SCR which stipulates the exceptions to the personal service if the party had previous notice, either

(a) by being present when the order was made, or

(b) *by being notified of the terms of the order, whether by* telephone, telegram or otherwise.

I can take it that our courts have adopted English rules of Supreme Court which came into force in 1966 – particularly RSC Order 52.

I am not told when the aforesaid provision relied upon, came into effect but I may not have much problem in accepting the principles behind these provisions. Thus if I accept that as per the respondent she became aware only on 23rd August, 2007 when the premises were not in possession either of the applicant or the company (Njengi Properties Ltd) then the aforesaid provisions cannot apply. I say so, on the basis of the evidence produced in the replying affidavit of the respondent cited for the contempt. I reiterate that the company's representative Leslie has not denied having written a note of 6th August, 2007 agreeing to vacate, nor the evidence of the suit premises having been in possession of a new tenant has been controverted.

Para 458 of Vol.9(1) of Halsbury's Laws of England (4th Edition) was relied upon by Mr. Gikandi to support the citation of the respondent as the contemnor which states that a judgment or order against a corporate body may be enforced by an order of committal against directors or other officers of the corporation. It is further provided that

"*A director or an officer who is aware of the terms of such a judgment or order (or of an undertaking given by the (Corporation) may be committed for contempt of court <u>if he willfully fails to take adequate and continuing steps to ensure compliance notwithstanding that he has not actively participated in the breach</u>*". (*emphasis mine*).

I shall pause here and state that I shall have no hesitation to accept the aforesaid proposition of the law.

I would thus not accept the contention raised by Mr. Omoti when he submitted that first of all there has to be an order of committal against the company and then only it can be enforced against the director. It is the case of the Applicant that the order of the Tribunal was obtained and thereafter it was served and it is alleged that the same is not complied with. This disobedience, if proved as per the standard required, has to be enforced against a physical person who could be a director or an officer of the company.

However, the moot question to be resolved is whether the Applicant has proved that the Respondent has willfully disobeyed the order of the Tribunal?

It is trite law that in order to succeed in the application to commit the cited person for contempt the applicant must prove the notice and service of the order which is not only unambiguous and clear but also in my view capable of being obeyed by the person who is served with such order.

Furthermore the contempt proceedings in civil matter is of a quasi-criminal character and the burden of proof is quite onerous on the Applicant which is higher than a balance of probability. The court must order in favour of the Respondent if it harbours any suspicion or non-observation of any of the ingredients of the offence.

As rightly pointed out by Mr. Omoti there is no clear proof of any penal notice being served along with the order except on 28th August,2 007 which service, in my considered view, is not proved as per the standard required.

Moreover, even if I accept that the respondent herein came to know of the order on 23rd August, 2007, it is not shown to me that by that time, she was in a position to comply with the order. Her averments of the new tenants in occupation of the suit premises by that time and the agreement of the applicant through its representative to vacate the premises as evidenced by the handwritten note of 6th August 2007 are not controverted or shown as per the required proof to be unmeritorious or untrue.

With these facts, I am unable to find that the respondent has committed contempt of a court order as per the established principle of law and standard of proof.

I thus dismiss the application with costs.

I may put for the an issue for consideration of the Law Reform Commission for the enactment of the Local Contempt of courts Act which shall remedy the ambiguous situation prevailing at present in this field of law.

Moreover, I also note the words "*subordinate courts*" which although defined in the Constitution do not make clear indication as to whether the tribunals can be covered under those words. I am aware that the jurisprudence from the case law has developed but the certainty in the statute could be an appropriate solution.

Dated, Delivered and Signed at Nairobi this 29th day of November, 2007.

K.H. RAWAL

JUDGE

29.11.07