



REPUBLIC OF KENYA

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

CIVIL SUIT NO. 399 OF 2004

HIGHLANDS PLANTS LIMITED (Formerly Stolze

Zwinkles Kenya Limited)PLAINTIFF

VERSUS

ALICE WAIRIMU MWANGI.....DEFENDANT

R U L I N G

The plaintiff's chamber summon dated 3rd May 2005 is brought under Order 39 Rule 2A (2) of the Civil Procedure Rules. The plaintiff seeks the following orders: -

- The defendant, ALICE WAIRIMU MWANGI, be arrested and committed to prison for a term not exceeding six months for disobeying an order of the court.
- The blockage constructed by the defendant on the gate to the suit premises, namely, L.R. NUMBER NYANDARUA/ OL KALOU CENTRAL/ 2379 be removed forthwith.
- The Kenya Police, Ol Kalou Police station supervise the removal of that blockage and do execute the order of the court.

The plaintiff on 19.7.2004 filed a plaint and simultaneously filed an application for injunction. On that same day an ex parte order was granted whereby the defendant was restrained from evicting the plaintiff from the suit property. That order was to remain in force until 30th July 2004. That order was served on the defendant's advocate on 29th July 2004.

When the matter came up for hearing inter partes on 30th July 2004 the defendant was represented by counsel and the order that was recorded by consent was that the injunction application be adjourned to 21st September 2004 and the interim order be extended until that day. On 21st September 2004 the matter was adjourned for dates to be fixed at the registry and interim orders were extended until the next hearing date. The matter was then fixed for hearing on 21st January 2005 when parties indicated that they were discussing the matter, and sought for a mention date on 4th February 2005. The interim orders were extended to that date by consent. On 4th February 2005, parties had not reached a consent and the matter was set down for hearing on 13th April 2005 interim orders were extended until that day. On that day the injunction application proceeded for hearing before Emukule J, and ruling is due to be delivered on 25th May 2005. Interim orders were extended to that date in the presence of both counsels.

The plaintiff's counsel, Mr. Gitonga Murugara, in support of the application said that service of the order on the defendant advocate was service on the defendant because the advocate is an agent of his client, counsel argued that to hold otherwise was to allow parties to flaunt court orders. He drew the court's

attention to pictures annexed to the affidavit which were taken before the breach of the order, which clearly shows an unobstructed gate way, and one after the gate way blocked by a stone wall. The plaintiff's supporting affidavit states; "while the court order is in force, the defendant has purported to evict the plaintiff from the suit premises by constructing a blockage of the gate using building stone." it further states; "The plaintiff's lorries cannot go into the premises to collect the plaintiff's produce." Mr. Gitonga stated that the plaintiff's complaint was not frivolous since the plaintiff had proved that the defendant was in breach of status quo.

The defendant's counsel, Mr. Mwangi Gachichio opposed the application. He stated that it was incompetent and bad in law. He relied on the case of MWANGI H.C. WANGONDU V NAIROBI CITY COMMISSION CIVIL APPEAL NO. 95 1988. This case dealt with an application for contempt brought under section 5 of the Judicature Act and Order 39 rule 2 (3) of the Civil Procedure Rules. Counsel read out the following portion. ".....as a general rule, no order of court requiring a person to do or abstain from doing any act may be enforced unless a copy of the order has been served personally on the person required to do or abstain from doing the act in question. The copy for the order served must be indorsed with a noticeif he disobeys the order, he is liable to the process of execution to compel him to obey it."

The plaintiff's counsel in response to this argument stated that it was important to note that the quote states "May." The use of this word he argued showed that there are exceptions. And since the defendant ordinarily resides in the United Kingdom it was proper to serve her agent that is her advocate.

Mr Gachichio argued that contempt proceedings were criminal in nature and accordingly the standard of proof was beyond reasonable doubt. He also relied on the case of MANDER V FALCKE (1891) 3 Chan 488. This case held that, "Notice of Motion to commit a defendant must be served upon him personally if practicable, service upon his solicitor being in-sufficient." The defendant in her replying affidavit stated that the gate was initially a wooden gate which broke down more than 6 months ago and when she requested the plaintiff to repair it the plaintiff failed. She said that the suit property is adjacent to her residential property and the breaking down of the gate compromised her security; and then stated, "I therefore fixed it by stone blocks as the gate was not very necessary as the employees of the plaintiff in any event often pass through the good gate to my adjacent premises to access the suit premises from my other land parcel as there is a gate between the two parcels".

The defendant in her replying affidavit makes certain allegation against the plaintiff but those allegations do not add value to the present application.

Mr Gachichio also argued that the plaintiff's application cannot be granted because there was no date given of the disobedience; that, that disobedience can only be where the order is clear and unambiguous. Although counsel said that the construction of the stonewall was six months ago, that statement was not supported by the replying affidavit and is hereby rejected.

As I begin to consider my ruling on this application I start by accepting the defendant's submission that to seek the committal of defendant for contempt of court is criminal in nature and accordingly service of the order and penal notice must essentially be effected personally on the defendant. It cannot be acceptable that service on an advocate can later lead to the committal of the defendant who is unserved. The defendant ought to have had acknowledgment of the order, by personal service, and ought to understand that the consequence of the breach of that order may lead to his committal.

The defendant hereof was not served personally but service of the order was served on her advocate. What I find very unfortunate is that a counsel who in conjunction with the court should be upholding the law and orders issued by the court, is heard to say, despite being a party to the extension of those orders, that a defendant cannot be held liable for breach of a court order because that order was only served on the advocate and not the defendant. The defendant, despite there being in force an order to stop her from evicting the plaintiff, has build a stone wall across the gate accessing the suit property and leaves the plaintiff at her mercy to use her gate at the adjacent property. That I think is unjust to the plaintiff particularly when the defendant is not heard to say that she had not knowledge of that order.

The defendant's counsel's argument that the plaintiff's application is incompetent or bad in law has no basis, save that the defendant had not been served personally.

However the injustice perpetrated by the defendant cannot be left to persist without any remedy by this court, to do so would be to fail a party who has been wronged. The court is able in such circumstances to invoke section 3A of the Civil Procedure Act to meet the justice that is required in this case. I believe the justice of this case requires the defendant to pull down the stonewall built by her on the suit premises and failure to do so the plaintiff will be granted leave to so pull that wall at the costs of the defendant. In order to ensure that peace is maintained the court will require on notice being given, that the police from Ol Kalou police station to oversee that removal.

That orders of this court are as follows: -

(1) That the defendant is hereby ordered within 14 days from the date of this ruling, hereof, to remove the stone wall at the gate built on NYANDARUA/OL KALOU CENTRAL/2379 under the supervision of the police from Ol kalou police station.

(2) In default the court grants the plaintiff after 14 days from the date of this ruling to remove the stone wall at the gate on NYANDARUA/OL KALOU CENTRAL/2379 under the supervision of the police from Ol Kalou police station and the cost for such removal shall be deductible from the plaintiff's rent payable to the defendant in respect of property NYANDARUA/OL KALOU CENTRAL/2379.

(3) The costs of the application dated 3rd May 2005 are awarded to the plaintiff.

Dated and delivered at NAIROBI, this 17th day of May 2005.

MARY KASANGO

JUDGE