REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
Civil Case 2088 of 2001

COPOS LTD……PLAINTIFF

Versus

MR MAALIM & 23 OTHERS……DEFENDANT

RULING

The plaintiff filed a Chamber Summons application on 12th November 2003 seeking orders to have 3 named respondents, Francis Mwangi, J. Wanyasi and Johnson Limiri, committed to civil jail. The plaintiff's application is premised on the assertions that the 3 respondents had disobeyed and/or breached an injunction order issued by Waki J. (as he then was) on 26th February 2003.

The precise wording of the order dated 26th February 2003 is as follows:

> "THAT the defendants, their servants and or agents be and are hereby restrained from trespassing and/or denying the plaintiff and its agents acess, use and enjoyment of its plot Number LR 209/8294/387 (Original Number 209/8294/1/3 pending the hearing and determination of this suit."

The application was supported by the affidavits of Robert Mutiso Leli, Julius M. Kiko and PC Gideon M. Mugambi.

Robert Leli's affidavit states that the injunction orders were served upon the 24 defendants, including the 3 respondents. Leli further states that all the defendants obeyed the court order, except for the 3 respondents. The said 3 respondents are said to have demolished the foundation slab for the plaintiff's intended building. The respondents are also said to have burnt construction materials at the site, and also taken away some materials/tools. These actions are said to have taken place on 25th October 2003. Furthermore, it is stated that the respondents instructed their watchmen to deny entry to the plaintiff, its employees, contractors and officers. The said instruction was by way of a letter dated 26/10/03.

The affidavit of Gibson Mutunga Muli spells out the details of how he (Muli) effected service of the injunction orders on 18 of the defendants.

The affidavit of Julius M. Kiko also sets out details of how he effected service of the same injunction orders on 4 of the defendants. The affidavit of PC Gideon Mugambi states that he accompanied Julius Kiko to serve the orders on the 4 named defendants.

In answer to the application, the 3 respondents have filed one (1) Replying Affidavit, of Joseph Wanyasa. In summary, the 3 respondents deny having been served with the orders. All 3 respondents also state categorically that they did not do any of the things attributed to them i.e. burning construction materials, demolishing the foundation slab and stealing some materials/tools belonging to the plaintiff, or instructing their watchmen to deny the plaintiff access to his property.

The plaintiff says that the respondents were represented by an advocate at the time when the injunction orders were granted. He also says that thereafter the orders were served upon the respondents. It is not disputed that the respondents were represented by counsel. However, it is strenuously denied that the order was served upon the respondents. Placing reliance upon the decision in **Civil Application No.NAI 89 of 1991 P. K. Muite & 10 Others vs Aaron G. Ringera & 3 Others,** the applicants assert that insofar as the respondents knew of the orders whether such orders were null and void, regular or irregular, they were obliged to obey the same. As a general principle of law, the reasoning put forward by the applicant, on this score, cannot be faulted. Therefore, if the respondents knew of the injunction orders, and yet they went ahead to disobey the said orders, the respondents would have to bear the consequences of their disobedience.

The applicants subscribe knowledge to the respondents through 2 sources; their advocate who was present in court when the orders were issued, and secondly the fact that the orders were served. In relation to the fact that the respondent was represented in court at the material time, that alone cannot import knowledge to the respondents. Indeed, by its conduct of extracting the formal order and taking steps to serve it upon the defendants, the applicant is deemed to appreciate the fact that there was need to serve the formal order.

Were the respondents served with the injunction order?

Gibson Mutunga Muli swore an affidavit of service, deponing that he effected service as follows:

> "(c) I also served Mrs. F. Mwangi at House No. 242. She accepted service but declined to sign my copy.
>
> (h) I also served Johnson T. Limiri personally House No. 322, but he declined to sing my copy.
>
> (p) I also served J. Wanyasi at House No. 330 personally she accepted service but declined to sign my copy, he was pointed to me by the plaintiff's director Mutiso Leli." – (**emphasis mine)**

The foregoing service of order was said to have been done on 12th September 2003.

One Julius M. Kiko has also sworn an affidavit of service, in which he has deponed that he served an unnamed daughter of Mr. J. Wanyasi. He also depones that he served Mr. Francis Mwangi. And he also says that he served Mr. Johnson T. Limiri, when the latter was allegedly uncooperative as he was drunk.

Having given due consideration to the 2 affidavits of service, I find that the applicant itself was clearly not satisfied with the first attempt at service, which was allegedly made on 12th September 2003, hence its decision to serve again. The reasons for the dissatisfaction are apparent insofar as it was a Mrs. F. Mwangi who had been served, and also one J. Wanyasi who appears to have been of an indeterminate gender.

The second round of service was by Julius Kiko. On his part he served Mr. J. Wanyasi's daughter. He also says that he served Mr. F. Mwangi, but Mwangi denies service. Meanwhile, Johnson T. Limiri who is alleged to have been served whilst drunk is actually insisting that he does not even imbibe any alcoholic drinks.

In the light of the foregoing assertions and denials, the court is unable to make a finding as to which of the parties is stating the truth, at this stage. It could possibly become necessary for the deponents of the various affidavits to be cross-examined, so as to ascertain the facts.

Did the respondents disobey or breach the injunction orders? Again, the applicant asserts that the 3 respondents breached the said orders, whilst the respondents deny any wrongdoing.

It is significant that the affidavit of Robert Mutiso Leli spells out the breach in the following terms, at paragraphs 7 and 8.

> "7. THAT on 25th October 2003 the respondents and/or their servants demolished foundation slab for the plaintiff's intended building and burnt construction materials at the site and also took away some materials/tools (annexed hereto are photographs marked "C").
>
> 8. THAT further the respondents also have instructed their watchmen not to allow the plaintiff's employees, contractors or its officers entry into the premises thereby denying access to the plaintiff. (annexed hereto is a copy of a letter dated 26th October 2003 and marked "D")"

The contents of paragraph 7 (afore cited) clearly suggest that the matters complained of were not necessarily carried out by the respondents. The said matters, if indeed they happened, may have been done by the servants of the respondents. Although, I must pose here to observe that the applicant has not made any effort to explain how they got to know who exactly demolished the foundation, burnt construction materials and took away some materials/tools. This aspect of the application is significant because if Mr. Leli had seen the respondents carry out the actions complained about, he would easily have been able to not only say so, but also to identify the person(s) would did each of the actions complained of. He would then not have left the issue so open-ended as it is now, when the breach could have been done by persons other then the respondents.

As regards the letter dated 26th October 2003 (annexture "D"), it is noted that it is signed by "Residents". There is however no signature on the said letter. No effort has been made to explain why it is only the 3 respondents who are responsible for the letter. The court is thus unable to find any nexus between the letter and the 3 respondents.

The requirement for a higher degree of proof in an application for contempt of court cannot be over-emphasized. In the case of **Mutitika vs Baharini Farm Ltd. 1985 KLR 227**, the Court of Appeal noted that

> "the courts, nevertheless take the view that where the liberty of the subject is, or might be, involved, the breach for which the alleged contemnor is cited must be precisely defIned."

The matters complained of here against the respondents are basically of a criminal nature. In effect the charges are very serious in nature, as they could lead to the incarceration of the respondents not only for contempt, but also for a criminal offence. Applying the test that the standard of proof should be consistent with the gravity of the alleged contempt, I hold that the applicant has failed to discharge the onus on it, which required personal service and proof that the respondents thereafter breached the injunction orders.

The court has also noted that whereas the acts of the alleged contempt are said to have happened on 25th and 26th October 2003, Mr. Julius M. Kiko was effecting service of the orders on 3rd November 2003. As previously stated hereabove, the applicants must be deemed to have concluded that the service by Gibson Mutunga Muli was irregular or insufficient hence the need for service to be effected by Julius M. Kiko. And following the service of the order by Kiko, no actions are attributed to the 3 respondents, after 3rd November 2004.

I am accordingly constrained to dismiss the Chamber Summons dated 11th November 2003, with costs to the respondents.

But I also take the liberty to remind all the parties that the orders made by Waki J. on 26th February 2003 remain in force, and must therefore be complied with.

Dated this 18th day of March 2004.

F.A. OCHIENG

Ag. JUDGE