



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
MISCELLANEOUS CIVIL APPLICATION NO 285 OF 2002

VICTORIA PUMPS LTD & ANOTHER.....PLAINTIFF

VERSUS

KENYA PORTS AUTHORITY & 4 OTHERS.....RESPONDENTS

RULING

Although no Complaint nor Application in High Court Civil Case No.1 of 2000 at Mombasa were annexed to this application, it is clear to me from the perusal of the Ruling dated 31st January 2002 and delivered on 8th Day of February 2002 that an application for mandatory injunction was filed by the Plaintiff against the Defendants which sought an order to have two containers released to the Plaintiffs. That application was heard and in what I may with respect term as well considered and well researched ruling, the learned Judge Hon. Justice Waki made the following order:-

“Order: I grant the order as prayed in (b) of the Chamber Summons dated 3.7.2000. The two containers shall be released unconditionally. The costs of this application shall abide the result of the main suit.”

The Applicants claim that that clear order was not complied with and have now filed this application dated 8th July 2002 in which they seek two main orders from the court, plus an order that the costs of this application be provided for. The prayers sought are as follows:-

“(1) THAT the 1st Respondent’s Managing Director, Mr Brown Ondego, the Officer In Charge of Container Operations Captain Musoke and the Operations Controller Mr Abdalla Ngozi be committed for contempt of the court’s order issued against the 1st Respondent by Honourable Justice Philip Waki on the 31st day of January, 2002 and for the court to specifically order that one of the conditions of purging the said contempt be the unconditional release of the 2 containers and/or full payment of the value of the 2 containers plus interest at commercial rates of 25% since the containers were withheld.

(2) THAT Warrant of Arrest be issued to produce the 1st Respondent’s Managing Director, Mr Brown Ondego, the Officer In Charge of Container Operations, Captain Musoke and the Operations Controller, Mr Abdalla Ngozi to appear before the Honourable Court to show cause why the aforesaid officers of the 1st Respondent should not be punished by way of committal to jail or by way of such other sentence as the court shall deem just and expedient to mete out against the 1st Respondent’s contempt and willful disobedience of this Honourable Court’s Order issued on 31st January, 2002.

(3) That the costs of this application be provided for”

There are four grounds for the same application and these are that on 31st January 2002, the Court ordered the release of the two containers Nos TRLU 3302547 and TRLU 3238598 to the Applicants; that the first Respondent which was ordered to release the same containers has unjustifiably refused, neglected and/or ignored to abide by the terms of the same order despite having been served with the court order and has persisted in such failure despite further reminders; that the same acts of the first Respondent are willful and blatant contempt of court order dated 31.1.2002 and has resulted into losses to the Applicants; and that if it is true that the two containers or either of them is lost then the 1st Respondent be condemned to pay US\$ 100,636.73 being the value of the containers plus interest at commercial rate of 25% from 3.12.1999 to-date.

The application itself is not supported by any Affidavit but it states at the bottom of it as follows:-

“WHICH APPLICATION is grounded on the grounds stated hereunder and further based on the supporting Affidavit of MR. PATRICK MUNYAO annexed and sworn in support of the application filed for leave at the leave stage together with the statement of Facts dated 11th June 2002 and filed herein at leave stage and on such other grounds and reasons and shall be stated and adduced at the hearing hereof.”

I am not certain that this is the correct procedure to be adopted in an application with such serious consequences as this application, but I do note that all the documents referred to in the passage I have reproduced above were apparently given to the process server who alleges that he served all of them. I will deal with the question as to whether the service was proper or not later in this Ruling. The affidavit referred to is sworn by Patrick Munyao and states *inter alia* that he fully reiterates the contents of the Affidavit he swore on 3.7.2000 and rely on the same. That Affidavit was not annexed but I do feel that as this application is claiming noncompliance with the orders made on 31.1.2002, that affidavit may not be all that relevant. However at paragraph 3 of the Affidavit of Patrick Munyao sworn on 11th June 2002 he says:

“THAT the Honourable Justice Waki delivered a detailed ruling herein on 8.2.2002 copy annexed. None of the Respondents preferred either an appeal, review or any other application against the ruling. The same is annexed as annexure (1).”

Paragraph 4 of the same Affidavit states that a formal court order was thereafter certified and personally served on the 1st Respondent’s responsible officers as required in law. He stated further that after service of the order, he had been visiting the Container Depot on daily basis but he was told that either the two containers or one of the same got lost; He continues to say that he believes that either one of the containers or both of them got lost and if only one got lost then the release of one of the containers would not satisfy the purpose for which the goods were imported. In the annexures, a document was annexed being the last annexure which the deponent maintains is the document showing the value of the goods in the containers which, according to the Applicants, is the value they had lost from 3.12.1999 and which value together with interest at 25% is what the Applicants claim should be paid in purging the contempt. He ended the same Affidavit by stating that the Applicants shall be willing to have the matter finalised by the First Respondent paying them the value of both containers or releasing the two containers unconditionally but not one of the containers or none of the containers. As I have indicated above, there were annexure to the same Affidavits. These were PN 1, PN2, PN3, PN4, and PN5.

The 1st Respondent, Kenya Ports Authority opposed the application and filed three Affidavits in reply. All the affidavits were filed on 29th July 2002 and all were sworn on 29th July 2002. Two of those Affidavits were sworn by the people sought to be committed to jail for contempt, namely Brown M M Ondego and Abdallah Ngozi. The third affidavit was sworn by the current Manager Container Operations, Julius M Alusa. The Affidavit sworn by Alusa states in brief that the two containers No TRLU 3302547 and TRLU 3238598 were brought to the Port of Mombasa on board MSC Angela Voyage 53/A which arrived at the Port on 21st March 1999 and the same containers were entered on 27.11.1999 and were according to the law required to be removed from the Port within 30 days of the date of entry. Vide

Customs Warehouse Notice to Deposit Goods into Customs Warehouse No.120351 dated 23rd October 2000 the Customs & Excise Department required the Ports Authority to deposit the container No.3238598 into Customs Warehouse. First Respondent complied and Container TRLU 3238598 was transferred to Customs Warehouse on 20th September 2000. Upon doing so, First Respondent's duty as a bailee over the same container was discharged. It goes on to say that *vide* Legal Notice No.927 in the Kenya Gazette issue of 16th February 2001, the Customs & Excise Department gave Notice that if the goods in the same container were not removed from Customs Warehouse within 21 days of that date, then the same goods would be deemed as abandoned. As the goods in the container were not removed as required, they were sold by Public Auction on 21.8.2001. Alusa maintains that there was no order restraining the First Respondent from transferring or dealing with container No. TRLU 3238598 before it was served with a court order of 31st January 2002 and that the court order for release was served on 4th March 2002 after the same container had been transferred and the sale of the goods therein by public auction had taken place. He ended his affidavit by stating that as to container TRLU 3238598 the applicant should contact the Customs and Excise Department, but as to container TRLU 302547, the container is in custody of the First Respondent and the Applicants have been informed in a letter dated 13th June 2002 to collect it from the Port but the Applicants have failed to do so. He also states that the value of both containers as declared in the Mombasa Port Release Order No 0061813 is KShs.2,958,003 which is a sum far below the amount of US\$ 100,636.73 claimed. He thus denies the allegation that the First Respondent is in contempt of court order and also denies liability to pay US\$ 100,636.73 or any part of it as he maintains that it properly discharged its duty as a bailee.

Brown M M Ondego stated in his Affidavit that he has not been personally served with an order of release against the First Respondent. He stated further that he relied on the Affidavit of Julius Alusa and that the container No TRLU 3238598 was taken to Customs Warehouse on 20th December, 2000 upon receiving notification dated 23rd October 2000 from Customs and Excise Department to deposit the said container into Customs Warehouse and this discharged its duty as a bailee and that the contents of TRLU 3238598 were sold by way of Public Auction by Customs & Excise Department on 21.8.2001. Thus according to him, by the time the order was delivered, the same container TRLU 3238598 had been sold and was thus not within the control and custody of the Respondent, but that container TRLU 3302547 is still in the custody of the First Respondent and the Applicant have failed to have the container cleared. He denied being in contempt of court order.

Abdalla Ngozi has in his Affidavit repeated the same allegations in the other two affidavits. He also stated that he has not been personally served with an order directing the First Respondent to release the containers which are the subject of this suit. He also denied being in contempt of the court order.

Before the submissions were made by the learned Counsels in this application, the application against the then Container Operations Captain Musoke was withdrawn by the Applicant as the same Captain Musoke, was not served with the application. This Ruling is therefore only confined to the application in so far as it is seeking orders against Brown Ondego and Abdalla Ngozi.

There are certain aspects of this application which I feel, I need to deal with first before I decide on the substantive aspects, if it will be necessary to deal with the same.

First is which order is alleged to have been disobeyed? The Ruling said to have been disobeyed though is dated 31st January 2002, was not delivered on that day. It was delivered on 8th February 2002 by Mr Justice Ouna on behalf of Hon. Justice Waki. This in effect means that as on 31st January 2002 before the ruling was delivered there was no ruling capable of being disobeyed or obeyed as the same ruling had not been delivered and no one could be said to have known about it so as to obey it or to disobey it. In my mind, the Ruling could only have taken effect from 8th February 2002 and could have only been issued on 8th February 2002 or thereafter and not before that date. The order that was allegedly served upon the Respondent's employees says at the end of it as follows:

“Given under my hand and the seal of the Court this 31st Day of January 2002.”

And is signed by the Deputy Registrar. Could that be true? Put another way, could the Deputy Registrar

have given and sealed the order on 31st January 2002? If the Ruling was delivered on 8.2.2002, then what was the learned Deputy Registrar sealing on 31st January 2002 some eight days before the Ruling was delivered? In any case body of the order says the Ruling is dated 31st January 2002 in Nairobi and was delivered on 8th February 2002 at Mombasa. This makes it clear that the Deputy Registrar at Mombasa could not even physically have sealed the same Ruling in Nairobi on 31st January 2002.

This takes me to the application itself. The orders sought in both prayers are that the same Brown Ondego and Abdalla Ngozi be committed for contempt of the court order issued against the first Respondent by Honourable Justice Waki on 31.1.2002 and that warrant of arrest be issued against both to show cause why they should not be punished for disobeying order issued on 31st January 2002. In my humble opinion, no orders were delivered on that date. What happened on that date as I can gather from the Ruling is that the Honourable Judge had his Ruling dated but that Ruling was not delivered till 8th February 2002 and the order was extracted and issued or sealed on 11th Day of March 2002. In my mind, by 31st January 2002 no order had been delivered and none could be sealed and be disobeyed till the same order was delivered on 8th February, 2002.

The next aspect I want to consider is whether there was any personal service as is required by law. It is not in dispute that the law in such a case as this where a party is seeking committal to civil jail against the other party on grounds that the order delivered by court has been disobeyed, the party sought to be committed or cited for contempt must be personally served with a properly extracted order which must also have a Penal Notice appended to it. I have seen the Order extracted and which was allegedly served upon the two i.e. Ondego and Ngozi. The Penal Notice is not properly appended as it should have been at the very end of the order and not part of it. However, I will not attach any importance to that. I will consider whether the same order plus Penal Notice were properly served upon Brown Ondego and upon Abdalla Ngozi. The two gentlemen have denied that they were personally served with the same order and Penal Notice.

The Affidavit of Service sworn by the Process Server who claimed to have served the two – i.e. Ondego and Ngozi states as follows at paragraphs 3 and 4:

“3. THAT on the 4th day of March 2002, I proceeded to Kenya Ports Authority with the intention to serve the Managing Director, Mr Brown Ondego, the Officer incharge of Container Operations, Captain Musoke and the Operations Controller Mr Abdalla Ngozi, as instructed by the Plaintiff’s Advocates. Upon introducing myself and the purposes of my visit, I was informed that as per the Corporations Internal Regulations I could not serve the above named persons in person and I was therefore referred to the Corporation’s Legal Department which department has authority to receive all court documents for and on behalf of the Cooperation’s Officer. After introducing myself and the purpose of my visit at the Legal Department I was referred to Mr Jilo Raha the Assistant Corporations Secretary and Head of Legal Services who I personally served by tendering to him a copy of the court order and required his signature on the court order. The said Jilo Raha accepted service at around 10.20 a.m. and acknowledged receipt for and on behalf of the Corporation, the Corporations Managing Director, Mr. Brown Ondego, the officer-in charge of Container Operations, Captain Musoke and the operations Controller Mr. Abdalla Ngozi by signing and stamping on the reverse side of the court order which I returned to this Honourable court duly served.”

This part of the Affidavit, which is the most relevant part as far as service is concerned readily accepts that no personal service was effected upon Ondego and Ngozi. The Process Server alleges that he was informed that according to Corporations Internal Regulations he could not serve the above named in person. He has not stated who told him so and who referred him to Corporations lawyers. The position may have been different if the position was as he stated in the Affidavit of Service he did swear on 31st July 2002 in respect of service of Notice of Motion dated 8.7.2002, Court Order issued on 28.6.2002, certificate of urgency, Notice to the Registrar etc where he clearly sated that he tendered those documents upon Mr Brown Ondego at around 11.00 a.m. and the same Brown Ondego accepted service but declined to acknowledge receipt by signing saying that all his legal matters should be handled by his Advocate Ms Gatere and then Mr Ondego called Gatere who received the same documents. Ngozi also did the same.

That scenario could satisfy the requirement of personal service. However in this service of the order which was allegedly served on 4th March 2002, there is nothing to indicate as to whether either Ondego or Ngozi or both were approached at all or whether an attempt was made to effect personal service upon them. In what is clearly inadmissible statement (see Order 18 Rule 3 of the Civil Procedure Rules) the Process Server makes a statement attributable to an unknown person that the two could not be served personally according to the internal rules of the corporation. It must have been obvious to the Process Server, that when the Applicants' advocates were instructing him to go and serve Ondego, Ngozi and another person personally he was required not to serve the Corporations known Lawyers but to serve the officers in person as the Order had a Penal Notice making it clear that the same officers stood to suffer in person for the sins of the Corporation. Such being the case, the same two officers were being given opportunity to obey the order and they had a right to be defended by an advocate of their own choice as individuals and not necessarily by the Corporations Advocates. That is why I say that if the Affidavit had stated that both officers were served in person but directed who to take the documents to, then the position could have been different. Secondly, I have perused the reverse part of copy the order allegedly served. There are two "Received" stamps. One states on the body of the stamp that it was received on "3.4.02" but whoever signed it has written it as received on 4.3.2002. The other one bears Received Stamp of the Corporation Secretary and Head of Legal Services. It does not state that the Corporation Secretary and Head of Legal Service received it on behalf of the two officers Mr Ondego and Mr Ngozi. This omission becomes important when one considers that the order was against the Kenya Ports Authority together with others and it had to be served upon the same Kenya Ports Authority whose advocate on record was the same Corporation Secretary and Head of Legal Services. In short, on the face of a denial of personal service of the order by the same Mr Ondego and Mr Ngozi, there is nothing to show that the Process Server actually served them; that they directed the Process Server to the Head of Legal Service and that the same Head of Legal Service received the same order on their behalf.

I do not need to emphasize the need of personal service of the order which is alleged to have been disobeyed upon those alleged to have disobeyed it. If there is any need to emphasize the same then the sentiments of Cockar, Omolo and Tunoi JJA in the case of *Nyamogo & Another vs. Kenya Posts & Telecommunications Corporation* (1993) LLR 2152 (CALL) to which I was referred by the learned Counsel for the Respondent will suffice. They stated as follows:

"The law on the question of service of order stresses the necessity of Personal Service. In *Halsbury's Laws of England* (4th Ed.) Vol.9 on p.37 para 61 it is stated:

61. Necessity of Personal Service. 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 Where the order is made against a company, the order may only be enforced against an officer of the company if this particular officer has been served personally with a copy of the order."

I am far from being satisfied that the order extracted from the Ruling of Hon. Justice Waki dated at Nairobi on 31st day of January 2002 and delivered at Mombasa on 8th Day of February 2002 was personally served upon Brown Ondego and Abdalla Ngozi as is required by the law.

This finding, and other comments I have made hereinabove would have been enough to dispose of this application. However, there are two other matters that I need to briefly consider which are on the substance of the application. These are whether in the circumstances of this case, an order would have issued committing the alleged condemnors for contempt of court and secondly whether the alleged contemnors should have been punished by way of ordering them to pay US\$100,636.73 if I had found them in contempt of court.

The Ruling that gave the order of mandatory injunction was delivered on 8.2.2002. The application, it would appear, was heard well before that date. It is not clear when the application was heard but the Respondents say there was no order of injunction or temporary injunction during the period when the application was being heard and that being the case and in compliance with Customs Act Cap 472 Section 27(5) and further pursuant to Notice to Deposit Goods into Customs Warehouse No.120351 dated 23rd

October 2000 issued by Customs Department, the Kenya Ports Authority transferred one container to warehouse where the contents were allegedly sold by public auction. One is not certain as to why only one container was subjected to this treatment. Further this allegation which has not been challenged by Applicants seems to me to go against what according to the Ruling the learned Counsel for the Respondent did submit to the court at the time the application for mandatory injunction was heard. I say so because upon reading the Ruling dated 31st January 2002 and delivered on 8th February 2002, I note the following:

“Learned Counsel for K P A, Mr Jilo simply submitted that KPA has no claim to make in the matter as it was only a bailee and will release the cargo to whoever between Inchcape and Oceanfreight wins the case”

That submission clearly gave the impression that both containers were still intact with the K P A and would readily be released to whoever won the case. Come the time the Ruling is delivered and who won the case is known and now the same KPA comes up with an allegation that one container had been transferred to the Customs Warehouse and had actually been opened and its contents sold by Public Auction. As I have already observed, the date of hearing that application is not known to me as the proceedings were not annexed and no mention of this was made in the Affidavits, but whenever it was heard, if Mr Jilo was right in his submission then it meant that as on that day the containers were still intact and Mr Jilo had the moral and professional duty to have his clients keep them or to inform the Applicants of any attempt to interfere with them even if there was no injunction orders stopping anybody from dealing with them.

Mr Alusa says at paragraph 10 of his affidavit that Customs & Excise Department issued Legal Notice No 927 in the Kenya Gazette that the same container would be removed to Customs Warehouse. This was all very well but one would still ask why the learned Head of the Legal Services in the Kenya Ports Authority allowed this to happen having known only too well that those containers were both subject to a court case in which court he either submitted that the goods were intact and were only waiting for whoever won the case. In any case, if by that time 21st August 2001, the goods in the container had been sold by Public Auction, then why submit to the court that the same goods were still intact awaiting whoever won the case? In my humble judgment, either way Mr Jilo appeared to have acted unprofessionally. I do feel this was unhappy for it may very well have been one of the reasons why the court ordered the two containers to be released to the Applicant unconditionally.

However, and having said so, the stark fact now standing out is that one container had been taken to Customs Warehouse and goods in it had been sold by Public Auction after a notice to that effect had been given out in the Kenya Gazette. The same sale took place on 21.8.2001, well over 51/2 months before the order said to have been disobeyed was delivered. These facts, as I have stated above were not disputed nor have they been challenged in any further Affidavit which the Applicant could have sought to file after the Replying Affidavits. It is thus clear to me that by the time the court made the order for release of both containers to the Applicant one container was no longer available and could not be released to the Applicants and even though, as I have said above the Respondents' advocate did not act properly in his submissions or in the follow up, the fact as appears in the documents before me are that one container was already out of the reach of the alleged contemnors. The order as regards the release of container No TRLU 3238598 was thus not capable of being enforced as it was, having been issued long after the same container had been removed from the possession and control of the alleged contemnors. In the same case of *Nyamogo & Another vs. Kenya Posts & Telecommunications Corporation* I have referred to, it is also stated as follows in part:

“It is clearly wrong to accuse or punish the officials of the Corporation for failing to comply with an order to restrain from retiring six months after the offices had been officially abolished. This notice of motion seeking committal for contempt of this court's order must fail, on this ground also.”

In the same way, it is clearly wrong to accuse or punish the officers Brown Ondego and Abdalla Ngozi for failing to comply with an order for release of container No TRLU 3238598 which was made after the

same container had been removed from the control and possession of Kenya Ports Authority, the employers of the same alleged contemnors and its contents sold at a public auction advertised in the Kenya Gazette.

That only disposes of the question involving one container – No TRLU 3238598. What about the other container No TRLU 3302547? That container has not been disposed of and is still there. The Respondents state as follows at paragraphs 14 and 15 of Alusa’s Affidavit”

“14. THAT by way of letter Reference No MCS 4316 dated 13th June 2002 and addressed to M/s Gikandi & Company Advocates for the Plaintiff/Applicant Kenya Ports Authority informed the said advocates to advise their clients the Applicants herein to do as follows:-

- (a) Contact Customs & Excise for container No TRLU 3238598 which was deposited in Customs Warehouse.
- (b) Collect container No TRLU 3302547 which is in the custody of Kenya Ports Authority (annexed at pages 9 is a copy of the letter.

15. THAT despite the advise given to the Applicants, the applicants have failed to clear container No TRLU 3302547 from the port.”

These allegations have not been rebutted by the Applicant and they stand. The Applicants seem to reflect on the issue at paragraph 7 of their Affidavit which states:

“7. THAT I have reason to believe that either the 2 containers or one of them was illegally sold or lost by the 1st Respondent and release of one of the containers will not satisfy the purpose for which the goods were imported and it means that the 1st Respondent will NEVER COMPLY with the court’s orders.”

For some unknown reasons, the Applicant does not elaborate on what was the purpose for which the goods were imported and why that purpose would not be met if the remaining one container is released to it. Again unfortunately the document headed “Costing of Consignment Stuck At Mombasa” also does not show which goods were in which container to enable me know to what extent it would serve no useful purpose accepting one container when the other container is not available. All I can assume from reading the list is that they seemed to have been tools of different types. I do feel in my mind that receipt of one container would to an extent meet the purpose for which they were both imported. I must however accept that if the Affidavit had revealed why it felt release of one container No 3302547 would not meet the purpose for which the containers were imported, I would have been in a better position to make an informed decision. It did not do so. It was its duty to do so, and I cannot punish the Respondents for what they clearly say they made available but the Applicants refused and/or failed to collect. I note that the letter asking the Applicant’s Counsel to advise his clients to collect the container was dated 13th June 2002, about 14 days before the application was filed. In my mind the Applicants needed to show good faith by taking what was released by the Respondent in its attempt to comply with the order and to seek the balance that remained.

I cannot see any evidence of contempt of court as concerns container No TRLU 3302547. Let the Applicant collect it. I will however emphasize the Hon. Justice Waki’s order which was that the containers were to be released unconditionally to the Applicants. That order will apply to the release of container No TRLU 3302547.

The last point need not be belaboured as I have not cited the alleged contemnors for contempt. However, if I were to go to that extent and if I were to consider purging the same contempt then I would have granted the value that was declared in the Release order serial No 0061813 which is Kshs.2,958,003. I would have reduced that amount by the value of the goods in container No 3302547 which goods are still intact. I would have then added some element of the interest for both containers upto the date the Respondent offered to release container No 3302547 to the Applicant. I would not have granted amount of US\$100,636.73 plus interest at commercial rates of 25% from 3.12.1999 to-date because when the

Applicant and his Consignor declared value of the goods in the containers, it accepted that it was telling the truth about the same goods. If it did not tell the truth, then it took a calculated risk and should not be allowed to change when the need to tell the truth now catches up with it. However, as I have stated, this is now no more than academic as I have not found the two Respondents in contempt of court and further, I feel certain that it will be canvassed at length during the full hearing of the case as it is now clear one container was not delivered. I do not want to prejudice the outcome of the same hearing. I make no final finding on the same question of damages.

This application cannot succeed. It is dismissed but, for what I have stated on the submission of the learned Counsel for the Respondents before Hon. Justice Waki, I will not grant any costs to the Respondents.

Orders accordingly.

Dated and delivered at Mombasa this 3rd day of September, 2002

J.W.O. OTIENO

JUDGE