



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 53 OF 2020

PREMIER DAFFODIL LIMITED.....PLAINTIFF/APPLICANT

VERSUS

SPEEDBIRD TRAVEL & SAFARIS LTD.....DEFENDANT/1ST RESPONDENT

DAVE MUNYA MWANGI.....2ND RESPONDENT

PHYLLIES WANJIRU MWANGI.....3RD RESPONDENT

RULING

Through the application dated 24/4/2020, the Plaintiff sought to have the Defendant and its directors Dave Munya Mwangi and Phyllies Wanjiru Mwangi found guilty of committing contempt of the court orders made on 2/4/2020. Further, it sought to have the Defendant and its Directors Mr. Dave Munya Mwangi and Phyllies Wanjiru Mwangi punished for committing contempt of court by being committed to civil jail or fined. The Plaintiff further sought to have the Defendant fined or its assets attached and sold in payment of the sum the court may set as a fine. In addition, it sought to have all property including motor vehicles driven by the Defendant's agents or employees found trespassing on L.R. No. 209/11348 Nairobi seized and detained on the suit land at the Defendant's risk until the Respondents purge the contempt of the court orders made on 2/4/2020.

The application was made on the grounds that the Plaintiff, which was formerly known as Daffodil Developers Limited, was the registered owner of L.R. No. 209/11/348 measuring approximately 7.4 acres situated in Embakasi, Nairobi ("the Suit Property"). The court issued an order of injunction on 2/4/2020 restraining the Defendant from excavating or constructing on the Suit Property until the application dated 10/3/2020 was heard *inter partes* once the courts resumed sittings. The Plaintiff was directed by the court to file an undertaking to pay damages which it did.

The Plaintiff claimed that the court order issued by the court on 2/4/2020 was served upon the Defendant on 7/4/2020 on instructions given by Dave Munya Mwangi who was said to be in Murang'a County at the time. Service was effected at Lower Hill Duplex Apartment suite number 11 Upper Hill. In addition, the Plaintiff's advocate served the demand letter dated 21/4/2020 upon the Defendant's director, Mr. Dave Munya Mwangi and upon his advocates Malonza and Company Advocates on 21/4/2020. The order was also served through email, telephone and the mobile enabled application of whatsapp on the telephone of Dave Munya Mwangi on 23/4/2020.

The Plaintiff urged that despite service upon the Defendant and its directors as well as on its advocates, the Defendant refused to comply with the court order to stop excavation and construction on the Suit Property. The Plaintiff claimed that the Respondents gave express orders to their agents or servants to continue with construction and exaction despite service and knowledge of the court order. The Plaintiff argued that the Defendant's directors Dave Munya Mwangi and Phyllies Wanjiru Mwangi had wilfully disobeyed the court order of 2/4/2020 and have brought this court and the rule of law into ridicule, odium and disrepute and has painted the court as weak, powerless and ineffective. The Plaintiff urged the court to uphold its dignity and assert its authority so as to enforce obedience of its orders and further the rule of law. The Plaintiff added that it was in the interest of justice that parties who wilfully disobey court orders must be punished.

The court granted the Plaintiff leave to effect service of the application upon the Defendant, its director Dave Munya Mwangi and its advocates, M/s Malonza and Company Advocates through email. An affidavit of service was filed in court on 7/5/2020.

The application was supported by the affidavit of Dushyant N. Patel, the Plaintiff's director who deponed that being satisfied that the matter was urgent and that it was necessary to restrain the Defendant from excavating or constructing on L.R. No. 209/11348 until the application dated 10/3/2020 was heard *inter partes* once courts resumed sittings, this court made an order on 2/4/2020. The order was delivered electronically owing to the Covid 19 pandemic that prompted the suspension of all open court civil proceedings. The Plaintiff's advocates instructed Gibson Wamweya Mburu of Gwanco Ventures to effect service on the Defendant. The process server contacted Mr. Dave Mwangi on 7/4/2020 through his cell phone who informed him that he was stuck in Murang'a due to the restrictions on entry into Nairobi. The process server averred that Mr. Mwangi directed him to effect service at the Defendant's sister company, Express Arts Limited offices at Duplex Apartment where he had previously effected service. Mr. Patel further deponed that Malonza and company advocates wrote an email

on 20/4/2020 to the Plaintiff's advocates confirming that they had instructions to act for the Defendant. He attached a copy to the official company search dated 20/2/2020 confirming the Defendant's directors as Dave Munya Mwangi and Phyllies Wanjiru Mwangi. He deponed that despite service and knowledge of the court order dated 2/4/2020, construction and excavation works had persisted unabated and attached photographs confirming the continued construction of the Suit Property. Mr. Patel relied on the affidavits of service sworn by Gibson Wamweya Mburu.

Gibson Wamweya Mburu deponed in the affidavit he swore on 8/4/2020 that on 6/4/2020 he received copies of the application dated 30/3/2020 and three copies of a court order dated 2/4/2020 together with a penal notice issued electronically from court with instructions to serve them upon the Defendant. He visited the Defendant's sister company, Express Arts Limited offices at Duplex Apartment Suite Number 11 where the Defendant's director Mr. Dave Mwangi of telephone number 0722898344 operated from. He had previously served at that address. The office was locked. He called Mr. Mwangi who did not pick his calls. Mr. Mwangi called him back and informed him that he was in Muranga and gave him an appointment for the next day. The process server returned to office at Duplex Apartment on 7/4/2020 and did not find the director. He called Mr. Mwangi on his telephone and after explaining the purpose for his visit Mr. Mwangi directed him to leave the documents with M/s. Pauline in his office. The Process server deponed that he effected service of the application, court order and correspondence on M/s. Pauline who retained the copies but declined to acknowledge receipt.

Mr. Patel attached a copy of the letter dated 20/4/2020 addressed to the Plaintiff's advocate. The letter informed the Plaintiff's advocate that Malonza and Company Advocates had been instructed to act for the Defendant. The firm indicated in the letter that it would enter appearance and file the replying affidavit once the court resumed normal operations. It requested the Plaintiff's advocates to direct all communication on the matter to the firm. Mr. Patel also annexed a copy of the Plaintiff's advocates' letter dated 21/4/2020 sent to Mr. Dave Mwangi by email. The letter reproduced the court order restraining dealings with the Suit Property and was served by email by John Williamson Kimani who swore an affidavit on 21/4/2020.

The application was further supported by the affidavit of Gibson Wamweya Mburu sworn on 23/4/2020. He deponed that on 21/4/2020 he effected service of the statutory notice dated 21/4/2020 addressed to Dave Munya Mwangi and the Defendant, which was copied to the Defendant's advocates Malonza and company Advocates together with copies of the court order of 2/4/2020 upon the firm of Malonza and Company Advocates who acknowledged receipt. He also served it upon Ms. Pauline on behalf of Mr. Dave Munya Mwangi who directed him to effect service on his office assistant. Mr. Patel also annexed a printout of a whatsapp message confirming that a copy of the letter dated 2/4/2020 and demand notice dated 20/4/2020 were served on Mr. Dave Mwangi at 11.44.

Mr. Gibson Wamweya Mburu served a copy of the application on Malonza and Company advocates on 5/5/2020. It was also served on Dave Munya Mwangi who directed the process server to effect service on Ms. Pauline.

Dave Munya Mwangi filed a replying affidavit to the certificate of urgency dated 24/4/2020 on 6/5/2020. He deponed that he was served with an injunction application with a hearing date for 23/3/2020 and he instructed Malonza and Company advocates to represent him. Owing to the Covid – 19 pandemic he stopped going to work and traveled out of Nairobi. He denied being served with the court order. Further, he deponed that the Plaintiff was obtaining court orders and trying to interfere with his occupation of the Suit Property using a fake title as stated in his reply to the injunction application. He added that he had embarked on a very costly development of his property which he had been in possession of and occupation since he acquired it over 10 years ago. He urged the court to order the Registrar of Lands Nairobi to produce their records regarding this property which he stated will determine the true owner of the property. He contended that the Plaintiff's application for contempt was premature and brought in bad faith since the Plaintiff had not served the court order on him or his wife.

Despite being invited through email by the court for the virtual hearing of the application on 6/5/2020, the Respondents did not participate in the proceedings. Mr. Elijah Mwangi and Daniel Kimani appeared for the Plaintiff. Mr. Mwangi informed the court that he had sent another email to Mr. Malonza advocates and that the replying affidavit filed by the Defendant had not been served on them. The Plaintiff sought orders of contempt in the application dated 24/4/2020 for disobedience of the court's orders issued on 2/4/2020 and served on 7/4/2020 and 21/4/2020. Mr. Mwangi contended that the photographs annexed showed disobedience as they showed that excavation and construction were still continuing on the suit land. He urged the court to find that the Defendant and its directors had disobeyed the court order after being served. Mr. Mwangi relied on **Shimmers Plaza Limited v National Bank of Kenya Limited [2015] eKLR**, **Miguna Miguna v Fred Matiang'i and another [2018] eKLR** and **Ben Njoroge Mithamo and another v Solicitor General and another [2015]** in urging the court to grant the orders sought by the Plaintiff.

The issue for determination is whether the court order of 2/4/2020 was served upon the Defendant and its directors and whether there was compliance with that order. The court reiterated in the case of **Shimmers Plaza Limited v National Bank of Kenya Limited** that service of the court order along with the penal notice need not be personally served on a person before contempt can be proved. Knowledge of a court order is sufficient to prove service for purpose of contempt proceedings. A person has notice of a fact if he has actual knowledge of it, or had received information about it or has reason to know about or knows about a related fact.

Gibson Wamweya depones in the affidavit of service that he effected service on Ms. Pauline on 7/4/2020 at Duplex Apartment on instructions from Mr. Dave Mwangi who directed him to serve the documents on Ms. Pauline. The court is also satisfied that Mr. Mwangi was served with court order through email and whatsapp by the Plaintiffs advocates on 21/4/2020. The order was also served upon the Defendants advocates Malonza and Company Advocates on 21/4/2020. The photographs annexed by the Plaintiff show that excavation and construction continued on the Suit Property after 21/4/2020. Mr. Mwangi admitted as much in his replying affidavit when he deponed that he had embarked on a very costly development of his property.

The court finds that the Defendant and Mr. Dave Munya Mwangi were served with the court order of 2/4/2020 and disobeyed it and are therefore guilty of committing contempt of the court order issued on 2/4/2020. The court is unable to find evidence of service of the court order on Phyllies Wanjiru Mwangi.

Mr. Dave Munya Mwangi will be committed to civil jail for 60 days. The Defendant will pay a fine of Kshs. 1,000,000 for contempt of court and its assets will be attached and sold in payment of the fine. All property including motor vehicles driven by the Defendant's agents, servants or employees found on L.R. No. 209/11348 Nairobi will be seized and detained on the Suit Property until the Defendant and Dave

Munya Mwangi purge the contempt of the court orders made on 2/4/2020. The costs of the application shall be borne by the Defendant.

Delivered virtually at Nairobi this 7th day of May 2020

K.BOR

JUDGE

In the presence of:-

Mr. E. Mwangi and Mr. D. Kimani for the Plaintiff

Ms. E. Musa for the Defendant

Mr. V. Owuor- Court Assistant