



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO. 149 OF 2019

DAQARE TRANSPORTERS LIMITED.....PLAINTIFF

VERSUS

ZAINAB HASHI..... DEFENDANT

RULING

Introduction

1. There is a motion before me.
2. It was filed by the Plaintiff on 30/08/2019. The Plaintiff alleged disobedience of a court order by the Defendant. The Plaintiff in its motion urges the court to find that the Defendant is in contempt. The Plaintiff also seeks to have the Defendant imprisoned for failing to honour a court order.
3. Before the Motion could be heard however, the Defendant lodged an objection *in limine*. The Preliminary objection dated 8/06/2021 was to the effect that the Motion is fatally defective for failure to serve the Order and Penal Notice personally on the Defendant. The plaintiff opposed the preliminary objection on the grounds that the Defendant is in court of the court. In summary the Plaintiff states that the Defendant should simply obey the Court order dated 25/07/2019 or be committed to civil jail for contempt.

Brief Litigation History

Plaintiff's Case

4. The grounds of the Application are contained at the foot of the said Application, and it is further grounded on the supporting affidavit sworn by Mohamed Abdi Abshir on 30th August 2019.
5. For clarity, the deponent to the supporting affidavit has averred as follows: -
 - (a) The Plaintiff took up these proceedings against the Defendant in **Nairobi CMCC No.3519 of 2018 Daqare Transporters Limited Vs. Zainab Hashi** for reasons that the Defendant herein, was interfering with the business of the plaintiff upon the demise of the pioneer of the business Abdi Abshir Warsame who died on 27th January 2018.
 - (b) By order of 4th May 2018 this honourable court temporarily restrained the Defendant from interfering with the Plaintiff's business in the premises described as TOL NO.39 situate at Landi Mawe off Factory Road Industrial Area within Nairobi.
 - (c) The final Ruling delivered on 25th July 2018 in the initial application confirmed the restraining order pending hearing and final determination of the suit and the order is still in place to date.
 - (d) The Defendant has continued to interfere in the Plaintiff's business in blunt disregard of the court order and she went on to apply for letters of administration for the estate of the late Abdi Abshir Warsame at the Kajiado High Court with intent to take over the business of the plaintiff.
 - (e) The Defendant by letter of 27th August 2019 again instructed L.M Ombete Advocates who wrote a demand letter to the Plaintiff's tenants at the mentioned premises demanding that rent be paid to the Defendant.

(f) All these acts of the Defendant are in violation of the court order as emanated in the Ruling of 25th July 2018 and thus making the Defendant a contemnor.

(g) The acts of the Defendants amount to contempt of court and the contemnor should be committed to jail for contempt and be ordered to repay all the loss occasioned by her interference.

Defendant's Case

6. The Defendant has opposed this Application vide the Preliminary Objection dated 8/6/2021 together with a Replying Affidavit dated 14/6/2021 seeking that the Suit be struck out with costs to be paid forthwith to the Defendant on the grounds that this Honourable Court lacks jurisdiction in the first instance on grounds that the contempt proceedings are fatally defective for failure to serve the Order and penal notice personally on the Defendant.

7. In the Defendant's response to the application dated 30/08/2019 avers that Mohamed Abdi Abshir is not and has never worked with Daqare Transporters Limited neither is he an employee of the company, that he is not the son of Abdi Abshir Warsame (deceased), that Mohamed Abdi Abshir is a stranger and a busy body in these proceedings.

8. It is the Defendant's contention that at an early time the Defendant will seek leave of the court for Mohamed Abdi Abshir to be cross examined on issues he has deponed to in his Supporting Affidavit dated 30th August, 2019.

9. It is not true that the Defendant has refused to obey the court order issued by Hon. A. M. Obura on the 4th May, 2018 as the same was an interim order.

10. The Defendant avers that she is not aware of any court order existing as she has never been served with the said order nor neither is she aware whether the same was ever extracted.

11. The Defendant contends that she has been made aware of the said order by being served with the Application for contempt it had been annexed to the Supporting Affidavit of the Plaintiff which order was interim and dated 4th May, 2018 by Hon. A.M. Obura.

12. The defendant states that she is the lawful widow of Abdi Abshir Warsame (deceased). That she duly applied for letters of Administration and the Grant was issued to her on 17th December, 2018 hence she is the legal Administratrix to the estate of Abdi Abshir Warsame (deceased) and among other properties included shares of the company. The grant has never been revoked by the court.

13. She is aware that her late husband Abdi Bashir Warsame (deceased) was the sole person running the affairs of the company and the Plaintiff did not and has never been an employee of Daqare Transporters Ltd.

14. Finally, the Defendant prays that the Application should be dismissed with costs.

Application dated 31st August 2021

15. The Plaintiff filed a further affidavit dated 22/6/2021 and avers that he is an employee of Daqare Transporters Limited and a son of Abdi Abshir Warsame (deceased). He is aware that by ruling of the Honorable Court on 25th July 2018 in Nairobi CMCC 3519 of 2018 Daqare Transporters Limited vs Zainab Hashi the Court restrained the Defendant from interfering in the business of the plaintiff company.

16. The grounds of the Application dated 31/8/2021 are contained at the foot of the said Application, and it is further grounded on the supporting affidavit sworn by Zainab Hashi on 31st August 2021.

17. For clarity, the deponent to the supporting affidavit has averred as follows: -

a. The Applicant is reliably informed that the documents presented by the Respondent were falsified without disclosing his source of information.

b. Mr. Mohamed Abdi Abshir is not a director or employee of the Respondent company and thus he lacks the locus standi to swear the affidavit and make the averments therein.

c. The Applicant wishes to cross-examine the said Mr. Mohamed Abdi Abshir, on all the averments in the affidavits sworn on his Affidavit sworn 30th August 2019 and 22nd June, 2021. The Respondent attached documents are suspicious and its deponent's averments are prejudicial to the Applicant, who risks committal to civil jail.

d. The Applicant stands prejudice if the Application dated 30th August, 2019 proceeds to full hearing without an opportunity of being accorded a fair, just and impartial hearing for the deponent to be called for cross-examination.

e. The deponent makes grievous allegations against the Applicant, and which are made in bad faith and maliciously and should be cross-examined to establish if they are guilty of perjury.

FURTHER RESPONSE

18. The Plaintiff filed a further affidavit dated 22/6/2021 and avers that he is an employee of Daqare Transporters Limited and a son of Abdi Abshir Warsame (deceased). He is aware that by ruling of 25th July 2018 the Honourable Court in Nairobi CMCC 3519 of 2018 Daqare Transporters Limited vs Zainab Hashi restrained the Defendant from interfering in the business of the plaintiff company.

19. He contends that he knows this because he is an employee of Daqare Transporters Limited and they have operated the company together with his father for many years before his demise. That he is the adopted son of Abdi Abshir Warsame and together they were five children namely Mohamed Abdi Abshir, Munira Abdi Abshir, Sabrina Abdi Abshir, Hadija Abdi Abshir, Flestine Abdi Abshir. That in fact four of them used to stay in the same house with Zainab Hashi and our father before she decided to divorce our father. That it is only Flestine who used to stay with her mother.

20. It is his contention that the Defendant herself acknowledged that his father adopted him when he was 6 years old and for that matter she cannot say that the Plaintiff is a stranger yet she has known the Plaintiff since he was a child and he stayed with her in the same house for years.

21. The Plaintiff's have not started on the inheritance of our father yet as per Islamic law but all the same his interest is not in the inheritance but to propagate the name of our father.

22. The Defendant has an Advocate in the lower court case and she cannot start raising issues of Service late in the day when she knows that she is facing contempt proceedings.

23. That the Plaintiff has served the Defendant with this case and all the papers involved close to five times the last one being in November 2020 when she called the police to state that the Plaintiff was a threat to her and he got arrested only to be released later on when the police learnt the truth of the matter and they advised her to go to her lawyer.

SUBMISSIONS

Plaintiff's Submissions

24. The Plaintiff filed its submissions dated 24/9/2021 in support of their application for contempt wherein he provided that all these acts of the Defendant are in violation of the court order as contained in the ruling of 25th July 2018 and thus making the defendant a contemnor. That the acts of the Defendant amount to contempt of court. The Plaintiff avers that the contemnor should therefore be committed to jail or fined for contempt and be ordered to repay all the loss occasioned by her interference.

25. Additionally, the Plaintiff also served its submissions to the Defendant's Preliminary Objection dated 24/9/2021 wherein she relied on the case of ***Katsuri Ltd vs Kapurchand DeparShar (2016) eKLR*** in laying out the elements constituting contempt. They submitted that the respondent has an advocate on record and she participated in the initial application and proceedings that gave birth to the order in question. She opposed the application and she filed submissions. That when it is time to obey and abide by the order the defendant wants to hide behind service and say that she was not made aware of the order. Further, it is the plaintiff's contention that she had Counsel on record, and they participated in the proceedings.

26. It their contention that the Defendant must not be allowed to feign ignorance.

Defendant's Submissions

27. The Defendant herein has filed written submissions dated 5/7/2021 in opposition to the Application dated 30/8/2019 and the Preliminary Objection dated 8/6/2021.

28. She also filed written submissions dated 15/10/2021 for the Application dated 31/8/2021 on cross-examination of the said Mr. Mohamed.

29. She submitted that she is the legal widow of the said Abdi Abshir Warsame and any activities and or instructions are undertaken at her behest are made well within her powers as the Administratrix of the Estate of Abdi Abshir Warsame(deceased). She further contends the capacity of one Mohamed Abdi Abshir, who deposed the affidavits in support of the instant application. Additionally, she avers that she is a stranger to the said Orders, their existence neither was she served with the Order.

30. They submitted that the Notice of Motion is brought under the provisions of the Contempt of Court Act, Section 3A of the Civil procedure Act. It is their submission that the Contempt of Court Act was declared unconstitutional in November 2018 in ***Kenya Human Rights Commission versus Attorney General & Another (2018) eKLR***.

31. It is the Defendant's submission that the power of the Court to punish for contempt is prescribed by section 5 of the Judicature Act.

32. In describing the elements that must be proved to make the case for civil contempt, the defendant relied on ***Katsuri Limited vs Kapurchand DeparShar (2016) eKLR***.

33. On the particular question of enforcement of judgment and orders, the defendant relied on Rule 81.4, 81.5 and 81.9 of the Civil Procedure (Amendment No. 2) Rules, 2012, regarding service of the judgment/order, the case of ***Nyamodi Ochieng Nyamogo & Another vs Kenya Posts & Telecommunications Corporation (1994) eKLR and Woburn Estate Limited vs Margaret Bashforth (2016) eKLR***.

34. It is the defendant's submission that the general principle is that no person can be punished for disobeying a court order unless he was

served personally. In the instant case, the Defendant was not personally served with the alleged Order and neither has the Plaintiff provided any proof of service before the court. In the circumstances the Defendant's averment that she was not served with the Order and neither did she know of it, remains uncontroverted.

35. Lastly, the Defendant submitted that the Plaintiff has not established the threshold to warrant the committal and or penalization of the Defendant. The Plaintiff has not proved that it served the Defendant with the order, that the Defendant knew of the existence of the said Order before the filing of the application for contempt, neither has it indicated if or otherwise, the Order had any annexed penal notice. In the absence of such, it has not established a contempt case, and as such the application dated 18th August 2018, should be dismissed with costs. She relied on the case of *Mutiika Vs Baharini Farm Ltd (1285) KLR 222*.

36. In the upshot, it is their submission that that the Application before this court should be dismissed with costs to the Defendant and similarly, the Defendant's Preliminary Objection allowed.

37. Additionally, it is the defendant's submission that the court should be guided by Order 19 rule 2 of the Civil Procedure Rules and allow the application dated 31/8/2021 as prayed. She relied on the case of *GGR vs HPS (2012) eKLR and Lawson and Anor vs Odhams Press Ltd and Anor (1948) 2 All ER 717* in contending that cross examination on an Affidavit in support of the interlocutory application is to be allowed only in special circumstances.

ISSUES FOR DETERMINATION

38. Having considered the Application, the Supporting Affidavit and the Defendant's Preliminary Objection and Replying Affidavit, the following arise as the issues for determination before this court.

- a. Whether the defendant's Preliminary Objection was raised on a point of law?
- b. whether the court has jurisdiction to determine the Notice of Motion Application dated 30/8/2019 and grant the orders asked for?
- c. Whether the defendant's application dated 31/8/2021 can be allowed as prayed?

Discussions and Determination

Issues

39. A reflection on the submissions by the parties and also the Notice of Preliminary objection dated 08/062021, would lead to the view that there are three issues to be determined at this preliminary stage. First, whether the defendant's preliminary objection was raised on a point of law? Secondly, whether the court has jurisdiction to determine the Notice of Motion Application dated 30/08/2019 and the grant the orders? Thirdly, whether the Defendant's Notice of Motion Application dated 31/08/2021 can be heard on merit?

ANALYSIS

a. Whether the defendant's Preliminary Objection was raised on a point of law?

40. A valid preliminary objection must be on a pure point of law. The case of *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696*, is the locus classicus on preliminary objections in this region.

41. In the case of *Ahmed Noorani & another v Rajendra Ratilal Sanghani [2020] eKLR* the Court of Appeal held that: "For a preliminary objection to succeed the following tests ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid preliminary objection should, if successful, dispose of the suit."

42. From the Ruling of 25th July 2018, it is indicated that the Defendant's counsel was present in Court as the Magistrate rendered the Ruling. Therefore, the defendant had knowledge of the court orders and cannot deny not having any knowledge of the court orders. See *Kenya Tea Growers Association Vs Francis Atwoli & 5 Others Petition No. 64 of 2010* where the court held that; "In the case before me, I am more than satisfied that even at higher level of beyond reasonable doubt, when an individual has been served with and/or has knowledge of a court order but not only ignores it but in fact incites others to do the same, the threshold for contempt has been met. Francis Atwoli in fact went further to arrogate himself the decision to determine when the strike should end despite the fact that the court order had stopped it.... his contempt was obvious and his conduct and words can attract no other finding."

43. The preliminary objection herein has not been raised on a pure point of law but facts. Therefore, the preliminary objection has no merit and thus it is not valid.

b. Whether the court has jurisdiction to determine the Notice of Motion Application dated 30/8/2019 and grant the orders asked for?

44. The Contempt of Court Act 2016 was declared unconstitutional for lack of public participation as required by Articles 10 and 118(b) of the Constitution of Kenya and encroaches on the independence of the Judiciary. See *Kenya Human Rights Commission v Attorney General & another [2018] eKLR*.

45. The Court of Appeal in *Al Hujura Agency Limited v Director-General, National Employment Authority [2021] eKLR* found that the

correct position was stated by the High Court at *Kajiado in Republic v. Kajiado County & 2 others ex parte Kilimanjaro Safari Club Limited [2019] e-KLR*, where it was held that: “*in light of the Contempt of Court Act being declared unconstitutional, the Court must revert to the law which governed contempt of court prior to declaration of unconstitutionality; the Court has a responsibility in maintenance of the rule of law, and there can be no gap in the application of the rule of law; in the absence of a means of enforcement of a remedy, the Court is within its right to adopt such a procedure as would effectually give meaningful relief to the aggrieved Party; and that such residual power is aimed at meeting the ends of justice, and avoidance of abuse of the process of Court.*”

46. The Court would therefore fall back on Articles 159 and 165(6) of the Constitution, read with English Law on committal for contempt of court under Rule 84.1 of the English Civil Procedure Rules, which deals with breach of Judgments, Order or Undertakings, applicable by virtue of Section 5[1] of the Judicature Act.

47. Section 5(1) of the Judicature Act 2012 provides that the High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and such power shall extend to upholding the authority and dignity of subordinate courts.

48. However, Section 10 of the Magistrate's Act, 2015 provides that Magistrates have powers to hear and punish for contempt arising out of their decisions. The Court of Appeal in the case of *Ramadhan Salim v Evans M. Maabi T/A Murhy Auctioneers & another [2016] eKLR* stated that: “*... the Magistrate's Courts Act, 2015 which came into force on 2nd January 2016 now gives the magistrate's courts unlimited jurisdiction to punish for contempt...*”

49. Lastly, Onyiego J in *In re ZJA & TA (Minors) [2020] eKLR* held that:

“In view of the above provision, I am in agreement with the respondent that the court with original jurisdiction is the court which issued the impugned orders and not this court. See HAO v PLS (2017) eKLR. It is trite that jurisdiction is key and the cornerstone of litigation and without it a court cannot move a step further hence it should down its tools. See Owners of the Motor Vessel “Lillian S” v. Caltex Oil (Kenya) Ltd (1989)eKLR.

31. Having held as above, this court cannot proceed to determine the merits on the contempt proceedings for doing so will usurp the authority of the Magistrate's Court and further prejudice its determination should a similar application be filed in the same court. It will also curtail the parties' right of appeal in case of an appeal.”

50. For the above reasons stated, the Application dated 30th August 2019 is hereby dismissed with costs being in the cause.

c. Whether the defendant's Notice of Motion Application dated 31/8/2021. can be allowed as prayed?

51. Since the Court does not have the jurisdiction to hear the Notice of Motion Application dated 30/8/2019, the court cannot therefore hear the Application dated 31/8/2021 on merit for the same reasons.

Orders accordingly.

Dated, signed and delivered through Virtual court at Nairobi this 1st Day of November 2021.

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MOGENI J

JUDGE

In presence of:-

NAApplicant

NARespondent

Mr. Vincent Owuor - Court Assistant