



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MILIMANI

CIVIL CASE NO. 303 OF 2014

RADHESHAYAM TRANSPORT LTD.....PLAINTIFF/RESPONDENT

VERSUS

CORPORATE BUSINESS CENTRE LTD.....DEFENDANT/APPLICANT

R U L I N G

1. The Notice of Motion dated 7th March, 2016 was taken out by the Plaintiff/Respondent in which he sought the following orders inter alia:
 - i. That this Honourable Court do certify this matter as extremely urgent and service be dispensed with in the first instance and the same be heard ex-parte – spent.**
 - ii. That this honourable court be pleased to order that Mr. Ravji Kerai & Mr. Kennedy Wachira Mari-Advocate, be detained in prison for a term not exceeding six months for contempt of court, as they disobeyed the order of this Honourable Court given on 20th November, 2015 by Hon. Justice Sergon, that the Plaintiff/Respondent refund to the Defendant/ Applicant Kshs. 6,200,000 forcefully and unlawfully obtained from the Defendant/Applicant's Director on 15th October, 2015.**
 - iii. That any other and/or further order be made in the interest of justice and to enforce the court order in this unique circumstance.**
 - iv. That cost of this application be awarded to the Defendant/Applicant.**
2. The Motion is supported by the Affidavit of Kiran Patel sworn on 7th March, 2016 who averred that he is the Director of the Defendant/Applicant and duly authorised to swear the affidavit.
3. It is his submission that this court had granted orders on 20th November, 2015 for the refund of Kshs.6,200,000 forcefully and unlawfully obtained from the Defendant/Applicant's Director on 15th October, 2015 under duress by the Plaintiff/Respondent.
4. He averred that an advance copy of the order had been duly served upon the Plaintiff/Respondent via email by the Defendant/Applicant's advocates on record.
5. The deponent also stated that the Defendant/Applicant's advocate through their process server tried to deliver the said order together with a demand for payment to the Plaintiff/Respondent's premises but the Director refused to acknowledge receipt of service and submitted an affidavit of service.
6. He averred that the Defendant/Applicant's advocates served the said order upon the Plaintiff/Respondent's Counsel on 8th December, 2015 at 8:55am and service was duly acknowledged by Wachira Ndung'u & Company Advocates and he attached the affidavit of service as proof.
7. He also stated that the Plaintiff/Respondent had deliberately refused to comply with the orders of the court in thus he is in direct disobedience of the court. He urged this court to commit Ravji Kerai, a director of the Plaintiff and Mr. Kennedy Wachira Mari, the Plaintiff's Advocates to serve in civil jail for contempt of court for a period of six months.
8. The Motion is opposed by the due who filed the Replying Affidavits Mr. Kennedy Mari averred that he is an advocate of the High Court of Kenya and a partner at the law firm of Wachira Ndung'u & Company Advocates and that he had represented the Plaintiff in the suit.

9. He averred that the suit was only between the Plaintiff and the Defendant herein and the order for refund was made against the Plaintiff and not against him as he was not a party to the suit.
10. He stated that the Defendant failed to seek for leave before filing the application herein and therefore, the application was bad in law, fatally defective and that the application did not disclose any cause of action against him.
11. The Respondent further stated that the application is contradictory in terms and substance and that the orders sought cannot be granted at the instance of the defendant.
12. He further averred that the two affidavits of service sworn by Alex Munyao Mutinda, the Process Server, made reference only to a telephone number but not the name of the person spoken to nor did it state the time when the phone call was placed.
13. He argued that the Process Server did not provide the name of the person whom he gave the demand letter and court order and the name of the director who was consulted and refused to receive the said documents. He submitted that the Process Server failed to mention the name of the receptionist who received the said documents and that he failed to disclose the documents being served and that none of the Citors were served with the court order or the demand letter. He urged the court to dismiss the application.
14. The Defendant/Applicant further opposed the motion and relied on the replying affidavit of Ravji Kerai sworn on 8th April, 2016 who averred that he is one of the Citors named in the suit and that he was aware that the Plaintiff had instructed the firm of Wachira Ndung'u and Company Advocates to represent it in the recovery of Kshs. 24,463,327 owed by the Defendant.
15. He submitted that the Plaintiff obtained judgment against the Defendant but the same was set aside by the Court. He averred that the case involved the Defendant and the Plaintiff and that the court order referred to the Plaintiff and not any of the Citors named in the application. He argued that the court was clear as to which party was to refund the decretal sum and thus not liable to refund the decretal sum.
16. He submitted that he was not served with either the demand letter nor the court order nor the application herein and was informed of this application by the Plaintiff's advocates on record Messrs Wachira Ndung'u and Company Advocates, therefore, he was not in breach of the existing court order.
17. He averred that the Defendant failed to seek for leave before filing the application herein hence the application was bad in law, fatally defective and that the application did not disclose any cause of action against him.
18. The citors further argued that the application was contradictory in terms and substance and that the orders sought cannot be granted at the instance of the defendant and averred that the two affidavits of service sworn by Alex Munyao Mutinda, the Process Server, on 15th February, 2015 only made reference only to a telephone number but not to the name of the person spoken to nor did it state the time when the phone call was placed.
19. The Motion is further supported by the further affidavit of Kiran Patel sworn on 12th May, 2016 in which he averred that he had been informed by the Defendant/Applicant's advocate on record that the demand letter and the court order were duly served upon the Plaintiff/Respondent's advocates and that the demand letter had the following words written on it:

“TAKE NOTICE that in the event that the entire outstanding sum is not received by ourselves in the next 24 hours, our firm instructions are to commence contempt proceedings against you ...”

20. He averred that the Defendant/Applicant's advocate had sent an advance copy of the demand letter to the Plaintiff/Respondent via email radheshayamtransport@yahoo.com and later through their advocate on record and that the Plaintiff/Respondent defied court orders through their refusal to comply with the said court order.
21. It was submitted by the Defendant that the Plaintiff/Respondent had filed an appeal but the appeal did not warrant breach of the said court order and neither did it discharge the Plaintiff/Respondent from complying with the order.
22. He averred that the application herein correctly named the Citors Ravji Kerai being the Director of the Plaintiff/Respondent's company known as Radheshayam Transport Limited while Mr. Kennedy Wachira Mari was the Plaintiff/Respondent's advocate who received the decretal sum. He averred that the criminal or civil liability of a company lies in its directors or other officials and urged this court to commit the Plaintiff/Respondent to civil jail for contempt of court.
23. The Defendant/Applicant argued that it had complied with all the requisite requirements regarding contempt proceedings as set out by law. It argued that the notice and leave of court to institute contempt proceedings was done away with an amended in 2013 under the **Supreme Court of England Rules**, which Kenya currently relies upon.
24. It is argued that for corporate liability, service of the court order had to be upon either its officials or agents. It argued that the firm of Wachira Ndung'u and Company Advocates had at all times knowledge of the said court orders and as duly authorised agents of the Plaintiff/Respondent, the company was deemed to be aware of the said court orders. It further argued that the relief sought for committal to civil jail of the citors was owing to their disobedience of the said court order and for failure to provide a satisfactory explanation for the disobedience of the court order.
25. I have considered the grounds stated on the face of the Motion and the facts deponed in the affidavits filed in support and against the Motion together with the written submission.

26. The following issues commend themselves for determination.

i. Whether leave ought to be sought before contempt proceedings are instituted.

ii. Whether the Plaintiff/Respondent is in contempt of court.

iii. Whether the orders sought are merited.

27. The **first** issue is whether leave ought to be sought before contempt proceedings are instituted in contempt proceedings; Kenya relies upon the Rules of the Supreme Court of England which were amended in 2013 and provided for under Section 5 of the Judicature Act. The current practice is that neither leave nor permission is required from either the High Court or the Court of Appeal to institute contempt proceedings as held by the Court of Appeal in the case of **CHRISTINE WANGARI GACHEGE VS. ELIZABETH WANJIRU EVANS & 11 OTHERS [2014] eKLR**.

28. The **second** issue is whether the Plaintiff/Respondent is in contempt of court. The court will approach this issue from two prongs. First the court will address the issue of service of the court order before addressing the issue of contempt as both are interrelated. Those cited for contempt have argued that they are not in contempt of any court orders and have argued that they were not liable to refund the sum of Kshs. 6,200,000 owing to the fact that they were not parties to the suit and as such the court order was not directed at them.

29. Mr. Ravji Kerai argued that he was the Director of the Plaintiff/Respondent's company; while Mr. Kennedy Wachira Mari argued that he was the Plaintiff/Respondent's advocate on record as the suit is between the Plaintiff and the Defendant.

30. The duo have also argued that they were not properly served owing to the affidavit of service failing to provide the names of the person whose telephone number 0722 855 899 belonged to, the Director who declined to receive service of the demand letter and the court order and the name of the receptionist at the office of the Plaintiff/Respondent's advocate on record.

31. Having critically examined the affidavits of service relied upon by the Defendant/Applicant and having analysed the rival arguments, I am convinced that there was proper service effected upon the Plaintiff and the citors. The Plaintiff, its advocates and the director were served with the court order with a demand letter.

32. Mr. Ravji Kerai a Director of the Plaintiff/Respondent's company argued that he is not in contempt of the court order as he had no knowledge of the court order yet the same was served upon the Plaintiff's advocate on record and the same had been sent by email. The Civil Procedure Rules under Order 5 Rule 8(1) provide:

Wherever it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on the agent shall be sufficient.

33. In the case of **Shimmers Plaza Ltd v NBK (2015) eKLR** where the Court of Appeal held *inter alia*: -

"... the procedure in commencing and prosecuting an application for contempt of court under the English Civil Procedure Rules, 1999. Part 81.9(1) of those rules, in particular, a judgment or an order to do or not to do an act may not be enforced unless the copy of the judgment or order was previously displayed and served; that the person required to do or not to do the act in question is warned that disobedience of the judgment or order would be a contempt of court, punishable by imprisonment, a fine or sequestration of assets, but the court can dispense with service. Otherwise a judgment or order may not be enforced unless a copy of it has been served on the person required to do or not to do the act in question. Under Rule 81.6, and as a general rule, service of the judgment or order must be personal on the contemnor unless the court dispenses with that requirement. Exceptions to that rule are found in Rule 81.8 to the effect that personal service will be dispensed with if the court is satisfied that the contemnor was present when the judgment or order was given or made, if the contemnor was notified of its terms by telephone, email or otherwise or if the court thinks it is just to dispense with service".

34. This court finds that the court order was served and the same has not been complied with by the Plaintiff.

35. The **third** issue is whether the orders sought are merited. Court orders are issued by court on merit and as such demand strict compliance. The court has the arduous task of granting orders in the interest of serving justice. Failure or disobedience to comply with court orders is tantamount to disrespecting the court and this ought not to be taken lightly. In the case of **Republic V Kenya School Of Law & 2 Others Ex Parte Juliet Wanjiru Njoroge & 5 Others [2015] eKLR** it was held *inter alia*:

"... Court orders are not made in vain and are meant to be complied with. If for any reason a party has difficulty in complying with court orders the honourable thing to do is to come back to court and explain the difficulties faced by the need to comply with the order. Once a Court order is made in a suit the same is valid unless set aside on review or on appeal".

36. The guilty party has not approached this court and shared the challenges, if any, it may have experienced in complying with the court order. It has acknowledged awareness of the court order but has opted to disregard the same.

37. Having come to the conclusion that the persons cited namely Ravji Kerai and Kennedy Wachira Mari, were properly served, the next question to be resolved is whether they are guilty for contempt.

38. There is no dispute that the Plaintiff was directed to refund to the Defendant a sum of Ksh.6,200,000/-. The Plaintiff is a limited liability

company which is a separate and distinct a legal entity from its Directors. Ravji Kerai, is a Director of the Plaintiff. He cannot be held liable for the actions or omissions of the Plaintiff unless the corporate veil is pierced and lifted. It is curious that the Plaintiff has not been cited for contempt by the Defendant.

39. Mr. Kennedy Wachira Mari, is the advocate who represented the Plaintiff in the suit. He cannot be held liable for the actions of his client unless there is evidence shown that he connived with the client.

40. In this case, no evidence was laid to established collusion. The order complained of was directed at his client and not him.

41. In the end, I find the motion dated 7th March, 2016 to have been directed at the wrong parties. No prove of contempt was established against Ravji Kerai and Kennedy Wachira Mari.

42. Finally, the Plaintiff was not specifically cited for contempt. I decline to make any adverse orders against it. Consequently, the motion is ordered dismissed with costs to the persons cited.

Dated, Signed and Delivered in Nairobi this 2nd day of October, 2018.

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J.K. SERGON

JUDGE

In the presence of:

.....For the Plaintiff /Respondent

.....For the Defendant/Applicant