



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL SUIT NO. 599 OF 2010

PETER O. NGOGE T/A O.P.NGOGE & ASSOCIATES ADVOCATES.....PLAINTIFF

-VERSUS-

COFFEE BOARD OF KENYA.....1ST DEFENDANT

CRYSTAL VALUERS LTD.....2ND DEFENDANT

RACHIER & AMOLLO ADVOCATES.....3RD DEFENDANT

RULING

1. The plaintiff herein took out the motion dated 16.7.2018 in which he sought for the following orders;

i. Spent.

ii. THAT the Defendants' notice of motion dated 2nd May, 2018 and filed on 8th May, 2018 together with the preliminary objections filed on 8th May, 2018 be dismissed with costs.

iii. THAT the Plaintiff's suit be relisted for formal proof hearing on priority basis as ordered by Honourable Justice Mbogholi Msagha on 3rd November, 2017.

iv. THAT the costs of the application be borne by the Defendants.

The motion is supported by the affidavit of Peter O. Ngoge.

2. The application is opposed by the Defendants who filed the Replying Affidavit of **Kevin Wakwaya** sworn on 25th July, 2018.

3. When the motion came up for interpartes hearing learned counsels recorded a consent order to have the same disposed of by written submission. The Plaintiff filed written submissions on 2nd August, 2018 and thereafter, supplementary submissions on 20th August, 2018 while the Defendants opted to rely on their Replying Affidavit as filed without filing submissions.

4. The Plaintiff argued that the Defendants have deliberately neglected and/or refused to comply with the orders made by the court on 2nd May, 2018 and 19th June, 2018 respectively, thereby not only denying the Plaintiff a fair and speedy hearing but in turn eroding the authority of the court.

5. The Plaintiff added that the court on 19th June, 2018 granted him leave to file this application should the Defendants fail to comply with the court orders of that day.

6. The defendants contended that the application is frivolous, vexatious and an abuse of court process. Further, that the application is brought under wrong legal provisions and is therefore incurably defective and ought to be struck out. The defendant further argued that the Plaintiff has failed to demonstrate the manner in which his rights under the cited Articles of the Constitution have been violated.

7. The defendants denied that they deliberately defied the court orders.

8. It is a constitutional right for all parties to be granted access to justice and a fair hearing. However, in the present instance, the court has noted that the Plaintiff has not demonstrated the manner in which these rights have been infringed.
9. The orders sought in the application are premised on the fact that on the one hand, the Plaintiff submitted that the Defendants have failed to comply with the orders made by the court on 2nd May, 2018 and 19th June, 2018. The Defendants on the other hand contended that the same is not true and that the Plaintiff has not specified which order(s) have not been complied with.
10. On 2nd May, 2018 this court directed the Defendants to file and serve a Notice of Preliminary Objection within two (2) days. The same was filed on 8th May, 2018 (6 days later). In the strict sense, the Defendants did not comply with the orders made on that day, as correctly argued by the Plaintiff. However, this court finds that the Preliminary Objection was filed without undue delay and the Plaintiff has not demonstrated that he suffered prejudice in the process.
11. The court also issued an order on the same date directing the Defendants to pay costs of Kshs.5,000/= to the Plaintiff before the next hearing date. The court records show that the Defendants filed an application dated 2.5.2018 together with the Preliminary Objection. When the matter came up before Honourable Lady Justice Kamau on 19th June, 2018, the Defendants were reminded to pay the costs of Kshs.5,000/= to the Plaintiff by 3rd July, 2018 and that no fresh dates ought to be given to the Defendants or audience granted to them unless and until they comply with the orders made on 2nd May, 2018.
12. It is the Plaintiff's submission that the Defendants deliberately failed to comply with the aforementioned orders, whereas the Defendants deny the same, hence the application currently before court.
13. It is noted that when the said application came up in court on 25th July, 2018, the Plaintiff did not raise the issue of non-compliance to the judge. In the same manner, when the matter came up the following day (26th July, 2018), the Plaintiff was silent on the same issue.
14. On 3rd October, 2018, counsel for the Defendants indicated to court that they had forwarded a cheque for Kshs.5,000/= to the Plaintiff pursuant to the order. The court records show that the cheque is dated 1st October, 2018. The Plaintiff did not refute the claim. Eventually, the court directed that the present application be determined before that of 2nd May, 2018.
15. This court expresses its disappointment that the Defendants did not comply with the orders of the court on two occasions even after having been given a second opportunity to comply, they still neglected to do so in accordance with the orders, and without explanation.
16. In this regard, I agree with the Plaintiff's submissions that there is an obvious disregard for the court orders. It is quite unfortunate that the court can make clear orders only for parties to comply as and when they deem it suitable.
17. That notwithstanding this court, it has also been observed that the Plaintiff did not raise the issue touching on non-compliance during the numerous instances when the matter came before court subsequently.
18. The orders issued on 19th June, 2018 were very clear that the Defendants should not be accorded audience or fresh dates until they comply accordingly. This did not happen and the Plaintiff did not bring it to the attention of the court. As such and without diminishing the fact that court orders must be obeyed, it is the court's view that this argument is brought too late and after the Defendants have complied. The Plaintiff's argument consequently cannot stand.
19. The Plaintiff has also raised numerous arguments pertaining to the Defendants' application of 2nd May, 2018. In fact, the Plaintiff previously filed a Reply to the aforesaid application on 18th June, 2018. This court does not comprehend why the Plaintiff is arguing against the substance of that particular application vide the instant application whereas the former is yet to be heard and determined.
20. The documents referred to in this application relate to the application of 2nd May, 2018 and the Preliminary Objection filed on 8th May, 2018. A close reading of the application and the submissions reveals that the present application has gone into the substance of the main suit as well. Under these circumstances and without going into the merits of the application of 2nd May, 2018, it is the court's considered opinion that the application cannot stand since it has failed to establish credible grounds to have the motion dated 2/5/2018 dismissed.
21. This court is of the opinion that in order to avoid unnecessary confusion, it would be prudent to deal with the application of 2nd May, 2018 separately, as ordered by the court on 3rd October, 2018. It would only be fair and just to grant the Defendants their day in court. In any case, the Plaintiff will have the opportunity to challenge the merits of that particular application and preliminary objection at the hearing, and has in fact filed a reply to the same.
22. In sum, the Plaintiff has failed to raise substantial grounds for having the aforesaid application dismissed.
23. In the end, I find no merit in the motion dated 16.7.2018. The same is dismissed with costs to the defendants. The application dated 2.5.2018 and the preliminary objection filed on 8th May 2018 to be fixed for hearing at the registry.

Dated, Signed and Delivered at Nairobi this 16th day of November, 2018.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff/Applicant

..... for the Defendants/Respondents