



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL CASE NO. 281 OF 2015

CELINA TRADING LLC.....PLAINTIFF

VERSUS

NGAO TRADING LIMITED.....1st DEFENDANT

SALOME WANGUI NJOROGE.....2nd DEFENDANT

RULING

1. Before the court is the Plaintiff's Notice of Motion dated 14th October, 2015 seeking the following orders;
 - a. *An order of committal to be made against the Director of Ngao Credit Limited, one John Ngumba to prison for such a period as this Honourable Court may deem fit and just, in that he, the said has disobeyed the Order made herein by this Honourable Court on the 7th day of July 2015 inter alia; requiring the Container No.MRKU5277753 be released to the Applicant upon paying the loan sum to the 1st Respondent.*
 - b. *An order that the costs of these contempt proceedings be borne by the 1st Respondent.*
2. The application is based on the grounds set in the application and the affidavit of Sasha Nedelkovski, described as the International Sales Director of the Plaintiff, sworn on 14th October, 2015. It was deponed that the pursuant to the orders granted on 7th July, 2015, the 1st Respondent herein was ordered to release the contents of Container No. MRKU5277753 being stored at Mitchell Cotts warehouse upon payment of the loan sum owed by the Applicant to the 1st Respondent.
3. That by a letter dated 8th August 2015 to the 1st Defendant Representative, the Plaintiff sought to know the bank details of the 1st Respondent to facilitate the compliance of the court order. However, it was the contention of the Plaintiff that through its letter dated 18th August, 2015, the 1st Defendant sought to amend the court order by suggesting that the loan amount owed to it was Kshs. 3,799,969.40/= and not Kshs. 1,600,000/=.
4. Despite this, it was the deponent's assertion that the Plaintiff went ahead and issued to the 1st Defendant a cheque of Kshs. 1,600,000/= on 25th August, 2015, which was thereafter rejected by the 1st Defendant. Thereafter, it was stated that the parties arranged a meeting between themselves

- at the Mitchell Cotts warehouse on 11th September 2015 wherein the Plaintiff was supposed to handover the cheque to the 1st Defendant in exchange for the consignment as ordered by the court.
5. This was not to be, as the 1st Defendant purportedly did not show up as arranged. In sum, it was the Plaintiff's case that the 1st Defendant has refused or failed to receive the loan sum as ordered by the court. That further to this, the Plaintiff is apprehensive that the 1st Respondent may have sold the contents of the subject container to another third part, namely Anthony Njuguna Waweru through a sale agreement dated 27th August 2015. The Plaintiff therefore urged the court to grant the orders as sought as it has established that the 1st Defendant was in breach of the orders granted by this court.
 6. Through the Replying Affidavit of John Ngumba sworn on 6th November, 2015, the 1st Defendant opposed the application. It was contended that the instant case revolves around a loan facility granted by the 1st Defendant to the Plaintiff, whereby the import consignment served as security for the loan advanced. That as at 26th May, 2015 the said loan stood at 3,292,292.40/= a fact that the Plaintiff was well aware of when filing the instant suit. In any case, it was averred that the Plaintiff offered to deposit the aforesaid matter as security in the application filed on 15th June, 2015, pending the determination of the case.
 7. The said application was heard on 7th July, 2015 wherein the Plaintiff's advocate submitted that the loan amount stood at Kshs. 3,292,292.40/= plus storage charges of Kshs. 45,000/= at the time of filing the suit. After the said hearing, it was deponed that the court ordered that there was no basis why the Plaintiff should not repay the loan to the 1st Defendant as a condition for the release of the goods held as security. The 1st Defendant pointed out that at no one time was it served with the court's order of 7th July, 2015 as alleged.
 8. Further, the 1st Defendant's stated that its advocate wrote to the Plaintiff on 7th July, 2015 advising on the 1st Defendant's account details for the deposit of Kshs. 3,292,292.40/= plus Kshs. 45,000/= as storage charges plus Kshs. 250,000/= as costs of the case. Further to this, it was contended that the 1st Defendant also acceded to the Plaintiff's request to take inventory of the consignment before paying the amount ordered by the court.
 9. It was the 1st Defendant's position that the Plaintiff delayed in the payment of loan amounts which as at 18th August, 2015 stood at Kshs. 3,799,969.40/= plus storage charges of Kshs. 79,528/=. To salvage the diminishing value of the goods and mitigate storage costs, the 1st Defendant contended that it wrote a demand to the Plaintiff on 18th August, 2015 for the repayment of the said loan amounts.
 10. The 1st Defendant was therefore of the position that the purported payment of Kshs. 1,600,000/= by the Plaintiff as full settlement of the loan is misplaced and is contrary to the court order of 7th July, 2015. That further to this, the loan amount of Kshs. 3, 292,292/= is uncontested in all the pleadings filed Plaintiff including the Notice of Motion dated 15th June, 2015.
 11. In reply to the Plaintiff's accusation that the goods in the consignment was sold to a third party, the 1st Defendant stated that it was entitled to do so in exercise of its power of sale. That on 18th August, 2015, the 1st Defendant issued an intention to sell the consignment to the 2nd Defendant and gave the Plaintiff 7 days to repay the loan or risk losing the consignment.
 12. The Notice period expired without action from the Plaintiff, prompting the 1st Plaintiff to sell off the goods to the 2nd Defendant since no court had barred it from doing the same. According to the 1st Defendant, its actions were justified as the Plaintiff had failed to repay the loan as ordered by the court and the interest plus cost accruing were eroding the security held. That in the foregoing, the application by the Plaintiff lacked in merit and should be dismissed with costs.
 13. The application was dispensed by way of written submissions. The Plaintiff filed its written submissions and supplementary written submissions on 25th January, 2016 and 18th February, 2016 respectively, while the 1st Defendant filed its submissions on 18th February, 2016.
 14. The Plaintiff has applied to have the Defendants committed to jail for disobeying the order of 7th June, 2015. The 1st Defendant on its part has challenged the application first on the basis that it has been wrongly brought. According to Mr. Mulani, Learned Counsel for the 1st Defendant, the

- Plaintiff failed to take steps to fulfill the conditions precedent before or on filing the motion. Mr. Mulani argued that the Attorney General was not served with a notice before commencement of contempt proceedings within the prescribed timelines.
15. That on this score alone, the application was fatally defective. It was also argued that the Plaintiff failed to demonstrate that it served the 1st Respondent or its director Mr. John Ngumba with the order issued on 7th June, 2015. That further, the penal notice in respect of that order was equally not served personally to the Mr. John Ngumba for the application to succeed.
 16. In reply, the Plaintiff argued that there it was no longer a requirement for an applicant to serve the Attorney General with a Notice of application for leave to apply for contempt proceedings. The case of **Sam Nyamweya & 3 Others –vs- Kenya Premier League Limited & 2 others (2015) eKLR** was cited in support of this position.
 17. The Plaintiff further asserted that the court order was served to the 1st Defendant’s Advocate and as such, the 1st Respondent was deemed to have knowledge of the orders. That even though Mr. Ngumba may not have been served with the penal notice, he had sufficient knowledge of the court orders. It was also the submission of the Plaintiff that it had adequately demonstrated that there was disobedience of the court order.
 18. I have considered the pleadings, depositions, rival submissions and the various cases cited by Learned Counsel to the respective parties. The issue for determination in this application, is primarily whether the 1st Defendant willfully disobeyed the orders of the court made on 7th June, 2013. The law is well established that Court orders are not made in vain and are meant to be complied with and therefore a party should not take it upon himself to decide on the validity or otherwise of Court orders.
 19. Once a Court order is made in a suit the same is valid unless set aside on review or on appeal. If parties are given a carte blanche to decide on the validity of court orders, the dignity of the courts would be severely eroded. It must always be remembered that contempt of court proceedings are meant to maintain the dignity of the Courts. I am therefore in agreement with the holding of the court in the case of **Econet Wireless Kenya Ltd vs. Minister for Information & Communication of Kenya & Another [2005] 1 KLR 828** where **Ibrahim, J (as he then was)** stated:

“It is essential for the maintenance of the rule of law and order that the authority and the dignity of our Courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a Court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or void”

20. Further to the above, it is trite law that where committal is sought for breach, it must be made clear what the defendant is alleged to have done and that it is breached. The notice of motion must state exactly what the alleged contemnor has done or omitted to do which constitutes a contempt of court with sufficient particularity to enable him to meet the charge. The necessary information must be given in the notice itself.
21. However, before dealing with the merits or otherwise of the arguments presented by the parties, I find it necessary to deal with a preliminary point pertaining to the court order given on 7th July, 2015. It is essential to point out, that no party addressed the court on the same.
22. However, it is my opinion that this court should apply its mind to the subject court order before dealing with the various arguments advanced by the respective parties.
23. It is of note that the court order at the center of this dispute has not been duly annexed to the Plaintiff’s application. Be that as it may, the 1st Defendant provided the same in the Relying Affidavit of John Ngumba and marked as **“JN4”**. At page 2, the same reads as follows;

“IT IS HEREBY ORDERED:

1. ***THAT the Container in question shall be released to the Applicant upon paying the loan sum to the 1st Defendant.*** (underlining mine)

24. What then amounts to the loan sum is in my opinion the crux of the subject application. There was all indication that parties were willing to comply with the orders of the court. However, in my opinion, the respective parties had varied interpretations of what constitutes the loan amount that needed to be paid.

25. On one hand, the Plaintiff asserts that the amount referred to by the court is Kshs. 1,600,000/= while the Defendant insists that the same was Kshs. 3,292,292.40/= plus accumulated storage charges of Kshs. 45,000/= at the time of filing the suit.

26. So what then is the correct loan amount and was the 1st Defendant capable of disobeying the aforementioned order? I have to state that as tempting as it maybe to resolve this question, the court has minded that this is an impossible task, as the court will have to interrogate affidavit evidence that has not been subject to cross examination.

27. As stated in the case of **Gachoni Enterprises Limited v D.N. Nyaga t/a Njeru, Nyaga & Co. Advocates & another [2012] eKLR;**

“The slightest ambiguity to the order can invalidate an application for committal as ambiguity can in turn lead to the standard of proof, which is the criminal standard, not being attained especially on affidavit evidence. Therefore the law is that no order requiring a person to do or abstain from doing any act may be enforced by contempt unless a copy of the order has been served personally and endorsed with a notice informing him that if he disobeys the order he is liable to the process of execution. In other words the Court will only punish for contempt of injunction if satisfied that the terms of the injunction are clear and unambiguous and that the defendant has a proper notice of the terms and the breach of the injunction has been proved beyond reasonable doubt. See Republic vs. Commissioner Of Lands & 12 Others Ex Parte James Kiniya Gachira Alias James Kiniya Gachiri Nairobi HCMA No 149 of 2002 and Jacob Zedekiah Ochino & Another vs. George Aura Okombo & 4 Others Civil Appeal No. 36 of 1989 [1989] KLR 165.” (emphasis supplied)

28. I am of the above persuasion. It is my finding that though the above case dealt with the disobedience of an order of injunction, the same principles can be applied in this case. The court order as it is can be subjected to multiple interpretations as to what the loan sum entails. However, I would be apt to add that though there was an element of ambiguity in the said order, when the same was made, none of the parties sought any clarification from the court as to what the “loan sum” meant.

29. The presumption therefore must be that each party knew the meaning and import of that order at the time the order was given. However upon demand for payment of the same, parties took different positions. In my assessment, each party took advantage of the fact that the loan sum was not defined to front a position favorable to themselves. Given the varied interpretations thereof, it is my finding that the court order as it was, could not be complied with as it was and can therefore not be the subject to the subject contempt proceedings.

30. Accordingly, it is on this ground that I find that the Notice of Motion dated 14th October 2015 lacks merit and the same is dismissed. The matter should however be expedited as it is apparent that the consignment was sold to a third party. The parties are hereby directed to comply with order 11 of the civil procedure rules in preparation for hearing within 30 days from this ruling, following which a date for hearing of this matter suit should be given.

31. I shall not award any cost for the application.

32. It is so ordered.

Written, dated and signed at Nairobi this 5th day of May 2016.

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C. KARIUKI

JUDGE

Dated, signed and delivered in court at Nairobi this 6th day of May, 2016.

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O. SEWE

JUDGE