



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 186 OF 2015

OSANO & ASSOCIATES PLAINTIFF

-VERSUS-

ICT AUTHORITY DEFENDANT

RULING

1. The **Notice of Motion** Application before the court is dated 3rd March 2016 and filed herein on 4th March 2015 by the Plaintiff/Applicant. The application seeks to secure the following orders:

a. The application herein be certified urgent.

b. The Honorable Court be pleased to hold the Respondent in contempt of court and the Respondent's Chief Executive Officer be committed to jail and detained in prison for a term of six (6) months or such period as the Honorable Court may deem fit for contempt of orders issued by this Honorable Court on 20th April, 2015 and confirmed vide the Ruling of Hon. Justice Ogola J on 4th December, 2015.

c. Costs of this application be awarded to the Applicant.

2. The application is premised on the grounds set out therein and is supported by Affidavit of Denis Osano Kute sworn on 3rd March 2016; A Supplementary Affidavit sworn on 21st March 2016 and a Further Affidavit sworn on 1st April 2016 by the same person.

3. The Applicant's case is that it is essential for maintenance of the rule of law and good order that the authority of this court is upheld at all times and that it is the obligation of every person against or in respect of whom an order is made by a court of competent jurisdiction to obey it unless that order is spent and/or discharged. The Applicant's case is that there are orders of this court in place referring the dispute herein for arbitration and stopping the Respondents from interfering in any manner with the operations of the suit contract. Despite having full knowledge thereof, the Respondent has willfully and mutinously elected to disobey the aforesaid orders and have continued to interfere with the operations of the contract by performing the Applicant's work while also refusing to go for arbitration as directed by the Court.

4. The Applicant's case is that the Respondents' mutinous actions and/or obstruction fundamentally undermine the authority and integrity of this court's due process, and will render in vain the arbitral proceedings that are yet to commence, and that it is just and fair that the matter be heard expeditiously and orders sought in the application herein granted to preserve the integrity and authority of this court in

order to maintain the rule of law and good order.

5. The application is opposed through the Replying Affidavit sworn by **Robert Mugo** on 23rd March 2016. In the Replying Affidavit, the Respondent inter-alia blames the Applicant for failure to take steps to have the matter go to arbitration.

6. The brief history of the application is that on 4th December 2015 this court rendered a ruling herein granting injunctive orders prayed for in the Plaintiff's applications being Chamber Summons dated 17th April 2015 and Notice of Motion dated 30th April 2015. In addition the court referred this matter to arbitration. The Plaintiff now complains that the Defendant has disobeyed the orders of this court, and that the Defendant's Chief Officer Mr. Robert Mugo be jailed for six (6) months for that disobedience.

7. The Defendant's defence is that they have preferred an appeal against the said orders of this court. Secondly, the Defendant's case is that the Plaintiff is equally culpable since they have not taken any steps towards the appointment of arbitrator and that indeed, the Plaintiffs' first attempt to appoint the arbitrator is conveyed by their letter dated 3rd March 2016, the same date this application was filed.

8. I have carefully considered the application. Before I go further this court must restate the cardinal duty of everybody, including the Chief Executive Officer of the Defendant, to obey the lawful orders of this court, and that this court will not hesitate to take any drastic steps to restore the confidence of the public in the legal process. The orders which this court issued on 4th December 2015 have neither been appealed against nor set aside. They remain effective and valid. The submission that the Defendant has sought to appeal against the same is of no effect, unless there is in evidence a successful appeal, manifested to this court as an order. Otherwise, the jurisdiction of this court is to punish, and to do so harshly to anybody who seeks to intentionally disobey the orders of the court.

9. I have considered the legal submissions of the parties, and the authorities cited for the various positions taken by the opposing litigants. I am satisfied, nonetheless, that, the Defendant has failed to obey the orders of this court, and that it has not provided any reasons for that disobedience.

10. The Defendant is a public authority or body. It is a body corporate which acts through its officers. The Chief Executive Officer is responsible for carrying out lawful orders of the court. If the Chief Executive Officer is not available, or for good reason is not able to carry out the functions of the Authority, his responsibilities are carried out by the next in authority, in this case the Acting Chief Executive Officer who is Mr. Robert Mugo who has deponed to the Replying Affidavit herein. Since the orders of the court are clear, and the same were rendered in the presence of the counsel for the respondent, this court does not understand the assertion by the Respondent that the Applicant is in breach of substantive and procedural law in respect of contempt proceedings. That breach is not demonstrated by the Respondent.

11. I have carefully considered the Supporting Affidavit sworn by **Denis Kute** on 3rd March 2016. I have specifically looked at paragraphs 8 to 25 thereof. It is clear to this court that the Respondent has been engaging in, and is interfering with the Applicant's core work under the contract and specifically with respect to the Unified Communications and Integrated County Management Systems. The aforesaid court orders expressly barred the Respondent from interfering in any manner with the operations of the said contract. That the Respondent has continued to interfere with the said contract is a clear manifestation that the Respondent is in gross contempt of court. This application seeks to restore the supremacy, authority and dignity of this court, and it is the utmost duty of this court to uphold an application such as this.

12. The Respondent submitted that proof of disobedience in contempt proceedings is not on a balance of probability, but that it goes beyond that. The Respondent cited the case of **Mutika vs Baharin Farm Limited (1985) KLR 229, 234**, where the Court of Appeal held that:

“In our view, the standard of proof in contempt proceedings must be higher than proof on the

balance of probabilities, almost but not exactly, beyond reasonable doubt ... The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to an offence which can be said to be quasi-criminal in nature”.

The Respondent submitted that the Applicant has failed to prove the contempt charge on the required standard, and further that the Applicant is not truthful in its application in that the Applicant is well aware the cited contracts are not in dispute; the applicant took no steps in proceeding for arbitration for a period of over 3 months after this court’s ruling and most importantly; the project that the Applicant cites and subject of the orders of 4th December 2015 as well as this application are being implemented by Nairobi City County and the Respondent has no way of interfering as alleged.

13. The Respondent’s second point of objection is that the application by the Applicant seeks an order of committal against the respondent’s CEO, yet it does not cite the CEO as one of the Respondents. Secondly there is no proof of service of the order upon the Respondent. It is the Respondent’s case that where one seeks committal of a corporation for contempt there is need to cite an appropriate officer against whom the order will be made, and secondly that service has been dispensed with. The Respondent quoted ***Arlidge & Smith on contempt Third edition Sweet & Maxwell 2005*** at page 927 paragraphs 12 – 102 as quoted in *PAYLESS CAR HIRE AND TOURS LIMITED V IMERIAL BANK LTD (2012) eKLR* where the learned authors observe:-

“As has already been pointed out, no one can be held for a breach of an order without knowledge that such an order has been made. Service of the order itself is also required, unless an order has been made to dispense with service. Therefore it would appear that in order to fix a corporation with liability for contempt, it will be necessary to show that it has been properly served or that service has been dispensed with on the basis that an appropriate officer of the company had knowledge of the order or for some other reasons”.

And in paragraph 12 – 40 that:-

“Although in the case of a Corporation service of an order may generally be effected by servicing solicitors, special provisions apply where it is sought to enforce a judgment or order against a corporation by means of an order for committal of an officer or sequestration of his assets. Before either of these remedies may be obtained, it must be proved that personal service has been effected on the officer concerned....”

14. In the light of the above authority, the Respondent submitted that in their view a party who has obtained an order of the court MUST ensure personal service of the same upon the party against whom such an order has been issued especially if the alleged contemnor is a corporation.

15. In Response to the above the Applicant cited the case of ***Basil Criticos V Attorney General & 8 Others [2012] eKLR*** where Justice Lenaola held that the law in Kenya as it stands today has changed and that knowledge of a court order supersedes personal service such that:

“where a party clearly acts and shows that he had knowledge of a court order, the strict requirement that personal service must be proved is rendered unnecessary. That should be the correct legal position and I subscribe to it”.

16. The Court of Appeal has had occasion to render itself on the issue in ***Shimmers Plaza Ltd v National Bank of Kenya Ltd [2015] eKLR***.

“Black’s Law Dictionary defines notice as follows: a person has notice of a fact or condition if that person has actual knowledge of it; has received information about it; has reason to know about it; knows about a related fact; is considered as having been able to ascertain it by checking on official filing or recording.

Would the knowledge of a judgment by the advocate of the alleged contemnor suffice for

contempt proceedings? We hold the view that it does. This is more so on a case like this one where the advocate was in court representing the alleged contemnor and the orders were made in his presence. There is an assumption which is not unfounded, and which in our view is irrefutable to the effect that when an advocate appears in court on instructions of a party, then it behoves him/her to report back to the client all that transpired in court that has a bearing on the client's case".

17. Further in *Justus Kariuki Mate & Anor v Martin Nyaga Wambora & Anor [2014] eKLR* the Court of Appeal stated that

"The trial court was correct in holding that the law as then was is contempt of court has since changed; the law as it stands today is that knowledge of an order is sufficient for purposes of contempt proceedings".

18. This court is persuaded by the authorities cited by the applicant. It is the finding of this court that the alleged contemnor had knowledge of the court orders stopping interference in any manner with the operations of the suit Contract and referring the dispute to arbitration.

19. It is the finding of this court that **Mr. Robert Mugo**, the acting Chief Executive Officer of the Defendant is the person lawfully obligated to observe and obey the orders of this court, and if he fails to do that, then he is the object of the orders which arise from these contempt proceedings. It is also the finding of this court that the said Robert Mugo was at all material times to this suit aware of the existence of the said court orders.

20. Pursuant to the foregoing this court is satisfied that the said Mr. Robert Mugo is in contempt of this court, and this court makes the following orders:

(a) That the Respondent's Acting Chief Executive Officer, Mr. Robert Mugo is hereby found guilty of contempt of this court's orders issued on 4th December 2015, and is hereby jailed for 3 (three) months.

(b) That in the alternative to above jail term, the contemnor shall pay a sum of Shs.1,500,000/= (One Million Five Hundred Thousand) within 2 days of this order.

(c) Costs of this application shall be paid by the Respondent.

Orders accordingly.

E. K. O. OGOLA

JUDGE

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 8TH DAY OF JULY, 2016

LADY JUSTICE G. NZIOKA

JUDGE

Ruling Read in open court in the presence of:

..... for Plaintiff

..... for Defendant

Teresia – Court Clerk