



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELCA NO. 23 OF 2019

KENYA WILDLIFE SERVICE.....APPELLANT

VERSUS

SHIHUA INDUSTRY ALLIANCE CO. LTD.....1ST RESPONDENT

THE COUNTY CONSERVATORY.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

THE DIRECTOR PUBLIC PROSECUTION.....4TH RESPONDENT

RULING

1. On 14th August, 2019, the Honourable Lady Justice Omollo rendered a Judgment in these proceeding in which she dismissed the appeal herein for lacking in merit and upheld the decision of the learned Magistrate (Hon. Mutunga SRM) delivered on 27th November, 2018 for the release of the seized goods to the 1st Respondent having taken into consideration the effective date of the listing of the consignment to appendix II of CITES and or on account of availed requisite permit. The court decree has not been complied with to date, necessitating the application for contempt now under consideration and another application for stripping and verification, also under consideration.

2. By notice of motion dated 18th September, 2019, the 1st respondent/applicant moved this court seeking orders that the officer in-charge of the Directorate of Criminal Investigations Kilindini Port and the Officer –in-Charge Kenya Wildlife Services, Mombasa be found guilty of contempt of court for illegally holding the applicant’s property contrary to the orders of court and the law. The applicant further seeks an order of mandamus compelling the release of the containers subject of this suit in accordance with the court order dated 22nd February, 2019.

3. On 6th October, 2019, counsel for the applicant informed the court that his client had decided not to pursue the contempt application against the DCIO Kilindini Port. The court thus ordered the application to be amended in terms that the DCIO Kilindini Port be removed from the contempt proceeding. The contempt proceedings is thus only against the Appellant’s Officer –in- Charge, Mombasa.

4. Counsel for the applicant submitted that there is a live judgment that ought to be enforced which enforcement is being frustrated by the Respondents. Counsel submitted that the court does not issue decrees or orders in a vacuum, in ambiguity and/or that are otherwise unenforceable hence the present application to cater for enforcement. That the applicant has in possession a judgment and decree which is unchallenged and which judgment and decree has effectively settled the dispute hereto and that the applicant is desirous of effecting the same in compliance with the orders and law as per expectation. The applicant’s counsel submitted that the respondents are in flagrant disobedience of the court orders herein, hence the present applications. Counsel for the applicant further submitted that stripping of the listed containers is for purposes of verification in compliance with maritime transportation to the satisfaction of the consignee since the goods have been detained for long.

5. Counsel for the applicant submitted that Kenya Revenue Authority, the 5th Respondent herein, was never a party to the main pleadings and therefore as an interested party cannot oppose a judgment that they never participated in and which judgment remains unchallenged. Citing authorities, counsel for the applicant ably forcefully and correctly submitted that a party must comply with an order of court whatever he thinks of such an order.

6. The appellant’s position is that they are no in direct control of the consignment arguing that the consignment in question is under the physical custody of the DCIO Kilindini Port and also under the control of the 5th respondent. Counsel for the appellant therefore submitted that the appellant has not willfully disobeyed the orders of the court. It was further submitted that the appellant is not the correct party to whom orders for stripping and verification is to be directed. That the appellant is not capable of affording the applicant Bills of Lading for

purposes of transshipment, arguing that this is an issue between the applicant and its shipping line. Further that the applicant has not specified the compliance reports/certificates it requires the appellant to produce for purposes of verification, adding that the appellant is not in possession of any report or certificate that relates to the consignment.

7. Counsel for the 5th respondent submitted that the elements for an application for contempt are that the terms of order were clear and unambiguous and were binding on the respondents; that the respondents had proper notice or knowledge of the order; that the respondent acted in breach of the order and that the respondent's conduct was deliberate. Counsel submitted that the order was not binding on the 5th respondent. The 5th respondent's counsel submitted that the consignment is under customs control and that the goods therein are restricted goods which can only be moved with certain permits under the East Africa Community Customs. Counsel further submitted that there have been material non-disclosure in the matter. It was submitted that there has been no deliberate disregard of the court Orders by the 5th respondent. The 5th respondent's counsel cited authorities and urged the court to dismiss the applications with costs.

8. I have considered the applications and the submission made. In contempt proceedings, proof must be made beyond the standard in civil cases as contempt is quasi-criminal. The burden of such proof lies on the applicant. The applicant stated that this court (Omollo, J) in a judgment delivered on 14th August 2019 dismissed the appellant's appeal herein and upheld the decision of the subordinate court delivered on 27th November, 2018 and issued on 22nd February, 2019 which decreed the release of seized goods to the applicant herein. The appellant and the 5th respondent have not denied being aware of the existence of that order but have instead given reasons as to why they cannot comply with the said order.

9. In **Trusted Society of Human Rights Alliance –v- Cabinet Secretary for Devolution & Planning & 3 Others (2017) eKLR** Mativo J in a persuasive decision stated:

“If the judiciary is to perform its duties and functions effectively and remain true to the spirit with which they are sacredly entrusted to it, the dignity and authority of the courts have to be respected and protected at all costs. Otherwise the very cornerstone of our constitutional scheme will give way and with it will disappear the rule of law and a civilized life in the society. It is for this purpose that courts are entrusted with the extra ordinary power of punishing those who indulge in acts whether inside or outside it which tend to undermine the authority and bring them in disrepute and disrespect by scandalizing them and obstructing them from discharging their duties without fear or favour. When the court exercises this power, it does so to uphold the majesty of the law and of the administration of justice. The foundation of judiciary is the trust and confidence of the people in its ability to deliver fearless and impartial justice. When the foundation itself is shaken by acts which tend to create disaffection and disrespect for the authority of the court by creating distrust in its working the edifice of the judicial system gets eroded.”

10. Clearly, the subordinate court and this court's order still remains in force, hence, I find no difficulty in finding that the appellant and the 5th respondent were obliged to comply with the said decision.

11. In the case of **Econet Wireless Kenya Ltd –v- Minister for Information & Communication of Kenya & Another (2005) 1KLR 828**, 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 court is 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.

12. In **Awadh –v-Mambu (No.2) No.53 of 2004 (2004) KLR 458** it was stated as follows:

“It must be remembered that court orders must be obeyed at all times in order to maintain the rule of law and good order. This of course means that the authority and dignity of our courts must be upheld at all times and this differentiates civilized societies from those applying the law of the court not to condone deliberate disobedience of its orders nor waiver from its responsibility to deal decisively and firmly with contemnors.”

13. Also in the case of **B-v- Attorney General (2004) 1KLR 431**, Ojwang J (as he then was) held:

“The court does not, and ought not to be seen to make orders in vain; otherwise the court would be exposed to ridicule, and no agency of the constitutional order would then be left in place to serve as a guarantee for legality, and for the rights of all people.”

14. A court order is binding on the party against whom it is addressed and until set aside remains valid and is to be complied with. I shudder to think of the place of our judicial system if parties are left to freely decide what court orders to obey and which ones to ignore. Parties must realize that once they are brought to court they are subject to the jurisdiction of the court. Under Article 159 (1) of the constitution judicial authority is derived from the people and vests in and shall be exercised by the courts and tribunal established by or under the constitution. In exercising judicial authority the courts and tribunals are, inter alia, to be guided by the principle that the purpose and principles of the constitution shall be protected and promoted. Under Article 10 (1) of the constitution the national values and principles of governance in the Article bind all state organs, state officers, public officers and all persons whenever any of them (a) applies or interprets the constitution; b) enacts, applies or interprets any law, or c) makes or implements public policy decisions. Under Article 2(a) of the same Article the national values and principles of governance include the rule of law.

15. Musinga J (as he then was) in **Moses P. N. Njoroge & Others –v- Reverend Musa Njuguna & Another Nakuru HCCC No. 247 “A”**

of 2004 was of the view, which view I respectively associate with that the rule of law requires that orders of the court be respected and obeyed and that duty equally applies even where a party is dissatisfied with an order and has appealed to an appellate court against the order, ruling or judgment. Willful and flagrant disobedience of court orders undermines the authority and dignity of the courts and must be dealt with firmly so that the court's authority is not brought into disrepute.

16. An order passed by a competent court, whether interim or final has to be obeyed without reservation. Rule of law makes it incumbent for all persons, without exception to respect court orders at all times. The whole purpose of litigation as a process of judicial administration is lost if court orders are not complied with. A party who knows of an order whether null or valid regular or irregular cannot be permitted to disobey it. In

Wildlife Lodges Ltd –v- County Council of Narok and Another (2005) Vol 2 EALR P. 344, it was held that it would be most dangerous to hold that suitors or their solicitors could themselves judge whether an order was null and valid; whether it was regular or irregular.”

17. There is need to emphasize that the principle of law is that the whole essence of litigation as a process of judicial process in the normal functioning of courts are not complied with in full by those targeted and/or called upon to give due compliance/effect. A state organ or agency or person legally and duty bound to give due compliance must do so. Court orders cannot be issued in vain. It is clear therefore that an order of the court has to be respected by the parties who are bound by it, and every effort must be made to implement the order of the court and not to disobey the same. It is not up to that party to choose whether to comply or not to comply with such an order. The order must be obeyed in totality, in all circumstances by the party concerned, subject to the party's right to challenge the order in issue in such a lawful way as the law permits.

18. Mativo, J in **Trusted Society of Human Rights Alliance case (supra)** stated:

“The purpose of this is simple. It is to protect the sanctity of the courts of judicature, which is well envisaged in the constitution; sustain the confidence in the third arm of government so that all the people who feel aggrieved by government, its agencies or private persons can have a place to run to for a neutral determination. To disregard court orders therefore, among others in my view, is by implication, to set the precedent that people should not believe in the courts. This is wrong because it puts persons with no remedy thus creating a medium in which they descend into anarchy by resorting to taking the law into their hands. This is in utter disregard of the democratic and good governance principles and values enshrined in our constitution.”

19. Applying the above tests, and considering the facts of this case, I am persuaded that the officer-in- charge of the Kenya Wildlife Service, Mombasa was fully aware of the terms of the court's orders at all material times and it is not sufficient to argue that the goods was being held by the 5th respondent. It was the Appellant who filed the appeal against the order of the subordinate court which ordered for the release of the goods to the applicant. The appeal herein was dismissed by this court (Omollo, J) and therefore the order for release of the goods remains in force. The appellant had ample time to comply with the order by asking for the release of the goods to the applicant as ordered by this court and the subordinate court. The appellant was under an obligation to satisfy the court on steps (if any) they took to comply with the court order after judgment was delivered herein. To my mind, a party must comply with an order whatever he thinks of such an order. To my mind, if the appellant was dissatisfied with the order, it should have attempted to get rid of the same through the proper course, that is either by setting it aside or through appeal. So long as the order existed, the appellant, and any other person for that matter, was bound to obey the same to the letter.

20. Further, the 5th respondent cannot be heard arguing that they cannot release the goods for whatever reason. What is important is that such a party has knowledge of the terms of the order. In my view, the 5th respondent cannot hide behind the excuse that the applicant was engaging in illicit trade. Those are issues that have already been addressed by the subordinate court and this court before the orders herein were issued. This court cannot therefore revisit them as the court is *functus officio*. The 5th Respondent is now a party to these proceedings and cannot avoid implementing a lawful court order.

21. Rule 3 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 provides that the rules shall be interpreted in accordance with Article 259 (1) of the Constitution and shall be applied with a view to advancing and realizing the (a) rights and fundamental freedoms enshrined in the bill of rights; and b) values and principles in the Constitution. Rule 8 provides that nothing in the rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. The constitution is an effective document that is the basis of our laws.

22. Considering the principles, purposes and objectives of the constitution enumerated above, I find myself unable to uphold the arguments advanced by the 5th respondent and the appellant. To me those are mere excuses aimed at avoiding implementing a valid court order. They have no plausible explanation for defying the order of his court which is unchallenged and remains valid and binding. As earlier stated, a party must comply with an order of court whatever he/she thinks of such order.

23. In the result, I find that the applicant has satisfied me that there was disobedience of the order of the court issued on 14th August 2019 and I find the officer-in- charge of the appellant, Mombasa, guilty of contempt. Consequently, it is hereby directed that the said officer-in-charge, Kenya Wildlife Service,

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Mombasa do appear before this court for purposes of sentencing.

24. Further, I find that the notice of motion dated 23rd December, 2019 in merited and the same is allowed.

25. Costs of the applications are awarded to the applicant

It is so ordered

DATED, SIGNED and DELIVERED at MOMBASA this 9TH day of July 2020.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant