



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

HIGH COURT CIVIL APPEAL NO. 27 OF 2014

FRANCIS MBUYA KINYORIA..... APPLICANTS

VERSUS

NYANSIONGO TEA FACTORY)

KENYA TEA DEVELOPMENT AGENCY LTD)).....RESPONDENTS

RULING

1. The Notice of Motion dated **8th January 2015**, taken out by the plaintiffs/applicants, **Francis Abuya Kunyonia** and **Dennis M. Omboka**, - seeks orders to the effect that the defendants/respondents' company secretary one **John Kennedy Omanga**, be cited and punished for disobeying, ignoring and/or disregarding a lawful order issued and/or granted by this court on **31st December 2014**, and that a warrant of arrest be issued against the said person to bring him before the court for committal to jail for disobedience of the order and/or sentence and that the said person be committed to jail for a duration not exceeding six (6) months and/or such shorter period as the court may deem fit and expedient.

2. Alternatively, the application seeks orders to the effect that a sequestration order to attach the defendant's property be granted and that the property be sold to defray damages occasioned by the breach and/or disobedience of the lawful court orders dated **31st December 2014**. That, the results of the elections conducted in disobedience of the court order be set aside.

The grounds for the application are contained in the body of the appropriate notice of motion and are fortified by a supporting affidavit deponed by the first plaintiff dated **8th January 2015**.

The application is opposed by the defendants/respondents i.e. **Nyansiongo Tea Factory Company Limited** and **Kenya Tea Development Agency Limited**, on the basis of the facts and averments contained in a replying affidavit dated **9th January 2015** deponed by the defendant's company secretary, **John Kennedy Omanga**.

3. With the consent of both sides, the application was argued by way of written submissions and in that regard submissions were filed on behalf of the plaintiffs by **Messrs Ochoki & Company Advocate**, and on behalf of the defendants by **Messrs Millimo Muthomi & Co. Advocates**.

The said submissions have been given due consideration by this court in the light of the grounds in support of the application and those in opposition thereto.

Basically, as may be deciphered from both the supporting and replying affidavits as well as the rival submissions, the issue falling for determination is whether the plaintiffs are entitled to a contempt order

against the defendants through their company secretary.

4. Order 40 Rule 3 of the Civil Procedure Rules provides for consequence of breach of interim injunction orders in that:-

“In cases of disobedience, or of break of any such terms, the court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the court directs his release.”

It is therefore without doubt that the consequences of breach of injunction orders are penal in nature and this being so, proof of contempt should be beyond reasonable doubt.

5. The jurisdiction to convict a person for contempt must be exercised with the greatest of care if not reluctance because it is at most arbitrary and unlimited and must be jealously guarded to prevent cases of overzealous applicants abusing the process of the court with abandon.

Whereas it is essential that the authority and dignity of the court be upheld at all times in pronouncing and upholding the rule of law and good order and whereas person, who undermine the authority and dignity of the courts must be dealt with firmly in order not to bring into disrepute the court's authority, nonetheless, it is the obligation and responsibility of the person seeking the order of contempt to establish that there has been willful disobedience of the order.

The terms of the order must be clear and unambiguous and must be properly brought to the notice of a defendant if the court is to impose punishment for alleged contempt.

6. The plaintiffs filed this suit on the **19th December 2014**, praying for judgment against the defendant for declaratory orders to the effect that the defendant's decision to reject the plaintiff's application to contest election of directorship of the first defendant scheduled for **January 2015** was illegal, unconstitutional, null and void and that the election manual procedure and rules formulated by the defendant dated **19th November 2014**, inclusive of the unlawful terms of notice dated **19th November 2014** were illegal, null and void.

The plaintiffs further prayed for an order of injunction to restrain the defendant's from conducting the elections for directorship of the first defendant until they complied with the requisite laws in place and in particular laws prescribing qualifications of applicants seeking to vie for directorship of the first defendant.

An order of mandatory injunction was also sought against the defendant to compel them to accept and/or oppose the plaintiff's application to contest the first defendant's elections.

7. Apparently, the suit was filed after the plaintiffs were disqualified from contesting in the elections for failure to meet set conditions. They lodged an appeal to the dispute resolution /appeals committee but the same was rejected or disallowed. Their plaint was filed in court contemporaneously with a Notice of Motion dated **19th December 2014**, seeking temporary injunction orders to **firstly**, restrain the defendants from short listing, publishing and/or clearing candidates, seeking to contest and/or vie for the position of directorship of the first defendant in the forthcoming director's election scheduled for **January 2015**, in exclusion of the plaintiffs pending the hearing of the application inter-parties and also pending the hearing and determination of the suit. **Secondly**, to compel the defendants by a mandatory injunction to permit, shortlist, clear and/or allow the plaintiffs to contest the first defendants directorship for the elections scheduled for **January 2015**.

8. The Notice of Motion was in the first instance presented before the court ex-parte the defendant and an interim injunction order was issued against the defendants restraining them from short listing, publishing and/or clearing candidates/applicants seeking to contest and/or vie for the position of directorship of the first defendant in the forthcoming directors election scheduled for **January 2015**, in exclusion of the

plaintiffs pending inter-parties hearing of the application.

The plaintiffs/applicants were directed to take a date for the hearing of the application and serve all the defendants/respondents for appearance before the duty Judge on **31st December 2014**.

The order was duly extracted and signed by the Deputy Registrar of this court for necessary service and compliance. It was dated **19th December 2014**.

9. The service of the order dated **19th December 2014** appears not to have been effected as at **31st December 2014**, when the plaintiffs and the defendants appeared before the duty Judge through their respective advocates. This meant that the defendants were not aware of the court order at any time prior to the **31st December 2014** and could not therefore have come within the purview of the court's jurisdiction to issue a contempt order against them and/or and of their servants and/or agents. It was on that date (**31st December 2014**) that the first defendant was served with an extended version of the order dated the same date. A copy thereof is annexed to the plaintiff's supporting affidavit and marked exhibit "**FAK 1**" together with the appropriate affidavit of service dated **7th January 2015**. A second affidavit of service also dated **7th January 2015** and marked "**FAK 1**" indicates that the second defendant was served with the order dated **31st January 2014** on **2nd January 2015**.

10. The service of the order dated **31st December 2014**, was effected upon the first defendant through one **Mr. Kariuki**, said to be the first defendant's factory manager while service upon the second defendant was effected through an unidentified light skin lady said to be in her 30's. It is not known whether these mysterious persons had the necessary authority to receive the order or accept service of the order on behalf of the two defendants or on behalf of the defendant's company secretary. The allegation by the plaintiffs that the defendants and/or their company secretary were served personally or otherwise with the order dated **19th December 2014**, as extended on **31st December 2014**, is highly doubtful. Even if the defendants may have become aware of the order before it was served upon them, it remained the obligation of the plaintiffs to effect formal service of the order and more so because it contained a penal notice and was in the first instance issued ex-parte.

This court does not think that an order requiring a person to do or abstain from doing any act may be enforced by contempt without a copy of the order having been personally served and endorsed with a penal notice informing him that if he disobeys the order he will be liable to the process of execution.

Mere knowledge of the existence of the order is not enough where the consequences of breach are drastic and criminal in nature. Personal service of the order particularly upon the person who is likely to be affected by its consequences is absolutely necessary and no manner of shortcuts should be accepted.

11. In his replying affidavit dated **9th January 2015**, the defendant's company secretary confirms that he was never personally served with any order of this court over this matter.

For all the reasons aforementioned pertaining to the service of the material order upon the defendants and/or their company secretary, it would be unjust, unfair and unlawful for this court to enforce the order by contempt against the defendant's company secretary or any other proper officer of the defendant.

Be that as it may and even if the order dated **31st December 2014** was served upon the defendants or any of their proper officers, this court holds the view that the validity of the order would be doubtful for the reason that whereas the original order dated **19th December 2014**, was issued by a Judge of the High Court, the extended version dated **31st December 2014**, was issued by a Judge of the **Environmental and Land Court** which has the status of the High Court but with a jurisdiction to only hear and determine disputes relating to the environment and the use and occupation of, and title to, land in terms of **Article 162** of the Constitution.

12. The question that emerges is whether a Judge appointed as a Judge of the **Environment and Land**

Court could extend an order of injunction issued by a brother Judge of the high court in a matter which did not fall within the realm of the **Environment and Land Court**? The answer would be in the negative in view of the recent decision of the **Court of Appeal in Malindi** in the case of **Karisa Chengo & Others .vs. Rep (2015) eKLR**, in which the court had to ponder on whether a Judge of the **Environmental and Land Court** has jurisdiction to hear and determine criminal matters.

In that regard, the appeal court observed that parliament enacted the **Environment and Land Court Act** with the object of giving effect to **Article 162 (2) (b)** of the Constitution and that the jurisdiction of the **Environment and Land Court** is set out at **Section 13** of the said Act.

13. The court stated that:-

“.....the Constitution has at Article 162(2) provided that; parliament shall establish courts with the status of the high court to hear and determine disputes relating to....” To our minds, by using the words “with the status of the high court,” it is clear that the high court is not higher in hierarchy than the Employment and Labour Relation Court (ELRC) and Environment and Land Court (ELC); these are courts of equal rank. By being of equal status, the high court therefore does not have the jurisdiction to superintend, supervise, direct, guide, shepherd and/or review the mistakes, real/or perceived, of the Employment and Labour Relation Court and Environment and Land Court administratively or judiciously as was the case in the past. The converse equally applies. At the end of the day however, Employment and Labour Relation Court and Environment and Land Court are not the high court and vice-versa, however, it needs to be emphasized that status is not the same thing as jurisdiction. The Constitution though does not define the word “status”. The intentions of the framers of the Constitution in that regards are obvious given the choice of the words they used; that the three courts (High Court, Employment and Labour Relation Court and Environment and Land Court) are of the same juridical hierarchy and therefore are of equal footing and standing. To us it simply means that the Employment and Labour Relation Court and Environment and Land Court exercises the same powers as the High Court in performance of its judicial function, in its specialized jurisdiction but they are not the High Court.”

14. That being the position, it would follow that the **Environment and Land Court** would have no jurisdiction to deal with civil matters that do not fall within its prescribed domain. **Section 13** of the **Environment and Land Court Act** gives no jurisdiction to the **Environment and Land Court** to deal with civil cases which have nothing to do with the environment or land. As was stated by the court of appeal in the aforementioned Karisa Chengo case, a Judge once appointed as either a **High Court, Employment and Labour Relation Court** or **Environment and Land Court** Judge cannot hear and determine matters reserved for any of those courts. Each Judge appointed to a particular court possesses the requisite Constitutional or Statutory experience required of one to serve in that court. A Judge is appointed to serve in a specific court. It cannot therefore be said that a Judge is just a Judge anyhowly.

15. From all the foregoing, it is apparent that the extension of the injunction order dated **19th December 2014**, on the **31st December 2014** by the **Environment and Land Court** was done without jurisdiction and therefore null and void. This meant that if the defendants were served with the order as extended then it was an invalid order for which they were entitled to disregard or disobey without any danger of being cited for contempt. Besides, in contempt cases, the jurisdiction of the court is invoked where the order complained of is clear and the exact date of the contempt is established particularly where there is no evidence of personal service. The responsibility to show that there has been willful disobedience of the order lies with the person seeking the order.

16. In this case, the material order was to restrain the defendants either by themselves, agents, servants and/or anybody claiming through them from short listing, publishing and/or clearing candidates, seeking to contest and/or vie for position of directorship of the first defendant in the forth coming directors elections scheduled for **January 2015** in exclusion of the plaintiff.

In the application leading to the order, the plaintiffs had also sought orders to the effect that the

defendants be compelled to permit, shortlist, clear and/or allow the plaintiffs to contest the first defendant's directorship in the elections scheduled for January 2015. This mandatory injunction was never granted by the court and did not constitute part of the material order in dispute.

17. The plaintiffs major complaint in this application is that the defendants through their company secretary disobeyed, ignored and/or disregarded the order dated 31st December 2014. As already mentioned hereinabove, the said order was not valid inasmuch as it was issued by a court without necessary jurisdiction. It was therefore legally non-existent for purposes of compliance by the defendants and/or their employees/agents etc.

It was rather strange for the plaintiffs to expect that the defendants would comply with orders which were invalid and unlawful and which purported to restrain the defendants from excluding the plaintiffs from the anticipated elections.

The plaintiffs contend that they were excluded from the elections contrary to the disputed orders. However, they could not be heard to complain as such because the second limb of that application of **19th December 2014**, was for a mandatory injunctions to have them shortlisted, cleared and/or allowed to contest the material elements but this was not granted.

Further, the acts which were prohibited were specified to be the shortlisting, publishing and/or clearing candidates seeking to contest in the elements scheduled for **January 2015** yet there was no mention of the actual date of the elections. It is not therefore clear when the alleged breach of the orders was committed by the defendants. In any event, the disputed order did not restrain the defendants from holding the elections as scheduled.

18. So, if all the procedures for the election had been completed including the shortlisting, publishing and clearing the names of these seeking to contest, then nothing stood in the way of the defendants to hold the elections as scheduled.

The defendants contend in their replying affidavit that the exercise of shortlisting, publishing and clearing the names of the pre-qualified candidates was completed on the **9th December 2014**, and **10th December 2014**, prior to the issuance of the disputed orders on the **31st December 2014** on which date the defendants maintained that the orders had long been overtaken by events. This fact was even brought to the attention of the court on that **31st December 2014** with the defendants expressing their inability to comply with the orders.

The fact was never disputed by the plaintiffs yet they forged ahead to obtain the orders and purport to have them served upon the defendants knowing too well that non compliance was a foregone conclusion. Such action was a clear demonstration of abuse of the court process on the part of the plaintiffs.

19. An order which cannot be complied with if granted would be in vain as no court would grant an order for contempt in the circumstances. In the end result, this court must find that the plaintiffs are not entitled to orders of contempt against the defendants or any of their employees/servants and/or agent.

The present application is therefore wanting in merit and is hereby dismissed with costs to the defendants.

Ordered accordingly.

J.R. KARANJA

JUDGE

[Read and signed this 1st day of December 2015]

In the presence of Mr. Ochoki for plaintiff/applicant and Mr. Bosire holding brief for Millimo for

defendant/respondent.