



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO. 46 OF 2011

WORBURN ESTATE LIMITED.....PLAINTIFF/RESPONDENT

=VERSUS=

MARGARET BASHFORTH.....DEFENDANT/APPLICANT

R U L I N G

Introduction:

1. What is before me is the Defendant's/Applicant's Application dated 24th June, 2014 seeking for the following orders:
 - (a) That the Plaintiff/Respondent's directors, namely FRANCO & ELLY ESPOSITO be ordered to show cause why they should not be committed to civil jail for disobedience of this Honourable court's judgment and order delivered on 16th April 2013 by the Honourable Judge C. W. Meoli, and reiterated in the subsequent ruling delivered on 2nd April, 2014 by the Honourable Judge O. A. Angote.
 - (b) That the Plaintiff/Respondent's Directors herein, that is to say FRANCO & ELLY ESPOSITO be committed to a term of six(6) months in civil jail for disobedience of the honorable judges C.W.MEOLI and O. A. ANGOTE.
 - (c) Costs be in the cause

The Applicant's case

2. The Defendant/Applicant has deponed that this court delivered its Judgment on 16th April 2013 and a Ruling on 2nd April 2014.
3. According to the Applicant, she has complied with the Judgment and the Ruling of the court by paying her service charge arrears from 23rd July 2009 to 16th April 2012 and also upon returning to her apartment on 23rd May 2013 as directed by the court.
4. However, it is the Defendant's/Applicant's case that the Plaintiff/Respondent has refused to comply with the orders of the court by continuing to bill her at an inflated and disavowed rate for the period when possession of her apartment was withheld from her for which no service charge is payable and that the Plaintiff has also continued to bill her for unsubstantiated excess service charges.
5. It is the Defendant's/Applicant's deposition that she has made every effort to settle the issue of the

- payable service charge with the Plaintiff/Respondent without success.
6. According to the Defendant, the Plaintiff continued to levy excess charges upon her even after the Judgment of 16th April 2013 and the Ruling of 2nd April 2014 and that the sole directors of the Plaintiff, Elly and Franco Esposito are also the sole directors of the Management Company appointed by the Plaintiff to receive service charges.
 7. The Defendant finally deponed that this court should safeguard its position in the administration of justice by not allowing its orders to be disrespected.
 8. In a Further Affidavit filed on 4th September 2014, the Defendant/Applicant deponed that even after filing the current Application, the Plaintiff sent to her further monthly invoices on 10th August 2014 and 3rd September 2014 at the inflated rate disavowed by the Honourable court.

The Plaintiff's/Respondent's case:

9. Mr. Esposito Franco, the Plaintiff's director filed a Replying Affidavit and deponed that he was aware of the Judgment of the court which required that the Defendant/Applicant should pay service charges at the rate subsisting before 23rd July, 2009 and that the Defendant has been paying her service charge at the rate subsisting before 23rd July 2009.
10. The Plaintiff's director further deponed that there is a pending suit being HCCC No. 51 of 2014 in which the subject matter is the implementation of the payable service charges as per the report of Paul Wambua Valuer and that the determination of that matter will determine the service charge payable by all the apartment owners.
11. It is the Plaintiff's case that while HCCC No. 51 of 2014 is pending, the Plaintiff has been issuing statements reflecting how service charges would be if the report by Paul Wambua is confirmed although he has been receiving service charges from the apartment owners at the old rate; that the Plaintiff has not issued any demand notice to the Defendant and that as per the Lease, the Plaintiff is entitled to the legal and other professional costs.
12. It is the Plaintiff's case that he can only be in contempt of the orders of the court if he demands anything above what subsisted as service charges before the 23rd July 2009.

Submissions:

13. The Defendant/Applicant made her oral submissions and reiterated the contents of her affidavit.
14. On the other hand, counsel for the Plaintiff/Respondent submitted that all the invoices that were sent to the Applicant after the Judgment and Ruling of the court should be disregarded and that the Plaintiff has no intention of making a follow up on the same.

Analysis and findings:

15. On 16th April 2013, Meoli J delivered her judgment in this matter. In the Judgment, the court held that the Defendant/Applicant should pay to the Plaintiff service charge at the rate that was subsisting before 23rd July 2009, vide a notice dated 28th March, 2008 for the period the Defendant was in occupation of the premises, namely 23rd July 2009 to 16th April, 2012.
16. The Defendant/Applicant, after the Judgment, moved the court by way of an Application for clarification of the Judgment. The Defendant filed the Application because the Plaintiff continued to demand from her service charges at inflated rates even after the Judgment. In the Ruling that was delivered on 12th April 2014, Meoli J clarified her Judgment by stating as follows:

“[secondly] until the service charge is professionally determined, the Plaintiff cannot demand service charge at the very rate that occasioned this suit in the first place. Such a demand in my view amounts to a negation of the Judgment of this court as delivered on 16th April 2013. The Defendant/Applicant will therefore continue to pay service charge at the rate ordered by the court's judgment and restated at paragraph 16 above, pending the assessment of the proper service charge, in accordance with the lease agreement.”

17. The Plaintiff's/Respondent's director has not denied that he has been sending to the Defendant/Applicant invoices in respect to the service charge that the court had rejected in the Judgment and the subsequent Ruling. The said invoices were sent on diverse dates with the last one being sent to the Applicant on 30th August 2014 while the current Application was pending.
18. In the said invoice, the Plaintiff has stated that the monthly service charge for September 2014 is Kshs.28,868.34. That is the same figure that has been quoted in the invoice dated 31st July 2014 which is in respect to the service charge for the month of August 2014. The same figure is indicated in the invoices for the month of June, 2014 and May 2014.
19. The invoice for the month of March 2014 for what the Plaintiff refers to as the provisional monthly service charges plus water charges is Kshs.29,368.34.
20. It is not in dispute that the payable monthly service charge as per the Judgment of the court is supposed to be Kshs.17,400 and not 28,868.34. This was the rate that was subsisting before 23rd July, 2009.
21. Although the Plaintiff's directors were aware of the Judgment and the subsequent Ruling of the court and the amount that the court had ordered the Defendant to pay as service charge, they continued invoicing the Defendant at a rate higher than what the court had decreed. Despite the payment of the required service charge by the Defendant after the Judgment, the Plaintiff's directors carried forward every month the balance of what they thought the Defendant owed them using the discredited rates.
22. According to the Plaintiff's director's affidavit, the invoices sent to the Defendant after the Judgment of the court of 16th April 2013 and the Ruling of 12th April 2014 were meant to inform the Defendant what she ought to pay after the suit which is different from this one has been finalised.
23. What is worrying about the Plaintiff's director's conduct *viz-a-viz* the orders of this court is that he admits that he is aware of the Judgment of the court and even while this Application was pending, he continued to send to the Applicant monthly invoices indicating a higher service charge on the pretext that it was an indication of what the Defendant should expect in future.
24. An invoice by its very nature is a demand for payment. It cannot be an indication as to what the recipient should expect to be asked to pay in future. The Plaintiff's directors have continued to disobey the orders of this court and they seem not to be apologetic about it. I say so because even after the Applicant filed the current Application for contempt and served them, they sent to her two invoices demanding for service charges which were disallowed by the court without any regard as to the consequences of their actions. In a nut shell, they didn't care about the existing court orders.
25. The conduct of the Plaintiff's directors is meant to disparage the orders of this court and to defy the authority and dignity of the court. While well aware of the orders of this court, the Plaintiff's directors have continuously disobeyed them by demanding service charges way beyond what the court had decreed.
26. The law relating to contempt proceedings was clearly laid down by the Court of Appeal in **Mutitika Vs Baharini Farm (1982-88) 1 KAR 863**, where it was held that if anyone knowing of the existence of an injunction or an order of stay, willfully does something to break the injunction is liable to be committed for contempt.
27. As was held in the case of **Hadkinson vs Hadkinson (1952) ALL ER 567**, it is a 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 even void.
28. In **Johnson Vs Grant, 1923 SC 789 at page 790**, Lord President Clyde stated as follows:-

“The law does not exist to protect the personal dignity of the judiciary nor the private rights of parties or litigants. It is not the dignity of the court which is offended. It is the fundamental supremacy of the law which is challenged.”

29. It is therefore paramount that this court should protect the supremacy of the law and the rule of law by punishing individuals who are in contempt of its orders, their status in the society notwithstanding.

30. Section 5 (1) of the Judicature Act provides that the High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England.
31. Previously, the law applicable in the High Court of Justice in England in respect to contempt proceedings was Rule 52 (2) of the Supreme Court Practice Rules of England. The said Rule required the Applicant to commence committal proceedings after obtaining the leave of the court first.
32. The Rules of the Supreme Court of England have since been replaced with the Civil Procedure Rules, 1999 which came into force on 1st October, 2012. Part 81 of the said Civil Procedure Rules, 1999 replaced Rule 52 of the Supreme Court Practice Rules. Leave or permission is no longer required before one can file an application for contempt for breach of a judgment or order pursuant to the new Rules in England (see **Christine Wangari Gachege Vs Elizabeth Wanjiru Evans & 11 others (2014) eKLR**). The Applicant did not therefore require the leave of the court to commence the current proceedings for contempt.
33. Having found on the required standard that the Plaintiff's directors, Franco Esposito and Elly Esposito, are in contempt of the Judgment of this court of 16th April, 2013 and the order of 2nd April, 2014, I shall, which I hereby do, make the following orders;

(a) Franco Esposito and Elly Esposito be and are hereby committed to jail for a period of 30 days from the date when they will be arrested.

(b) Warrants of arrest to issue as against the said Franco Esposito and Elly Esposito for the purpose of committing them to jail as ordered above.

(c) The said warrants of arrest to be enforced by the Officer Commanding Police Division (OCPD), Malindi forthwith.

Dated and delivered in Malindi this 17th day of **October**, 2014.

O. A. Angote

Judge