

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 2197 OF 1982

GAVA.....PLAINTIFF

VERSUS

GENERAL PRINTERS LTD.....DEFENDANT

RULING

On July 4, 1983 at the request of the parties and by consent, I entered judgment for the plaintiff in the sum of Shs 80,000 inclusive of all costs and interest. After some discussion the documents which the plaintiff had supplied for the purposes of printing to the defendant were ordered to be returned to the plaintiff. In coming to that order I used the word “manuscript” by which I intended, and I understood the parties to intend, to signify those said documents. A further order was made that all existing books and plates were to be destroyed: this was also by consent.

In January 1985 a notice to show cause affecting Managing Director of the defendant company was issued and served on the company for him to show cause why he should not be arrested and committed to civil jail. The basis of this notice to show cause was that the manuscript had not been handed over in accordance with the decree.

Thereafter by notice of motion the defendant has asked under section 99 and section 3A of the Civil Procedure Act (cap 21) that the word “manuscript” in the order and decree be replaced by the words “typed script” or alternatively that the order and the decree be amended by deletion of that part of the judgment and decree which relates to the return of the manuscript.

The basis of this application is that Mr Manek says that he had misunderstood his clients when he was agreeing the terms of the consent order, in that although his clients had in their possession a typed file copy of the book as finally set up by the typesetters, they did not have now, and never had, the manuscript in question which had been handed over to the typesetters direct and then back to the plaintiff for proof reading in accordance with what was alleged to be the usual trade practice, a practice disputed by the plaintiff in his affidavit as are the facts alleged.

Section 99 of the Civil Procedure Act (cap 21) deals with errors and accidental slips in the judgment and in my view is not appropriate to remedy a consent judgment faithfully recorded by the court. I do not think in this case I can make an order under that section as I have been asked to do.

Mr Le Pelley asks me to say on the basis of the affidavits that since the defendant company never was in the position to hand over these documents and since if the judgment and the decree are left as they are, an unjust order of committal to prison may result, this court has an inherent jurisdiction to look at the evidence now before the court by affidavit and to say that the decree should be amended to fit the case as he puts it through the affidavits.

I have considered the affidavits very carefully. It is clearly the case for the plaintiff that he handed the material which he wanted printed direct to the defendant company and that was the trade practice. The defendant company’s officers deny this and there is support from an officer of the typesetters as to the fact of handing over to them, and there is further evidence from an experienced publisher that the practice is as the defendant has stated and not as the plaintiff says. The issue is very clear, and although it could not normally be resolved without the calling of evidence *viva voce*, there is such a glaring *volte face* in the affidavits filed by the plaintiff herein that it is easy to decide on the matter of credit without the delay that

would be occasioned by hearing the witness.

Although the plaintiff says now that he handed over to the defendant company the relevant material to ground his application for committal of the managing director of the defendant, in an affidavit filed in support of an application to strike out the defence made 2½ years ago he stated:

“On receiving my order the defendant company sent me to another firm of printers for typesetting and paste up and the defendant only received from me the make ready proofs for plate making before printing”.

This is precisely the case for the defendant now. The contradictory affidavits of the plaintiff are sought to be explained on the basis that this issue was not the issue in question in 1982 when the former affidavit was made, but such explanation just will not do. The plaintiff appears to be a person who will swear to whatever suits him at the time whether it is true or not.

I will not therefore allow this court to be used as an engine for harassing the defendant who has already agreed to pay damages for not carrying out its contract with the plaintiff in respect of a condition of settlement entered into quite clearly in error. Apparently the plaintiff is using this order to try to obtain a committal for failure to comply with an order of the court when it is fully well known to him that the order cannot be complied with by the defendant, and indeed had, unknown, to the defendant been overtaken by events by the action of a company not a party to this suit.

As the least action necessary to see that justice is done in this case, then I declare that that part of the decree which orders the defendant to hand over to the plaintiff the manuscript is now impossible of performance, the act required having already been performed by a company not a party to this suit, and that therefore that part of the decree was nugatory and incapable now of execution. Costs reserved.

Dated and Delivered in Nairobi this 9th day of July 1986.

D.C.PORTER

JUDGE