



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC. CASE NO. 178 OF 2017

PARAGON ELECTRONICS LTD.....1 ST PLAINTIFF

REMAX PROPERTY MANAGEMENT LIMITED.....2ND PLAINTIFF

VERSUS

YUSUF SHARAFALLY ESUFALI.....1 ST DEFENDANT

AMAMA YUSUF SHARAFALI ESUFALI.....2 ND DEFENDANT

RULING

1. Paragon Electronics Limited (**the 1st plaintiff**) is the registered proprietor of Land Reference Number 330/355. On the said parcel of land are erected four (4) blocks of apartments known as **Remax Terrace Apartments (the suit property)**. Remax Property Management Limited (**the 2nd plaintiff**) is a management company incorporated to manage the premises. The two defendants in this suit are joint owners, as lessees, of Apartment Number 12, located on the 5th Floor of Block B1 within Remax Terrace Apartments.

2. On 17/3/2017, the plaintiffs brought this suit contending that the defendants were occupying four parking slots instead of the two (2) which they were entitled to. They, among other prayers, sought a permanent injunction restraining the defendants against the alleged encroachment. Together with the plaint, they brought a notice of motion dated 22/2/2017 seeking an interim restraining order against the defendants. This court heard the said application and disposed it on 21/9/2018 through the following orders:

a) Pending the hearing and determination of this suit, the defendants are restrained against parking more than or allowing the parking of more than two cars in the suit premises, LR No. 330/355 Nairobi.

b) The defendants shall bear costs of this application.

3. Subsequent to that, on 17/1/2020, the plaintiffs brought a notice of motion dated 15/1/2020 in which they sought an order citing and holding the defendants guilty of contempt of court and condemning them to pay a fine or serve a six months term in civil jail. The said application dated 17/1/2020 is the subject of this ruling.

4. The application was supported by an affidavit sworn on 15/1/2020 by one Kevin Ayodi who described himself as a representative of the plaintiff. He deposed that his responsibility was to regularly visit the suit property for the purpose of inspection and carrying out or supervising maintenance works at the suit property. For a long time, the defendants' security guards did not allow him access to the suit property. When he eventually gained access to the suit property in January 2020, he noted that the defendants were in disobedience of this honourable court's order of 21/9/2018 in that they had parked three vehicles in the suit premises, namely: (i) Toyota Salon Car Registration Number KCE 432P; (ii) Mitsubishi Salon Car Registration Number KCP 612G; and (iii) Motor Cycle Registration Number KMCX 732 M.

5. The defendants opposed the application through a replying affidavit sworn on 28/2/2020 by Amama Yusuf Sharafali Esufali and a supplementary affidavit sworn by the same deponent on 15/7/2020. She deposed that the application constituted an abuse of the court process because it was served a month after it was filed. She added that Kevin Ayodi did not have the *locus standi* to swear the affidavit in support of the motion. She further deposed that she was not aware of any ruling rendered in September 2019, contending that the only ruling she was aware of was rendered on 21/9/2018. She further stated that the parkings in the suit premises were not demarcated or numbered so as to give full effect to the car parking licence executed by the parties. Lastly, she deposed that a motor cycle was not a motor car within the meaning assigned to a motor car under **Section 2** of the **Traffic Act**. She urged the court to dismiss the plaintiff's application.

6. The application was canvassed through written submissions. The plaintiffs filed written submissions through the firm of **AKO Advocates LLP**. Counsel for the plaintiffs framed the following as the two issues falling for determination in the application: (i) whether the defendants were in contempt of the court order given on 21/9/2018; and (ii) whether the plaintiffs' supporting affidavit was defective and incompetent

for want of capacity by the deponent.

7. On the first issue, counsel submitted that, to succeed in civil contempt proceedings, the applicant had to prove: (i) the terms of the order; (ii) knowledge of the terms of the order by the respondent; and (iii) failure by the respondent to comply with the terms of the order. Counsel argued that the terms of the order of 21/9/2018 were clear and the defendants had confirmed in paragraphs 9.4 and 9.5 of the replying affidavit that they owned Motor Cycle Registration Number KMCX 732M, and that the said motor cycle was normally parked on the extreme end of the car parking area. Counsel further submitted that a motor cycle was a motor vehicle within the definition under the Traffic Act. Counsel added that the defendants' actions were wilful and deliberate.

8. On the second issue, counsel submitted that the law did not dictate that a person swearing a supporting affidavit on behalf of a company had to be a director of the company, adding that the only requirement was that the deponent would have personal knowledge of the relevant facts. Counsel contended that affidavits would be sworn by any witness on behalf of individuals, companies or corporations as long as that witness was seized of facts of the case. Relying on, *inter alia*, the decisions in: (i) **KTDA Farmers Company Limited v Kei Matt Limited [2018] eKLR**; (ii) **Ajiwa Samji Limited v Kenya National Highways Authority & Another [2018] eKLR** and (iii) **Al-Riaz International Ltd v Ganjoni properties Ltd [2020] eKLR**, counsel urged the court to grant the application.

9. The defendant filed written submissions dated 5/11/2020 through the firm of **Taibjee & Bhalla Advocates LLP**. Counsel submitted that the application was incurably defective because it was brought under the repealed provisions of the **Judicature Act [Cap 8]**. Counsel further submitted that the application was defective because no prior leave of the court was obtained in accordance with **Section 8** of the Contempt of Court Act. Thirdly, counsel argued that the word “**car**” should be interpreted in the context assigned to the word “motor car” under **Section 2** of the **Traffic Act** and be taken to mean “a motor vehicle having a seating accommodation for not more than ten passengers excluding the driver but does not include a motor cycle.”

10. I have considered the application, the response thereto and the parties' rival submissions. I have also considered the relevant legal framework and jurisprudence. The following four issues fall for determination in the application: (i) whether the present application is totally defective by dint of the applicant's failure to invoke the framework in the **Contempt of Court Act [No 46 of 2016]** in initiating this application; (ii) whether leave of the court was necessary before the present contempt proceedings were initiated; (iii) whether the affidavit sworn by Kevin Ayodi is incompetent on account of lack of *locus standi*; and (iv) whether a motor cycle is a car within the meaning of the order issued by this court on 21/9/2018. I will make brief sequential pronouncements on the four issues in the above order.

11. The first issue is whether the present application is fatally defective by dint of the applicant's failure to invoke the framework in the **Contempt of Court Act [Act No 46 of 2016]**. Through a judgment rendered by Mwita J on 9/11/2018 in **Kenya Human Rights Commission v Attorney General & Another [2018] eKLR** the High Court invalidated the entire **Contempt of Court Act [Act No 46 of 2016]** through the following disposal orders:

1) A declaration is hereby issued that Section 30 and 35 of the impugned Contempt of Court Act, No 46 of 2010 [sic] are inconsistent with the Constitution and are therefore null void [sic]

2) A declaration is hereby issued that the entire Contempt of Court Act, No 46 of 2016 is invalid for lack of public participation as required by Articles 10 and 11(b) of the Constitution and encroaches on the independence of the Judiciary.

3) No order as to costs”

12. No material has been placed before the court to suggest that the above invalidating orders were subsequently reviewed by the same court or overturned by a higher court. The tenor and import of the above orders is that, the Contempt of Court Act (Act No 46 of 2016) no longer has the force of law in Kenya and cannot be invoked as a valid statute upon which to found contempt proceedings. With the Contempt of Court Act invalidated, the third tier superior courts reverted to the pre-2016 legal framework on contempt proceedings, namely, the **Judicature Act**.

13. The present application was brought under **Section 5** of the **Judicature Act**, and **Sections 1A, 1B, 3A** and **63** of the **Civil Procedure Act**. The defendants have faulted the applicants for bringing the motion under a repealed law, and have contended that the applicants should have invoked the **Contempt of Court Act**. I do not agree with that view because the **Contempt of Court Act** which had repealed the Judicature Act was nullified on 9/11/2018, meaning that the framework in the **Judicature Act** was restored. It is therefore my finding that the notice of motion dated 15/1/2020 is not incompetent on account of failure to invoke the framework in the invalidated **Contempt of Court Act**.

14. The second issue is whether leave of the court is necessary before contempt proceedings are initiated in a civil case in Kenya. Our civil procedure law on contempt proceedings is the prevailing law in England. The law in England changed in 2012 and the requirement for leave was removed. Indeed, Kenya's Court of Appeal affirmed this position in **Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 others [2014] eKLR** in the following words:

“We find on the basis of the new Civil Procedure Rules (of England) which are now contained in the Second Supplement to the 2012 White Book that no leave is required before bringing an application, like the one before us, for committal for contempt relating to breach of this court's order.

15. In light of the above legal position, it is my finding that the applicants did not require prior leave before bringing the present application.

16. The third issue is whether the affidavit sworn by Kevin Ayodi is incompetent on account of lack of *locus standi*. The impugned affidavit is not a verifying affidavit in respect of which Order 4 rule 1 of the Civil Procedure Rules specifies particulars of the competent deponents; it is an ordinary affidavit presented as evidence in an already existing suit. Ordinary affidavits are regulated by, *inter alia*, the provisions in the

Oaths and Statutory Declarations Act (Cap 15) Part V of the Evidence Act (Cap 80) and Order 19 of the Civil Procedure Rules. The relevant admissibility rule is that, in civil proceedings, where direct evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the maker of the statement had personal knowledge of the matters dealt with by the statement.

17. Maraga Ag Judge (as he then was) rendered himself on this issue in **Peter Onyango Onyiengo v Kenya Ports Authority [2004]eKLR** in the following words:

“From these definitions, it is clear that an affidavit is a sworn statement usually given to be used as evidence. So anybody swearing an affidavit on behalf of a corporation can also give evidence for or on behalf of a corporation. To suggest, therefore, that everybody who testifies for or on behalf of a corporation has to have authority from the corporation given under seal as required by Order 3 rule 2 (c) is in my view not correct. In the circumstances, I hold that other than verifying affidavits, which as I have stated must be sworn by the plaintiffs themselves or authorized agents, all other affidavits filed and used in courts are not among the acts covered by Order 3 rules 1 to 5. All other affidavits can be sworn on behalf of individuals or corporations by anybody as long as that person is possessed of the facts and/or information that he deposes on, that in the rules of evidence would be admissible, mere failure to state that the deponent of such an affidavit has the authority of the corporation on whose behalf he swears it does not invalidate the affidavit. That is an irregularity courts can under Order 18 rule 7 of the Civil Procedure Rules ignore.”

18. I have considered the depositions made by Mr Ayodi in relation to the alleged contempt. He does not attribute the relevant facts to a third party. He is the primary source of the evidence presented in support of the application. His evidence is therefore properly admissible in relation to the alleged contempt. In the circumstances, I find no merit in the contention that the affidavit sworn by Kevin Ayodi is incompetent on account of lack of *locus standi*.

19. The last issue is whether a motor cycle is a car within the meaning of the order issued by the court on 21/9/2018. The said order reads as follows:

1. Pending the hearing and determination of this suit, the defendants are restrained against parking more than or allowing the parking of more than two cars in the suit premises, LR No. 330/355 Nairobi.

2. The defendants shall bear costs of this application.

20. The applicant contends that there was breach because two salon cars and a motor cycle were simultaneously parked at the suit premises. On their part, the defendants contend that they are not in breach of the order because they did not park more than two cars in the suit premises. They argue that a motor cycle is not a car.

21. The **Concise Oxford English Dictionary**, 12th Edition, defines a car as follows:

“a powered road vehicle designed to carry a small number of people”

22. Although the **Traffic Act (Cap 403)** does not have a definition of the word “car,” **Section 2** of the **Act** contains the following definitions relating to “**motor-car**”, “**motor-cycle**”, and “**motor vehicle**” respectively:

“motor-car” means a motor vehicle having seating accommodation for not more than ten passengers excluding the driver, but does not include a motorcycle;

“motorcycle” means a motor vehicle with less than four wheels the weight of which unladen does not exceed eight hundred weights;

“motor vehicle” means any mechanically propelled vehicle, excluding any vehicle running on a specially prepared way such as a railway or tramway or any vehicle deriving its power from overhead electric power cables or such other vehicles as may from time to time by rules under this Act be declared not to be motor vehicles for the purposes of this Act;

23. My understanding of the above definitions is that, a motorcycle is not a motor car under the Traffic Act. Secondly, motor cars and motorcycles are motor vehicles within the meaning of the Act. Thirdly, a motor vehicle with accommodation capacity of more than ten passengers is not a motor car.

24. My interpretation of the order made on 21/9/2018 is that it prohibits the parking of more than two cars in the suit premises. Secondly, its focus is a car, which under the **Traffic Act**, is described as motor-car. Put differently, the order of 21/9/2018 did not cover motor bikes or motor cycles. In the circumstances, it would be inappropriate to cite the defendants and punish them on account of a motor bike/ motor cycle which does not fall within the meaning or description of a car or a motor car. My finding on the last issue therefore is that a motorcycle or motor bike is not a car within the meaning of the order issued by this court on 21/9/2018.

25. The net result is that the notice of motion dated 15/1/2020 fails. The applicants shall bear costs of the application.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 2ND DAY OF DECEMBER 2020.

B M EBOSO

JUDGE

In the Presence of: -

Mr Nganga for the Plaintiffs/Applicants

Mr Ataka for the Defendants/Respondents

Court Clerk - June Nafula