



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

LAND CASE NO. 238 OF 2016

DAVID UMARA BAHOLA

HARON MITIHANI BAHOLA.....PLAINTIFFS/APPLICANTS

VERSUS

TANASCO COMPANY LIMITED.....DEFENDANT/RESPONDENT

AND

TUNASCO INSAAT TAAHHUT

TURIZM TICARET A.S.PARTY SERVED WITH APPLICATION

RULING

1. Before me for determination are two applications. The first application is a Notice of Motion dated 17th November 2016 in which the Plaintiffs pray for Orders:-

i) THAT the Directors of the Defendant/Respondents and/or Manager be summoned to appear before Court and show cause why they should not be committed to civil jail for a period not exceeding six months for being in contempt of Court by virtue of the Court Order dated 15th day of September, 2016.

ii) THAT an order be issued to remove all structures and/or pillars erected on Plaintiff's parcel of land (the suit property herein) at the Defendant's cost.

2. The said application is based on the grounds that the Defendant has ignored to obey the Orders of 15th September 2016 despite the same having been served upon them.

3. The second application is filed by an entity known as Insaat Taahut Turiz Ticavet AS which describes itself as the Party served with the Application. In the application dated 8th March 2017, the said Party served with the Application prays for orders:-

iii) That this Honourable Court be pleased to vacate, discharge and set aside the Order of this Court made on 15th September 2016 and to declare the same a nullity ab initio

iv) That this Honourable Court be pleased to order that the whole suit as instituted herein is misconceived and incompetent and that the same being fatally flawed and incurably defective should be struck out with costs.

v) That this Honourable Court be further pleased to order that both of the plaintiffs' two applications dated 13th September 2016 and 17th November 2017 be struck out in limine on grounds that the same are also both misconceived, incompetent and incurably defective.

vi) That this Honourable Court be also pleased to find that there is not in existence either of the parties named as Tunasco Company Ltd or Tanasco Company Ltd and accordingly that the Plaintiffs have filed the main suit against nobody and have obtained void orders that are incapable of execution against anybody.

4. The second application is based on the grounds that the Plaintiffs have filed this suit against an unknown and non-existent entity named in the Plaint as 'Tunasco Company Limited' and has obtained an Order against another entirely unknown and non-existent entity called 'Tanasco Company Ltd'. The affected party contends that the Plaintiff has not served it with the orders sought to be enforced in the contempt application and hence the Plaintiffs' application is illegal, irregular and unprocedural and should accordingly be dismissed.

5. I have considered the two applications before me and the oral submissions made herein by the Learned Advocates for the parties. I have equably taken into account the authorities the counsels referred me to.

6. The genesis of this suit lies in a Plaint dated 13th September 2016 and filed herein on 14th September 2016. In that Plaint, the two Plaintiffs have named the Defendant as Tunasco Company Limited and accuse it of commencing road construction activities on the land without offering them any compensation. They accordingly seek against the named Defendant a permanent injunction to restrain it from interfering with their 8 acres of land unless adequately compensated.

7. Filed contemporaneously with the Plaint was an application also dated 13th September 2016 in which the Plaintiffs sought the grant of the injunction orders pending the hearing and determination of the suit. The said application was placed before the Honourable Justice Angote who on 15th September 2016 granted the orders of injunction in the interim. In the extracted orders filed herein the Defendant is described as Tanasco Company Ltd. This is the same name again given to the Defendant in the Plaintiffs application before me seeking to have its directors committed to jail for contempt of the Orders issued on 15th September 2016.

8. According to Mr. Otara, Learned Counsel for the Plaintiffs, the Orders in contention were served upon the Defendant who have now come in its full name purporting that it was a party served with the Orders. Counsel submitted that since the Defendants are not denying service and/or notice of the orders, they ought to be punished having acted contrary to the said Orders.

9. On his part, Mr. Adala, Learned Counsel for the said Party Served with the Application submitted that his client was not the Defendant named in the suit and/or the Orders. It was further his submission that they had only admitted being served with the application and not the orders of 15th September 2016 and the contempt application was therefore misconceived and cannot lie as against his client.

10. In *Econet Wireless Kenya Ltd –vs- Minister for Information & Communications of Kenya & Another(2005)1 KLR 828*, Ibrahim J(as he then was) observed as follows:-

“It is essential for the maintenance of the Rule of Law and Order that the authority and dignity of our Courts are 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.”

11. Contempt proceedings are however quasi-criminal in nature and since the liberty of a person is at stake, the standard of proof is higher than in civil cases. As was reiterated in *Gatharia K. Mutitika –vs- Baharini Farm Ltd(1985)KLR 222:-*

“The Courts take the view that where the liberty of the subject is, or might be involved, the breach for which the alleged contemnor is cited must be precisely defined. A contempt of Court is an offence of a criminal character. A man may be sent to prison. It must be satisfactorily proved....”

12. In this regard, I am persuaded by the dictum in the South African case of *Kristen Carla Burchell –vs- Barry Grant Burchell (Eastern Cape Division Case No. 364 of 2005)(cited in Katsuri Ltd –vs- Kapurchard Deparshah(2016)eKLR)* where it was held that in order to succeed in civil contempt proceedings:-

“.....the application has to prove (i) the terms of the order, (ii) knowledge of these terms by the Respondent, (iii) Failure by the respondent to comply with the terms of that Order. Upon proof of these requirements the presence of willfulness and bad faith on the part of the Respondent would normally be inferred, but the Respondent could rebut this inference by contrary proof on a balance of probabilities.

13. It is clear in the proceedings before me that the Respondent is invariably described in the Plaint as Tunasco Company Ltd and in the Application presently before me as Tanasco Company Ltd. In the Affidavit of Service of Morris Mwavuo Ngunyo filed herein on 18th November 2016, the orders issued by this Court on 15th September 2016 were served upon a Secretary of the defendant. The said unnamed Secretary is said to have accepted service but declined to sign the same.

14. In my mind, the Secretary served if at all was for either of the entities named in both the Plaint and the Application before me. That was either Tunasco Company Ltd or Tanasco Company Ltd. It is trite law that a limited liability company is a legal entity separate even from its shareholders and directors. It has full capacity to sue and be sued. It is a legal person. This position was restated as long ago as 1897 by Lord Macnaghten in the celebrated case of *Salomon –vs- Salomon & Company Limited(1987) AC 22 at 51* as follows:-

“The Company is at law a different person altogether from the Subscribers to the Memorandum; and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act.”

15. Arising from the foregoing, it could not therefore be said as was maintained by the Plaintiffs that the parties sued herein and the one they served with the Application for contempt were one and the same. They are different legal entities. The company known as Tunasco Insaat Taahut Turizm Ticaret A.S. has not been sued and cannot therefore in law be responsible for the acts or omissions of another legal entity be it Tunasco Company Ltd or Tanasco Company Ltd.

16. In the premises, I make the following Orders:-

i) The Plaintiffs application dated 17th November 2016 is hereby dismissed.

ii) The Orders of this Court issued on 15th September 2016 are hereby vacated, discharged and/or set aside as the same are a nullity ab initio

iii) The Plaintiffs shall bear the costs of both the applications dated 17th November 2016 and the one dated 8th March 2017.

Dated, signed and delivered at Malindi this 15th day of March, 2018.

J.O. OLOLA

JUDGE