



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MILIMANI LAW COURTS

ELC SUIT NO. 1167 OF 2016

BIG FIVE BREWERIES LIMITED.....PLAINTIFF

=VERSUS=

FORTIS TOWER MANAGEMENT LTD.....DEFENDANT

RULING

1. The Plaintiff/Applicant filed a Notice of Motion dated **15th May 2017**, in which it sought a number of orders. On **27th June 2018**, the parties herein entered into a consent which settled some of the prayers which were sought by the applicant. What remained for determination were prayers relating to contempt of Court on the part of the Directors of the Defendant/Respondent

2. The applicant holds a sub-lease on the 11th Floor of Fortis Towers which is managed by the Respondent. The applicant operates a *bar, restaurant and lounge* on the said floor. Due to the nature of the applicant's business, it has to carry goods to its premises using a service lift in the building. In 2016 the Respondent introduced some regulations regarding use of service lifts. The applicant moved to Court where the Court gave orders that Respondent was to stick to regulations which were in place prior to 1st September 2016.

3. The applicant contends that in May 2017, the Respondent through an e-mail informed the applicant not to use passenger lifts to ferry goods to its premises. The service lifts had broken down and the only alternative was to use the passenger lifts. The applicants was made to ferry goods through stairs as it had been asked not to use passenger lifts. The applicant states that the respondent did not repair the service lifts in time and that even when the applicant offered to repair the lift and be reimbursed later, the Respondent did not agree to this arrangement. The applicant further stated that the Respondent allowed other occupants of upper floors to ferry their goods using passenger lifts and it argues that this was discriminatory against it.

4. The applicant therefore contends that the respondent's action was in contempt of the court order and hence the directors of the respondents should be punished for contempt of court.

5. The applicant's application is opposed by the Respondent through a replying affidavit sworn on 13th June 2017. The applicant laments that it was put in the situation through the court action which took control of the manner in which lifts in the building are being managed. The respondent states that there is no evidence to show that it has gone contrary to what the court directed ; that the court never issued any orders that once service lifts break down passenger lifts would be used. The respondent further contends that there having been an agreement on repair of lifts which had broken down, the applicant should not have pressed on with contempt against the Directors of the Respondent.

6. I have carefully considered the applicant's application as well as the opposition to the same by the respondent. I have also considered the submissions by the parties herein. This being an application for contempt, the only issue for determination is whether the applicant has proved that there was contempt. In an application of this nature, the applicant is expected to prove the following:-

a. That there was a court order issued requiring the contemnor to do or not to do a certain act.

b. That the said order was served upon the contemnor or the contemnor had knowledge of the same.

c. That the contemnor disobeyed the said order.

7. In the instant case, the applicant contends that there was a Court Order given on 8th November 2016. I have gone through the ruling of the Court delivered on 8th November 2016. The ruling contained the orders which were granted. I therefore find that there was a Court Order given on 8th November 2016.

8. On whether the order was served upon the contemnors or the contemnors had knowledge of it, it is clear that the order was not served upon the contemnors but the contemnors had knowledge of the order. The contemnors had knowledge of the order because the ruling was delivered in the presence of the Advocate for the Respondent. It was therefore expected that the advocate briefed the Respondent of the orders given. The fact that there was no order extracted or served does not take away the element of knowledge of the same.

9. I have now to determine whether the Respondent disobeyed the order. The applicant contends that the Respondent is guilty of disobedience of the Court Order because when the service lifts broke down, the defendant wrote an e-mail asking the applicant not to use the passenger lifts to ferry goods to the 11th floor. The applicant states that whereas it was stopped from using passenger lifts, others were allowed to do so.

10. The applicant states that its manager took a video of other occupants of the building who were using the passenger lifts to ferry their goods. This video was not played for the court to appreciate the truth or otherwise of the applicant's allegations. Contempt of court is a serious issue. It might land a person in prison and therefore it must be proved satisfactorily.

11. I have looked at the orders which were issued on 11th September 2016. The orders which were given related to usage of the lifts at certain hours. There is nothing in the orders which states that in case of breakdown of the service lifts, the respondent was to use passenger lifts. Even if this was the case, there is no evidence that the applicant was not allowed to use the passenger lifts during the period the service lift was out of service. This being the case, I do find that the applicant has failed to prove that there was contempt of the Court Order of 11th September 2016. I find no merit in the applicant's application which is hereby dismissed with costs to the respondent.

It is so ordered.

Dated, Signed and Delivered at Nairobi this 10th day of April 2018.

E.O .OBAGA

JUDGE

In the presence of ;-

Mr Mwala for Mr Mwamuye for Plaintiff/Applicant

Court Assistant: Hilda

E.O .OBAGA

JUDGE