



REPUBLIC OF KENYA
ENVIRONMENT & LAND COURT

AT MILIMANI

ELC NO. 1508 OF 2016

RED CUBE RESTAURANT LIMITED.....PLAINTIFF

=VERSUS=

JOSEPH MWANGI WACHIURI.....1ST DEFENDANT

TERESIA MUTHONI MWANGI.....2ND DEFENDANT

ZACK MAK ENTERPRISES.....3RD DEFENDANT

AND

ERASTUS NGURA ODHIAMBO

T/A DYNAMICS –ERA SOLUTIONS.....PROPOSED INTERESTED PARTY

RULING

1. The Plaintiff/Applicant brought a Notice of Motion dated **12th January 2017** ,in which it seeks the following reliefs:-

i. Spent

ii. That the 1st and 2nd Defendant/Respondents and the proposed interested party be cited for contempt for disobedience of Court orders issued on 6th December 2016 and 22nd December 2016.

iii. Spent

iv. That an order for committal be and is hereby made against the 1st and 2nd Defendant/Respondents and the proposed interested party to civil jail for a period of six (6) months.

v. That the Officer Commanding Karen Police Station be ordered to provide protection to the Plaintiff/Applicant from the 1st and 2nd Defendant/Respondents and the proposed interested party and any other person from interfering with the quiet possession of the suit premises known as Red Cube Restaurant Limited either by themselves or their agents.

vi. That the costs of this application be borne by the 1st and 2nd Defendant/Respondent and the proposed interested party.

2. The applicant had filed a suit against the Respondents **on 2nd December 2016**, in which it sought among other prayers orders of injunction restraining the Respondents from entering into the suit premises to levy distress and sell items therein by public auction. The applicant contemporaneously filed an application in which it sought orders of injunction.

3. The application for injunction was placed before Lady Justice Gacheru on 2nd December 2016. The application was certified urgent and temporary injunction orders were granted to last for **14 days**. The matter was fixed for mention on 19th December 2016. On 19th December 2016, the interim orders were extended and the matter fixed for mention on 16th January 2017.

4. Before the application could come up for mention on 16th January 2017, the applicant filed the present application. When the matter came up on 16th January 2017, directions were given regarding the present application. The Respondents were granted time to file a response to the current application. Parties were directed to file written submissions in respect of the application.

5. The applicant through one of its directors **Teresia Wanjiku Mbatia** contends that injunctive orders were issued on 6th December 2016, and were subsequently extended on 22nd December 2016. That on 22nd December 2016 she proceeded to the suit premises known as Red Cube Restaurant Limited and pinned five copies of the Court Order issued on 6th and 22nd December 2016. That she found the proposed interested party whom she served with the court order of 22nd December 2016.

6. The applicant further contends that she went to the suit premises the following week where she found the proposed interested party who was carrying on construction works on the suit premises. The proposed interested party had broken the suit premises and entered therein. She reported the incident to Karen Police Station.

7. The applicant's application is opposed through a Replying affidavit sworn by the Respondents on 20th January 2017. The Respondents deny that they were served with the court orders of 6th December 2016 and 22nd December 2016.

8. The Respondents contend that as at the time the orders of injunction were given on 2nd December 2016, they had already entered into a lease agreement with the proposed interested party, on 28th November 2016. That the orders which were given on 2nd December 2016 had lapsed by 16th December 2016, and that by the time the applicant sought their extension on 19th December 2016, the same had already lapsed and there was nothing to extend.

9. The Respondents argue that they re-entered the suit premises for non-payment of rent by the applicant and that as at 28th November 2016, the applicant had not filed a suit. The proposed interested party had taken over and there was therefore nothing to restrain them from.

10. I have carefully considered the applicants application, the opposition thereto by the Respondents as well as the submissions by counsel for the parties herein. This is mainly an application for contempt of Court order. In such an application, the applicant is expected to show that

(i) There was a valid court order asking the contemnor to do or refrain from doing a certain act.

(ii) That the order was served upon the contemnor or that the contemnor had knowledge of the order.

(iii) That the order contained a penal Notice warning of consequences of non-compliance with the same.

(iv) That the contemnor disobeyed the court order.

11. In the instant case, the applicant is contending that the order of the court which was disobeyed is that of 6th December 2016, and 22nd December 2016. As I said herein above, injunctive orders were given by justice Gacheru on 2nd December 2016. An order was extracted and issued on 6th December 2016.

12. The Orders of injunction given on 2nd December 2016, were extended on 19th December 2016. An order was extracted and issued on 22nd December 2016. There is no contention that the court gave orders on 2nd and 19th December 2016, and the same were issued on 6th and 22nd December respectively. The first question to be answered is whether those orders were served upon the contemnor or whether they had knowledge of them.

13. There is no evidence that the two orders were served upon the contemnors. There is no affidavit of service filed in this matter or annexed to the applicants' supporting affidavit. One of the directors of the applicant is the one who has deponed in the supporting affidavit that she is the one who pinned 5 copies of the court order on the suit premises and that she also served the proposed interested party who was on the suit premises. This director is not a process server and could not have purported to serve anyone.

14. On the two occasions the court gave orders, neither the advocate nor the litigants were present. The court orders were given in chambers in absence of the parties or their clients. There is therefore no way it would be expected that the contemnors would have knowledge of the court orders. Even if there was pinning of the Court orders on the suit premises, there is no evidence that the contemnors particularly the Respondents had knowledge of the orders or that they went there and saw them. In any case, the suit premises had been leased to the proposed interested party who was at the suit premises not as an agent of the Respondents but in his own right as lessee of the suit premises. Those orders were not directed at him and he was not a party to the suit. Though he has made an application to be enjoined in the suit, that application is yet to be heard.

15. The two orders did not contain any penal Notice warning the contemnors of consequences of disobeying the orders. I have demonstrated herein above that there was no service of the court orders. One cannot be guilty of disobeying a Court order which has not been served upon him or of which he has no knowledge of the same.

16. In the case of **Shimmers Plaza Limited Vs National Bank of Kenya Limited (2015) eKLR** the Court of Appeal had this to say regarding knowledge of orders of Court by advocate of the contemnor;-

“ Would knowledge of the judgement or order by the Court by the alleged contemnor suffice for contempt proceedings . We hold that it does. This is more in a case such as this one where the advocate was in court representing the alleged contemnor and the orders were made in his presence. There is an assumption which is not unfounded, and which in our view is irrefutable to the effect that when an advocate appears in court on instructions of a party, then it behoves him/her to report back to the client all that transpired in court that has a bearing on the client's case. This is the position in other jurisdictions within and outside the commonwealth”.

17. There is an argument in the applicant's submissions that the contemnors had knowledge of the court order as the proposed interested party has deponed in his affidavit in support of joinder to the suit that when his workers were served with the court order issued on 6th December 2016, he asked his landlords (the alleged contemnors) what was happening and that they told him that the applicant was their former tenant who had been evicted by auctioneers. It is therefore clear that though the order may have been brought to their attention, it was of no effect because they had already entered into a lease with the proposed interested party who had taken possession. The applicant obtained the injunction orders too late and by concealing the fact that she had already been evicted and that is why she sued the auctioneers in

the suit as the third defendants. In the circumstances, the contemnors cannot be guilty of disobeying an order which they were not capable of complying with as they had already leased out the suit premises to a third party who had taken possession.

18. It is now clear from the above analysis that the alleged contemnors are not guilty of contempt of any order. I find no merit in the application for contempt or order for protection by the applicant. The applicant is already out of the suit premises. There is no order of quiet enjoyment of the premises which can be granted. A third party is already in possession. I therefore find that the applicant's application lacks merit. The same is hereby dismissed with costs to the Respondents.

It is so ordered.

Dated, Signed and Delivered at *Nairobi* this *28th* day of *March,2017*

E.O .OBAGA

JUDGE

In the Presence of:-

Mr Amolo for Mr Kounah for Applicant

Court Assistant: Kevin

E.O .OBAGA

JUDGE