



REPUBLIC OF KENYA
IN THE ENVIROMENT AND LANDS COURT
AT MALINDI
CIVIL SUIT NO. 133 OF 2015

IAN PAUL HUTCHINSON T/A/ BAHNHOF

BAR AND RESTAURANT MTWAPA.....PLAINTIFF

= VERSUS =

CHARLES CHISHENGA MAJANJA.....DEFENDANT

RULING

1. I have before me an application dated 20th December 2016. The Applicant Ian Paul Hutchinson is seeking for orders:-

2. THAT this Honourable court be pleased to grant an order that one Charles Chisenga Majanja, the Defendant herein do appear before this court and show cause why he has failed to comply with the court order issued by this Honourable Court on 19th October 2016 that he has placed a signboard by the name Club Bistro and/or Bistro Aprodisia and/or Bistro and is now trading in the said premises Plot Number 742/III/MN despite a temporary injunction restraining the Defendant from evicting the Plaintiff from the said premises which is a clear breach and disobedience of the said court order.

3. THAT in case of failure (of) the said Charles Chisenga Majanja, the Defendant to so appear before this court as ordered, a warrant of arrest be issued against the said Charles Chisenga Majanja and that he be arrested and compelled to appear in court and show cause why he has failed to comply with the order of this court issued on 19th October, 2016.

4. THAT in the event of the said Charles Chisenga Majanja, the Defendant's failure of showing such cause as to why he has failed to comply with the said court order dated (and) issued on 19th October 2016, this court be pleased to order that the said Charles Chisenga Majanja, the Defendant be committed to civil jail and be imprisoned for a period of six (6) months for failure to comply with the said court order issued on 19th October 2016.

5. THAT the Office of the County Commissioner Kilifi and/or Officer in Charge Mtwapa Police Station to escort and supervise the execution of the court order herein.

6. THAT the costs of the application be borne by the Defendant.

2. The application is supported by the Applicant's Affidavit sworn on 20th December 2016 the contents

whereof are summarized in the grounds of the Application as follows:-

- a. *That this court issued an order on 19th October 2016 which order restrained the Defendant from evicting the Plaintiff from the rented premises namely Bahnhof Bar and Restaurant Mtwapa pending the hearing and determination of this case.*
- b. *That this Honourable Court had made a finding that the lease agreement made between the Plaintiff and the Defendant dated 12th May 2008 is still valid until the year 2018 in second term and renewable for two more terms before any further talks.*
- c. *That this court made a finding that if the injunction were not granted the Plaintiff will incur irreparable loss and damage considering that he has invested in the said business on the understanding that the term of the Lease Agreement was to run at least until May 2018 for the second term.*
- d. *That on 24th October 2016, the Defendants was served with the said court order at his residence in Mtwapa and he is accordingly aware of the order.*
- e. *That despite the clear provisions of the order, the Defendant has since changed the name of the business to Club Bistro and/or Bistro Aprodisia an act which amounts to an eviction of the Plaintiff from the suit premises.*
- f. *That unless this court interferes, the Plaintiff will continue to suffer loss and damage as he has been prevented from trading at the premises.*

3. In a Replying Affidavit filed in court on 27th January 2017, the Defendant Charles Chisenga Majanja is opposed to the grant of the orders sought. The Defendant avers that he is not aware of and has not been personally served with the said court order and thus he is a total stranger to the same and puts the Plaintiff to strict proof of the personal service upon himself.

4. The Defendant avers that on 1st February 2016, he instructed Messrs Sure Auctioneers who proceeded to levy distress upon the Plaintiff on 24th February 2016 for arrears of rent amounting to Kshs 180,000/=. He states that upon being served with a Proclamation, the Plaintiff deserted and closed the premises forcing the said Auctioneers to apply for breaking orders which were granted on 4th March 2016 by the Chief Magistrate's Court at Mombasa. Subsequently, he states the Plaintiff's goods were sold on 9th April 2016. It is his case that the Plaintiff has since never gone back to the suit premises and indeed he is the one who was forced to pay an electricity bill amounting to Kshs 969,881/= which the Plaintiff left outstanding with the Kenya Power Lighting Company (KPLC).

5. The Defendant therefore contends that by the time the court order was issued on 19th October 2016, the Plaintiff had already left deserted and the suit premises and that he had, in the absence of the Plaintiff proceeded to lease them to a 3rd Party. Accordingly, the Defendant denies that he is in breach of the said orders as alleged or at all.

6. I have considered the application and the Replying Affidavit thereto. I have also considered the rival submissions and authorities placed before me by the Learned Advocates acting for the two parties.

7. A perusal of the record herein reveals that the Plaintiff filed this suit on 5th August 2015 praying for:-

- a. *An injunction restraining the Defendant by himself, his agents, servants, employees, relatives and/or assigns from evicting the Plaintiff from the rented premises namely Bahnhof Bar & Restaurant Mtwapa situated on Plot No. 742/III/MN and interfering with the Plaintiff's quiet possession and selling the said premises to unsuspecting Third Parties.*
- b. *The Defendant to be ordered to pay to the Plaintiff the good will plus the Plaintiff's promotion*

and appraisal of the premises and all the expenses the Plaintiff incurred in developing the premises.

8. Contemporaneous with the suit, the Plaintiff filed a Notice of Motion application dated 4th August 2015 under certificate of urgency seeking for temporary orders restraining the Defendants from evicting the Plaintiff from the named rented premises until the hearing and determination of the said application. Subsequently, the file was placed before the Honourable Angote J. on 7th August 2015 who upon consideration of the issues, certified the application as urgent and granted temporary orders in terms of Prayer No. 2 of the application for 14 days pending hearing inter-partes. The application was thereafter mentioned before the Learned Judge a number of times as the parties were given time to comply with different directions of the court, culminating on 7th April 2016 when the application was dealt with and the court reserved a ruling thereon for 17th June 2016.

9. It would appear that the ruling was not ready on the earlier date and was instead delivered on 16th September 2016. In his Ruling, the Learned Judge ordered as follows:-

a. "That a temporary injunction is hereby issued restraining the Defendant, his agents, servants, employees, relatives and/or assigns and any other persons claiming under the Defendant from evicting the Plaintiff from the rented premises namely Benhof Bar and restaurant Mtwapa situated on Plot Number 742/III/MN till hearing and determination of the Plaintiff's suit filed herein.

b. That the Defendant do pay the costs of the Application to the Plaintiff.

10. It is those orders that the Defendant is accused of flouting. The duty to obey the law by all individuals is without doubt paramount in the maintenance of the rule of law, good order and the due administration of justice. Romer L.J., commenting on the duty of all to obey court orders in the renowned English Case of ***Hadkinson vs Hadkinson(1952) all ER 576*** stated that:-

"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 obligations is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void."

11. The law on contempt of court is one of those vestiges of the laws we adopted from England. Until recently on 13th January 2017 when the Contempt of Court Act 2016 came into force, Section 5 of the Judicature Act required the courts to refer to the procedure set out under the Rules of the Supreme Court of England. The application before me was filed on 20th December 2016, a couple of days before the new Act came into force and it is therefore to the old procedure that I must return.

12. Section 5 of the Judicature Act provides :

"5 contempt of court

i. The High Court and the Court of Appeal shall have the same power to punish contempt of court as is for the time being possessed by the High Court of Justice in England, and such power shall extend to upholding the authority and dignity of subordinate courts.

ii. An order of the High Court made by way of punishment for contempt of court shall be applicable as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the High Court.

13. Section 4(2) of the Environment and Land Court Act establishes this court as a superior court of record with the status of the High Court. Under Section 14 of the Act, a Judgment, award, order or decree of the court is enforceable in accordance with the Civil Procedure Rules. In affirming an earlier decision of the Court of Appeal, the Supreme Court in the recent case of ***Republic –vs- Karisa Chengo & 2***

Others(Petition No. 5 of 2015) at page 25 observed as follows-

“By being of equal status, the High Court therefore does not have jurisdiction to superintend, supervise, direct, guide, shepherd and/or review the mistakes, real or perceived, of the ELRC and ELC administratively or judiciously as was the case in the past. The converse equally applies. At the end of the day however, ELRC and ELC are not the High Court and vice versa. However, it needs to be emphasized that status is not the same thing as jurisdiction. The Constitution though does not define the word “Status”. The intentions of the framers of the Constitution in that regard are obvious given the choice of ...words they used; that the three courts(High Court, ELRC and ELC) are of the same juridical hierarchy and therefore are of equal footing and standing. To us it simply means that the ELRC and ELC exercise the same powers as the High Court in performance of its Judicial functions, in its specialized jurisdiction but they are not the High Court”(emphasis mine)

14. Flowing from the above, it is clear to this Court that even though section 5 of the Judicature Act aforesaid refers only to the High Court, this Court is of equal footing and standing as the High Court and is accordingly empowered to punish for contempt of court.

15. As was observed by the Court of Appeal in **Mutitika vs Baharini Farm Ltd(1985) KLR 229** at 234;

“Contempt of Court is an offence of a criminal character. It may lead to one being sent to prison and it must therefore be satisfactorily proved beyond a balance of probabilities.”

16. The law governing punishment for contempt by the justices in England previously was subject to the common law and Order 52 of the Supreme Court Rules. England subsequently enacted the Contempt of Court Act 1981, part 81 of whose Civil Procedure(Amendment No. 2) Rules 2012, replaced the original Order 52 of the Supreme Court Rules (see **Shimmers Plaza Ltd vs National Bank of Kenya Ltd (2015)KLR pg 4.**)

17. Rule 81(9) of the said Rules provided as a general rule that no order of court requiring a person to do or abstain from doing any act may be enforced unless a copy of the order has been served personally on the person requiring him to do or abstain from doing the act in question. In other words, both the order and notice cautioning of penal consequences must be served simultaneously on the person required to comply with the order. Rule 81.8 however provides circumstances when personal service may be dispensed with. These include circumstances when the court is satisfied that the person has had notice of the order either by being present when the order was given or made; or by being notified of its terms by telephone, email or otherwise.

18. Courts in Kenya have gradually embraced the provisions of Rule 81.8 of the Rules of the Supreme Court of England and no longer require personal service of an order as a prerequisite for proof of contempt. In **Justus Kariuki Mate & Another vs Martin Nyaga Wambora & Another CA 24/2014**, the Court of Appeal observed as follows:-

“On the other hand, however, this Court has slowly and gradually moved from the proposition that service of the order along with the Penal Notice must be personally served on a person before contempt can be proved. This is in line with the dispensations covered under Rule 81.8(1) (supra)”

19. Indeed in **Shimmers Plaza –vs- National Bank of Kenya(2015) eKLR**, the Court of Appeal cited with approval Hon. Leonaola J. (as he then was) in **Basil Criticos –vs- the Attorney General & 8 Others (2012) eKLR** where the Learned Judge pronounced himself thus:-

“The law has changed and as it stands today knowledge supersedes, personal service... where a party clearly acts and shows that he had knowledge of a court order, the strict requirement that personal service must be proved is rendered unnecessary.”

20. While also affirming the position in the **Martin Wambora Case** (above) the Court of Appeal in **Shimmers Plaza Ltd (Supra)** however emphasized the importance of caution when it stated:-

“It is important however, that the court satisfies itself beyond any shadow of a doubt that the person alleged to be in contempt committed the act complained of with full knowledge or notice of the existence of the order of the court forbidding it. The threshold is quite high as it involves possible deprivation of a person’s liberty.”

21. In the instant case, the defendant denies being aware of or having been shown and/or served with a court order granted by this court on 16th September 2016. Indeed in their submissions filed herein, the Defendant submits that the Plaintiff has failed to prove beyond reasonable doubt that there was breach of the terms of the said injunction by the Defendant. It is further the Defendant’s submissions that the Defendant has never been served with the application giving rise to the Ruling and Orders made on 16th September 2016 and that the “alleged” court orders cannot be enforced since the suit premises were already in the hands of third parties-a new tenant in the suit premises-by the time the said Court Orders were obtained.

22. As already indicated, this suit was filed contemporaneously with an application dated 4th August 2015 seeking temporary orders of injunction to restrain the Defendant from inter alia evicting the Plaintiff from the suit premises pending the hearing and determination of the application and/or the suit. On 7th August 2015, the Honourable Justice Angote then seized of the matter granted temporary orders for 14 days restraining the Defendant from evicting the Plaintiff. From the record, the matter was then fixed for inter-partes hearing on 31st August 2015.

23. It is apparent from the court record that the said Orders were served upon the Defendants on the very day they were granted. In an Affidavit of Service sworn at Mombasa on 11th August 2015, one Michael Thoya Mbwana, a Court Process server states as follows:-

“2. That on the 7th August 2015, I was instructed by the firm of M. Ananda & Co Advocates that I effect service of an order issued by the court on the even date (a) certificate of urgency dated 4th August 2015, attached with a Notice of Motion, Plaintiff supporting affidavit with annexures all issued in duplicate upon the defendant hereinabove.

3. That on the same day and date at 4.00 p.m. upon receipt of the said Instructions I proceeded to the Defendant’s residence at Mtwapa known to me since I had served him previously in other matters.

4. That upon arrival at about 5.30 p.m. I met the Defendant at the main entrance where I informed him (of) the purpose of my visit, who then welcome me (sic) to his sitting room. He perused the documents and then talked to his advocates where after he accepted service personally by retaining a duplicate of each in the presence of his wife and two sons but he refused to sign my copy hence I return the unsigned copy duly served.”

24. Subsequently, vide a Notice of Appointment dated 11th August 2015 and filed in court on 12th August 2015, Messrs Wycliffe Makasembo Advocate entered appearance for the Defendant in this matter. On the same day they filed a Replying Affidavit sworn by the Defendant on the same day in response to the Plaintiffs application wherein they sought the court’s assistance to evict the Plaintiff from the suit premises for among other reasons, constantly insulting and abusing him in front of his wife and grandchildren and for playing loud music which he could not withstand from the said Bar. In addition, the Defendant accused the Plaintiff of breaching the terms of the lease agreement they had by engaging in illegal, un-African, anti-social, annoying, disturbing and inconveniencing activities and turning his hitherto respected premises into some “Sodom and Gomora” by permitting naked women to engage in dance and intercourse live on stage.

25. The application thereafter came up a number of times for different directions culminating on 7th April

2016 when the Court reserved a Ruling on the matter for 17th June 2016. Even though the Court made no mention of the interim orders while reserving its ruling, I note that the same were extended to no specific date on 8th September 2015 and the parties thereafter appeared before the court four(4) times, that is on 30/9/2015; 29/2/2016; 9/3/2016 and on the said 7/4/2016.

26. From his Replying Affidavit to this application, the Defendant has stuck to the point that he was unaware of any orders that were issued by this court on 19th September 2016 the date when the Honourable Angote J delivered his Ruling on the matter. As it were, he makes no mention of the existence of the orders earlier granted on 7th August 2015. In my considered view, the orders granted on 7th August 2015 were served upon the Defendant as per the Affidavit of the Process Server on the same date. This is what prompted the Defendant to file his Replying Affidavit on 12th August 2015. He subsequently participated in the proceedings through his Advocates on record and he cannot therefore feign ignorance of the existence of the said orders. Looking at the said record, I have not seen anywhere where the orders were discharged and/or vacated after 8th September 2015 when they were extended. From the circumstances herein, it is my considered view that the orders granted on 7th August 2015 remained valid and in force upto and until the Honourable Judge pronounced himself on the application on 16th September 2016.

27. As Lord Bowen L.J. stated in ***Heelmore -vs- Smith (2) 1886 L.R. 35 CD 455:***

“The object of the discipline enforced by the court in case of contempt of court is not to vindicate the dignity of the court or the person of the Judge, but to prevent undue interference with administration of Justice.”

28. Black’s Law Dictionary (9th Edition) defined contempt of court as:-

“Conduct that defies the authority or dignity of a court. Because such conduct interferes with the administration of Justice, it is punishable usually by fine or imprisonment.”

29. The Applicant herein came to court seeking to restrain the Defendant from evicting him from the suit premises. This court granted those orders initially for 14 days and thereafter extended them indefinitely. Armed with the knowledge that the substratum of the suit and the application remained as they were, the Honourable Justice Angote reserved judicial time to prepare a ruling on the issues raised by the parties before him. What the Defendant is now telling the court is that even as the court took its time to address the dispute, he had cleverly found some way and resolved the dispute to his benefit.

30. I think the power of courts to punish for contempt is meant to assure a party who walks through the justice door with a court order in his hands that the order will be obeyed by those to whom it is directed. That is the only way to preserve and safeguard the rules of law. A court order requiring compliance is not a mere suggestion or an opinion. It is a command that is issued after much thought with circumspection. It must therefore be complied with and it is in the interest of every person that this remains the case.

31. That being so, I find and hold that the Defendant’s actions complained of in this application were deliberate and malicious. They were cleverly executed to circumvent the cause of justice and deny the Plaintiff his just entitlement. In evicting the Plaintiff in spite of the orders in place, the Defendant was and is accordingly found in contempt of the orders granted by this court on 7th August 2015 and extended on 8th September 2015.

32. Arising from the foregoing, I hereby order and direct that a warrant of arrest does issue against the Defendant Charles Chisenga Majanja and that he be arrested forthwith and compelled to appear in this court and show cause why he should not be punished for failing to comply with the orders of this court.

33. The Officer Commanding Mtwapa Police Station is hereby directed to effect the orders of this court.

34. The costs of the Application shall be borne by the Defendant.

Dated, signed and delivered at Malindi this 27th day of July, 2017.

J.O. OLOLA

JUDGE