REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

PETITION NO. 18 OF 2016

SIOKWEI TARITA LIMITED…..……...……PETITIONER

VERSUS

THE COMMISSION OF UNIVERSITY EDUCATION……..…1ST RESPONDENT

KISII UNIVERSITY……...…2ND RESPONDENT

RULING

Siokwei Tarita Limited (herein referred to as the Petitioner) has filed the application for committal of ***Prof. John S. Akama*** and ***Dr. Kipyegon Kirui***, alleged contemnors to jail. The applicant specifically seeks orders that Dr. Kipyegon Kirui and Prof. John S. Akama, Director Eldoret Campus and Vice Chancellor, both of the 2nd respondent respectively the cited Contemnors herein do stand committed to jail for a period as this Honourable Court shall determine for contempt of Court in that being aware of the orders made by this Honourable Court in this suit on 14th December, 2016 and extended on 10th January 2017, knowingly and willfully violated and/or disobeyed and/or disregarded and or thwarted and undermined the effect and purpose of the said order and or knowingly and willfully failed to take reasonable steps to ensure that the said orders were obeyed. That the costs occasioned by this application be paid by the 2nd respondent on indemnity basis.

The application is based on grounds that Dr. Kipyegon Kirui and Prof. John S. Akama, Director Eldoret Campus and Vice Chancellor, both of the 2nd respondent respectively are in gross contempt of Court order issued on 14th December, 2016 and extended on 10th January 2017 and 18th January, 2017. The respondents were served with the orders of court issued on 14th December, 2016 in the terms ***that a conservatory order be and is hereby issued staying the decision of the 1st respondent to immediately close down the 2nd respondent's Campus at L. R. Eldoret Municipality Block 7/162, Tarita Centre pending the hearing and determination of this application inter-partes and that a Conservatory Order be and is hereby issued restraining the 2nd respondent from terminating the term lease between the Petitioner and 2nd respondent over L. R. Eldoret Municipality/Block 7/162, Tarita Centre and or from defaulting to pay the monthly rent due as per the lease, pending the hearing and determination of this application inter partes;***

In gross contravention of the Court order, Dr. Kipyegon Kirui and Prof. John S. Akama, Director Eldoret Campus and Vice Chancellor, both of the 2nd respondent respectively, during currency of the order of court, have:

> ***i. Proceeded to purport to terminate the term lease by inter alia removing their fixtures and fittings to another premise and in their wake occasioning gross damage to the suit premises;***

ii. Have neglected to pay rent and as of today, there is outstanding rent arrears in the sum of Kshs. 10,533,043.00;

According to the applicant, the Rule of Law is under attack, and unless the Honourable court grants the application as prayed, the rule of Law and their client shall suffer irreparably. Orders of court shall not mean anything, they shall be just as the conduct of the contemnors herein have characterized them, useless pieces of paper; It is in the interests of the fair administration of justice and the rule of law that the application is granted to restore the integrity of the Judiciary, Rule of Law, and protect against the otherwise devastating violation of fundamental rights of the Petitioner/Applicant guaranteed by the Constitution of Kenya, 2010.

In the supporting affidavit, ***Barnabas Bargoria***, the Managing Director of the applicant states that he filed the present Petition on 2nd December, 2016 seeking protection of fundamental rights, and together with the Petition he filed an application for conservatory orders and that on 14th December, 2016 on the basis of the application filed, the court granted conservatory orders staying the decision of the 1st respondent to immediately close down the 2nd respondent's campus at L. R. Eldoret Municipality Block 7/162, Tarita Centre, pending the hearing and determination of this application inter partes and restraining the 2nd respondent from terminating the term lease between the Petitioner and 2nd respondent over L. R. Eldoret Municipality/Block 7/162, Tarita Centre and or from defaulting to pay the monthly rent due as per the lease, pending the hearing and determination of this application inter parties. The order of the Honourable court was served upon the respondents. The 2nd respondent was served on 14th December, 2016. The affidavit of service further evidences service.

However, in gross contravention of the court order, Dr. Kipyegon Kirui and Prof. John S. Akama, Director Eldoret Campus and Vice Chancellor, both of the 2nd respondent respectively, during currency of the order of court have proceeded to purport to terminate the term lease by inter alia removing their fixtures and fittings to another premises and in their wake occasioning gross damage to the suit premises and have neglected to pay rent and as of today there is outstanding rent arrears in the sum of Kshs.10,533,043.00;

That he further confirmed to the 2nd contemnor Dr. Kipyegon Kirui personally the fact of existence of the court order when the said 2nd Contemnor purported to take away the fixtures and fittings of the 2nd respondent from the suit premises, this was in late December, 2016. The 2nd Contemnor however, invaded the suit premises in the wee hours at night of 28th/29th December, 2016 armed with a gang and beat and tied up the night watchman. They then proceeded to dismantle fixtures and fittings carting away these items to another leased premise and in effect purporting to terminate the term lease over the suit property, all in contravention of the order of the Honourable court.

The assault above was reported at the police station on 29th December, 2016 and assigned O. B. No. 06/12/2016. The dismantling of fixtures and fittings and attendant installations by the 2nd respondent under instructions of the 1st Contemnor and supervision of the 2nd Contemnor has left the suit property in a near derelict state.

The Petitioner was constrained to engage a Quantity Surveyor to assess the extent of the damage requiring restoration together with the cost of restoration, and in a report dated 20th January 2017, the Quantity Surveyor aggregated the cost at Kshs.27,369,724.00.

The Petitioner's financiers have constantly confronted the Petitioner inquiring of the date of resumption of payment of instalments, this is precursor to demand for realization of the security. The conduct of the 2nd respondent herein has exposed the Petitioner to prejudice, and there is necessity for the orders of sanction as prayed herein before the matter can proceed for inter-partes hearing of the application for conservatory orders.

That by the foregoing, evidently, the rule of Law is under attack, and unless the Honourable Court grants the reliefs sought, the Rule of Law and the Petitioner shall suffer irreparably. Orders of court shall not mean anything, they shall be just as the conduct of the Contemnors herein have characterize them, useless pieces of paper.

The applicant believes that it is in the interests of the fair administration of justice and the rule of law that the application is granted to restore the integrity of the Judiciary, Rule of Law, and protect against the otherwise devastating violation of his fundamental rights of guaranteed by the Constitution of Kenya, 2010.

Prof. John S. Akama, the first alleged contemnor and the Vice Chancellor of Kisii University states that he was never served with the court order issued on 14.12.2016. That he has never seen the court order issued on 14.12.2016. The first alleged contemnor states further that on 15.12.2016 he was in his office at the main campus in Kisii, where he is stationed and that he does not have an office in Eldoret Campus and that he was not in the 2nd respondent's office on the alleged date. That he was at main campus in Kisii together with the 2nd alleged contemnor hence none of them was served. He was shocked to be served with summons to attend court. The import of the replying affidavit is that the alleged contemnors were not served.

Dr. Kipyegon Kirui states that he is the Director of Kisii University, Eldoret Campus and the 2nd alleged contemnor and that he was not served with the application for contempt but saw the summons in a *whatsup* message. He learned the existence of the application through Nyairo & Company Advocates. Further, that he has never been served with court order issued on 14.12.2016. Moreover, that he has not set sight on the court order. On the alleged date of service, he was at the 2nd respondent's main Campus in Kisii. He is not aware of any service by Pella Amugune Tsisanga. His name does not appear in the visitor's Black book. He is informed by the secretary that no order was ever served. Moreover, that the order was not served upon the head Office and that there is no proof of acknowledgement by the person whom the process was served upon. The alleged contemnor further states that Mr. Bargoria never spoke to him about a court order. He denies that the watchman was beaten and tied.

The applicant submits that on 14.12.2016, prayer No. 2 of the application was allowed by consent between the Petitioner's advocates and the advocates for the 1st respondent. For prayer 3, however, the court invited the Petitioner to make arguments for conservatory orders, this was done and as per its jurisdiction under Rule 23 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 and upon satisfaction of the ingredients for Conservatory Orders as in ***Centre for Rights Education and Awareness (CREAW) & 7 Others Vs Attorney General (2011) eKLR*** held that:

> "…a party seeking a conservatory order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution, the court granted prayer 3 of the application. The court order was against the 2nd respondent, a public body located in Kisii town within the Republic of Kenya. It was served upon the branch of the 2nd respondent through Pella Amugune.

The Petitioner submits that the existence of the court order was made known to the respondents. The Petitioner further submits that the 2nd respondent terminated the lease by breaking fixtures and moving them out of the suit premises and leaving the premises in destruction position. Moreover, the alleged contemnor defaulted in paying rent.

The alleged contemnor through Nyairo Advocate submit that the Petitioner has not established that the order was served. Mr. Nyairo further submits that a careful look at the affidavit of service reveals that the alleged Contemnors were not personally served with the order and that the process server never met the alleged contemnors for personal service. The process server does not know the person he purports to have served. The process server never made efforts to serve the 2nd respondent at its principal office. The

affidavit of service is devoid of material facts and details as required by law. The court order was purportedly served on 15th December, 2016 at the 2nd respondent's Eldoret University Campus upon unknown persons. The alleged contemnors were not personally served.

Moreover, that the orders of injunction lapsed after the expiry of 3 days pursuant to the provision of Order 40, Rule 4(6) of the Civil Procedure Rules which provides for the lapse of a temporary order of injunction. This provision is not relevant as one year had not lapsed and that the order granted was not a temporary injunction.

The alleged contemnors allege that service was allegedly made upon on unknown person and therefore they are not aware of the order.

I have considered the application for contempt. and do find that the applicant has proved that there was valid order issued by the court on the 14th December 2016 in the presence of counsel for the petitioner and counsel for the respondent *staying the decision of the 1st respondent to immediately close down the 2nd respondent's Campus at L. R. Eldoret Municipality Block 7/162, Tarita Centre pending the hearing and determination of this application inter-partes* and restraining the 2nd respondent from terminating the term lease between the Petitioner and 2nd respondent over L. R. Eldoret Municipality/Block 7/162, Tarita Centre and or from defaulting to pay the monthly rent due as per the lease, pending the hearing and determination of this application inter partes. The structures were removed after the order was made, it is not clear whether by the time of removal, the court order had been served upon the alleged contemnors but it is clear that counsel for the respondents was in court when the order was granted. The alleged contemnor admits removing fittings and structures by the 2nd respondent but declines knowledge of the order.

Having considered the evidence on record, the application dated 7.2.2017 I do find that the order was given in the presence of counsel for the respondents and therefore personal service was secondary as the alleged contemnors are presumed to have been aware through their counsel. A simple interpretation by a court of law of contempt of court is when a person decides against heeding directive by the court which is regarded disrespectful to the court. In modern societies where the rule of law is practiced, courts are the arbiters in ensuring there is no anarchy. They do this by interpreting the law, using constitutional provisions, statutes and precedents from previous court decisions.

It has been held several times that whenever a court order is made such an order is binding and whoever has difficulty has the opening to come to court to seek an explanation rather than defy it. In the case of Ex-***Parte Peter Nyamu Karaguri Muhuri Karaguri V Attorney General Of Kenya & 5 Others[2013]eKLR, H.C at Nairobi*** *Civil Miscellaneous Application 405 of 2007*, supra, the leaned judge Odunga J. observed that;

> ***"The notice of motion must state exactly what the alleged contemnor has done or omitted to do which constitutes a contempt of court with sufficient particularity to enable him to meet the charge. The necessary information must be given in the notice itself."***

Contempt of court in this context may be defined in terms of Civil Contempt. In the premises, according to the Halsbury's Laws of England, civil contempt has been described as follows;

> **"...disobedience to process is a civil contempt of court to refuse or neglect to do an act required by a judge or order of the court within the time specified in the judgment order requiring a person to abstain from doing a specified act, or to act in breach of an undertaking given to the court by a person, on the faith of which the court sanctions a particular course of action or inaction..."** *(See Halsbury's Laws of England, 4th Edition (9th Re-Issue), Pg 33, para 52.)*

While Black's Law Dictionary defines contempt as follows;

> **"The failure to obey a court order that was issued for another party's benefit. A civil contempt proceeding is coercive or remedial in nature. The usual sanction is to confine the contemnor until he or she complies with the court order.** *(See Black's Law Dictionary, 7th Edition at pg 313)*

In *Hadkinson Vs. Hadkinson (1952) 2 All ER 567 at pg 569* it was held as follows;

> "***A party who knows of an order, whether null and void, regular or irregular, cannot be permitted to disobey it…it would be most dangerous to hold that the suitors or their solicitors could themselves judge whether an order was null and void, whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question, that the course of a party knowing of an order which was null and irregular and who might be affected by it was plain. He should apply to the court that it might be discharged. As long as it existed, it must not be disobeyed..."***

In *Mutika vs. Baharini Farm Ltd [1985] KLR* 227 at pg 230 and 233 the learned judges Hancox, Nyarangi JJA and Gachuhi Ag JA,

> "The principle propounded in re Maria Annie Annie Davis [1889] 21 QBD 236, and 239, that "Recourse ought not be had to process of contempt in aid of a civil remedy where there is any other method of doing justice. The observations of the latter Master of the Rolls in the case of Re Clement seem much in point: 'It seems to me that this jurisdiction of committing for contempt being practically arbitrary and unlimited, should be most jealously and carefully watched, and exercised, if I am say so, with the greatest reluctance and the greatest anxiety on the part of judges to see whether there is no other made which is not open to the objection of arbitrariness, and which can be brought to bear upon the subject. I say that a judge should be most careful to see that the cause cannot be mode of dealing with persons brought before him. On accusations of contempt should be adopted. I have myself had on many occasions to consider this jurisdiction, and I have always thought that, necessary though it be, it is necessary only in the sense in which extreme measures are sometimes necessary to preserve men's rights, that is, if no other pertinent remedy can be found. Probably that will be discovered after consideration to the true measure of the exercise of the jurisdiction' must be born in mind... "

In Teachers Service Commission V Kenya National Union Of Teachers & 2 Others [2013] eKLR Ndolo J observed that: -

> ***"38. The reason why courts will punish for contempt of court then is to safeguard the rule of law which is fundamental in the administration of justice. It has nothing to do with the integrity of the judiciary or the court or even the personal ego of the presiding judge. Neither is it about placating the applicant who moves the court by taking out contempt proceedings. It is about preserving and safeguarding the rule of law."***

In the case of ***Bell vs. Tuhoy & Another (2002) 3 All ER 975 Pg 981, para 22,*** the honourable learned judge Neuberger. J opined as follows;

> **"That an order made by a judge of unlimited jurisdiction, for instance in the High Court must be obeyed, and failure to observe it can amount to contempt of court, however irregular it might be unless and until it is reversed or set aside". (see Bell vs. Tuhoy & Another See also Issacs vs. Robertson (1984) 3 All ER 140 at 142-143, (1985) AC 97 at 101-103)**

In ***Safepak Limited V Malplast Industries Limited*** **[2008] eKLR, H.C at Nairobi Civil Suit No. 365 of 2007,** the learned judge P.M Mwilu stated as follows;

> **"The burden of proof is on the Applicant to clearly show that the Respondent was in contempt. And that is the position in RE BRAMBLEVALE LTD 1970] Ch.128 at page 137**

where Lord Denning MR. said.

> **"A contempt of court is an offence of a Criminal character. A man may be sent to prison for it. It must be satisfactorily proved. To use the time-honored phrase, it must be proved beyond all reasonable doubt. It is not proved by showing that when a man was asked about it, he told lies. There must be further evidence to incriminate him. Once some evidence is given then his lies can be thrown into the scale against him. But there must be some other evidence."**

In our Court of Appeal Civil Application No.39/1990 REFRIGERATOR & KITCHEN UTENSIL LIMTED VS- GULABCHAND POPATLAL SHAH & OTHERS approving the standard of proof in contempt cases as set out in the case of GATHARIA MITIKA & others –vs- BAHARINI FARM LIMITED CIVIL APP NO. 24/1995GATHARIA MITIKA & others –vs- BAHARINI FARM LIMITED CIVIL APP NO. 24/1995, their Lordships held that in cases of alleged, contempt, the breach for which the alleged contemnor is cited must not only be precisely defined but proven to a standard which is ***higher than proof on a balance of probabilities*** but not as high as ***proof beyond reasonable doubt***. The charge must be proved beyond peradventure"

Our jurisprudence has shifted from the rigid principles that there must be personal service. A party cannot feign ignorance of a court order and yet the advocate was in court. **Lenaola J** in the case of **Basil Criticos Vs Attorney General and 8 Others [2012] eKLR** pronounced himself as follows: -

> ***"...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"***

In this is matter, the advocate for the respondents was in Court representing the respondents managed by the alleged contemnors and the orders were made in his presence. There is an assumption which is not unfounded, and which in my view is irrefutable to the effect that when an advocate appears in court on instructions of a party, then it requires 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.

In addressing the issue whether service of a judgment or order on the solicitor for the Ministers is sufficient knowledge of the order on their part to found liability in contempt; the Supreme Court of Canada in ***Bhatnager v. Canada (Minister of Employment and Immigration), [1990] 2 S.C.R. 217*** **at p. 226,** *LJ Sopinka,* held

that: -

> ***"In my opinion, a finding of knowledge on the part of the client may in some circumstances be inferred from the fact that the solicitor was informed. Indeed, in the ordinary case in which a party is involved in isolated pieces of litigation, the inference may readily be drawn. In the case of Ministers of the Crown who administer large departments and are involved in a multiplicity of proceedings, it would be extraordinary if orders were brought, routinely to their knowledge, in such a case there must be circumstances which reveal a special reason for bringing the order to the attention of the Minister."***

The Court went on to state that;

> ***"On the cases, there can be no doubt that the common law has always required personal service or actual personal knowledge of a court order as a pre-condition to liability in contempt.... Knowledge is in most cases (including criminal cases) proved circumstantially, and in contempt cases inference of knowledge will always be available where facts capable of supporting the inference are proved. (See Avery v. Andrews (1882) 51LJ Ch. 414) (Emphasis by underline)***

In **United States v. Revie 834 F.2d 1198, 1203 (5th Cir. 1987),** the court held that the defendant had adequate notice of a show cause order because his attorney was on notice. Therefore, a client may be similarly "served" with a court's order by his attorney's communication of its contents and this communication is presumed if the attorney has knowledge of the order.

As stated earlier, in the matter before us, when the application came up for hearing, the respondent was ably represented by an advocate who did not opposed prayers sought. I am satisfied that the alleged contemnors were aware or ought to have been aware of the court order through their able counsel and went ahead to disobey the orders by dismantling fixtures and fittings in the premises and therefore I do find the alleged contemnors in contempt of court and do order them to pay a fine of Ksh.100,000/= each failure of which they be jailed for a period of one month each. Costs to the petitioners.

DATED AND DELIVERED AT ELDORET THIS 26TH DAY OF JULY, 2017.

A. OMBWAYO

JUDGE