



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC CASE NO.781 OF 2015

JOHANNES AKELO OMBOTO.....1ST PLAINTIFF

GRADUCE OMBOTO AKELO.....2ND PLAINTIFF

VERSUS

KENYA RAILWAYS CORPORATIONDEFENDANT

RULING

1. **Johanes Akelo Omboto and Graduce Omboto Akelo**, the 1st and 2nd Plaintiff's filed the notice of motion dated 21st March 2013 seeking to have **Kenya Railways Cooperation**, the Defendant, to be found in contempt of the consent order of 8th November 2009 and have the Managing Director and Cooperation Secretary committed to civil jail for six months or the Defendants property attached. The application is based on the five grounds on its face summarized as follows:

- a. That under the consent of 8th November 2009, the Defendant was to collect rent and deposit it in an interest earning account in the names of the advocates but has not done so.
- b. That the Defendant under latter dated 2nd February 2012 offered the suit property to Telkom Kenya Ltd for kshs.630,000 which was paid to the Defendant in breach of the consent.
- c. That the Defendants advocate have totally failed to complete the opening of the account and depositing the rent proceed despite the Plaintiffs completing the account opening forms on two occasions.
- d. That the parties have an obligation to guard the integrity of the court and therefore this application should be granted in the interest of justice.

The application is supported by the affidavit of 1st Plaintiff sworn on the 21st March 2013.

2. The application is opposed by the Defendant through the affidavits of David Njogu, a legal officer with the Corporation, sworn on 9th July 2013 and 19th August 2015.

3. The application came up for hearing first on the 18th June 2013. The counsel for the Plaintiff applied for another date and the matter was fixed for mention on 16th July 2013 when a hearing date of 7th October 2013 was fixed. The next court appearance was on 21st October 2014 when counsel for the

Defendant sought and obtained leave to file a supplementary affidavit. That after several other court appearances, the counsel agreed to file written submissions on the 25th June 2015. Thereafter the matter was mentioned severally before the Deputy Registrar before being referred to this court on 19th September 2016 when today date for ruling was fixed.

4. The Plaintiffs counsel filed their written submission dated 24th July 2015 while the Defendant's counsel filed theirs dated 3rd February 2016 and the following is a summary of the parties cases;

A. PLAINTIFFS CASE

That the consent order of 8th November 2009 was for the parties to maintain the status and for rent collected to be deposited in an account in the names of the parties advocates. That the Defendant has declined to do so and hence this application. The counsel referred to the following two decided cases and asked the court to grant their prayers.

- i. **Pelican Investments & Another –V- National Bank of Kenya & 2 others [2005] eKLR.**
- ii. **Peter Mwaura Kariuki -V- Florence Gachambi & Another {2014} eKLR.**

B. DEFENDANT'S CASE

That the consent order of 8th November 2006 has been complied with through the opening of account NO.0070032515550152 in the names of Behan Okero Advocate and Otieno Yogo Co. Advocate on 29th May 2013 with a credit balance of Kshs.2,443,810/= as of 7th June 2013. That the amount represented the accrued rent from the date of the consent order. That the delay in opening the account was due to the need to reconcile the aggregate amount collected by the Defendant and not in disobedience of the order. The counsel referred the court to the decisions in the following decided cases:

- i. **Mutitika –V- Baharini Farm Ltd {1985} KLR 227 on Standard of proof required.**
- ii. **Republic –V- Commissioner of Lands & 12 others Exparte James Kiniya Gachira alias James Kiniya Gachiri [2004] eKLR and**
- iii. **Kyangavo -V- Kenya Commercial Bank Ltd & Another [2004] eKLR.**

5. The following are the issues for determination by the court,

- a. Whether the Plaintiffs have established that there has been a disobedience of the court order by the Defendant.
- b. Whether the Defendant should be cited for contempt.
- c. What orders to issue

6. The court has carefully considered the grounds on the notice of motion, the affidavit evidence by both sides, the rival written submissions by counsel and come to the following determinations;

- a. That the documentary evidence attached to the Defendant's replying affidavit in the form of statement of account in respect of account No.0070032515550152 in the names of Behan & Okero Advocate and Otieno Yogo & Co. advocate opened on 29th May 2013 with a deposit of Sh.2,443810/= has not been disputed by the Plaintiffs and the court finds that it confirms compliance with the consent order as far as the opening of an account in the names of the advocates and depositing the rental money is concerned.

b. That the Defendant has annexed to the further affidavit documents showing the total amount collected from the six named individuals who the court takes to be the tenants for the period from 1st July 2010 to 11th April 2013 totaling sh.2,443,800/=. The court takes this amount to be the rent the Defendant collected from the tenants on the suit property during that period and more or less tallies with the amount deposited in the account in (a) above. That the Plaintiffs have not disputed the Defendant's tabulation and totals and the court takes it to be a reflection of amount of the rent collected and deposited in the joint account in terms of the consent order.

c. That the Plaintiff did not annex the copy of the consent or consent order to the supporting affidavit. That the court has however perused the records and traced the consent letter dated 8th November 2006 and the Deputy Registrar note of the same date entering the consent. That the only extracted copy of that consent order traced in the file was issued on 7th October 2010, which is about four years after the date of the letter of consent. That no consent order dated 6th November 2009 that counsel for the Plaintiff referred to was traced in the file. That as there is no evidence to confirm the two dates the Plaintiffs' counsel signed the bank account opening documents and forwarded them to the Defendant's counsel, the court is unable to determine whether the Defendant could be said to have unreasonably or inordinately delayed in opening the account and depositing the rent money thereon as agreed.

d. That further to the finding in (c) above, the Defendant has explained that the delay was occasioned by the time taken to reconcile the amounts collected, opening the account and depositing the amount in it. That the Plaintiffs had the duty to prove that the Defendant had disobeyed the order and the standard of proof is as restated in the case of **Mutitika –V- Baharini Farm Ltd** [1985] KLR229, at 234 thus;

” The standard of proof in contempt proceedings must be higher than proof on balance of probabilities, almost but not exactly beyond reasonable doubt.....”

That what the court takes to be the position taken by the Defendant is that the court order was not clear on the timelines within which to open the account and deposit the rent collected and that they have not disobeyed it even though it was not until 2013 that the account was opened and deposit of rent collected made in arrears.

e. That the court is not in a position at this stage to make a determination, one way or the other, whether the filing of Kisumu H.C. MISC. Civil Application Number 256 of 2006 amounted to interference of the status quo agreed under the consent of 8th November 2006. That any party not satisfied with the orders made therein in any case has the right to prefer an appeal in accordance with the law. That likewise, the court will leave the issue of Telkom Kenya Ltd use of a portion of the suit land that is subject matter of Kisumu HCCC No.34 of 2012 to be dealt with in that matter as the pleadings filed therein have not been availed to this court. The parties are however warned to ensure they do not offend the provisions of **Section 6 and 7** of the Civil Procedure Act Chapter 21 of Laws of Kenya in filing a multiplicity of suits over the same subject matter which would otherwise be better handled in one case.

7. That in view of the foregoing the court finds that the plaintiffs have failed to establish disobedience of the consent order on the part of the Defendant and the notice of motion dated 21st March 2013 is hereby dismissed with costs in the cause.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 30TH DAY OF NOVEMBER 2016

In presence of;

Plaintiff s Absent

Defendant Absent

Counsel Mr Yogo for Plaintiff and Mr Mwasibwa for the 1st Defendant.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

30/11/2016

30/11/2016

S.M. Kibunja Judge

Parties absent

Mr Mwasibwa for 1st Defendant

Mr Yogo for the Plaintiffs

The Attorney General for the 1st Defendant to the counter claim absent

Court: The ruling delivered and dated in open court in presence of Mr. Yogo for the Plaintiffs and Mr. Mwasibwa for the Defendant.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

30/11/2016