



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**ELC. NO. 126 OF 2011**

**MHANDISI ENTERPRISES LIMITED. .... PLAINTIFF**

**- V E R S U S -**

- 1. MOHAMED SWALEHE MWAJEMBE**
- 2. RAMA OMARI CHIMWEGA**
- 3. DISTRICT LAND REGISTRAR (KWALE)**
- 4. ATTORNEY GENERAL**
- 5. MARY NDALE KAI**
- 6. OMAR ATHUMANI**
- 7. ATHUMANI JUMA**
- 8. MUHAMED SWALEHE**
- 9. KWALE DISTRICT SURVEY OFFICER ..... DEFENDANT**

**RULING**

1. The applicants in the notice of motion dated 25th November, 2014 are the 1st and 2nd defendants in this suit. Their notice of motion is premised in the provisions of Article 159 (2) (d) of the Constitution Order 10 rule 11 and Order 22 rule 22 of the CPR and Sections 1A,1B & 63e of the CPA Cap. 21. In the motion, the applicants sought six prayers as contained in the body of the motion. Prayer 1 and 2 were granted ex parte initially.

2. The two main prayers pending for this court's determination is prayer 3 and 4 which is reproduced as hereunder,

"3. That this Honourable Court be pleased to issue orders of stay of the consent order entered into by the parties herein on the 8th day of July 2013 and consequently issued on the 8th day of July 2013 which ultimately led to the ruling of this Honourable Court on the 18th day of September 2014 and consequent committal to civil jail of the 1st and 2nd defendants/applicants for contempt of court orders thereto pending the hearing of this application inter parties"

"4. That this Honourable court be pleased to issue orders setting aside the consent order entered into by the parties herein on the 8th day of July 2013 and consequently issued on the 8th day of July 2013 which ultimately led to the ruling of this Honourable court on the 18th day of September 2014 and consequent committal to civil jail of the 1st and 2nd defendants/applicants for contempt of court orders thereto pending the hearing and determination of this suit."

3. The application is supported by the grounds listed on the face of it and the affidavit deposed to by the 1st applicant, Mohamed Swalehe Mwajembe. In prayer 3, the applicants are seeking to stay the execution of the consent order recorded on 8th July 2013 which led to another ruling of the court made on 18th September 2014. The applicants contend there is an error apparent on the record as explained in their ground (b), (c) and (d). The issue of error is also contained in paragraph 4 of the supporting affidavit.

4. In submissions, Mr. Egunza for the applicants stated that the judge ought to have ordered for payment of committal allowance in execution of the decree and such omission breached the committal order. Further that the consent order was not entered into with instructions of the 1st and 2nd defendants and the applicants had no knowledge of this order. They learnt of this order on 18th September, 2013 during their committal to civil jail. In this respect counsel referred this court to the case of **Basil Cesticos vs Attorney General and 12 others (2012) eKLR.**

5. Mr. Egunza submitted that this court should determine whether there was prior service of the order of 8th July 2013 and the consequent orders. He cited the case of **Ochino & another vs Okombo & 4 others (1989) KLR 165** which deliberated on the issue of service. Finally the applicants relied on the provisions of Article 159 (2) (d) of the Constitution and urged this court to allow their application and set aside the consent order dated 8.7.2013.

6. The motion is opposed by the plaintiff/respondent who filed a notice of Preliminary Objection that the applicants should not be granted any audience as they have not purged the contempt. Mr. Wangalwa for the respondent submitted that the order of the court sentencing the applicants to 4 months in jail was in conformity with the provisions of order 40 rule 3 (1) and the orders of 6th November, 2014 were made per incuriam. This decision is final in regard to this court. He submitted further that there was no evidence the contempt has been purged.

7. Mr. Wangalwa further submitted that the contemnors were aware of the order which order they have disobeyed with impunity. He continued that the applicants were given opportunity to show cause but were not apologetic and nothing has changed since then. The respondent submits the consent was entered into by 3 parties and the applicants have not served the Attorney General. Finally he submits there is no provision in law for a contemnor to be released on bond and urged the court to set aside the exparte orders earlier given.

8. I have perused the pleadings filed and the submissions made by each of the counsels for the parties. To begin with and in answer to the submissions by the applicants that no committal allowance was paid hence breach of committal rules; Contempt proceedings are quasi - criminal and the court in exercising such jurisdiction to punish a contemnor exercises a criminal jurisdiction and not a civil one. Therefore where one is committed to civil jail for being in contempt of court order, no allowance is payable for the subsistence of the contemnor. I thus agree with the respondent's submission that no subsistence allowance was payable in this case as the sentence was meted out at the court's instance.

9. On grounds (b) - (f) on the face of the application, the applicants are seeking to set aside consent order of 8th July 2013 citing error apparent on the face of the record. However in oral submissions, the applicant stated that they were never served or made aware of the order. Secondly that the part of this order they have disobeyed has not clearly been stated. I find the applicants to be contradicting themselves in oral submissions and the pleadings in the motion but I will consider all points they have put forward. The court of appeal in the case of **Flora Wasike vs Wamboko(1982-1988)KAR625** said that for a consent order to be set aside,

***“Prima facie, any order made in the presence of counsel is binding on all parties to the proceedings or action and on those claiming under them and cannot be varied or discharged unless obtained by fraud or collusion or by an agreement contrary to the policy of the court . . . or, if the consent was given without sufficient material facts or misapprehension or in ignorance of material facts or in general for a reason which would enable the court to set aside an agreement,” (underline mine for emphasis)***

I am not convinced the applicants have proved that this consent was entered into either by fraud or collusion or established any reason that would make this court to vary or set aside the order of 8<sup>th</sup> July 2013.

10. The applicants further contend that the consent order was obtained through misrepresentation and hence cannot be binding on them. The 1st applicant deposed that the consent was entered into without instructions. They have failed to go further and explain what was the limit of their previous advocate's instructions if any. The previous advocate has not sworn any affidavit that he lacked such instructions. In any event, this was a matter that ought to have been raised during the hearing of the contempt proceedings. The applicants raising the issue of service, not being aware of the order and or not being aware of which part of the order they have disobeyed is asking me to sit on appeal on the

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11. Further in prayer No. 4, the applicants are seeking to set aside the consent order of 8th July 2013 pending the hearing and determination of this suit. The basis of which that the applications dated 10th November 2011 and 10th January 2012 are distinct from each other and cannot purport to concert/make a consent in law. This ground in my view is misplaced as this is not one of the reasons provided for in law for setting aside a consent order. Neither can the issue that the two applications were not consolidated be a ground for setting aside as the parties were well aware of the contents of the said applications when the consent was recorded.

12. The current motion is not asking me to review the decision of my learned brother Mukunya J. Before the applicants were committed to civil jail, it is not denied they were given an opportunity to show cause on 6th November 2014. The judge commented thus during the proceedings of 6th November 2014, "*The contemnors do not seem apologetic at all. I gave them time to purge the contempt but they have not done so.*" The applicants were represented by counsel during this hearing. Mr. Egunza has not explained why during the show cause hearing the applicants did not tell the court they were never aware of this order or did not understand what it required them to do. He also did not say if the contempt has been purged at the time this application was being argued.

13. In summary I find this motion as lacking in merit for the reasons stated in the body of this ruling and accordingly dismiss it with costs. The earlier ex parte orders releasing the contemnors on bond are hereby discharged and the order of this court issued on 6th November 2014 committing them to civil jail re-instated. It is so ordered.

**DATED and delivered in open court at Mombasa this 9th day of February 2015.**

**A. OMOLLO**

**JUDGE**