



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ELC CIVIL SUIT NO 930 OF 2012

JOSEPH WATHOA KIGWE.....PLAINTIFF

ROSEMARY WANJIRU KIGWE

=VERSUS=

KENYA NATIONAL HIGHWAYS AUTHORITY.....1ST DEFENDANT

CHINA WU YO CO LTD.....2ND DEFENDANT

ATHI WATER SERVICES BOARD.....3RD DEFENDANT

NAIROBI WATER SEWAGE & CO.LTD.....4TH DEFENDANT

CITY COUNCIL OF NAIROBI5TH DEFENDANT

RULING:

The Plaintiffs /Applicants herein have brought this Notice of Motion dated **28th February 2014**, under **Order 40 Rule 3 of the Civil Procedure Rules, Sections 3A and 63 of the Civil procedure Act, Cap 21 of the Laws of Kenya** and all enabling provisions of the Law.

The applicants have sought for these Orders;-

- a) That **Eng. Maraqin Milgo**, the Chief Executive Officer/Managing Director of Athi Water Service Board and the Chairman, Athi Water Services Board be detained in prison for a term not exceeding six months for blatantly disobeying Orders issued by the Court on 25th November 2013.
- b) That the Court be pleased to deny the 3rd Defendant /Respondent audience in this matter until and unless the Defendant purges the contempt of Court committed herein.
- c) That the Defendant be ordered to pay the costs of this application immediately and upon the determination of the application herein.

The application is premised on the grounds stated on the face of the application and upon the supporting Affidavit of **Joseph Wathoa Kigwe** , the 1st Plaintiff herein . Among the grounds in support are; that on 20th November, 2013, the Honourable Court granted a mandatory Injunctive Orders in favour of the Plaintiffs/Applicants and same was issued on 25th November, 2013. Further that the said Orders

were granted interpartes in the presence of the Defendants Advocates and the said injunctive Orders compelled the 3rd Defendant to reconnect the Plaintiffs property being **LR No. 209/5821/12** measuring $\frac{1}{2}$ **acre** and situate in Parklands area along Forest Road to the main sewer line and ensure that the same is properly served by the Nairobi City's main sewer system. The said reconnection was to be done within 30 days from the date of delivering of the Rulings i.e from 20th November, 2013. Furthermore, the said Order was extracted and served upon the 3rd Defendant directly and upon its advocates on record on 4th December, 2013 and such service was duly acknowledged. However, the 3rd Defendant has elected to disobey the said Court Orders and has declined to carry out the reconnection as ordered by the Court. Therefore the 3rd Defendants actions of disobeying the Court are willful and deliberately calculated and designed to defeat the course of justice. The 3rd Defendant has blatantly flouted the Court orders and the same is an attack on the integrity of the Courts process and rule of law and therefore the said actions must not be countenanced.

The application is contested. **Emily Kyalo**, Legal Officer of the 3rd Defendant swore a Replying Affidavit and averred that indeed the proceedings herein arose out of the construction which was a project commissioned by the Kenya National Highway Authority . She admitted that infact vide a Court Ruling delivered on **15th November, 2013** it was indeed on (20th November 2013) the 3rd defendant was compelled to reconstruct the Plaintiff's property within 30 days of the ruling. It was her contention that even before the said Ruling was delivered, the 3rd Defendant was aware of the plaintiffs application dated 30th November, 2012 and had started to make arrangements for such construction on consultation with **Kenya National Highway Authority**. Further, that since the project was commissioned by the **Kenya National Highway Authority**; the 3rd Defendant has always sought for permission from (**KeNHA**) to be granted access to both the upstream and downstream connecting manholes as well as to facilitate the exposure of existing services along route to be reconnected as evidenced by annexure **EK1**. The deponent denied that the 3rd Defendant has deliberately disobeyed the Court Order issued on 20th November, 2013 as alleged by the Plaintiffs as the reconnection works commenced even before the Order was issued on 20th November, 2013. It was therefore contended that the works have been going on and are still in progress, though it involves consultations with other stakeholders such as **Nairobi City Water and Sewerage Co. Ltd** and **Kenya National Highway Authority**. She prayed for dismissal of the Plaintiffs' application.

The Plaintiff's filed a further affidavit and averred that the Replying Affidavit was a mere statement with no factual and or evidentiary basis and the same are evasive designed to hoodwink the Court that the 3rd Defendant is taking steps to comply with the Orders issued by the Court and which is not the case. Further, that contrary to the allegations in the Replying Affidavit, the 3rd Defendant has not done anything to reconnect the subject sewer line. Applicants alleged that no sewer line reconnection work was on going in the subject area as alleged by the 3rd Respondent. He therefore deposed that it is only fair and just that the Orders sought herein should be granted in order to protect the Courts integrity and the rule of law.

The other defendants did not file their Reply to the Notice of Motion filed by the Plaintiffs herein. However, the Orders sought are against the Managing Director and Chairman of the 3rd Defendant.

The parties consented to canvass the instant Notice of Motion by way of written submissions. I have now carefully considered the pleadings generally, and the annexures thereto, the written submissions and the attached authorities and I make the following findings:-

There is no doubt that the plaintiffs herein filed an interlocutory application against the Defendants dated 30th November, 2012. The said application was canvassed interpartes and a Ruling was delivered on 20th November, 2013. The Court found in favour of the plaintiffs and ordered that:-

- i. **The 3rd Defendant be compelled to reconnect the Plaintiffs property LR No.209/5821/12 situated in the Parklands area along Forest Road to the**

main sewer and ensure that the same is properly served by Nairobi City Main sewer system.

ii. **The 3rd Defendants was to carry out the reconnection within 30 days from the date of the Ruling.**

It is also evident that after the above Ruling was delivered, the Plaintiff extracted the Orders on 25th November, 2013 vide letter dated 3rd December, 2013. The said orders was served to the Managing Director of the 3rd Defendant and their **Advocate, Kipkenda & Company Advocate**. There is a copy of the extracted Order bearing a receipt stamp from the Law Firm of **Kipkenda & Co. Advocates** received on 4th December, 2013 and also bearing the stamp of the 3rd Defendant even dated. There is therefore no doubt that the said Order was served upon the 3rd Defendant and their advocates on 4th December, 2013. The said Order bore a Notice of Penal Consequences which reads as follows:-

“ TAKE NOTICE that if any person/party upon whom this Order is served and/or who has Notice or is aware of this Order fails to comply with the same order, they will be liable to prosecution for contempt and imprisonment for a period of up to six months amongst other orders that this Court may deem necessary “.

The 3rd Defendant was therefore aware of the penal consequences of failure to comply with the Court Order. It was very clear from the Court Order that the 3rd Defendant was supposed to reconnect the plaintiffs property to the main sewer line within a period of 30 days from the date of the Court's Ruling.

The Plaintiffs/Applicants have averred that as at 28th February 2014, when they filed the Notice of Motion, the 3rd Defendant had not complied. On their part, the 3rd Defendant averred that it had started consultations with the 1st Defendants and was in the process of constructions of 300 mm diameter sewer line approximately 14 m along **Forest Road- Akoth Aura Road** to serve the Shell Petrol Station along Forest Road and the adjacent area. The letter that the 3rd Defendant relied on is dated **5th June 2014**. That letter was written after the instant application had been filed.

The Court order is very clear that the 3rd defendant was to comply within a period of 30 days after the Ruling was delivered. The Court Order is also very clear that the 3rd defendant was to reconnect the plaintiff's property on **LR No. 209/5821/12**, to the main sewer but not to all and sundry. Though the 3rd Defendant had a duty to reconnect the main sewer line along **Forest Road- Akoth Aura Road**, the first priority as per the Court order was to reconnect the Plaintiffs property. The 3rd Defendant has not done that. The 3rd Defendant did not even bother to come back to Court for extension of the period of compliance with the Court Order.

It is evident that the 3rd Defendant has failed to comply with the Court Order issued on 25th November, 2013. Further, the 3rd Defendant tried to explain that failure to do so was because it had to consult the 1st Defendant. However, the Court Order herein was directed to the 3rd Defendant and not 1st Defendant **Kenya National Highway Authority (KeNHA)** Furthermore the 3rd Defendant has not shown the extend of its consultations with 1st Defendant in an attempt to comply with the Court Order. The 3rd Defendant is therefore in blatant disobedience of the Court order issued on 25th November, 2013 by this Court.

The law is very clear on the obedience of the Court Orders and gives consequences of such disobedience. **Order 40 Rule 3(1)** of the Civil Procedure Rules provides that:-

“ In case of disobedience or breach of any such terms, the Court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached and may also order such person to be detained in prison for six months unless in the meantime the Court directs

his release”.

Further **Section 63(c) of the Civil Procedure Act, Cap 21** provides that :-

“ In order to prevent the ends of justice from being defeated , the Court may if it is prescribed; grant a temporary injunction and in case of disobedience convict the person guilty thereof to prison and Order that his property be attached and sold”.

The provisions of the **Environment and Land Act No. 19 of 2011** also buttress the above position. **Section 29 of the said Act** reads as follows:-

“ Any person who refuses , fails or neglects to obey an order or direction of the Court given under this Act, commits an offence and shall on conviction be liable to a fine not exceeding one million shillings or to imprisonment for a term not exceeding two years or both.

The 3rd Defendant herein was ordered to carry out the reconnection of the Plaintiffs property within 30 days from the date of the Court’s Ruling. The 3rd Defendant has not complied and it is therefore in blatant disobedience of the Court Order and thus guilty of contempt of the Court Orders. I will be persuaded by the case of **Hadkinson Vs Hadkinson (1952) 2 All ER 567** at page 569 where it was held that;

“It is 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 obligation 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 Voiddisregard of an order of the Court is a matter of sufficient gravity whatever the Order may be....”

Having now considered the applicants Notice of Motion dated **28th February 2014**, the written submissions, and the relevant law, the Court finds that indeed, the 3rd Defendant is in contempt of the Court Orders issued on **20th November 2013**. The Court will hold the Managing Director and Chairman of 3rd Defendant in contempt of Court Orders issued on **20th November 2013**, and therefore liable to be punished for contempt of Court. The Court cannot allow the 3rd Defendant to get away with deliberate disobedience of the Orders of the Court.

I will therefore direct that the said **Eng. Maraqin Milgo**, the Chief Executive Officer/ Managing Director and Chairman of **Athi Water Services Board** do appear in Court on and show cause why they should not be committed to prison or otherwise penalized for contempt of Court. Summons to issue to the above stated persons and the same be served by the Plaintiffs’ counsel. The applicants are also entitled to costs of this application.

It is so ordered.

Dated, Signed and delivered this **16TH day of APRIL, 2015**

L. GACHERU

JUDGE

Court:

Ruling read in open Court in the presence of

..... for the Plaintiffs/Applicants

..... for the 1st Defendant/ Respondent

.....for the 2nd Defendant/Respondent

.....for the 3rd Defendant/Respondent

.....for the 4th Defendant/Respondent

.....for the 5th Defendant/Respondent

Hilda : Court Clerk

L. GACHERU

JUDGE