



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI**

**ELC CIVIL SUIT NO. 340 OF 2011**

**DIASTA INVESTMENTS LIMITED.....PLAINTIFF**

**VERSUS**

**NILESH DEVAN KARA SHAH.....1<sup>ST</sup> DEFENDANT**

**KATILAL DEVAN KARA SHAH.....2<sup>ND</sup> DEFENDANT**

**HASWHIN DEVANI KARA SHAH.....3<sup>RD</sup> DEFENDANT**

**CITY COUNCIL OF NAIROBI .....4<sup>TH</sup> DEFENDANT**

**NATIONAL ENVIRONMENTAL**

**MANAGEMENT AUTHORITY.....5<sup>TH</sup> DEFENDANT**

**RULING**

The Plaintiff has made an application by way of a Notice of Motion dated 24<sup>th</sup> September 2014, that is filed pursuant to the provisions of section 5(1) of the Judicature Act and Schedule 1, Order 52 Rules 3 and 4 of the Rules of the Supreme Court of England (RSC). The Plaintiff is seeking the following substantive prayers:-

1. This Court issues an order of committal to prison of Nilesh Devan Kara Shah, Ratilal Devan Kara Shah and Hashwin Devan Kara Shah who are the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants ( hereinafter “the 1<sup>st</sup>-3<sup>rd</sup> Defendants”), for such period as the Court may determine for their disobedience of the Orders granted on 26/6/2011.
2. This Court issues any other order or relief as it shall deem fit, just or expedient to grant in the circumstances of this case in the interest of justice for upholding the authority, dignity and honour of the court.
3. The costs of this application and the application for leave be borne by the 1<sup>st</sup>-3<sup>rd</sup> Defendants.

The application is supported by an affidavit sworn on 24/9/2013 by Priten Patel, a Director of the Plaintiff. The deponent states that by consent of both parties which consent was adopted as a Court order on 26/11/2011, the 1<sup>st</sup>-3<sup>rd</sup> Defendants were restrained from carrying on further construction works (save for the installations of a lift and electricity), on the 7<sup>th</sup> and 8<sup>th</sup> floors of the building erected on all that parcel of land known as L.R. No. 209/7584, pending the hearing and determination of the Plaintiff’s application dated 11/7/2011. In addition that the said order was made in the presence and consent of the 1<sup>st</sup>-3<sup>rd</sup> Defendants’ Advocate, Mr. Walter Amoke of M/s Oraro & Company Advocates, and in the

presence of and with the consent of counsel for the Plaintiff, Mr. Philip Nyachoti of M/s Nyachoti & Company Advocates.

The deponent further stated that on 18/2/2013, this Court delivered a ruling staying all proceedings, pending the Plaintiff's compliance with the procedure of dispute resolution under the Physical Planning Act and the Environmental Management and Co-ordination Act. It is the deponent's averment on or about 28/6/2013, the 1<sup>st</sup>-3<sup>rd</sup> Defendants started carrying on further extensive construction works (other than the works permitted) on the 7<sup>th</sup> and 8<sup>th</sup> floors of the buildings, and have continuously carried out such works despite the existence of the said order, yet the same has not been vacated and/or discharged. The deponent stated that the stay of proceedings, was only for a limited period, pending compliance with the procedures of dispute resolution.

It is deponed for the Plaintiff that the intention of the ruling of 18/2/2013 was to maintain the *status quo* as at that date and not to vacate and/or discharge the orders in place, since the suit still has reasonable a chance of progressing for hearing and determination. Consequently, the deponent contends that the 1<sup>st</sup>-3<sup>rd</sup> Defendants' actions are done contemptuously in blatant disregard of the order issued on 26/7/2011 which is an affront to the dignity and honour of this Court, and it is therefore in the interest of justice that the 1<sup>st</sup>-3<sup>rd</sup> Defendants be committed to civil jail and directed to purge their contempt before proceedings are taken in this suit.

### **The 1<sup>st</sup> – 3<sup>rd</sup> Defendants' Response**

The application was opposed by the 1<sup>st</sup>-3<sup>rd</sup> Defendants who filed a Notice of Preliminary Objection and a Replying Affidavit both dated 21/11/2013. The Preliminary Objection contains the following averments:

- a. The Plaintiff failed to serve the mandatory 24-hour notice on the Attorney General of its intention to seek the leave of Court to commence contempt proceedings as required by the RSC, Order 52, Rule 2(3).
- b. The contempt application is not supported by a statement as required by the mandatory provisions of RSC, Order 52, Rule 2(1).
- c. The formal application was not filed within 14 days of 21/8/2013, therefore the leave granted lapsed.
- d. The application has failed to provide the full details, that is, the names, descriptions and address of the persons sought to be committed.
- e. No order of committal or other orders can be made on the foot of the said contempt application against the 1<sup>st</sup> -3<sup>rd</sup> Defendants either as sought or at all as:-
  - i. The order alleged to have been breached has never been served upon the person sought to be committed, whether personally as required or at all.
  - ii. The contempt proceedings have not been served on the persons sought to be committed whether personally as required or at all.
  - iii. The order obtained herein by the Plaintiff on and sent to the 1<sup>st</sup>-3<sup>rd</sup> Defendants' counsel did not have a notice of penal consequences endorsed thereon.

The 1<sup>st</sup>-3<sup>rd</sup> Defendants also responded in a Replying Affidavit sworn on 2<sup>nd</sup> November 2013 by Hashwin Devan Kara Shah, the 3<sup>rd</sup> Defendant herein, wherein he denied that there was extensive construction undertaken on the suit property by the 1<sup>st</sup>-3<sup>rd</sup> Defendants. Further, that the works referred to by the Plaintiff are by tenants putting their internal fixtures and fittings. It was his disposition that the effect of the ruling of 18/2/2013 is that it vacated the orders issued on 26/11/2011. Further, that the Court did not make any order restraining the 1<sup>st</sup>-3<sup>rd</sup> Defendants from doing anything whether in respect of the subject property or at all, pending the hearing and determination of the Plaintiff's compliance with the procedures for dispute resolution.

The deponent contended that the order issued on 26/11/2011 is no longer in force as the application dated

11/7/2011 was heard and determined, and therefore the injunction lapsed. He further contended that the terms of the ruling and order of 18/2/2013 are clear, and do not require any modification and/or attribution of alleged intentions as the Plaintiff purports. Additionally, that if the Court's intention was to maintain the status quo it would have stated as much.

The deponent stated further that the Plaintiff has failed to comply with the orders of the court as it has not appealed to the Liaison Committee of the 4<sup>th</sup> Defendant or the National Environmental Tribunal of the 5<sup>th</sup> Defendant, save for copying the two tribunals its letter of complaint addressed to the Public Complaints Committee dated 26/3/2013, and followed belatedly with a letter dated 23/5/2013. The deponent denied conducting themselves in contemptuous of any orders stating that it is the Plaintiff's conduct which constitutes an abuse of the Court's process by instituting these proceedings prematurely before exploiting the alternative dispute resolution mechanisms; willfully declining to comply with the directions of the Court and follow the correct statutory procedure, and instead writing a perfunctory letter to the wrong body; and using contempt of court process to further harass and intimidate the Defendants.

The deponent urged the court to dismiss the contempt proceedings with costs, deposing that they are misconceived and without merit as they lack a legal as well as factual foundation.

### **The Submissions**

The application was canvassed by way of written submissions. Nyachoti & Company Advocates for the Plaintiff filed submissions dated 21/3/2014 wherein counsel structured the submissions under two broad categories, namely, procedural and substantive issues. Procedurally, counsel submitted that by virtue of Section 5 of the Judicature Act, the law applicable to contempt of court proceedings is Part 81 of the English Civil Procedure (Amendment No, 2) Rules, 2012, in view of the abolition of Order 52 of the Rules of Supreme Court of England. Further, that once Section 5 of the Judicature Act is cited, it automatically imports the current and applicable law of contempt in England, and that failure to invoke the correct provisions of English law did not make their application incompetent. In support of this submission, counsel referred the court to the case of **Midroc Water Drilling Company Limited v Cabinet Secretary, Ministry of Environment, Water & Natural Resources & 2 Others (2013) eKLR** where the Court found that invoking the wrong order by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants did not render their application incompetent.

It was the counsel's further submission that pursuant to the applicable law, the requirements are firstly, to set out the grounds on which the committal application is made and identify, separately and numerically each alleged act of complaint including, if known, the date of each alleged act and secondly, that the application be supported by affidavit(s) containing all the evidence relied upon. In that regard, counsel submitted, there is no requirement as to the issuance of a 24-hour notice to the Attorney General or filing a statement as was initially required by the defunct rules of procedure. In support of this submission, counsel relied on a recent decision by the Court of Appeal in **Christine Wangari Chege v Elizabeth Wanjiru Evans & 11 Others (2014) eKLR** where the Court stated thus:

**We find on the basis of the new Civil Procedure Rules (of England) which are now contained in the Second Supplement to the 2012 White Book that no leave is required before bringing an application...for committal for contempt relating to breach of this court's order...**

On service of the court order said to be breached, counsel submitted that the said order arose out of consent between the parties which was adopted as an order of the court. Consequently, the 1<sup>st</sup>-3<sup>rd</sup> Defendants were estopped from pleading that they were not served with the orders or were unaware of the same. Counsel submitted further that the Defendants were in compliance with the said orders until the ruling delivered on 18/2/2013, further demonstrating that they had knowledge of the orders.

It was submitted for the Plaintiff that personal service of an order is only required to ascertain that the party is aware of the subject order. Counsel cited to the court English and Kenyan authorities including **Basil Criticos v Attorney General & 8 Others (2012) eKLR** and **Kenya Tea Growers Association v Francis Atwoli & 5 Others Petition No. 64 of 2010** whose holding is that knowledge of a court order, if

proven, supersedes the issue of personal service.

As regards service of the contempt proceedings, counsel for the Plaintiff submitted that indeed the rules required personal service upon the 1<sup>st</sup>-3<sup>rd</sup> Defendants. However, that the 1<sup>st</sup>-3<sup>rd</sup> Defendants are represented by a reputable firm of advocates who have been on record from the date of entry of the consent order, and who acknowledged service following which the 1<sup>st</sup>-3<sup>rd</sup> Defendants responded to the application. Counsel submitted that the response to the application demonstrates knowledge of the existence of the proceedings even though the 1<sup>st</sup>-3<sup>rd</sup> Defendants were not served in person.

In respect to the penal notice, counsel referred the Court to Rule 81.9 (2) of the English Civil Procedure Rules which provided that the penal notice was not a mandatory requirement. Counsel also submitted that the 1<sup>st</sup>-3<sup>rd</sup> Defendants undertook to refrain from further construction pending the hearing and determination of the application, and thus the penal notice was irrelevant.

On the substantive issues, the counsel for the Plaintiff submitted that the order of 26/11/2011 are indeed valid and enforceable in view of the words, “*until the hearing and final determination of the said application,*” which, counsel submitted, was intended to be in force until the application dated 11/7/2011 was determined. Further, that a stay of the application did not amount to dismissing or determining a matter, therefore, the matter is still pending, and can be revisited upon the Plaintiff exhausting the dispute resolution mechanisms available. Counsel in this regard referred the court to the definitions of the words “stay” and determination” in **Black’s Law Dictionary 8<sup>th</sup> Edition**, and to various authorities including the Canadian case of **R v Jewitt (1985) 2 S.C.R. 128**, where the court held that stay of proceedings is stopping or arresting of judicial proceedings by the direction or an order of the court.

Oraro & Company Advocates for the 1<sup>st</sup>-3<sup>rd</sup> Defendants filed submissions dated 7/4/2014, wherein counsel submitted on their Preliminary Objection as well as on the merits of the contempt application. The said counsel reiterated that the substantive application for contempt was filed more than 6 weeks after the Plaintiff had obtained leave of Court. Further, that, on the Plaintiff’s own admission of the change in the law in England that is applicable in contempt proceedings, the proceedings herein are null and void *ab initio*, as the Plaintiff’s application relies on non-existent provisions of the law, and therefore that this Court lacks jurisdiction to entertain or grant any relief.

Counsel submitted that in the event that the court was inclined to overlook the incompetence, the said application is still unsustainable for reasons that the new applicable law re-enacted the provisions of Order 52 (now repealed). Counsel extensively cited the provisions of RSC Order 52 and highlighted the instances of non-compliance of the same by the Plaintiff.

Counsel for the 1<sup>st</sup>-3<sup>rd</sup> Defendants also submitted that personal service of the order alleged to have been breached and which has been endorsed with a notice of penal consequences must be established before a Court can entertain or consider the application for contempt of court on its merits. He relied on various cases in this respect including **Ochino & another v Okombo & 4 Others, (1989) KLR 165** and **Nyamodi Ochieng – Nyamogo & Another v KPTC Civil Application No. Nai 264 of 1993**. Further, that no application for contempt of court will be entertained unless it is personally served on the party against whom the orders are sought. It was the counsel’s contention that the Plaintiff had not even attempted to show that the order on which his application is predicated was served on the 1<sup>st</sup>- 3<sup>rd</sup> Defendants.

It was further submitted for the 1<sup>st</sup>-3<sup>rd</sup> Defendants that it has repeatedly been emphasized that where the liberty of the subject is at stake or its property is in danger of sequestration, the Court must insist on strict compliance with the all the procedural safeguards, otherwise the summary process of contempt will be abused. Consequently, any deprivation of the 1<sup>st</sup>-3<sup>rd</sup> Defendants’ liberty without full compliance with the laid down procedures would run afoul of Article 29(a) of the Constitution, which provides that every person has the right not to be deprived of freedom arbitrarily or without just cause.

As regards Article 159 of the Constitution and Sections 1A and 1B of the Civil Procedure Rules relied on

by the Plaintiff, counsel submitted that the provisions did not constitute an open license to ignore all rules. It was submitted that fundamental matters of procedure such as the existence of a suit as a basis for seeking interlocutory relief, cannot be characterized as ‘undue regard to technicalities’.

On the merits of the application, counsel reiterated the 1<sup>st</sup>-3<sup>rd</sup> Defendants’ contention that upon delivery of the ruling of 18/2/2013, the orders made on 26/7/2011 lapsed as the application dated 11/7/2011 had been heard and determined. Further, that the court did not make any order restraining the 1<sup>st</sup>-3<sup>rd</sup> Defendants from doing anything whether in respect of the subject property or at all, pending the Plaintiff’s compliance with the procedures for the dispute resolution provided for under the Physical Planning Act and Environmental Management and Coordination Act.

Lastly, counsel for the 1<sup>st</sup>-3<sup>rd</sup> Defendants submitted that an order staying an application is as much a determination, as an order granting or dismissing an application. Counsel submitted that there was no evidence that the 1<sup>st</sup>-3<sup>rd</sup> Defendants breached an order of the Court as they acted on well-founded advice that there was no court order restraining them, and that the Plaintiff has failed to show that there was an order, duly endorsed with a notice of penal consequences which was served upon them in person.

### **The Issues and Determination**

This Court will first address the preliminary issue raised of whether there is a subsisting order for which contempt of court proceedings can lie, in light of the stay by this Court of the Plaintiff’s Notice of Motion dated 11<sup>th</sup> July 2011. The orders that are alleged to have been disobeyed by the 1<sup>st</sup>-3<sup>rd</sup> Defendants were granted by Mboghli J. on 26<sup>th</sup> July 2011 upon the consent of the Plaintiff’s and 1<sup>st</sup> – 3<sup>rd</sup> Defendants’ Advocates as follows:

#### **“By consent;**

- 1. The Plaintiff be and is hereby granted leave to file and serve a supplementary affidavit within 14 days from today and Defendants be granted leave to file a further affidavit within 7 days of service.**
- 2. The parties to file and exchange written submissions in respect of the application dated 11/7/2011 by 15/9/2011.**
- 3. Counsel to highlight submissions on 18/10/2011**
- 4. The Defendants be and are herein restrained from comprising on any further construction works on the 7<sup>th</sup> & 8<sup>th</sup> Floors on the subject building on LR No. 209/7584. Save for the installation of or lift and electricity which will be done without prejudice to the orders sought in the plaint and application dated 11/07/2011 until the hearing and determination of this said application.**
- 5. The Defendant hereby undertake not to apply for occupation in certificate for the 7<sup>th</sup> and 8<sup>th</sup> Floors of the said building on LR No. 209/7584 until the hearing and final determination of the said application.**
- 6. Parties at liberty to apply.”**

The said consent orders were recorded during the hearing of the Plaintiff’s Notice of Motion dated 11<sup>th</sup> July 2011, which was seeking the following orders:

- 1. That pending the hearing and determination of this suit, a permanent injunction be and is hereby issued restraining the Defendants whether by themselves, their employees, servants and/or agents or otherwise, howsoever from proceedings and/or continuing with the construction of a ten (10) storeyed shops and offices block or any other constructions of similar size and/or nature on L.R. No. 209/7584.**
- 2. That a mandatory injunction be and is hereby issued directing and/or compelling the Defendants to liaise and consult with the Plaintiff and all other stakeholders while planning any other development(s) on the aforementioned parcel of land and to obtain all requisite approvals from the respective Government Authorities and ensure that the same are**

- obtained procedurally, regularly, legally and properly, taking into account all the relevant and applicable laws and regulations thereto.**
- 3. That a mandatory injunction be and is hereby issued compelling the Defendants to adhere to the Licence issued to them to construct eight (8) floors including the basement and ground floor only on the said parcel of land as opposed to the current ten (10) floors and any other development(s) outside the legally approved one(s) on the said parcel of land and any such building be demolished.**
  - 4. That the Court does declare that the Plaintiff's, its tenants, occupants and other neighbours rights to a clean and healthy environment have been and/or are likely to be contravened and that the said Plaintiff, tenants, occupants and neighbours need protection."**

This Court after hearing the said Notice of Motion and considering the Plaintiff's and 1<sup>st</sup> – 3<sup>rd</sup> Defendants pleadings and submissions thereon, ordered as follows in a ruling delivered on 18<sup>th</sup> February 2013:

**"...The Plaintiff's application is in the premises stayed for the foregoing reasons, pending the Plaintiff's compliance with the procedures of dispute resolution provided for under the Physical Planning Act and the Environmental Management and Coordination Act as detailed out in the foregoing.**

**There shall be no order as to costs at this stage."**

The question therefore before the court is the effect of the stay of the application on the consent orders that was given in the course of its hearing.

It has been argued by the Plaintiff in this regard that this Court's decision to stay the said application did not have the effect of determining the application, but of suspending and/or postponing the application pending the stated contingency. The 1<sup>st</sup> -3<sup>rd</sup> Defendant on the other hand submitted that that upon delivery of the ruling of 18/2/2013, the orders made on 26/7/2011 lapsed as the application dated 11/7/2011 had been heard and determined, and as the court did not make any interim orders.

I find that I have to agree with the 1<sup>st</sup> -3<sup>rd</sup> Defendants' submissions for two reasons. Firstly, the effect of a stay of proceedings is to suspend a suit indefinitely or until the occurrence of a condition imposed by the court, and therefore if the court wants to save any orders granted during the suit it must expressly state so, otherwise any such orders are also deemed to have been suspended by the stay order.

A stay of proceedings is in this regard defined in **Black' Law Dictionary Ninth Edition** at page 1548 as "an order to suspend all or part of a judicial proceeding or a judgment resulting from that proceeding". Consequently, if this Court wanted to save the orders given on 26<sup>th</sup> July 2011 or to order that a particular *status quo* to be maintained by the parties herein pending the compliance by the Plaintiff with this Court's directions, it would have expressly ordered so.

Secondly, an examination of the ruling delivered by this Court on 12<sup>th</sup> February 2013 shows that the main reason why the Plaintiff's Notice of Motion dated 11<sup>th</sup> July 2011 was stayed, was because this Court found that it was not the right forum at that stage to hear and determine that application, and the application was therefore not properly before it. The Plaintiff was consequently referred to the appropriate mechanisms and fora that would give it the relief it sought. It is noteworthy that the Plaintiff has not brought any evidence to show its compliance with this Court's direction in this regard.

I therefore find for the foregoing reasons that there is no subsisting order in force that can be the subject of the present application for contempt of court, as the effect of staying of the Plaintiff's application dated 11<sup>th</sup> July 2011 in the ruling delivered by this Court on 18<sup>th</sup> February 2013, was to also stay the consent orders of 26<sup>th</sup> July 2011 given pursuant to that application. The Plaintiff's Notice of Motion dated 24<sup>th</sup> September 2014 is accordingly denied.

The Plaintiff shall meet the costs of the said Notice of Motion.

Dated, signed and delivered in open court at Nairobi this \_\_\_\_14<sup>th</sup>\_\_\_\_ day of \_\_\_\_July\_\_\_\_, 2014.

**P. NYAMWEYA**

**JUDGE**