



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC CIVIL SUIT NO. 38 OF 2014

JACKSON OMWENGA T/A

JACKSON OMWENGA & CO. ADVOCATES..... PLAINTIFF

VERSUS

HARAMBEE SACCO SOCIETY LTD..... 1ST DEFENDANT

GLADYS GICHOHI.....2ND DEFENDANT

RULING

The Plaintiffs' Application

The Plaintiff in his application by way of a Notice of Motion dated 24th February 2014 is seeking the following orders:

1. That the 2nd Defendant herein Gladys Gichohi be committed to civil jail for a period of six (6) months for disobeying the orders given on 02/12/2013 and that the 1st Defendant be fined for not complying with the orders of 02/12/2013.
2. That the court do appoint Nathan Muhatia Pala trading as Muhatia Pala Auctioneers to execute the orders of 02/12/2013 by removing the structures erected on the common areas.
3. That the Defendants do pay the costs of this application and Muhatia Pala Auctioneer's charges.

The application is premised on grounds that on 02/12/2013 the parties herein appeared in court, and an order was issued requiring the Defendants to give the Plaintiff access to its offices. However, that despite the service of the order on the Defendants on 09/12/2013 and on its Advocates on 10/12/2013, the Defendants have ignored and continued ignoring the said orders.

The Plaintiff averred that the court should appoint Nathan Muhatia Pala trading as Muhatia Pals Auctioneers to execute the orders of 02/12/2013 at the cost of the Defendants, as the Defendants' action are tantamount to disrespect of the court. He claimed that there is no accesses to his offices as the common areas have been blocked. The Plaintiff annexed a copy of the said court order and photos of his office.

The Plaintiff's counsel filed written submissions dated 14th July 2014 wherein he argued that the orders were extended from time to time, and that the Defendants were personally served with the said orders but chose to ignore them and they have not removed the offending structures, He also submitted that the facts by the Plaintiff are not disputed and are not denied by the Defendant.

The Defendants' Response

The 1st and 2nd Defendants filed Grounds of Opposition to the Plaintiff's application dated 9th June 2014. The main ground for opposing the application was that the Court order upon which the said application is predicated was for a specific purpose, namely to allow the Plaintiff have right of access to his offices until 16th December 2013. Further, that it was not an open ended order restraining the construction of the structures on the common area. The Defendants stated that in the circumstances, no reasonable grounds have been furnished by the Plaintiff that would warrant the grant by this Court of the Orders sought, as it has not been demonstrated that the Defendants have disobeyed the Court Order by otherwise impeding the Plaintiff's access to his offices.

The Defendants' counsel filed written submissions dated 24th September 2014, wherein they argued that the essence of the law of contempt is to ensure obedience with unambiguous and clear court orders. Further, that the interim order of 4th December 2013 was for a particular purpose, which was to grant the Plaintiff to access to his offices and was not open ended restraining the Defendants from constructing the offices .

The Defendants' Advocate submitted that the Defendants had fully complied with the order, and that the Plaintiff had not shown beyond reasonable doubt that the Defendants had impeded his access to his office. He cited the decision in **Amos Anyasi T/A ANA & Associates vs Muhammed Ramazani & Another (2009) eKLR** in this respect. Lastly, it was submitted relying on the decision in **Director General of Fair Trading vs Buckland & Another, (1990)1 All ER 545**, that the Plaintiff must also show that the 2nd Defendant who is sued in her capacity as an officer of the 1st Defendant had the necessary *mens rea* and *actus reus* required to commit the contempt.

The Issues and Determination

There are three issues before the court for determination arising from the pleadings and submissions highlighted in the foregoing. The first is whether there was personal service of the orders issued by this court on 4th December 2013 and a notice of penal consequences on the 1st and 2nd Defendants. Secondly, if there was such service, whether the 1st and 2nd Defendants are culpable for contempt of court. The last issue is if the 1st and 2nd Defendant are found culpable, whether the Plaintiff can be granted the remedies sought.

A brief summary of the law applicable to these issues is as follows. Order 40 Rule 3 of the Civil Procedure Rules provides for the consequences of breach of an order of injunction, and states that in cases of disobedience, or of 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 a term not exceeding six months unless in the meantime the court directs his release.

The substantive law that applies is the English law on committal for contempt of court by virtue of section 5(1) of the Judicature Act which provides that:

“The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate courts.”

The applicable English Law in this respect is Part 81 of the English Civil Procedure Rules of 1998 as variously amended, which part repealed in most part the Rules of the Supreme Court that previously applied, including Order 52 and parts of Order 45 of the Rules of the Supreme Court. The law on the personal service of court orders is now found in Rule 81.8 of the English Civil Procedure Rules. The said rule provides that unless the court dispenses with service, a judgment or order may not be enforced by way of an order for committal unless a copy of it has been served on the person required to do or not do the act in question. Rule 81.6 of the English Civil Procedure Rules specifically provides that the method

of service shall be personal service, which is effected by leaving the order with the person to be served.

Rule 81.9 (1) of the English Civil Procedure Rules of 1998 is also clear that a judgment or order to do or not do an act may not be enforced unless there is a prominently displayed a warning to the person that disobedience to the order would be a contempt of court punishable by imprisonment, a fine or sequestration of assets. Under sub-rule (2) of the said Rule, it is only in the case of an undertaking to do or not to do an act which is contained in a judgment or order where the notice of penal consequences may be dispensed with.

This Court notes that Kenyan courts have also held that personal service of orders and a penal notice is a requirement in contempt of court proceedings, and reference is made to the Court of Appeal decisions in **Nyamogo & Another v Kenya Posts and Telecommunications Corporation, (1994) KLR 1**, and **Ochino & Another v Okombo & 4 others (1989) KLR 165** in this respect.

Coming back to the facts of the present application, the order complained to have been defied by the Defendants was issued by the court on 4/12/2013 and stated as follows:

“THAT the Defendants by themselves their agents servants employees or any new tenant be and are hereby restrained from putting up offices and/or structures on the entrance to the Plaintiff’s offices and or common areas and the said structures being erected on the entrance to the plaintiff’s offices and or common areas be removed by the Defendants to allow the Plaintiff have a right of access to his offices situated on L.R No. 209/9966 on the 10th Floor till the 16th December 2013.”

From the Court record, the interim orders were extended on 16th December 2013 and 21st January 2014. According to an affidavit of service sworn on 16th November 2013 by Eunice Moraa Nyabio an Advocate of the High Court of Kenya, service of the Court order was effected on the 2nd Defendant on 9th December 2013. There is no affidavit of service of the said order on any official of the 1st Defendant.

I have perused the Plaint filed herein dated 21st November 2013. It is not stated therein that the 2nd Defendant is sued as an officer and/or official of the 1st Defendant, and for all intents and purposes she is sued in her personal capacity. As the 1st Defendant is a limited liability company, personal service on it therefore ought to have been upon its directors and/or other officials as required by Order 5 Rule 3 of the Civil Procedure Rules, which service was not done. I therefore find that there was no personal service of the orders issued on 4/12/2013 on the 1st Defendant, and in the circumstances it cannot be culpable of disobedience of the said court orders

The aforementioned affidavit of service did not attest to service of a notice of penal consequences on the 2nd Defendant. The absence of service of a penal consequence notwithstanding, it is my view and it has been held in several judicial decisions that if personal awareness of the court orders by the alleged contemnors is demonstrated, they will be found culpable of contempt even though they had not been personally served with the penal notice. See in this regard the decisions in **Kenya Tea Growers Association vs Francis Atwoli & Others**, **Nairobi High Court Constitutional Petition No 64 of 2010**, **Husson v Husson, (1962) 3 All E.R. 1056**, **Ronson Products Ltd v Ronson Furniture Ltd (1966) RPC 497**, and **Davy International Ltd vs Tazzyman (1997) 1 WLR 1256** .

The second issue for determination is whether the 2nd Defendant, whom this Court has found was the one aware of the orders issued on 4/12/2013, is culpable for contempt of court. The applicable law as stated in **Mwangi H.C. Wangonde vs Nairobi City Commission**, **Nairobi Civil Appeal No. 95 of 1998** is that the threshold of proof required in contempt of Court is higher than that in normal civil cases, and one can only be committed to civil jail or otherwise penalized on the basis of evidence that leaves no doubt as to the contemnor’s culpability.

In the present case the acts of contempt alleged by the Plaintiff are that there is no access to his offices as

the common areas have been blocked, and the Defendants have refused to remove the structures thereon as ordered by the Court. The orders reproduced in the foregoing are clear that was enjoined by the Court was the construction of structures at the entrance to the Plaintiff's office.

The Plaintiff provided photographs of a door and reception constructed by the Defendants in the common areas and of the door leading to his offices as his evidence in this respect. These photographs however do not show how access to the Plaintiff's offices has been blocked, and no evidence of structures at the entrance to his office was given. It is also not evident when the said photographs were taken to give an indication of the time of the alleged construction and disobedience of this Court's orders.

Arising from the foregoing, I find that the Plaintiff has not discharged the burden of proof applicable in contempt of court cases. His Notice of Motion dated 24th February 2014 is accordingly declined.

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

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____9th____ day of

____December____, 2014.

P. NYAMWEYA

JUDGE