

Libros

IN THE HIGH COURT OF TANZANIA
AT DAR ES SALAAM

CIVL CASE NO. 464 OF 1999

SILENT IN HOTELS LTDPLAINTIFF

VERSUS

INTERSTATE OFFICE SERVICE LTD RESPONDENT

Date of last order 15/02/2008

Date of Judgment 19/12/2008

RULING

MLAY, J.

The Plaintiff is the owner of the landed property known as Silent Inn and situated on Plot No. 1 Sam Nujoma Road (Mpakani Road) in the City of Dar es salaam.

The Plaintiff entered into a tenancy agreement with the Defendant which included a condition to effect renovations to the premises. Subsequently, the Plaintiff filed a suit against the Defendant for an alleged breach of the tenancy agreement and seeking judgment and decree against the Defendant for certain orders, including vacant possession of the said premises.

On 14/3/2005 the suit came up before Ihema J, and the following proceedings took place:

“Coram: Ihema, J

For the Plaintiff - Dr. Lamwai

For the Defendant - Mr. Rweyongeza

CC: Nester

Dr. Lamwai: My Lord there is a Chamber Summons filed following the actions by the defendant.

Mr. Rweyongeza: My Lord I am not aware of the alleged demolitions complained, but I am prepared to pray for the maintaining the status quo pending hearing.

Order: By consent it is hereby agreed and ordered that status quo be maintained, it structure to remain as it is pending the hearing of the suit including the counter claim. In the meantime hearing on 27 and 30 May 2005. Parties agree on the issues for trial”.

Upon the retirement of Ihema, J, the suit was reassigned to me. On 10/5/07 the suit came up before me and the following proceedings took place.

"10/5/07

Coram - Mlay, J

For the Plaintiff/ Applicant - Dr. Lamwai

For the Defendant/ Respondent - Muganizi for Rweyogeza.

Mugamizi; My Lord since this is a land matter, the extension of time to proceed has to be obtained from the C.J.

Dr. Lamwai: There is a general extension which I promise to bring. As renovations are going on we pray that no further renovations should take place until the matter is determined.

Muganizi: We have no objection to an order that the status quo be maintained.

Order: As the Plaintiffs have prayed that the ongoing renovations should stop and Mr. Muganizi advocate holding brief for Mr. Rweyongeza for the Defendant has no objection, it hereby ordered that no further renovations should take place on the disputed premises as from the date of this order, until final determination of the matter.

The Plaintiff to file c/a before Mention date and mention on 7/6/07"

On 30/6/08, The Plaintiff filed an application by Chamber summons under section 68 (c) and (e) ; Order XXXVII Rule 2 (2) and section 95 of the Civil Procedure Code (Cap 33 RE 2002); section 124 Penal Code and all other enabling provisions of the law. The chamber summons seeks, "*Counsel for the decree Holder/ Applicant be heard on an application for the following orders namely:*

- a) *That this Honourable Court May be pleased to order the attachment of the properties, inclusive of businesses at the disputed premises and / or for arrest and detention of FRED WILLIAM RWE GASIRA, Principal Office of the Defendant / Respondent for deliberate breach of lawful orders of this Honourable Court.*
- b) *That this Honourable court may be pleased to order FRED WILLIAM RWE GASIRA, Principal officer of the Defendant/ Respondent to show cause why they should not be committed to Civil imprisonment for deliberate breach of lawful order of this Honourable Court.*
- c) *Costs be provided for*
- d) *Any other / further relief (S) that this Court may deem proper to grant".*

The application was supported by the affidavit of THADDEUS MAKOI, the Managing Director of the Applicant. The deponent has avared in the affidavit, as follows:

1. *That I am the Managing Director of the first applicant herein thus conversant with what I depose hereunder;*
2. *That on the 14th day of March 2005, this Honourable Court, Hon. Ihema, J (as he then was) issued an order for the maintenance of status quo. That in 2002 the status quo was evidence by photographs annexed hereto collectively marked NRCA 1" and forms part of this affidavit.*
3. *That despite the said order, the Defendant/ Respondent in letter defiance went ahead and did renovations inside the hall and bar area.*
4. *That further to the foregoing, on 10th May 2007, this Honourable Court president (sic) by Hon. Mlay, J made an order that no further renovations should take place at the premises as from the date of the order till determination of the matter. That despite the said order the defendant respondent went ahead renovated premises added new structures there at including shops. Photographs proving the foregoing are annexed here to collectively marked "NRCA2" and forms part of this affidavit.*
5. *That despite the said order, in utter defiance of the said court order the defendant respondent were ahead renovated the premises and has rented them out to tenants and a church. That the Defendant/ Respondent is earning income form the said tenants, the church inclusive, without any regard to the court orders.*

6. *That the foregoing that defendant has provide to have not respect to any orders o this court, this putting to reticule lawful court orders”.*

The Respondent filed a counter affidavit to which the Applicant also filed a supplementary Affidavit. The application was ordered to be disposed of by way of written submissions, which advocates of both parties have filed, and hence the present ruling.

The Applicants advocate referred to the two orders made in the proceeding quoted earlier on, in this ruling. The advocate contended that *“in his counter affidavit filed on 17th July 2008, Fred Rwegasira at paragraph 14, last part thereof, admits introducing shops, thus constructing shops. He submitted that “no court order non consent from the lawful owner of the said plot, Mr. Thoddeus Makoi was sort/ and or obtained prior to the said shops being introduced”* The advocate contends that todate, no one apart from Rwegasira, knows how much he earns from the said shops.

He contended further that Rwegasira lies on oath by stating that he introduced the said shops before the court order. He argued tha this is not the truth because, *“had that been the case Mr. Makoi could have complained earlier as he receives no cent from the said shops.....”* and argued alternatively that, assuming that to be the case that the construction was before the last order, the act was done after

the order made by Ihema, J. He contended that the order had not been vacated. The learned advocate further contended that in the affidavit of the Applicant, the Respondent is "*in habitual breach of court orders in that he*" went ahead and hired the premises to a church, without any order of the court or consent of the owner.

Referring to paragraph 15 of the Respondents counter affidavit, the Applicants advocate contended that it shows "*another clear admission of commission of actions that undermine the authority of this Honorable court*". He argued that although the Respondent has in the counter affidavit stated that the court orders have nothing to do with use of the premises, Ihema, J ordered the maintenance of the status quo and that the court did not restrict the order to renovations. He argued further that my order made on 10/5/2007, was due to the fact that the applicant had complained that the premises were being renovated contrary to the order of Ihema, J. contended further that the shops developed resulted from the said renovations and that they have now been rented out. He argued that the shops would not have reached the stage of being rented, if renovations were not done and of the result, the status quo was altered. He submitted that from the affidavit of Thaddeus Makoi, it is clear that the renovations were done after 2002, as shown in photographs, annexures "NCRA 1" and "NCRA 2".

The Applicants advocate submitted that Rwegasira is making money as rent from tenants and he should not be left to benefit from breaching court orders. He prayed that Fred Rwegasira be ordered *"to deposit in court all proceeds unlawful (sic) earned from the said premises"*.

He further prayed that he be held in contempt and to show cause why his properties should not be attached and why he should not be committed to civil imprisonment. He asked this court to proceed as this court did in the case of TANZANIA BUNDU SAFARIS LTD VS DIRECTOR OF WILDLIFEX ANOTHER [1996] T.L.R 246.

The Respondent through their advocate R. K. Rweyongeza before giving into the substantive arguments raised by the Applicant, started off by submitting that, *"the failure by the applicant to file a reply to the strong avarements, can only mean that the applicant accepted the avarements therein we submit therefore that it is very late in the day for the applicant to challenge the contents of the counter affidavit though submissions by its counsel from the Bar as they have fried to do in this case..... we therefore pray to adopt in full the unopposed counter - affidavit of the respondent as deponed by fedly William Rwegasira as part of our submissions,"*

The learned advocate has not cited any legal authority in support of his proposition in the above quoted submission, that a party is required to file a reply to a counter affidavit, and if he does not, he has accepted everything which is avared in the said counter affidavit. My understanding of the law relating to affidavits, is that an affidavit is a substitute of oral evidence and that, like all evidence, affidavits are governed by the law of evidence and any evidence is subject to evaluation.

The Applicants advocate would therefore be entitled to evaluate and comment on the evidence adduced by way of the Respondents counter affidavit, notwithstanding that a reply to the counter affidavit or a supplementary affidavit had not been filed. I do not therefore see any substance in the opening submission by the Respondent's advocate, on the failure to file a reply to the counter affidavit or, to the effect of such failure. The Applicant or this court, is not bound by the contents of the Respondents counter affidavit, just because the Applicant did not file a counter affidavit in reply. As a matter of fact, the Applicant did file a supplementary affidavit.

On the substance of the application the Respondents advocate chose to submit on each order alleged by the Applicant, to have been disobeyed by the Respondent. He started with the order of Ihema, J which was made on 14/3/2005. The said order was; "*that status quo*

be maintained, ie. Structure to remain as it is pending the hearing of the suit including the counter claim... .."

The appellants complaint in paragraph 3 of the supporting affidavit, is, *"that despite the said order, the defendant/ respondent in utter defiance went ahead and did renovations inside the hall and Bar area"*

The Respondents advocate quoted the Respondents reply as contained in Paragraph 7 of his counter affidavit in which it is averred:

"7. That, I dispute the contents of paragraph 3 of the affidavit. I state that after the order of Justice Ihema, J, for the maintenance of a status quo ante, no renovation inside the Hall and the Bar took place the front part including the Bar was demolished by TANROADS in 2006. Obeyed the order even after the expiry of its life span".

The learned Respondents advocate contended that the applicant never challenged this avarement and also argued that "even if the two avarements are pitted against each other the applicant has not shown to the court how did the respondent

breached the order by carrying not renovations to the bar and to the Hall, particularly after the respondent denies to have done so".

He further argued that the court is not told of the condition of the bar and the hall before and after the renovations or what these renovations were. He submitted that the applicant has not even shown to this court that renovations ever took place after the order by justice Ihema. Apparently in reply to the Applicants avarement in paragraph 5 of his supporting affidavit that the use of the disputed premises as a church contravenes the order by Ihema, J, the Respondents advocate having quoted the said order, submitted that one, "*cannot, by any stretch of imagination, read into the order..... that the order of Ihema, J. covers the use of the premises*".

The Respondent further submitted that the structure that was to be protected was pulled down, bringing into play "*the issue of NOVUS ACTUS INTERVIEWS*". He contended that before the structure was pulled/ down by TANROADS "*the respondent warned the applicant on the pending order*" and that this is what is averred in paragraph 9 of the counter affidavit. He contended further that the applicant rushed to the District land and Housing Tribunal and to the High court Land Division and obtained temporary injunction to no avail, as TANROADS "*went ahead and demolished the building*". He submitted that "*the applicant is very much aware that the status quo ordered by Mr. Justice Ihema, J did not exist after demolition*". The

learned advocate for the Respondent quoted from the letter the Respondent wrote to the Applicant annexure 10SL3 to the counter Affidavit, the following:

“once demolition is through there will be need to preserve the rest of the building and fixtures thereto by building a wall to mitigate further loss”.

The learned advocate argued that, *“the applicant had to do something to protect the properties and this in our humble submission cannot be taken to be defiling the order of Justice Ihema , J under the circumstances narrated in the counter affidavit.....”*. He submitted that the application in so far as it relates to the order of Ihema, J, lacks merit.

The Respondents advocate then went on to submit on the application, as it relates to the alleged violation of my own order dated 10th May, 2007.

He started off by quoting the Applicants complaint as contained in paragraphs 4 and 5 of his affidavit. The learned advocate submitted that the Applicants allegations have been *“vehemently”* dispute by the Respondent in paragraph 14 of the counter affidavit in which the Respondent stated:

“That I dispute the contents of paragraph 4 of the affidavit, I state that after the court Order of 10

May, 2007, the applicant has never made any renovation or carried out any construction. I state that the photograph appended as annexure NRCA2 are what the building was after the second demolition by TANROADS but before the court Order of May, 2005. I state that shops were introduced immediately after demolition as part of creating activities to protect the area and mitigate losses of paying for water electricityand other outgoings for a place that have never been used for any business since 1966. this was before the court order of May 2007".

The Respondents advocate reiterated the "respondent denies to have disobeyed the court order. The construction took place after the second demolition and nothing has ever taken place after the Court order of 10 May 2007".

The Respondents advocate submitted that failure by the Applicant to contradict the Respondents avancements in paragraph 14 is an admission that; *"The construction complained of was after the demolition by Tanroads but before the order of Justice Mlay, J".* Referring to the Applicants complaint as contained in paragraph 8 of the Applicants affidavit, the Respondent denied to have built or renovated any shops after the order of 10/5/2005 and submitted

that, the applicant has nothing to offer to prove such serious allegations. Referring to the Applicants complaint after the use of the premises as a church, the Respondents advocate contended that the use of the premises as a church was in place before the court order but submitted that no relief can be ranted against the complaint because no relief was prayed for. He quoted the reliefs sought as:

- a) *That may the Honorable court be pleased issue temporary injunction restraining the defendant respondent or and its workman from containing to restructure the suit premises until the matter is heard and finally detained.*
- b) *That May the Honorable court be pleased to fix the hearing date of this case has it has remained adjourned sine die since 30/9/2005.*

The orders being sought by the applicant have been clearly set out in the chamber summons and reproduced at the beginning of this ruling.

They are not in any way in the form of the reliefs quoted by the Respondents Advocate above. The orders sought are:

- a) *That this Honourable Court may be pleased to order the attachment of the properties, inclusive of businesses at the disputed premises and /or for arrest and detention of FRED WILLIAM RWEASIRA, Principal Officer of the Defendant/*

Respondent for deliberate non compliance and / or deliberate breach of lawful orders of this Honourable Court.

- b) *That this Honourable Court may be pleased to order FRED WILLIAM RWE GASIRA, Principal Officer of the Defendant/ Respondent to show cause why they showed not be committed to civil imprisonment for delineable breach of lawful orders of this court.*
- c) *Costs be provided for*
- d) *Any other / further reliefs.....*

The Applicant has alleged that the Respondent has deliberately breached or disobeyed an order of this court.

In OSWALDS CONTEMPT OF COURSE THIRD EDITION P.101. it is stated:

“Wilful disobedience to a judgment or order requiring a person to do any act other than the payment of money, or to abstain from doing anything is contempt of court”

The Applicant has therefore alleged that the Respondent has been in contempt of court. In the case of BUNDU SAFARIS LTD V DIRECTOR OF WILDLIFE AND ANOTHER [1996] TLR, Mapigano , J stated at page 251 of the report:

“The prime object of proceedings of this nature is to vindicate the rule of law by a finding of contempt, rather than to punish an individual”.

In Oswalds contempt of Law cited earlier, its is stated at page1, as follows:

“contempt, in the legal acceptance of the term, primarily signifies disrespect to that which is entitled to legal regard; but as a wrong purely moral, or affecting an object not possessing a legal status, it has in the eye of the law no existence”.

By the present application, the applicant has instituted contempt proceedings, the purpose of which, is not, and should not be to punish the Respondent, but to vindicate the rule of law by ensuring obedience of or compliance with, orders of his court. The question is whether this court made any order and whether the Respondent wilfully disobeyed or contravened such an order. The Applicant has alleged that this court made two orders, both of which the Respondent has contravened and disobeyed. The first order is alleged to have been made by Ihema, J on 14/3/2005. It has been conceded by both parties and the record of the proceedings confirm that on that date, Ihema, J made the following order:

“By consent it is hereby agreed and ordered that status quo be maintained, ie. Structure to remain as it is pending the hearing of the suit including the counter claim... ..”.

The Applicant has claimed in paragraph 3 of this affidavit of THADDEUS MAKOI *“that despite the said order, the Defendant/respondent in letter defiance went ahead and did renovations inside the hall and Bar area”*. In response, the respondent stated in paragraph 5 of his counter affidavit:

“ I admit paragraph 3 of the affidavit to the extent that his Lordship Mr. Justice Ihema,J issued an injunction for the maintenance of status quo. I dispute that the order was for restructuring of the building but for demolition as prayed for by the applicant”.

On the face of the order made by Ihema, J on 14/3/2005, although, it proceeded from the applicants complaint that the Respondent was demolishing the premises in question, it clearly stated that, maintaining status quo meant that the *“structure to remain as it is, pending the hearing of the suit including the counter claim”*.

It was not confined to non demolition only as implied by the Respondent. For the structure "*to remain as it is*", even construction done on the premises, would constitute contravention of the court order. It is true that although the Applicant alleged in paragraph 3 of his affidavit that the Respondent "*did renovations inside the hall and Bar area*", there was no further evidence offered to substantiation that allegation. However, in paragraph 13 of the Respondents Counter Affidavit, the Respondent stated:

"13 THAT, the applicant had to move swiftly for the interest of the parties to put up a wall so as to protect the rest of the building and the properties therein. I state now the suit premises and all properties are secure and no more construction work is going on".

The Applicants advocate referred to the above avarement, though wrongly referring to paragraph 15, and argued that by the said avarement, the Respondent has conceded contravening the court order. Since Ihema, J had ordered the maintained of the *status quo* and specifically stated that it meant the structure should "*remain as it is*" the construction of a wall even for the good intention of protecting the premises as contended by the Respondent in paragraph 12 of the

counter affidavit, is not an act of maintaining the *status quo*, as ordered.

The status quo was to be maintained until "*the hearing of the sent and of the counter - claim*", which has not taken place to date. It follows that the Respondent's contention that the order made by Ihema, J had somehow expired, is without merit.

In paragraph 12 of the counter affidavit the Respondent has conceded the construction of a wall and also in paragraph 14 of the same document, conceded that "*shops were introduced*". The Respondent has tried to justify the construction of the wall and shops as a protection of the premises following the demolition of part of the premises by TANROADS and also, for reasons of "*creating activities to protect the area and mitigate losses of paying for water electricity watchman and other outgoings.....*".

The construction of shops and "*creating activities*" which involved adding structures to the disputed premises, was in contravention of the order of the court that the "*Structure to remain as it is*". If the circumstances had changed such that the court order needed to be changed, then the Respondent faced with the court order that the structure is to remain as it is, should have applied to the court for the variation of the order to meet the changed circumstances. Informing the Applicant of the demolition by

TANROADS did not in any manner authorize the Respondent to contravene the order of the court to maintain the *status quo*, and as clarified in that order.

The question is whether the act of constructing a wall and shops on the premises was done willfully. The Respondent has argued that the demolition of part of the premises by TANROADS brought about the situation of "NOVUS ACTUS ITNERVENIENS". This simply means that the said demolition was an intervening act by a third party, for which the Respondent is not liable. With respect, I do not see the relevance of this argument. The argument would only have been relevant, if the wall and the shop were constructed by TANROADS and not by the Respondent. In these circumstances, the TANROADS not being the agents of the Respondents, their action would have been a proper intervening act for which the Respondent could not be cited for contempt, for not maintaining the *status quo* as ordered by Ihema, J. Since the wall and the shops were constructed by the Respondent who was fully aware of the order to maintain *status quo*, i.e the structure to remain as it is until the hearing of the suit and counter claim, the respondent's act of constructing the wall and shops was done willfully.

The Applicant has asked that court to attach the properties of the Respondent and also for the arrest and detention of FRED

WILLIAM RWE GASILA, Principal Officer of the Respondent for contravening the court order.

As for the attachment of property, such a remedy is not available in contempt proceedings. The "*attachment*" referred to in contempt proceedings, does not relate to "*attachment of property*", but to the person, a practice which originates from the practice obtaining in the court of Chancery in England.


It is not necessary for the purpose of this ruling to say anything more about "*attachment*" except to quote from OSWALD CONTEMPT OF COURT, the following passage:

"the distinction between committal for contempt and attachment still exists, although for some practical purposes it may be taken to be abolished".

If the Applicant thought attachment in proceedings of this nature, referred to be attachment of the property of the offender, he is mistaken. What then is the punishment for contempt? A person cited for contempt can be committed to prison, but as stated by Mapigano, J in the BUNDU SAFARIS case earlier cited, "*the law holds that contempt is also punishable by imposition of a fine*". In the present case, the imposition of a fine will also meet the needs of justice. In

assessing the fine the court has considered, that the Respondent did not only build a wall on the disputed premises but also instructed shops. This was in total defiance of the court order "*to maintain the status quo i.e the structure to remain as it is*"

Accordingly, it is ordered that the Respondent pays a fine of Tshs.1,000,000/- (one million) within 14 days of this order, and if in default, the Managing Director of the Respondent, FREDDY WILLIAM RWE GASIRA to go to jail to serve a term of three months. It is also ordered that the Respondents pay the costs incurred by the Applicant in this application. The Respondent has through the advocates submissions, prayed that the earnings from the shops be deposited in this court. First, prayers cannot be properly be made in submissions. Secondly, such earnings are not relevant to the contempt proceedings. If the Applicant intends to recover or otherwise benefit from the said earnings or to do anything relating to the business being conducted on the premises, this may be a subject of separate proceedings and not the subject of contempt proceedings.


J. I. Mlay,
JUDGE

19/12/2008.

Words: 4, 396