



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION

CIVIL APPEAL NO.E 469 OF 2019

DARI LIMITED.....1ST PLAINTIFF/APPLICANT
 RAPHAEL TUJU.....2ND PLAINTIFF/APPLICANT
 MANO TUJU.....3RD PLAINTIFF/APPLICANT
 ALMA TUJU.....4TH PLAINTIFF/APPLICANT
 YMA TUJU.....5TH PLAINTIFF/APPLICANT
 S.A.M. COMPANY LIMITED.....6TH PLAINTIFF/APPLICANT

- VERSUS -

EAST AFRICAN DEVELOPMENT BANK.....1ST DEFENDANT
 MUNIU THOITHI.....2ND DEFENDANT
 GEORGE WERU.....RD DEFENDANT

RULING

1. Before me is the **Notice of Motion application** dated **19th March 2020**. That application is filed by the defendants. The application was heard on 22nd July 2020 and by this Ruling that application is being determined. It follows, as rightly submitted by learned advocate **Mr Paul Nyamodi**, that prayers No. 2, 4, 5 and 6 of that application are not before me for consideration in this Ruling because they are prefaced by the words **“pending the hearing and determination of the application.”** Those words confirm that those prayers could only be issued by this court prior to the hearing and determination of the application. Now that the application was heard and is being determined by this Ruling those prayers will not be considered in this Ruling. To clarify my finding I will reproduce those prayers as follows:

(2) THAT pending the hearing and determination of this application, this Honourable Court be pleased to order that the second to Fifth plaintiffs grant the Receivers full, complete, and effective access to the first plaintiff’s premises in accordance with the Notice of Appointment and the Receivers’ letter to the directors of 23rd December 2019 and in accordance with this court’s orders of 2nd and 13th March 2020.

(3) THAT this Honourable Court be pleased to issue a Notice to Show Cause against Raphael Tuju, Yma Tuju, Alma Tuju, and Mano Tuju to show cause why they should not be committed to civil jail for disobedience of this court’s orders to allow the Receivers to resume their duties at the First Plaintiff’s premises.

(4) THAT pending the hearing and determination of this application, this Honourable Court makes an order that until the Contemnors purge their contempt to the satisfaction of the court, the contemnors and the first plaintiff ought not to be heard in these proceedings.

(5) THAT pending the hearing and determination of the application, this Honourable Court be pleased to order the second to Fifth Plaintiffs to provide the receivers with the First Plaintiff’s statement of Affairs, financial returns and company records.

(6) THAT pending the hearing and determination of this application, this Honourable Court be pleased to order the second to Fifth Plaintiff's to provide *the Receivers with the following information, in addition to all other necessary information*:

- a. The First Plaintiff's Cashbook as from 23 December 2019 to date showing all the receipts and payments of the company;
- b. The First Plaintiff's December 2019, January 2020, and February 2020 management accounts;
- c. The First Plaintiff's debtors and creditors listing as at 4th February 2020;
- d. The First plaintiff's staff payroll for the last three months.

(7). THAT such other or further orders as may be just be made to meet the ends of justice and to safeguard and protect the dignity of this honourable court.

(8). THAT the costs of this application be provided for.

It follows that this Ruling will deal with prayer number 3 above, which is the prayer still subsisting up to now.

2. The application is supported by the affidavit of George Weru dated 18th March 2020 and also by his supplementary affidavit of 24th April 2020.

3. In those affidavits the deponent stated that a court order was issued in this matter on 2nd March 2020 which ordered the 2nd to the 6th plaintiff to accord the Receiver managers of the 1st plaintiff, Dari Limited, access of the 1st plaintiff premises for the Receiver managers to proceed with the receivership of 1st plaintiff. That the said court order was issued in the presence of the learned advocates for the plaintiffs. That the 2nd to 6th plaintiffs have deliberately refused to allow the Receivers of 1st plaintiff to access the 1st plaintiff's premises.

4. By his supplementary affidavit that deponent outlined the number of time he and his co-receiver manager, Muniu Thoithi, had been denied access to the 1st plaintiff's premises on the instructions of the 2nd to 6th plaintiffs. That on seeking the assistance of the police, at Karen Police Station, the police declined to assist and thereafter police were deployed by the plaintiffs at the 1st plaintiff's premises, whose presence was intimidating to the civilian guards posted by the Receiver managers.

5. The defendant argued that with afore stated conduct of the plaintiffs it was clear that the plaintiffs have no intention of obeying the court orders given their persistent and flagrant disobedience of court orders.

6. The plaintiffs did not file either replying affidavit or grounds of opposition to the application. It follows that the plaintiff's do not controvert the evidential basis of the application. The plaintiff's defence to the prayer sought is that the plaintiffs were not served with the court order of 2nd March 2020 and that the debt of the 1st plaintiff to the Bank, East African Development Bank, is disputed and is the subject of the court of appeal stay order.

ANALYSIS AND DETERMINATION

7. On 23rd December 2019 the Bank appointed, under the powers contained in the Debenture issued by the 1st plaintiff to the Bank, Muniu Thoithi and George Weru as joint Receiver and managers.

8. The 1st plaintiff obtained financial facility from the Bank which was guaranteed by Raphael Tuju, Mano Tuju, Alma Tuju, Yma Tuju and S.M. Company Limited. The 1st plaintiff issued a Debenture to the Bank as stated above. On the Bank appointing the joint Receiver managers the plaintiffs filed this suit. The plaintiffs also filed an application for interlocutory injunction. The court issued interim injunction on 24th December 2019 as follows:

- **THAT** a temporary injunction is hereby granted for seven (7) days restraining the 2nd & 3rd Respondents being the 1st Respondent's Receiver and Manager or such other Receiver and Manager that the 1st Respondent may purport to appoint from discharging, executing and/or effecting any powers or such powers under the Notice of Appointment or Receiver and Manager dated 23rd December, 2019 or such other appointing instrument or in any other way interfering with the operations, management, running and affairs of the 1st Applicant pending the hearing of this Application.
- **THAT** the application to be served upon the Respondents.
- **THAT** the matter be mentioned on 3rd January, 2020 before the duty judge for further directions on hearing of the Application.

9. That application for interlocutory injunction was heard *inter partes* alongside the defendants' application and a Ruling was delivered on 2nd March 2020. The orders issued by that Ruling of 2nd March 2020 were as follows:

i. THAT the receivers shall forthwith resume their duties at the 1st plaintiff's premises but shall not dispose of the assets put under the debenture pending the hearing and determination of this matter.

ii. THAT the 2nd and 3rd defendants upon resumption of management of the 1st plaintiff should forthwith deal with the issues raised regarding the 1st plaintiff's bank account and all other issues that appertain to their lawful performance of their duties as receivers and managers.

iii. THAT on the application dated 24th December 2019, the order praying to restrain the 2nd and 3rd respondents from exercising their statutory duties pursuant to the notice of their appointment dated 23rd December is not allowed; in view of the fact that the notice is still effective;

iv. THAT an order to stay the notice of appointment pending the hearing and determination of the suit is not tenable in view of the fact that, the stay will not automatically revoke the notice. This will leave the company in limbo where the 2nd and 3rd defendant will remain appointed on paper without functional operations and the director's powers suspended upon appointment of the 2nd and 3rd defendant and continues to operate unlawfully.

v. THAT the application dated 27th December 2019 is thus not allowed but and the application dated 27th succeeds to the extent of reinstatement of the 2nd and 3rd defendants into control and management of the 1st plaintiff's affairs.

10. On 13th March 2020 in presence of the learned advocate for the plaintiff's and the defendants, and after the court had been addressed by those advocates the following orders were issued:

1. If the court orders issued on 2/3/2020 have not been obeyed, they should be obeyed forthwith. The consequence of disobedience of valid court orders are clearly understood under the law.

2. In that regard I direct that the Respondent (the plaintiffs) *to reflect on the same*.

3. In the same vein I do direct the applicants (the defendants) *whether there is another alternative option to enforcement of the orders eg an application for contempt or otherwise*.

11. It is in that background the defendants seek the prayer for the 2nd to 5th plaintiffs to show cause why they should not be committed to civil jail for disobedience of the court orders of 2nd and 13th March 2020.

12. The plaintiff defends that prayer on the ground that the 1st to 5th plaintiffs were not personally served with the orders of the court. Learned advocates for the plaintiff stated that the fact they were present when the court issued the orders was not service as required in an application such as this which seeks to take away the liberty of the plaintiffs.

13. The defendants in response to that line of argument relied on the court of appeal decision in the case **Shimmers Plaza Limited v National Bank of Kenya Limited [2015] eKLR**. The court of appeal in that case engaged in very informative discussion on the prevailing law on contempt of court. The court stated the proceedings of contempt of court in Kenya is the current law governing the High Court of Justice in England. The court of appeal discussed the need of personal service in contempt of court proceedings and proceeded to cite Rule 81.5 of the England PART 81 of the Civil Procedure (Amendment No. 2) Rules 2012 which provides that unless the court dispenses with service under rule 81.8 a judgment or order may not be enforced unless a copy has been served on the person required to do or not to do an act.

14. The orders issued by this court on 2nd March 2020 required the plaintiffs to permit the joint Receiver managers to resume their duties at the 1st plaintiff's premises. The order of 13th March 2020 was an order requiring the plaintiffs not to do an act, that is not to prevent the joint Receiver managers resuming their duties. I have gone to the trouble of highlighting what the orders of 2nd and 13th March 2020 provided because the English Rules under rule 81.8 dispenses with the need for personal service of the order where the order requires or prohibits such a person from doing an act. This is what the court of appeal in the **Shimmers Plaza** case (*supra*) stated:

“Rule 81.8 subjects the dispensation of service of copies of a judgment or order to the issue of notice of the judgment and the courts discretion. It provides that:-

“(1) In the case of a judgment or order requiring a person not to do an act, the court may dispense with service of a copy of the judgment or order in accordance with rules 81.5 to 81.7 if it is satisfied that the person has had notice of it –

by being present when the judgment or order was given or made; or by being notified of its terms by telephone, email or otherwise.

(2) In the case of any judgment or order the court may –

dispense with service under rules 81.5 to 81.7 if the court thinks it just to do so; o.....

As per rule 81.8, dispensation of service on the basis of notice or knowledge of the terms of an order will only apply to a court judgment or order requiring a person not to do an act, that is, a prohibitory order. The dispensation of service under rule 81.8

(1) is subject to whether the person can be said to have had notice of the terms of the judgment or order. The notice of the order is

satisfied if the person or his agent can be said to either have been **present** when the judgment or order was given or made; or was **notified** of its terms **by telephone, email or otherwise**. In our view, '**otherwise**' would mean any other action that can be proved to have facilitated the person having come into knowledge of the terms of the judgment and/or order. This would definitely include a situation where a person is represented in court by counsel. Once the applicant has proved notice, the respondent bears an evidential burden in relation to willfulness and mala fides disobedience. This Court in the **Wambora** case (*supra*) affirmed the application of these requirements.....

15. Further in that case the court of appeal recognised that, as a court, it was slowly moving from the need to require personal service in contempt cases. The court in that regard in **Shimmers Plaza** case (*supra*) stated:

“On the other hand however, this Court has slowly and gradually moved from the position that service of the order along with the penal notice must be personally served on a person before contempt can be proved. This is in line with the dispensations covered under 81.8 (1) (*supra*).

Kenya's growing jurisprudence right from the High court has reiterated that knowledge of a court order suffices to prove service and dispense with personal service for the purposes of contempt proceedings. For instance, **Lenaola J** in the case of **Basil Criticos Vs Attorney General and 8 Others [2012] eKLR** pronounced himself as follows:-

“...the law has changed and as it stands today knowledge supersedes personal service.....where a party clearly acts and shows that he had knowledge of a Court Order; the strict requirement that personal service must be proved is rendered unnecessary”

16. The court of appeal proceeded to pronounce that knowledge of the judgment or order by the advocate of the alleged contemnor suffice for contempt proceedings. The learned judges then stated:

“Would the knowledge of the judgment or order by the advocate of the alleged contemnor suffice for contempt proceedings? We hold the view that it does. This is more so in a case such as this one where the advocate was in Court representing the alleged contemnor and the orders were made in his presence. There is an assumption which is not unfounded, and which in our view is irrefutable to the effect that when an advocate appears in court on instructions of a party, then it behoves him/her to report back to the client all that transpired in court that has a bearing on the client's case.”

17. The facts in respect to this matter is that on 2nd March 2020 the plaintiffs were represented by Mr Paul Muite SC and Ms. B. Ndong. On 13th March 2020 the plaintiffs were represented by Mr Paul Nyamodi and Ms. B. Ndong. On both days the court made an order permitting the joint Receiver managers to resume their duties and an order forbidding the plaintiffs from disobeying the court orders.

18. The plaintiffs' argument that the order ought to have been served is adequately responded to by the above discussion. But further to that there is evidence, deposed to by George Weru, which evidence was not challenged by the plaintiffs that the 2nd to 5th plaintiffs were aware of the court orders made and specifically instructed their employees or their security personnel to deny the joint Receiver managers access to the 1st plaintiff's premises. Specific names of those employees were stated in the affidavits of George Weru and the 2nd to 5th plaintiff did not refute those depositions nor did they deny employment of those persons.

19. The 2nd to 5th plaintiff it would seem in this case hold themselves as being above the law. George Weru deposed that the said plaintiffs have gone as far as getting the assistance of the Kenya Police who are assisting them to disobey the orders of this court. These are the same police officers who refused to assist the joint Receiver Managers to enforce an order of this court on ground that the said court order did not direct that police do assist the joint Receiver managers. The police had no qualms to assist the 1st to the 5th plaintiff disobey a specific order of this court. This leads me to cite, with approval, the sentiments expressed in a **Canadian Case Macmillian Bloedel v Simpson, 1993 Can LII 2529 (BCSC)** thus:

“Some Canadians take democracy for granted. It is easy to forget that democracies have failed. It can happen to us unless we as a people co-exist by the rule of law. If we do not, Canada could collapse into a form of tyrannical rule. Our country will ultimately deteriorate if people feel they are entitled to abuse the rights of others when they are unable to convince the majority of the rightness of their cause.

Preserving the dignity of the court is only a minor part of contempt proceedings. The fundamental issue is much deeper. Underneath it all, contempt proceedings are taken primarily to preserve the rule of law. Without the rule of law democracy will collapse. Individuals will then decide which laws they will obey and which ones they won't. Government by the rule of law will disappear. People will then be controlled by the rule of the individual. The strongest mob will rule over the weak. Anarchy will prevail.

..... former Chief Justice Farris of this court in the celebrated case of Canadian Transport Co. Ltd. v. Alsbury (1952), 1952 CanLII 430 (BC SC), 6 W.W.R. (N.S.) 473 (B.C.S.C.),....., I quote from p. 478:

Once our laws are flouted and orders of our courts treated with contempt the whole fabric of our freedom is destroyed. We can then only revert to conditions of the dark ages when the only law recognized was that of might. One law broken and the breach thereof ignored, is but an invitation to ignore further laws and this, if continued, can only result in the breakdown of the freedom under the law which we so greatly prize.”

20. All one needs to do in reading the above passage is substitute Canada for Kenya.

21. Each and every citizen of this country has unqualified obligation to obey court orders unless such an order is discharged. The converse would lead to chaos where society would be ruled by the rule of the mighty.

22. The plaintiffs' attempt to argue this matter was stayed by court of appeal was adequately responded to by this court's Ruling of 8th July 2020.

23. I find and I hold that **Raphael Tuju, Yma Tuju, Alma Tuju and Mano Tuju** were served with the orders made on 2nd and 13th March 2020 which orders they have wilfully disobeyed. They are guilty of contempt of court and I will require them all to attend court to show cause why they should not be committed to jail for that disobedience.

CONCLUSION

24. The orders of the court in respect to the Notice of Motion dated 19th March 2020 are:

a. RAPHAEL TUJU, YMA TUJU, ALMA TUJU and MANO TUJU are guilty of contempt of this court orders of 2nd and 13th March 2020.

b. RAPHAEL TUJU, YMA TUJU, ALMA TUJU and MANO TUJU shall attend this court on a date that shall be fixed to show cause why they should not be committed to civil jail for that contempt.

c. The defendants are awarded the costs of the Notice of Motion dated 19th March 2020.

DATED, SIGNED and DELIVERED at NAIROBI this 30th day of JULY 2020.

MARY KASANGO

JUDGE

Before Justice Mary Kasango

C/A Sophie

For the Plaintiffs:

For the Defendants:

ORDER

This decision is hereby virtually delivered this 30th day of July, 2020.

MARY KASANGO

JUDGE