



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 265 OF 2014

BROADWAYS ENTERPRISES LIMITED.....PETITIONER

-VERSUS-

MINISTRY OF LANDS, HOUSING AND URBAN DEVELOPMENT....1ST RESPONDENT

NATIONAL LANDS COMMISSION.....2ND RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....3RD RESPONDENT

THE KENYA NATIONAL HIGHWAYS AUTHORITY.....4TH RESPONDENT

RULING

1. Through the notice of motion dated 4th October, 2019 the Petitioner/Applicant, Broadway Enterprises Limited, seek orders against the 4th Respondent, the Kenya National Highways Authority, as follows:

- a. This application be certified urgent and heard ex-parte in the first instance;**
- b. The Director General of the 4th Respondent be ordered to appear before court to show cause why he should not be found guilty of contempt and punished in accordance with Section 5 of the Judicature Act for failing to obey the terms of the consent order dated 24th May, 2016.**
- c. In the event the contempt is not purged, an order for committal to civil jail for a period this Honourable Court deems fit, and a fine this Honourable Court deems appropriate be imposed against the Director General of the 4th Respondent.**
- d. The costs of this application be borne by the 4th Respondent in any event and be assessed by the court forthwith.**
- e. Any other orders the court deems fit in the circumstances.**

2. The application is supported by the grounds on its face and the supporting affidavit sworn on the date of the application by Niraj Shah, a director of the Applicant.

3. The Respondent filed a notice of preliminary objection dated 18th February, 2020 through which the application is opposed on the grounds:

- a. That the jurisdiction of this honourable court has not been properly seized as the application offends section 3(a) of the Kenya Roads Act (Cap.409), section 19 (a) of the Companies Act, 2015 and the principles of law set out in the case of Salomon v Salomon [1897] AC 78. The Petitioner is seeking to enforce the decree against the Director General of the 4th Respondent through the said application whereas the latter was a corporate personality and is a different entity from its directors and officers with capability of suing and being sued.**
- b. That the application offends section 68 of the Kenya Roads Act (Cap 409). The Applicant has not followed the correct**

enforcement procedure against the 4th Respondent. The Petitioner is wrongly seeking to cite the 4th Respondent's Director General for contempt and an order for committal to civil jail whereas the order and/or ruling it is seeking to enforce was issued against the 4th Respondent and not the Director.

c. That the application is frivolous, incompetent and otherwise an abuse of court procedure having been filed in violation of the specific procedures and provisions of law set out above.

d. That there has been no personal service of the order the Applicant is seeking to enforce through the instant application on the Director General and therefore no proof that he was aware of the order informing this application in contrast to the principles of law set out in the Court of Appeal decision in *Shimmers Plaza Ltd v NBK (2015) eKLR*.

e. That there is a pending appeal in the Court of Appeal being Nairobi Civil Appeal 27 of 2018 against the ruling the Petitioner is seeking to enforce through the instant application.

4. Briefly, the Petitioner and 4th Respondent recorded a consent on 24th May, 2016 as follows:

“By consent application dated 11.4.2016 is determined in the following terms:

a. The 4th Respondent shall pay to the Petitioner KShs.13,768,934/- being interest as ordered by this court on 13.11.2015.

b. The said sum to be paid on or before 30.6.2016.

c. Mention on 27.7.2016 for directions on any balance that may be outstanding.”

5. An attempt by the Respondent to review the consent was dismissed on 24th February, 2017. The 4th Respondent aggrieved by the decision moved to the Court of Appeal but attempts to stay the execution of the decree pending the determination of the appeal was rejected by this Court (Mwita, J) on 21st March, 2018.

6. The principle governing applications for contempt of court have been stated in several cases. In *Worburn Estate Limited v Margaret Bashford [2016] eKLR* the principles were summarized as follows:

“This Court in two recent successive decisions in *Christine Wangari Wachege (supra)* and *Shimmers Plaza Limited (supra)* explained in *extenso* the procedure in commencing and prosecuting an application for contempt of court under the English Civil Procedure Rules, 1999. Part 81.9(1) of those rules, in particular, a judgment or an order to do or not to do an act may not be enforced unless the copy of the judgment or order was previously displayed and served; that the person required to do or not to do the act in question is warned that disobedience of the judgment or order would be a contempt of court, punishable by imprisonment, a fine or sequestration of assets, but the court can dispense with service. Otherwise a judgment or order may not be enforced unless a copy of it has been served on the person required to do or not to do the act in question. Under Rule 81.6, and as a general rule, service of the judgment or order must be personal on the contemnor unless the court dispenses with that requirement. Exceptions to that rule are found in Rule 81.8 to the effect that personal service will be dispensed with if the court is satisfied that the contemnor was present when the judgment or order was given or made, if the contemnor was notified of its terms by telephone, email or otherwise or if the court thinks it is just to dispense with service. There has been little change in this requirement since the decision of this Court in *Ochino & Another v Okombo & others [1989] KLR 165*. The court may also make an order in respect of service by alternative method or at an alternative place....

We reiterate that contempt proceedings being of quasi –criminal in nature and since a person may lose his right to liberty, each stage and step of the procedure must be scrupulously followed and observed.”

7. On the first ground of the notice of preliminary objection, the answer is found in the decision in the case of *Ikon Prints Media Company Limited v Kenya National Highways Authority & 2 others [2015] eKLR* where after analyzing the various provisions of the Kenya Roads Act, 2007 the Court concluded that:

“The question raised by 1st Respondent as to the procedure adopted is aptly answered when one considers that this was not an ordinary civil litigation. It was not an ordinary civil suit. It was a Constitutional litigation. That is where the judgment originated from. In Constitutional litigation the court must ensure that the ends of justice is met and if need be fashion appropriate reliefs either at judgment stage or even post judgment stage, once the parties appear before the court.”

8. What the Applicant desires from this Court is an enforcement of its judgment. The claim that the Applicant ought to have first obtained an order of mandamus has not been supported by reference to any law.

9. The fact that the 4th Respondent has filed an appeal does not deny the Applicant the right to execute the decree since there is no order of stay. I will, however, ensure that the public funds are protected pending the determination of the appeal.

10. The procedural hurdles the 4th Respondent is trying to erect against the application are indeed without merit. A court cannot stand aside as its orders are disobeyed on the basis that there is no procedure for dealing with the contempt. The power of this Court to punish for

contempt was affirmed in **Woburn Estate Limited (supra)** as follows:

“The jurisdiction of the High Court (or any other court for that matter) to punish for the violation of its orders cannot be in question. Apart from section 5 (1) of the Judicature Act that vests in the High Court the power, like those of the High Court of Justice in England, to punish any party who violates its orders, the court, by virtue only of being a court has inherent powers to make sure its process is not abused and its authority and dignity is upheld at all times.”

11. I now turn to the substance of the application. The 4th Respondent claims that there was no service of the order upon its Director-General. The statement cannot be sustained when one looks at paragraph 5 of the affidavit in support of the application where it is averred that up to seven letters were written to the 4th Respondent’s advocate demanding payment. There is no averment by either an officer of the 4th Respondent or its previous or current advocate that the advocate for the 4th Respondent did not communicate to the Director-General about the demands. The Director-General of the 4th Respondent cannot claim not to be aware of a decision involving such a substantial amount of money and which has been in the court corridors for a lengthy period of time. I therefore find the claim that the Director-General is not aware of the court orders unsustainable.

12. There is no other ground upon which the instant application should not succeed. What we have here is the usual intransigence of officers of government and state agencies who just disobey orders for the fun of it. That attitude should not be allowed to continue.

13. I therefore allow the Applicant’s application dated 4th October, 2019 in the following terms:

a. Considering that we are entering the Christmas festivities, the 4th Respondent’s Director-General shall within ninety days (90) of service of this order deposit the decretal amount in a joint account in the names of the advocates of the Applicant and KeNHA. The deposited decretal amount shall remain untouched pending the hearing and determination of the pending appeal or issuance of further orders by the Court.

b. In default the 4th Respondent’s Director-General shall attend court, on a date to be fixed during the delivery of this ruling, to show cause why he should not be committed to civil jail for contempt of the Court; and

c. Each party shall bear own costs of the proceedings.

Dated, signed and delivered virtually at Nairobi this 17th day of December, 2020.

W. Korir,

Judge of the High Court.