



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
WINDING-UP CAUSE NO. 42 OF 2015
IN THE MATTER OF THE COMPANIES
ACT (CAP. 486 OF THE LAWS OF KENYA
IN THE MATTER OF WINDING UP OF CONSOLIDATED
MARINE CONTRACTORS LTD (COMARCO LTD)
JUDGEMENT

1. In a decision rendered on 25th May 2017, this Court directed Consolidated Marine Contractors Limited (The Company) to avail and to allow the Petitioner herein to make copies of the following Documents;

(i) Books of Account

(ii) Reports

(iii) Title or other evidence of Assets

(iv) Any other documents that will enable the Petitioner carry out an audit of the Management, Assets, Affairs and Accounts of the Company.

2. The Petitioner complains that the Company has disobeyed that Order and has sought the intervention of the Court in the following respect;

1. That John Phillips of P.O Box 2222 Loyang Avenue No.01-04 Loyang Valley, Singapore 509068 and a director of the Company and Jorgen Horsbol Nielsen of P.O. Box 99543, Mombasa and a director of the Company do stand committed to jail for such a period as this Honourable Court may determine for contempt of Court by knowingly disregarding the order given by Hon. F. Tuiyott on 25th May, 2017.

2. The Company be ordered to pay an appropriate fine for knowingly disregarding the order given by Hon. F. Tuiyott on 25th May, 2017.

3. Any other relief this Honorable Court may deem just and fit to grant.

That intervention is brought through the Notice of Motion dated 10th November 2011 which is the subject of the present Decision.

3. The circumstances to the matter at hand, as presented by The Petitioner, are that the Company would be aware of the order as its Advocates (Ghalia and Ghalia Advocates) were in Court at the time it was made. In addition the order was duly extracted and served on the said Advocates on 28th June 2017. The said firm of Advocates are still on record for the Petitioner.

4. Only in partial compliance has the Company sent copies of title deeds for 3 properties and Tax Returns for the year 2014 to the Petitioners' Advocates. The Petitioner is aggrieved that full compliance has not happened even after the lapse of 169 days as at the date of the application.

5. The Company did not file an answer or respond to the application.

6. The need to uphold the dignity and authority of the Court is so navel to a working democracy that Parliament thought it fit that process and powers of Courts to punish for Contempt of Court needed to be set out and defined in a stand alone Statute. That recent Statute, the Contempt of Court Act (Act No. 45 of 2016), came into force on 13th January 2017.

7. Aware that incorporated bodies act through its Managers and there may be temptation for such Managers to hide behind the cloak of incorporation to escape liability for Contempt, the Statute makes the following provisions in respect to duly incorporated Companies in Section 29 thereof;

(1) Where a company is guilty of contempt of court in respect of any undertaking given to a court by the company, every person who, at the time the contempt was committed, was in charge of and was responsible to the company for the conduct of business of the company, as well as the company, shall be deemed to be guilty of the contempt and such person may with the leave of the court be committed to civil jail:

Provided that nothing in this subsection shall render any such person liable to punishment if the person proves to the satisfaction of the court that the contempt was committed without his or her knowledge or that he or she exercised all due diligence to prevent its commission.

(2) Where the contempt of court is committed by a company and it is proved to the satisfaction of the court that the contempt has been committed with the consent or connivance of, or is attributable to any neglect on the part of any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of the contempt and may, with the leave of the court be committed to civil jail and in addition, be liable to a fine not exceeding two hundred thousand shillings.

8. There is no shadow of doubt that the Company was aware of the Court order. Not only were its Advocates present in Court when the order was made, but an extracted copy was served on them. It would be because of the knowledge of the Order that through a letter dated 18th August 2017 that the said Advocates forwarded some documents in partial obedience to the order. In the same letter The Advocates request for more time to provide further documents. There is therefore cogent, and undisputed, evidence that the Company was aware, first, of the order and secondly that it had not fully complied.

9. The Petitioner's Counsel indulged the Company but the time granted did not yield a positive result. As at the date of The Application about 4 months had passed from the time the Company had requested for more time to comply.

10. The persons cited for contempt are Peter John Phillips and Jorgen Horsbol Nielsen, both said to be Directors of the Company. As proof for the positions they hold, the Petitioner has shown to the Court a search of the Company Records dated 19th February 2014. Although the Petitioner was expected to provide more current proof, the two have not disputed the evidence tendered by the Petitioner. The Court takes it, and so holds, that the two were Directors at the time the order was to be observed and at the date of this Application.

11. The two do not set up a defence that the contempt was committed without their knowledge nor do they say that they had exercised all due diligence prevent its commission (see the proviso to section 29(2). Indeed they did not respond at all to the Application!

12. There can be no difficulty in reaching a Decision the Petitioner has easily achieved the threshold of proof required in matters of this nature i.e higher than proof on a balance of probabilities, almost, but not exactly beyond reasonable doubt. See Mutitika vs Baharini Farm [1985]KLR 227. I therefore find Peter Johns Phillips and Jorgen Horsbol Nielsen guilty of contempt of this Courts Order of 25th May, 2017.

13. Although I am urged by the Petitioner to commit them to jail, I shall not rush into meting down a custodian sentence. I therefore fine each of two a sum of Kshs.100,000/= and in default to serve an imprisonment of 6 months.

14. As Court orders are not made in vain, the two shall ensure compliance of the Court Order of 25th May 2017 within 30 days hereof failing which this Court will not hesitate to hand down a custodian sentence.

15. In the meantime the Petitioner shall have costs of the Motion of 10th November 2011.

Dated, Signed and Delivered in Court at Nairobi this 15th day of February, 2018.

F. TUIYOTT

JUDGE

PRESENT:

Akello h/b Ghatia for Respondent

Ngige Wanjiru for applicant

Dennis – Court clerk