



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 387 OF 2016

BRIAN MUTHEE MWANGI.....PLAINTIFF

-VERSUS-

JUBIZA INVESTMENTS LIMITED.....DEFENDANT

RULING

[1] Before the Court for determination is the Plaintiff's Notice of Motion dated **23 August 2017**. It has been taken out under the provisions of **Sections 4(a), 5, 28(1)** and **29** of the **Contempt of Court Act, 2016** as well as **Order 40 Rule 3(1)** of the **Civil Procedure Rules 2010**. It seeks the following orders:

[a] Spent

[b] That the Court be pleased to issue a Notice to Show Cause against **Victor Kirui, Brian Nalyanya** and **Samuel Mbeki**, the Directors and Chairperson, Vice Chairperson and Secretary, respectively, of the Respondent herein, to show cause why they should not be committed to civil jail for a period not exceeding 6 months for disobeying/being in contempt of Court orders issued on **7 April 2017**.

[c] That the Court be pleased to grant leave for the committal of **Victor Kirui, Brian Nalyanya** and **Samuel Mbeki**, the Directors and Chairperson, Vice Chairperson and Secretary, respectively, of the Respondent, to serve 6 months imprisonment for disobeying the Court orders issued on **7 April 2017**.

[d] That, in addition to being committed to civil jail, the said **VICTOR KIRUI, BRIAN NALYANYA** and **SAMUEL MBEKI** be ordered to pay a fine.

[e] That costs of this application be borne by the Respondent.

[2] The application was premised on the grounds set out on therein and is supported by the affidavit of **Brian Muthee Mwangi**, the Plaintiff herein, sworn on **23 August 2017** together with its annexures. The background to the application is that, by way of a **Plaint** dated **23 September 2016**, the Plaintiff filed the present suit contemporaneously with application under Certificate of Urgency seeking interim orders as follows:

[a] That the application be certified urgent and heard *ex parte* in the first instance;

[b] That pending the hearing and final determination of the suit herein, the Court be pleased to order the Defendant to supply, furnish and or issue the Plaintiff with the following documents:

[i] Annual Returns for the past 3 years;

[ii] Tax Compliance Certificate;

[iii] Statements of Accounts;

[iv] Copy of the Certificate of Incorporation;

[v] Copy of the Memorandum and Articles of Association

[vi] The Shareholders Agreement executed in or about 2016

[c] That the Court be pleased to order the Defendant to deposit **Kshs. 900,000/=** in court pending the hearing and determination of the suit;

[d] That in the alternative to Prayer [c] above, the Court be pleased to order a halt on any dealings with the properties registered in the name of **Jubiza Limited** and a complete freeze of the Defendant's bank account(s) pending the hearing and determination of this suit.

[e] That the costs of the application be provided for.

[3] When the application first came up for hearing on **23 September 2016**, directions were given that the same be served for *inter partes* hearing on **28 September 2016**. The application was duly served but no appearance was made by or for the Defendant on **28 September 2016**. Accordingly, the Court issued an order that the *status quo* then prevailing in terms of the Defendant's accounts be maintained pending further orders of the Court. The Defendant then filed its application dated **29 September 2016** on **30 September 2016** seeking the setting aside of the aforesaid *status quo* order issued by the Court.

[4] During the pendency of the two applications, and upon indication by Counsel for the Respondent that the Defendant was ready and willing to deposit **Kshs. 900,000/=** (which was the main thrust of the Plaintiff's application) in a joint interest-earning account in the names of Counsel for the parties, an Order was issued for the preservation of **Kshs. 900,000/=** in a joint interest earning account pending the hearing and determination of the two applications. Thereafter, on **7 April 2017**, upon hearing the Plaintiff's and the Defendant's applications, the Court issued the following orders:-

[a] That the **Kshs. 900,000** that was deposited in an escrow account in the joint names of the Advocates on record for the parties herein, be so maintained pending the hearing and final determination of this suit.

[b] That the Defendant do supply, furnish and or issue the Plaintiff/Applicant with the following documents:

[i] Annual Returns for the past 3 years;

[ii] Tax Compliance Certificate;

[iii] Statements of Accounts;

[iv] Copy of the Certificate of Incorporation;

[v] Copy of the Memorandum and Articles of Association

[vi] The Shareholders Agreement executed in or about 2016.

[5] The Plaintiff now contends that on or about **7 June 2017**, his Advocates served the Defendant's Advocates with a copy of the Court Order as a reminder and to engender compliance; and that, although the Advocates for the Defendant subsequently forwarded to the Plaintiff's Advocates some of the documents, namely copies of the Memorandum and Articles of Association for the Defendant, audited accounts and the Certificate of incorporation, not all the documents that are the subject of the Court Order have been supplied. It was further contended that the Defendant's Advocates thereafter provided the Plaintiff's Advocates with a copy of an unexecuted Shareholders Agreement stating that the same remained unexecuted by the Shareholders. It was further contended that although the Defendant's Advocates undertook to avail the Tax Compliance Certificate and the Annual returns of the Defendant as soon as possible, but this was not to be.

[6] The Plaintiff further averred that on or about the **3 July 2017**, his Advocates wrote to the Defendant's Advocates reminding them of the need to comply fully with the Court Order; and added that to date the Defendant's Advocates have not replied to the aforesaid letter; but instead continues to willfully ignore the Order of the Court. Hence, it was contended that **Victor Kirui, Brian Nalyanya and Samuel Mbeki**, who are officials and persons in charge of and responsible for the business of the Defendant, have for all intents and purposes taken the orders and process of this Court for granted, hence are undermining its authority. Accordingly, the three officials ought to be cited for contempt of court in the interest of justice and to uphold the rule of law so as to protect the dignity and authority of the Court.

[7] The Defendant opposed the application vide the Replying affidavit sworn on **16 October 2017** by one of its Directors, **Samuel Mbeki**. The Defendant acknowledged the Court Order made on **7 April 2017** in all its facets. It was further confirmed that the Defendant's Advocates wrote to the Plaintiff's Advocates on **23 June 2017** forwarding the Defendant's Memorandum and Articles of Association, Audited Statements of Accounts and the Certificate of Incorporation. The Defendant however asserted that, in the said letter it was indicated that the draft Shareholders Agreement had never been executed; and to buttress this, the Defendant's Advocate forwarded to the Plaintiff's Advocates the said draft of the Shareholders Agreement, contending that that was the documents in had in its possession.

[8] As regards the Tax Compliance Certificate, the Defendant averred that, since the process of filing returns was on going, they were not able to supply the Annual Returns in time together with the Certificate of compliance; and that in the month of **June 2017** there was a rush

by different individuals and entities to file returns and hence they could not procure the certificate as soon as they desired. It was further asserted that the Defendant has since provided all the documents in its possession in compliance with the Court Order; and therefore that this application ought to be dismissed.

[9] Having considered the application, the affidavits filed in respect thereof, the proceedings to date including the written submissions filed herein by Learned Counsel, it is indubitable that the Plaintiff is a shareholder in and a stakeholder of the Defendant. His cause of action is that the Defendant held several Special General Meetings without notice to him in which decisions were taken and resolutions made without his knowledge or participation, yet the resolutions would invariably affect his legal and beneficial interests as a shareholder. The Plaintiff contends that it was on account of such arbitrariness on the part of his co-directors that he opted to resign as a director of the Defendant and claim back his dues amounting to **Kshs. 900,000/=**; but that the Defendant refused and/or ignored his request for payment. Accordingly, he was constrained to seek the intervention of the Court.

[10] It is further manifest that the Court Order of **7 April 2017** was not only made in the presence of the Advocate for the Defendant, but was also duly served on it. **Annexure "BM1"** to the Supporting Affidavit is good evidence that the Order was extracted and duly served on the Defendant. It bears a received stamp dated **9 June 2017** to confirm that it was served on the Defendant's Advocates.

[11] Whereas the Order had a penal notice appended thereto, there is no dispute that the Defendant's compliance therewith was only partial; or that the Defendant is yet to furnish the Plaintiff with a Statement of Accounts as well as a duly executed Shareholders Agreement. The Plaintiff's Advocates thereafter sent two letters to the Defendant, through their Advocates, reminding the Defendant of the need to fully comply with the Order. Copies of the letters dated **9 June 2017** and **3 July 2017** were annexed to the Supporting Affidavit as **Annexures "BMW2"** and **"BMW4"**. Thus, to date, the Defendant is yet to fully comply, particularly in connection with the Shareholders Agreement and the Statement of Accounts.

[12] In the Plaintiff's written submissions filed herein on **10 November 2017**, his Counsel cited the case of **Daniel Ooko Ochogo vs. James Migoye Otieno [2016] eKLR** to support the Plaintiff's argument that court orders must be obeyed by all unless and until set aside, as otherwise, we would have nothing but anarchy. It was further the submission of the Plaintiff's Counsel that the Defendant should not be heard to say now that the Shareholders Agreement does not exist, because no such fact was pleaded by the Defendant or adverted to in the Replying Affidavit. In support of this contention, the Plaintiff relied on the Nigerian case of **Adetoun Oladeji (NIG) Ltd vs. Nigeria Breweries PLC SC 91/2002** and **Independent Electoral and Boundaries Commission & Another vs. Stephen Mutinda Mule & 3 Others [2014] eKLR**.

[13] The Defendant's written submissions were filed herein on **9 November 2017** and it is largely a reiteration of the averments set out in the Replying Affidavit of **Mr. Samuel Mbeki**. Thus, it was argued that the Defendant has substantially complied and that as regard the outstanding documents, it was impossible to comply. With regard to the Statement of Accounts, it was argued that nowhere in the Court Order was it stated that the statements required were Bank Account Statements, as now alleged by the Plaintiff, or the audited financial statements.

[14] As for the Shareholders Agreement, it is the Defendant's position that there was a draft Shareholders Agreement but that the same was never executed. It was its posturing that it had complied, having supplied a copy of the draft Shareholders Agreement to the Plaintiff. It was further the Defendant's contention that the Plaintiff, as a Shareholder of the Defendant, had not shown that he signed the Shareholders Agreement. It was thus posited by Counsel for the Defendant that the Plaintiff's application has been actuated by malice and is therefore an abuse of the process of the Court; and that he is merely out to settle scores with the three directors of the Defendant for withholding his money. Counsel relied on **Worburn Estate Limited vs. Margaret Bashforth [2016] eKLR**; **Re Bramblevale Ltd [1970] 1 Ch. 128**; **Peter Ng'ang'a Muiruri vs. F.M. Gikanga t/a Expeditious General Merchants [2014] eKLR** and **Silverse Lisamula Anami vs. Justus Kizito Mugali [2017] eKLR** to support the argument that contempt of court is an offence of criminal character and therefore that there must be satisfactory proof beyond a balance of probabilities, noting that it can lead to loss of liberty.

[15] The jurisdiction to mete out punishment for contempt of court is donated by **Section 5** of the **Contempt of Court Act, No. of 2016**; whose objectives, as set out in **Section 3** thereof, are to:

- [a] uphold the dignity and authority of the court;
- [b] ensure compliance with the directions of court;
- [c] ensure the observance and respect of due process of law;
- [d] preserve an effective and impartial system of justice; and
- [e] maintain public confidence in the administration of justice as administered by court.

[16] Accordingly, any willful disobedience of any judgment, decree, direction, order, or other process of a court or willful breach of an undertaking given to a court, amounts to civil contempt and is therefore punishable accordingly, by dint of **Sections 4(1)(a), 28, 29 and 30** of the **Contempt of Court Act**. This is because obedience of court orders is at the very heart of the rule of law, of which the courts are the custodians. Thus, in **Econet Wireless Kenya Ltd vs. Minister for Information & Communication of Kenya & Another [2005] KLR 828**, this fact was accentuated thus:

"It is essential for the maintenance of the rule of law and order that the authority and the dignity of our courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against whom an order is made by court of competent jurisdiction, to obey it unless and until the order is discharged. The uncompromising nature of

this obligation is shown by the fact that it extends even to cases where the person affected by the order believes it to be irregular or void."

[17] Thus, the elements that the Plaintiff herein needed to prove are:

[a] that the Order of 7 April 2017 was clear, unambiguous and binding on the Defendant;

[b] that the Defendant had knowledge of or proper notice of the terms of that Order;

[c] that the Defendant has deliberately failed to obey the terms of the Order;

(see Katsuri Limited vs. KapurchandDeepar Shah [2016] eKLR)

[18] There is no contestation that the Court Order of 7 April 2017 was made in the presence of Counsel for the Defendant; or that it was subsequently served and was therefore binding on the Defendant. In any event, it is now trite law that knowledge of a court order suffices. Thus, in the case of Shimmers Plaza Limited vs. National Bank of Kenya Limited [2015] eKLR the Court of Appeal made it clear that:

"...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... 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 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."

[19] In the premises, the only issue for my determination is whether the Plaintiff has shown to the satisfaction of the Court that the Defendant has deliberately failed to obey the terms of the Order. As has been noted herein above, there was partial compliance with the Order of 7 April 2017; such that, in terms of the documents sought for, the Plaintiff's complaint related to only two, namely: the duly signed Shareholders Agreement and the Statement of Accounts. There is undisputed evidence herein to show that the Defendant did provide the Plaintiff with a copy of the Shareholders Agreement, save that the same was in draft form and therefore unsigned; and whereas the Plaintiff insisted on being provided with the duly executed copy, there appears to be a dispute as to whether or not the shareholders signed the Agreement. This being a matter that can only be resolved after hearing the parties, it is my finding that for purposes of the instant application, there was compliance. Indeed, among the documents exhibited by the Plaintiff in support of his application is a letter dated 23 June 2017 from the Defendant's Advocates (marked Annexure "BMW3") which confirms that a copy of the unsigned Shareholders Agreement was one of the documents that the Defendant provided the Plaintiff with, in compliance with the Court Order.

[20] As for the Statements of Accounts, the story is different. As indicated in the aforementioned letter dated 23 June 2017, the Defendant purported to forward to the Plaintiff Audited Accounts in place of Statements of Accounts. This was however promptly rejected by the Plaintiff vide his Advocates' letter dated 3 July 2017 (marked Annexure "BMW4") in which he was categorical that:

"...for avoidance of doubt we did not seek 'audited Accounts' as stated in your above referenced letter, the Order expressly states Statement of Accounts this means your Client's Bank Account Statements as directed by the Court in any event within seven (7) days of this letter failure to which we have instructions to commence contempt proceedings against your Clients Directors without further notice to yourself."

[21] By this time, three months had elapsed since the Order of 7 April 2017. And it is instructive that the contempt application was not made until 23 August 2017. Clearly therefore, there is reason to conclude that the Defendant willfully disobeyed this aspect of the Court Order, as further exemplified by the submissions of its Counsel, wherein, in an apparent justification of the Defendant's inaction, it reasoned that the main aim of supplying the documents in the Order of 7 April 2017 to the Plaintiff was to enable him get another shareholder to buy his shares since the Plaintiff had opted out of the company. It was further posited that the Plaintiff's rejection of the audited accounts was not in good faith. With all due respect, such surmises are presumptuous to say the least; for it was not open to the Defendant to determine what was good for the Plaintiff or hypothesize on the reasons why the documents were required by the Plaintiff. Its obligation was to provide the documents, including the Statements of Account as specified in the Order of 7 April 2017.

[22] Moreover, from the Plaintiff's application dated 23 September 2016, it is manifest that his concern was in connection with the Defendant's dealings with its properties, hence the prayer, per Paragraph 4 thereof, for a complete freeze of the Defendants bank accounts pending the hearing and determination of the suit. The sale of the Plaintiff's shares does not appear to have been a priority at the time. It is therefore mischievous for the Defendant to attempt a justification of its disobedience of the Court Order that was otherwise clear and whose context was unambiguous. As a shareholder of the Defendant, the Plaintiff is entitled to the documents he seeks as of right, and even without the intervention of the Court; and where the Court has spoken, as it did herein, what it expects is implicit obedience, unless and until the Order in question is set aside, varied or discharged.

[23] As was well explicated in the Shimmers Plaza Case (supra), it must be reiterated that:

"...court orders must be obeyed. Parties against whom such orders are made cannot be allowed to trash them with impunity. Obedience of Court orders is not optional, rather, it is mandatory and a person does not choose whether to obey a court order or not. For as Theodore Roosevelt, the 26th President of the United States of America once said:

"No man is above the law and no man is below it; nor do we ask any man's permission to obey it. Obedience to the law is demanded as of right; not as a favour."

[24] In the result, whereas the Defendant partially complied with the Court Order dated **7 April 2017**, its failure to fully comply and provide the Statements of Account is reprehensible. I am therefore satisfied that the Plaintiff has made a good case to warrant the citing of the Defendant and the three contemnors, for contempt of Court as prayed in the Plaintiff's application dated **23 August 2017**. Accordingly, it is hereby ordered and directed, pursuant to **Section 29** of the **Contempt of Court Act**, that the Defendant's Chairperson, **Victor Kirui**, the Defendant's Vice Chairperson, **Brian Nalyanya**; and the Defendants Secretary, **Samuel Mbeki**, do appear before this Court to show cause why they should not be committed to jail for contempt of court.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 9TH DAY OF FEBRUARY 2018

OLGA SEWE

JUDGE