



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 289 OF 2013

CROWN PAINTS (KENYA) LIMITED.....PLAINTIFF/APPLICANT

VERSUS

DRY ASSOCIATES LIMITED.....DEFENDANT /RESPONDENT

RULING

1. An Interlocutory matter of Documents has come into the way of the movement of the Dispute herein. Each side of the Dispute blames the other.

2. Dry Associates Limited (**DAL**) now brings the Motion of 29th April 2016 for the following orders:-

1. Imperial Bank Limited (Under Statutory Management) be ordered to provide copies of the following documents within 7 days of the Order of the Court to the Plaintiff's and Defendant's advocates:

a. Copies of the print out of all payments (including withholding taxes deducted) by bankers cheque, company cheque or electronic transfer with regard to Sirius Solution Ltd Imperial Bank Account Number [...].

b. Images and details for all cash, cheque, RTGS and electronic transfer payments made from Sirius Solution bank account; and

c. Images and evidence of payment details of cheques from series' number 001 to 100 and all bankers' cheques from Sirius Solutions.

2. The Managing Director of the Respondent be summoned to Show Cause why he should not be punished for contempt of Court for refusing to obey the Order/Ruling of 30th October 2015.

3. An Order be issued allowing the Defendant's authorized agents to have unlimited access to the Plaintiff's records at its premises and be allowed to inspect and take copies of all document set out in paragraph 1 of the Chamber Summons Application dated 15th June 2015 filed by the Defendant.

4. The Court be at liberty to grant such relief for the expeditious determination of the suit.

5. The Plaintiff/Respondent do bear the costs of this application on a full indemnity basis.

3. The Motion is brought against a backdrop that can be abridged. Crown Paints (Kenya) Ltd (**Crown Paints**) in need of raising funds, issued Commercial paper in the value of Khs.300,000,000/= (**hereinafter the Commercial Paper Issue**). DAL, a duly licensed Investment Bank and Fund Manager, was appointed as the Transaction Advisor, Arranger and Placement Agent and Registrar for the Commercial Paper Issue. The relationship between Crown Paints and DAL encountered a difficulty and Crown Paints alleges that some Investors had lost their investments under the Commercial Paper issue due to a fraud perpetrated by one Timothy Karungu Karanja (Karanja) who was an employee of DAL.

4. As the Principals, Crown Paints was required by the Capital Markets Authority to compensate the Investors for the loss suffered and Crown Paints did so by making payments totaling Kshs. 39,577,617/70 which included elements of interest.

5. It is the case for Crown Paints that DAL admitted liability and reimbursed a sum of Kshs.14,857,053.25 leaving a balance of Kshs.24,715,564.45 being the amount now sought by Crown Paints in these proceedings.

6. DAL resists the claim and blames Crown Paints for the loss suffered by the Investors. Leaving out details, DAL contends that Crown Paints failed to abide by the stipulated terms and conditions of the issue and accepted funds secretly and in collusion with Mr. Karanja thereby endangering Investors' funds. DAL therefore claims back the Kshs.14,847,053.25 it had paid. This is one of the Prayers in the Counterclaim.

7. After pleadings had closed, DAL on 30th October 2015, successfully sought orders against Crown Paints in the Motion of 15th June 2015. These are the Prayers sought and made:-

1. The Plaintiff do provide copies of the following documents for purposes of taking accounts and reconciliations by the Defendant which accounts and reconciliations are to be filed in court:

(a) The Plaintiff's register of investors in relation to the Commercial Paper Programme.

(b) The Plaintiff do provide copies of the print out of all payments (including withholding taxes deducted) by bankers cheque, company cheque or electronic transfer with regard to the following accounts:-

i. Investment Advice Line

ii. Sirius Solutions Ltd [Imperial Bank a/c no. [...]]

iii. Meridias Capital Ltd [Bank of Africa a/c no.[...]]

iv. Bluecrest Holdings Ltd [Family Bank a/c o.[...]]

v. Diefel Investments Ltd

vi. Gray Properties [Bank of Africa a/c no.[...]]

vii. DAL Wealth Management Ltd [K-Rep Bank a/c no.[...]]

viii. Daraja Retreat Centre [Equity Bank a/c no.[...]]

(c) Evidence of payment for the aforementioned transactions be availed to the Defendant for purposes of carrying out a forensic audit.

(d) The Plaintiff releases "Crown Berger CP Programme Diversions" reconciliation sheet.

(e) The Plaintiff releases the Catholic Church receipts and payments (Including withholding taxes deducted) reconciliation sheet.

(f) The Plaintiff allows the Defendant to review documentation regarding the following Crown RTGS (Real Time Gross Settlement) payments into Sirius Solutions Ltd bank:

Date	Amount (Kenya Shillings)
-------------	---------------------------------

i. 26-Feb-09	1,811,384.20
---------------------	---------------------

ii. 27-Apr-10	4,825,115.15
----------------------	---------------------

iii. 12-Feb-10	3,056,285.00
-----------------------	---------------------

iv. 23-Aug-10	1,026,797.35
----------------------	---------------------

v. 1-Mar-11	1,510,989.00
--------------------	---------------------

(g) The Plaintiff releases documentation and bank statements regarding following payment from Sirius Solutions made on 17-March 2009 for Kshs.188,244.20.

(h) The Plaintiff releases to the Defendant copies of withholding tax certificates for the following Sirius Solutions Ltd deposits:

Principal Amount (KES)	Deposit Date (on or about)
-------------------------------	-----------------------------------

i. 4,867,126	19-Mar-09
ii. 1,028,970	15-Apr-10
iii. 1,555,218	07-Jan-11

8. The Application now before Court has two limbs. One is in respect to a complaint by DAL that Crown Paints has refused to fully comply with that Order and the second seeks an order directing Imperial Bank Limited (under Statutory Management) (hereafter IBL) to provide the documents set out in paragraphs 1(a), (b) and 1(c) of the Motion of 29th April, 2016.

9. Let me start with the Orders sought against IBL. DAL pegs its request on the provisions of Section 178 and 179 of the Evidence Act which reads as follows:-

“ 178. Restriction on compelling production of banker’s book.

A banker or officer of a bank shall not, in any proceedings to which the bank is not a party, be compellable to produce any banker’s book the contents of which can be proved under this Chapter of this Act, or to appear as a witness to prove the matters, transactions and accounts therein recorded, unless by order of the court made for special cause.

179. Inspection of bankers’ books.

(1) On the application of any party to proceedings a court may order that such party be at liberty to inspect and take copies of any entries in a banker’s book for any of the purposes, of such proceedings.

(2) An order made under this section may be made either with or without summoning the bank or any other party, and shall be served on the bank three clear days before it is to be obeyed, unless the court otherwise directs.

(3) For the purposes of subsection (1), “proceedings” includes any proceedings in Tanzania or Uganda”.

10. DAL has chosen not to enjoin IBL to the Motion and takes the view that enjoinder is not necessary. DAL may not be off the mark because Section 179 (2) permits that an Order for Inspection of Banker’s Books can be made without summoning the Bank. Counsel for DAL argues that if IBL has any difficulty complying then it can make that explanation to Court.

11. On the operation of Section 179 (2), I take a view that short of an explained urgency or demonstration that a Bank is likely to act in a manner to defeat the intended order and any delay gives that opportunity, a suitor for inspection of a Banker’s Books ought to summon the Bank in its application. The Bank may have something to say about the intended Order. It may inform Court whether or not it is able to avail the Documents, the time required to allow inspection or to avail the Documents and the costs of availing or copying the Documents. In this way a Court will be able to fashion an order that is practical and implementable. This may be better use of judicial time than hastily issuing an ex parte order and then entertaining objections or explanations later.

12. DAL has not stated any apprehension that IBL is unlikely or would be unwilling to cooperate in providing the Books and this Court does therefore pend the hearing of order (1) until IBL is served.

13. There is a further reason why the Court chooses to deal with this prayer at a later date. DAL will have to reflect on whether the order it seeks against IBL is part of the Order already obtained against Crown Paints in the Ruling of 30th October 2015 and if so whether the Order now sought can be granted without a variation thereof.

14. It is common ground that Crown Paints was and is fully aware of the order of Hon. Kariuki J. made on 30th October 2015. If there was any doubt then the affidavit of David Muriithi sworn on 28th March 2017 debunks it. Muriithi is the Chief Accountant of Crown Paints. It is in his Affidavit that he explains that Crown Paints has complied with the Court order to the best of “*our ability*”.

15. It is also common ground that the Court order has not been fully complied with. That has been asserted by DAL and conceded to by Crown Paints. How does Crown Paint explain failure for full compliance?

16. Mr. Muriithi depones as follows:-

“9. That we do not have the said documents, we have never had them and we have no control over them neither do we know if such documents exist; as a result we have been placed at a tremendous disadvantage as we have been ordered to do that which we have no means or capacity to do whatsoever. (Annexed herewith and marked DM 3 is a copy of our letter to the Defendant advising that we are incapable of supplying the documents).

10. THAT as a consequence thereof the Defendant has been unfairly granted the means to seek contempt against us for matters that they are fully aware that we have not control over”.

17. This Court would have to agree with Counsel Mueke appearing for DAL that the stance taken by Crown Paints is undefendable because it(DLA) has not sought to set aside, vary or discharge the orders granted by Hon. Kariuki J. Indeed, the occasion for arguing that it was not in possession of certain documents passed when Crown Paints choose not to raise the issue when reacting to DAL’s initial application for

production of the Documents. On that occasion, Crown Paints confronted the application by filing 5 grounds in opposition and in none does it state that it is not in possession of any of the Documents sought.

18. The Application before Court was filed on 4th July 2016, this was before the coming into force of the Contempt of Court Act (*Act No. 46 of 2016 which commenced on 13th January 2017*). Then the procedure for instituting contempt of Court proceedings started with reference to Section 5(1) of The Judicature Act and Section 36(1)(b) of The High Court (Organization and Administration) Act. The latter gave Statutory clothing to the already existing power of the High Court to punish for contempt while the former gave directions as to the procedure.

19. The Application before Court is in respect to an alleged contempt of a Court order. In this instance no permission (or leave) is required before the bringing of the Application (See a detailed discussion of the procedure in the Court of Appeal decision in **CHRISTINE WANGARI CHEGE VS. ELIZABETH WANJIRU EVANS** [2014] eKLR). To that extent the Application now for consideration is properly before Court.

20. Contempt proceedings are quasi criminal in nature and the liberty of the alleged contemnor may be at stake and for this reason the standard of proof is higher than a balance of probabilities, almost, but not exactly, beyond reasonable doubt (**Gatharia Mutitika vs. Baharini Farm Ltd [1985]** KLR 227).

21. So that an alleged contemnor is found culpable, the elements of contempt must be proved to this standard. What are those elements? Mativo J. in **Katsuri Limited vs. Kapurchand Depar Shah** (2016) eKLR approved the book, "**Contempt in Modern New Zealand**" as restating those essential elements. In it the authors state:-

"There are essentially four elements that must be proved to make the case for Civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases) that:-

(a) the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant.

(b) the defendant had knowledge of or proper notice of the terms of the order.

(c) the defendant has acted in breach of the terms of the order and

(d) the defendant's conduct was deliberate".

22. In the matter at hand, I find that the Order was clear, unambiguous and binding on Crown Paints. Crown Paints does not complain that the order is vague or hazy. Crown Paints participated in the Application that led to the grant of the Orders said to have been breached. Crown Paints complied with some of the orders made on that day. Crown Paints is aware that the compliance does not fully satisfy the terms of the Orders. It is therefore beyond peradventure that not only did Crown Paints have knowledge of the terms of the order but it has breached it. The first three elements are proved.

23. Let me turn to the fourth. Is the conduct of Crown Paints deliberate? Crown Paints complains that it neither had nor has possession or control of the Documents which it is accused of failing to provide. An argument that it is being asked to comply with the impossible. That it has been placed in an intractable position! Is that so? This Court has found that Crown Paints fully participated in the proceedings leading to the Orders and never intimated or stated that production of the Documents was beyond it. And when the orders were made it did not seek to vary or appeal against them. So when breach happened, the only reasonable inference to be made is that the breach is deliberate.

24. Crown Paints is a Body Corporate. There does not seem to be a dispute in that regard. Body Corporates act through their Officers or Directors or Managers. In contemplation that the Managers of Body Corporates may hide behind the Corporate veil to escape punishment for contempt, the law presumes that disobedience by a Company is disobedience by its Manager or Managers unless such a Manager or Managers satisfies the Court that the contempt was committed without his or her knowledge or that he or she exercised all due diligence to prevent the commission. That in fact is the essence of Section 29 of current Contempt of Court Act, which reads,

(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".

25. The Order sought by DAL is that the Managing Director of the Respondent be summoned to Show Cause why he should not be punished for the contempt committed by his Company. This is the way to go as the "Show Cause" proceedings gives the Managing Director an opportunity to make an explanation and perhaps exonerate himself/herself.

26. The last Prayer in the Motion is for an Order to allow agents of DAL unlimited access to the Records of Crown Paints at its premises and

upon access to be allowed to inspect and take copies of all Documents set out on paragraph 1 of the Chamber Summons application of 15th June 2015. These Documents form part of the subject matter of the Ruling of 30th October 2015. So it is true as pointed out by Crown Paints that the ruling of 30th October 2015 did not provide for visitation and access. On the other hand, Crown Paints itself has failed to deliver up all the Documents ordered. As Court Orders are not made in vain, it is incumbent upon a Court of Law to make any such Orders that will aid or assist the effectuation or implementation of an Order it has made. Yet an order of access may be intrusive and so this Court will give Crown Paints one further opportunity to fully comply with the Court order failing which DAL is at liberty to bring an application to vary the Order of 30th October 2015 to include access.

27. These are now the Court's final Orders:-

(i) Prayer 1 of the Notice of Motion dated 29th April 2016 shall be heard and determined upon the service of The Application upon Imperial Bank Limited (under statutory management).

(ii) Prayer (2) thereof is allowed as prayed.

(iii) Crown Paints shall within 30 days hereof fully comply with the Order of Kariuki J. granted on 30th October 2015 failing which Dry Associates shall be at liberty to apply for variation of the Court order of 30th October 2015 so as to include access.

(iv) Costs of the Notice of Motion of 25th April 2016 to the Applicant.

Dated, Signed and Delivered in Court at Nairobi this 13th day of April, 2018.

F. TUIYOTT

JUDGE

PRESENT:

Waigwa h/b Mueke for Defendant

Mumma h/b Kingati for Plaintiff

Nixon - Court Assistant