



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL SUIT NO. 28 OF 2016

KEMU-SALT PACKERS PRODUCTION LIMITED.....PLAINTIFF/RESPONDENT

VERSUS

DUBAI BANK KENYA LIMITED (IN LIQUIDATION)....1ST DEFENDANT/APPLICANT

PETER KAHI.....2ND DEFENDANT/APPLICANT

ANTHONY MUTHUSI.....3RD DEFENDANT/APPLICANT

RULING

[Notice of Motion Application dated 23rd January, 2017]

1. This application is brought under sections 4 (1) (a), 5 (6), 28 and 29 of the Contempt of Court Act, 2016; sections 1A, 1B and 63 of the Civil Procedure Act, Cap. 21; and Article 165 (3) of the Constitution of Kenya. Through the application Dubai Bank Kenya Limited (in Liquidation), Peter Kahi and Anthony Muthusi the 1st to 3rd defendants/applicants respectively seek against identified directors and or shareholders of the Plaintiff, Kemu-Salt Packers Production Limited orders as follows:-

“1. THAT KHOJA NURDDIN, HUSSEIN SALEH MOHAMED ISMAIL (a resident of Malindi and of Post Office Box Number 1565-80200 Malindi), HASSAN ZUBEIDI, AHMED HASSAN, HASSAN AHMED ABDULLAHI as Directors and/or Shareholders of the Plaintiff/Respondent herein and of Post Office Box Number 1565-80200 Malindi and Post Office Box 11127-00400 Nairobi, and Post Office 69196 Nairobi respectively do stand committed to jail for such period as this Honourable Court may determine for contempt of Court in that being aware of the Orders made by this Honourable Court in this suit on 21st November, 2016 (hereinafter referred to as “the said Orders”) knowingly and wilfully violated and or disobeyed and/or disregarded and/or thwarted and undermined the effect and purpose of the said Orders and/or knowingly and wilfully failed to take reasonable steps to ensure that the said Orders were obeyed by the Plaintiff/Respondent.

2. THAT this Honourable Court do impose a fine on the Plaintiff/Respondent for breach of this Honourable Court’s Order.

3. THAT the costs of and occasioned by this application be paid by the Plaintiff/Respondent and its directors on a full indemnity basis.”

2. The application is supported by the grounds on its face and an affidavit sworn by the 3rd Applicant, Anthony Muthusi on 23rd January, 2017. It is also supported by a supplementary affidavit sworn by the 3rd Applicant on 10th May, 2017.
3. The application is opposed through an affidavit sworn on 21st February, 2017 by the Plaintiff's Director, Hussein Saleh Mohamed Ismail. I shall henceforth refer to Kemu-Salt Packers Production Ltd as Kemu-Salt. The directors named in the application will be referred to as the respondents.
4. Before proceeding to highlight the application and the response thereto, I find it necessary to give a brief history of this matter. On 8th November, 2016 Kemu-Salt instituted these proceedings challenging its placement under receivership by Dubai Bank on 6th September, 2016. At the time of filing suit, Kemu-Salt also applied and obtained an *ex-parte* order which, *inter alia*, barred the applicants from dealing or interfering with any undertaking, goodwill, property or its assets. At the time of the issuance of the said *ex-parte* order the 2nd and 3rd applicants had already taken over Kemu-Salt and they had to vacate its premises in obedience of the order.
5. On 16th November, 2016 the applicants approached the court seeking to set aside the orders of 8th November, 2016 on the main ground that orders had been issued by Angote, J in Malindi ELC No. 265 of 2016 (O.S.) barring the 2nd and 3rd applicants from selling Kemu-Salt's land and assets pending the hearing and determination of that particular matter thereby rendering the orders issued herein on 8th November, 2016 otiose.
6. On 21st November, 2016, Chitembwe, J varied the orders he had issued on 8th November, 2016 in the following terms:-

“Since the official receivers were already on the ground before the interim orders were granted, I do vary the orders I issued on 8th November, 2016 and do allow the official receivers to be back on the ground subject to compliance with the orders issued by Angote J. in the ELC case.”
7. This is the order which the applicants accuse Kemu-Salt of refusing to obey hence the basis of the instant application against its shareholders and or directors.
8. The applicants' case is that on 22nd, 23rd and 24th November, 2016, the 2nd and 3rd applicants' attempts to regain possession of the salt plant belonging to Kemu-Salt were repulsed by armed opposition under the instructions of Mr. Hussein Ismail, a director of Kemu-Salt. It is the applicants' case that on 23rd November, 2013 the 3rd Applicant was accompanied by a court process server who was to effect service but they were again denied entry by armed militia.
9. The applicants' case is that between 25th November and 7th December, 2016 there was flagrant violation of the court order in that the directors of Kemu-Salt disposed of the assets of the company.
10. The applicants contend that attempts by their advocate to seek intervention through the respondents' counsel were futile and it is only after the filing of the application herein that the 2nd and 3rd applicants were allowed to regain possession of the premises. According to the applicants, it was discovered that machinery and generators had been removed between November, 2016 and January, 2017.
11. The respondents opposed the application. Their case is that they have never disobeyed the orders issued by this court on 21st November, 2016 and that they had allowed the 2nd and 3rd applicants to regain possession of the salt plant. They assert that they are law abiding citizens and the applicants herein have not adduced any evidence to demonstrate that they disobeyed the court orders.
12. Hussein Ismail avers that the 3rd Applicant in his supporting affidavit heavily relies on information

allegedly passed to him by one Moses Wachira Mugo who is not a party to this suit and has not sworn any affidavit to confirm those assertions.

13. On the 3rd Applicant's averment that five motor vehicles were spotted entering the salt plant and later exiting laden with salt, Hussein Ismail avers that no evidence has been adduced in support of the allegation.

14. The advocates filed written submissions in support of their clients' positions. Counsel for the applicants started off by indicating that the application herein has been brought under the Contempt of Court Act, 2016 which came into force on 13th January, 2017.

15. It is the applicants' case that a party who violates court orders should not attract the mercy of the court. In support of this assertion, the decision of the Court of Appeal in **Justus Kariuki Mate v Martin Nyaga Wambora [2014] eKLR** is cited. In that case, the Court citing **Hadkinson v Hadkinson [1952] All ER 567** stated that the duty to obey the law by all individuals and institutions is cardinal in the maintenance of the rule of law and the due administration of justice.

16. The applicants assert that had the company complied with the court order, there would have been no reason for their advocates to write to the company's advocates asking them to urge the company to obey the court order. The applicants contend that the company's disobedience of the court order was motivated by the desire to make profit.

17. According to the applicants any party who chooses to disobey a court order ought to be brought to account as this is the only way the court can restore its dignity and maintain the sanctity to be given to court orders.

18. Turning to the question of service, the applicants contend that once a party has knowledge of a court order, that party has a duty to obey the order. The applicants assert that on the day the order was issued, there was an advocate holding brief for the company's former advocate. Further, that the court order was served on 23rd November, 2016. Reliance is placed on the decision in **Shimmers Plaza v National Bank of Kenya [2015] eKLR** wherein the Court of Appeal held that:-

“Would the knowledge of the judgement 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.”

19. It is the applicants' submission that these proceedings have been instituted against the named individuals as they are directors and/or shareholders of the company and had a duty to ensure that the court order was obeyed.

20. Counsel for the respondents commenced his submissions by stating that it is the duty of the applicants to prove that the company through the respondents failed to obey the court order.

21. Counsel submitted that there are certain conditions that must be met by an applicant before a respondent can be said to be in contempt of the court. In support of this submission counsel referred this court to the decision of Mativo, J in **Katsuri Limited v Kapurchand Depar shah [2016] eKLR** wherein he stated that:

“Writing on proving the elements of civil contempt, learned authors of the book Contempt in Modern New Zealand [22] have authoritatively stated as follows:-

“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. The respondents' view is that the applicants have failed to prove the ingredients of contempt of court. According to the respondents, they were indeed aware of the court order and they allowed the applicants to access the premises.

23. Referring to the photographs annexed to the supplementary affidavit of the 3rd Applicant, the respondents' counsel submits that the said photographs are undated, do not show when and where they were taken and who took them. Further, that Hussein Ismail is not in those photographs. The respondents' view is that the photographs cannot be relied on. Counsel urges the court to treat the photographs in the manner that Justice Gacheru treated similar photographs in **Nils Bernard Fride Nelson & 3 others v Dunson Karu & 7 others [2013] eKLR** when she opined that:-

“The applicants in the Further Affidavit of Joyce Kariuki attached photographs. It was alleged that those are activities being carried out by the 2nd Defendant herein. 2nd Defendant denied carrying out those activities. There were no licences attached to the affidavits to show that the businesses are owned by the 2nd Defendant and they are actually being carried on the suit premises.

The photographs attached are undated and they do not show where they were taken from and who took them. There was no evidence to link the photographs with the suit property and especially the said Sunflower Academy that is allegedly affected by the car wash business.”

24. Turning to the applicants' averment that certain motor vehicles had been seen leaving the premises laden with salt, the respondents contend that no affidavit by any eye witness has been filed to support the allegation.

25. The respondents also denied that the 2nd and 3rd applicants were denied entry to the premises by armed Borana militia.

26. The respondents asked the court to note that in the supporting affidavit sworn by the 3rd Applicant, his averment was that he was informed of the events at the salt plant by one Mr. Mugo only for him to place himself at the scene through the supplementary affidavit. The 3rd Applicant's averment that the trucks that ferried salt from the plant must have also transported machinery is dismissed for being speculative as nowhere does the 3rd Applicant aver that he saw the machines being moved.

27. The respondents' view is that this case does not meet the required standards and they urge this court to dismiss the application.

28. The applicants' counsel filed submissions in response to the respondents' submissions. He stressed that the standard of proof in contempt proceedings is as was stated by the Court of Appeal in **Mutitika v Baharini Farm [1982-88] 1KAR 863**. In that case the Court stated that:-

“In our view the standard of proof in contempt proceedings must be higher than proof on the

balance of probabilities, almost but not exactly, beyond reasonable doubt. We envisage no difficulty in courts determining the suggested standard of proof. The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to offence which can be said to be quasi-criminal in nature.”

29. Counsel for the applicants reiterated the contents of the 3rd Applicant’s supporting affidavit and supplementary affidavit in order to demonstrate that the respondents were indeed in contempt of the court order.

30. Relying on the decision in **Attorney General for Tuvalu v Philatelic Distribution Corporation [1990] 2 All ER 216** counsel submitted that a director of a company is liable for the acts of the company and can be punished for contempt. He cites a passage at page 222 where the court stated that: -

“In our view where a company is ordered to do certain acts or gives an undertaking to like effect and a director of that company is aware of the order or undertaking he is under a duty to take reasonable steps to ensure that the order or undertaking is obeyed, and if he willfully fails to take those steps and the order or undertaking is breached he can be punished for contempt. We use the word “willful” to distinguish the situation where the director can reasonably believe some other director or officer is taking those steps.”

31. The applicants assert that the person who swore the replying affidavit in response to the application was the executive director of the company and he is clearly in contempt of court.

32. As for the respondents’ objection to the photographs, counsel submits that the dates and location where the photographs were taken are not in doubt and for that reason the decision in **Nils Bernard Fride Nelson**, which was cited by the respondents, has no application in this case. Further, that the Privy Council in the case of **Karuma v Reginam [1955] 1 All ER 236**, which was an appeal emanating from Kenya, held that it matters not how you obtain evidence for as long as it is relevant it is admissible. At page 239 of that case it was stated that:-

“In their Lordships’ opinion, the test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how the evidence was obtained.”

33. The applicants contend that they have proved their case and they urge the court to allow the application.

34. Upon considering the evidence and the submissions of the parties to this application, I have come to the conclusion that the issue for the determination of this court is whether the respondents disobeyed the court order issued on 21st November, 2016.

35. There is no question about the existence of the said orders. Although the applicants in their submissions gave the impression that the respondents deny having been served with the orders, the respondents in their reply and submissions do not raise the issue of service. The respondents do not have any issue with the clarity of the court orders. There is also no question as to whether the applicants followed the correct procedure in bringing the instant application. The respondents’ acknowledgement of the existence of the orders and service of the same therefore renders the application of the principles enunciated in the **Shimmers Plaza** case unnecessary in this case.

36. The duty of the court in this matter is therefore reduced to analysis of the affidavit evidence placed before it in order to make a determination as to whether the respondents acted in defiance of the court order.

37. The applicants’ evidence as disclosed in the affidavits of the 3rd Applicant is that the 2nd and 3rd applicants were on 6th September, 2016 appointed by the 1st Applicant to act as joint receivers of Kemu-

Salt. After the issuance of the order of 21st November, 2016 allowing them to regain possession of the salt plant of Kemu-Salt, the 3rd Applicant on 22nd November, 2016 sent Mr. Moses Wachira Mugo, an employee working under him at Ernest & Young, to Kemu-Salt's plant at Marereni, Malindi with a copy of the order of the court issued on 21st November, 2016 with instructions to gain access and secure the premises.

38. Mr. Mugo informed the 3rd Applicant that attempts to gain access to the plant were unsuccessful as Mr. Hussein Ismail denied him access and directed the security guards and armed Borana militia not to allow anybody access to Kemu-Salt's plant. He was also informed by Mr. Mugo that he had reported the matter to the OCS Marereni who refused to assist him stating that the issue was a civil matter and he could only intervene based on an express court order.

39. It is the 3rd Applicant's attestation that on 23rd November, 2016 he travelled to Malindi and proceeded to the plant at Marereni in company of a court process server and security guards. He avers that he was denied access by Hussein Ismail.

40. It is the 3rd Applicant's averment that his advocate, Geoffrey Muchiri, informed him that he had spoken to Kemu-Salt's advocate, Mr. Bernard Kiberass Koyokko on telephone on 24th November, 2016 and alerted him on the frustration and disobedience of the court order by Kemu-Salt and its directors and put him on notice that he would institute contempt proceedings.

41. Further, that his advocate also informed him that he had talked with Mr. Gicharu Kimani, another of the company's lawyers, on 24th and 25th November, 2016 asking for an update on the compliance with the court order.

42. It is the 3rd Applicant's averment that he was informed by Mr. Mugo that between 25th November, 2016 and 7th December, 2016 a large number of heavy commercial vehicles, among them motor vehicle registration numbers KBC 405K, KCH 764, KBQ 457R, KCF 683F and KCE 447D, were sighted arriving and later leaving the plant laden with salt.

43. The 3rd Applicant also averred that on 10th January, 2017 a notice emanating from their advocate was sent to Messrs Wagara and Koyokko Advocates asking them to confirm whether their client would account for the salt sold between November, 2016 and January, 2017. The notice also sought confirmation that the 2nd and 3rd applicants would be allowed to regain access to the plant immediately. The 3rd Applicant's disposition is that at the time of filing this application the letter had not been responded to.

44. The respondents' reply to the evidence tabled by the applicants is found in paragraphs 8 to 14 of Hussein Ismail's replying affidavit. I can only do justice to their case by reproducing those paragraphs as follows: -

“8. THAT the averments by Mr. Anthony Muthusi the 3rd Defendant/Applicant herein as stated in paragraphs 17 to 30 of the Affidavit sworn in support of the Defendant's application are not true, they are misguided and they are meant to mislead this Honourable Court and jeopardize the Plaintiff/Respondent case.

9. THAT the Plaintiff/Respondent has never at any time disobeyed the Orders of this Honourable Court issued on 21st November, 2016, and it has in fact allowed the Receivers (2nd and 3rd Defendants/Applicants) to be on the ground at the premises of the Plaintiff/Respondent.

10. THAT the 3rd Defendant/Applicant is currently on the ground and at the premises of the Plaintiff/Respondent in accordance with the court Order issued on 21st November, 2016.

11. THAT the Plaintiff/Respondent is a law abiding entity and the Applicants herein have not adduced any evidence to the effect that the directors, shareholders, employees and/or agents of Plaintiff/Respondent have disobeyed the Orders of this Honourable Court issued on 21st November, 2016 and thus they are not in continued willful and blatant contempt of court.

12. THAT I am informed by my Advocates information of which I verily believe to be true that Mr. Anthony Muthusi in his supporting Affidavit largely relies on information from one Mr. Moses Wachira Mugo who is not a party to the suit. There is also no Affidavit sworn by Mr. Moses Wachira Mugo annexed as evidence to the said application to confirm the assertions of Mr. Anthony Muthusi.

13. THAT in reply to applicants' allegations in paragraph 24 of the supporting Affidavit by Mr. Anthony Muthusi, no evidence has been adduced to confirm that actually motor vehicles Registration No. KBC 405K, KCH 764, KBQ 457R, KICF 683F and KCE 447D left the premises of the Plaintiff laden with salt.

14. THAT on 20th February, 2016 one of the employees of the Plaintiff reported at the Malindi Police Station of a theft at the Plaintiff's premises whereby the 2nd and 3rd Defendants stole a pump from the premises of the Plaintiff. The same was recorded in OB No. 02/20/02/2017/1100 hrs."

45. The 3rd Applicant swore a supplementary affidavit in response to the replying affidavit. He averred that immediately Kemu-Salt was placed under receivership, a valuation was undertaken. He annexed the Valuation Report to the affidavit.

46. His averment is that on 25th January, 2017 while his advocate was filing the contempt application in court he met the advocate for the company who expressed shock that they had not been allowed access to the plant. They later proceeded to the plant and upon arrival they were barred access by armed Borana militia who informed them that Mr. Hussein Ismail had left express instructions that no one should be allowed access to the plant. Once again a call was made to the company's lawyer who assured them that they would access the plant. Eventually they were allowed to enter the plant and that is when the court order was served by fixing it on a prominent part of the offices.

47. The 3rd Applicant's averment is that they only managed to gain full control of the plant one week after 25th January, 2017. It was then that they discovered that three generators, four packing machines, a mechanical weighing scale and a horizontal thermic boiler which were at the plant on 8th November, 2017 when they left in compliance with the court order were missing. The 3rd Applicant exhibited photographs showing the empty spaces where the machines had been before their removal.

48. The 2nd and 3rd applicants denied stealing any property belonging to Kemu-Salt asserting that this was a red herring by the respondents aimed at diverting attention from their unlawful actions. The evidence on record clearly shows that the 2nd and 3rd applicants had not taken over the salt plant at the time they allegedly stole in February, 2016.

49. A perusal of the submissions of the advocates for the parties herein readily show that they both agree that the standard of proof in a case like the one before this court is one higher than proof on a balance of probabilities but lower than proof beyond reasonable doubt. They have both cited the decision of the Court of Appeal in **Mutikika** (supra).

50. What remains to be decided is whether the evidence laid before the court established a case against the respondents to the required standards. The 3rd Applicant in his affidavits explains in detail the events that took place after the issuance of the order on 21st November, 2016. He states the source of the information that he disclosed to the court. He has backed this information with photographs. The photographs support his averment. He avers that some photographs shows the empty spaces from which

machinery had been removed. The circumstances of this case are therefore different from those in **Nils Bernard Fride Nelson** (supra).

51. The 3rd Applicant in his supporting affidavit avers that he and his team were repulsed on 23rd November, 2016 when they attempted to gain access to the plant. He avers that it is only on 25th January, 2017 when they managed to gain access to the plant.

52. The 3rd Applicant exhibited a letter dated 10th January, 2017 from their advocate (Geoffrey Muchiri) addressed to Wagara, Koyokko & Company Advocates, and drawn to the attention of Bernard Kiberass Koyokko, indicating that the order of 21st November, 2016 had not been complied with. He avers that the letter had not been responded to.

53. The respondents offered a general denial to these allegations only opting to attack the veracity of the averments of the 3rd Applicant on the grounds of his sources and quality of evidence. Even without the photographs and the information received by the 3rd Applicant from the named sources, who included his advocate, the evidence of the 3rd Applicant confirms, to the standard required in a case of this nature that the applicants were denied access to the plant despite court orders which were known to the company.

54. The respondents who are said to be either directors or shareholders of Kemu-Salt therefore acted in defiance of court orders. The applicants' case is proved and their application succeeds. Prayer 1 of the application is allowed with costs to the applicants. The contemnors will be given an opportunity to mitigate before sentence is passed on a date to be set after the delivery of this ruling.

Dated, signed and delivered at Malindi this 28th day of Sept., 2017.

W. KORIR,

JUDGE OF THE HIGH COURT