



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CONSTITUTIONAL & HUMAN RIGHTS DIVISION
PETITION NO. 249 OF 2016

BETWEEN

BIA TOSHA DISTRIBUTORS LIMITED.....PETITIONER

AND

KENYA BREWERIES LIMITED.....1ST RESPONDENT

UDV (KENYA) LIMITED.....2ND RESPONDENT

EAST AFRICAN BREWERIES LIMITED.....3RD RESPONDENT

DIAGEO PLC.....4TH RESPONDENT

COGNO VENTURES LIMITED.....INTERESTED PARTY

RULING

Introduction

1. There is a motion before me.

2. It was filed by the Petitioner on 23rd August, 2016. The Petitioner alleged disobedience of a court order by the Respondents. The Petitioner in its motion urges the court to find that the Respondents are in contempt. The Petitioner also urges the court to hold the Respondents and some of their officers personally responsible for contempt. Fines have been invited. Imprisonment too has been bid.

3. Before the Motion could be heard however, the 2nd Respondent lodged an objection *in limine*. The objection was to the effect that the Motion is incompetent, misconceived and otherwise an abuse of the process of the Court on the grounds that:

a. The 2nd Respondent is not in contempt of any order by this court or of the Court of appeal

b. The order of the status quo was granted by the Court of Appeal and it is the proper court to deal with any allegation of contempt, the Order having been made before any other application.

c. The application is made without jurisdiction as Section 5 of the Judicature Act (cap 8) of the Laws of Kenya as well as part 81 Rule 81.4 of the Civil Procedure (Amendment No. 2) Rules of England, 2012 do not apply in these proceedings.

d. Rule 8(1) of the Constitution of Kenya(Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 does not apply in the proceedings herein.

e. The application is without merit as it is predicated on alleged status quo ante as opposed to status quo as ordered by the Court of Appeal

f. The order of the Court of Appeal was not predicated upon the order of the High Court and was granted by the Court of appeal suo moto in exercise of its appellate jurisdiction.

g. The status quo order by the Court of Appeal acted as a stay of the orders by the High Court granted on 29th June 2016.

4. The Preliminary objection invited support from the co-respondents as well as the Interested Party but was contested by the Petitioner.

Brief litigation history

5. In so far as it is relevant, the history of litigation herein was as follows.

6. The Petitioner filed a Petition on 14 June 2016 alleging a violation of its right to property under Article 40 of the Constitution. Alongside, the Petition an interlocutory application was filed. Following brief preliminaries, the interlocutory application was heard by way of oral submissions on 22 June 2016. A ruling on the interlocutory motion was rendered on 29 June, 2016. Orders were issued. The Petitioner was successful.

7. Dissatisfied with the ruling, the Respondents moved to the Court of Appeal. The Respondents sought a stay of execution and stay of the proceedings before this court by way of a motion filed before the Court of Appeal. On 11 August 2016, the Court of Appeal directed that interlocutory appeal be fast-tracked. The Court of Appeal also granted orders for the maintenance of the status quo then obtaining. Twelve days later the Petitioner moved this court with the instant application.

2nd Respondent's Objection

8. The 2nd Respondent's objection *in limine* was urged by Mr. George Oraro SC.

9. According to Mr. Oraro, the application instituting contempt proceedings was defective in so far as it had been made under Section 5 of the Judicature Act (Cap 8). Mr. Oraro was of the view that Section 5 of the Judicature Act , which imported the English Law on contempt for the time being applicable to and applied by the High Court of Justice in England, was no longer applicable to contempt proceedings in Kenya. Section 36 and Section 35 respectively of the High Court (Organization and Administration) Act No.27 of 2015 and Court of Appeal (Organization and Administration) Act No. 28 of 2015, it was stated, now expressly confer contempt jurisdiction on the local courts. As a result, as well, Part 81 of the Civil Procedure (Amendment No. 2) Rules of the High Court of England was also inapplicable. Accordingly, the application was defective beyond repair as the local statutory law was superior to any foreign law.

10. Senior Counsel further contended that the subject matter of litigation was now before the Court of Appeal where an order for the maintenance of status quo had been issued on 11 August, 2016. It was further argued that the Court of Appeal's order had since subsumed this court's order of 29 June 2016. Counsel took issue with the fact that the application for contempt was made on 23 August 2016 after the parties had appeared before the Court of Appeal. Then referring to the cases of **R vs. National Environmental Tribunal & Another [2013]eKLR** and **Thugi River Estate Ltd & Another vs. National Bank of Kenya Ltd. & 3 Others [2015]eKLR**, Mr. Oraro submitted that the order of status

quo by the Court of Appeal effectively froze the state of affairs. Counsel added that until the appeal was heard, this court could neither revisit its own order of 29 June 2016 or the Court of Appeal's order of 11 May, 2016. It was counsel's submission that if the Petitioner felt aggrieved then the proper forum to let out its dissatisfaction was the Court of Appeal.

11. As I understood Mr. Oraro, this court had effectively no jurisdiction to entertain the Petitioner's motion of 23 August 2016.

1st, 3rd & 4th Respondents' case

12. Mr. Kamau Karori assisted by Ms. Odari appeared for the 1st, 3rd and 4th Respondents.

13. Mr. Karori reiterated the submissions made by the 1st Respondent's counsel that the court had no jurisdiction to entertain the application for contempt. More robustly, Mr. Karori submitted that the order by the Court of Appeal effectively froze not just the state of affairs but also the proceedings before this court. Counsel urged that in view of the two court orders, no step ought to be taken for the purpose of ensuring that neither court is embarrassed by any orders issued by this court.

The Interested Party's case

14. Represented by Mr. Issa Mansur, the Interested Party also supported the 2nd Respondent's preliminary objection.

15. Mr. Mansur was categorical that though the Court of Appeal's order as to status quo appeared to lack some clarity, this court would not interpret the same but was now duty bound to decline jurisdiction and only await the decision by the Court of Appeal.

16. Counsel referred the court to the Court of Appeal decision in **Saroj K. Shah vs. Naran Manu Patel & 2 Others [2014]eKLR** where the court lamented over the issuance of status quo orders minus clear definitions of the prevailing state of affairs.

The Petitioner's case

17. Appearing for the Petitioner, Dr. K.Kiplagat contended that the preliminary objection as taken up by the 1st Respondent and supported by the other parties, did not meet the threshold of preliminary objections.

18. Dr. Kiplagat contended that the court had the necessary remit as the order the Petitioner was complaining of having been disobeyed was not the Court of Appeal's order of 11 August 2016 but rather this court's order of 29 June 2016. Additionally, counsel submitted that the Petitioner was not in any way seeking to vary or even interpret the Court of Appeal's orders. According to counsel, the Court of Appeal only issued an order for maintenance of status quo and not stay of proceedings.

19. As to whether the application was competent, counsel urged the court to ignore procedural defects which did not go to the root of the application. Then referring to the case of **R vs. Minister, Ministry of Medical Services [2011]eKLR**, Counsel submitted that in matters contempt, the court ought to avoid procedural issues and hiccups raised by alleged contemnors and invoke Article 159 of the Constitution to effect substantial justice.

Discussion and Determination

Issues

20. A reflection on the submissions by the parties and also the Notice of Preliminary objection dated 14 September 2016, would lead to the view that there are three issues to be determined at this preliminary

stage. First, is the preliminary objection itself competent. Secondly, is the Notice of Motion competently before the court? Thirdly, has the court the necessary jurisdiction to entertain the application for contempt.

An objection to a Preliminary Objection

21. It is not uncommon for parties faced with preliminary objections raised to either their suits or applications, to react by also raising an objection to the preliminary objection. The Petitioner herein is not an exception. Having argued substantively against the grounds advanced by the Respondents in support of the preliminary objection, the Petitioner's Counsel wound up the submissions by stating that the objections did not qualify to be preliminary objections and the court ought to summarily dismiss the same as the Respondents consistently made reference to fact, certain aspects of which were disputed. Dr. Kiplagat could himself not avoid referring to fact, drawing occasional rebuke from the Respondents.

22. Such line of argument is however not surprising. The case of **Mukisa Biscuits Co. Ltd vs. West End Distributors Ltd [1969] EA 696** which was referred to by the 2nd Respondents counsel set the barometer way back in 1969. In his concurring judgment, Newbold P stated as follows of preliminary objections:-

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary Objection. A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”

23. And for the last over three and half decades the *Mukisa Biscuits*' benchmark has stood in good stead obtaining approval from even the Supreme Court of Kenya.

24. The flight – path for preliminary objections seem however to have been slightly altered by the Supreme Court. In the case of **Hassan Ali Joho & Another vs. Suleiman Said Shabhal 2 Others [2014]eKLR (SCK)** the court stated that:

“.....a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit.”

25. The same approach, the departure from the traditional *Mukisa Biscuits*' preliminary objection, was again adopted by the Supreme Court of Kenya in **Independent Electoral & Boundaries Commission vs. Jane Cheperenger & 2 Others [2015]eKLR** where the court went further to state as follows:-

“[21] The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to preliminary objections. The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.” [emphasis is mine]

26. Later in **Lady Justice Kalpana Rawal & Another vs Vs. Judicial Service Commission & Others [2016]eKLR (SCK)**, the Supreme court again adopted a similar approach and focused on the purpose rather than the nature of the preliminary objection in disposing of an application summarily.

27. Where the purpose of the objection assists in saving the scarce judicial time and militates against profligate deployment of time, then the court will entertain a preliminary objection even where it appears

some factual aspect of the case may come under scrutiny. Of course, the caution that disputes are better off being resolved judiciously rather than summarily, must be tagged along.

28. I have no quarrel with the fore-stated principles of the law. I also form the view, in the instant case that the preliminary objection is worthy of being heard *in limine*. The core issue raised touches on the court's jurisdiction and that ought to be interrogated at the very inception as without jurisdiction the court must down its tools: see ***OWNERS OF THE MOTOR VESSEL LILLIAN "S" vs. CALTEX OIL (KENYA) LTD 1989 KLR 1*** . If I find that the court lacks jurisdiction, so much of the scarce judicial time will be saved. I decline to accede to Dr. Kiplagat's contention that the preliminary objection is not a preliminary objection *strict sensu*.

Of the competency of the application

29. It is not in dispute that the Petitioner moved the court under Section 5 of the Judicature Act. Section 5(1) of the Judicature Act empowers the High Court to punish any proven contempt of court and provides thus:

5.(1) The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate courts.(emphasis)

English law is effectively invited into play and in particular Part 81 of the Civil Procedure (Amendment No. 2) Rules of 2012. With it is also invited an array of procedural matters. The procedural competence is however not for the court's interrogation now.

30. What is in controversy is whether the application to cite the Respondents for contempt of court should have been filed pursuant to Section 36 of the recently enacted High Court (Organization and Administration) Act 2015 ("the HCOA Act") as the Respondents contend. The Petitioner contends that there was no need to move the court under section 36 of the HCOA Act and that even if there was need, Article 159 of the Constitution must or ought to be invoked to ensure that a party who is alleged to have disobeyed a court order does not simply walk away thanks to a procedural technicality.

31. The HCOA Act came into operation on 2nd January, 2016 the same day the Court of Appeal (Organization and Administration) Act 2015 also came into force. Section 35 of the latter statute provides as follows:-

"35. (1) Subject to the provisions of any other law, the Court shall have power to punish for contempt.

(2) A person who, in the face of the Court –

(a) assaults, threatens, intimidates, or insults a judge of the Court, the Registrar of the Court, a Deputy Registrar or officer of the Court, or a witness, during a sitting or attendance in Court, or in going to or returning from the Court;

(b) interrupts or obstructs the proceedings of the Court; or

(c) without lawful excuse disobeys an order or direction of the Court in the course of the hearing of a proceeding, commits an offence.

(3) In the case of civil proceedings, the willful disobedience of any judgment, decree, direction, order, or other process of a court or willful breach of an undertaking given to a court constitutes contempt of court.

(4) In the case of criminal proceedings, the publication, whether by words, spoken or written, by signs, visible representation, or otherwise, of any matters or the doing of any other act which –

- (a) scandalizes or tends to scandalize, or lowers or tends to lower the judicial authority or dignity of the court;*
 - (b) prejudices, or interferes or tends to interfere with, the due course of any judicial proceeding; or*
 - (c) interferes or tends to interfere with, or obstructs or tends to obstruct the administration of justice, constitutes contempt of court.*
- (5) A police officer, with or without the assistance of any other person, may, by order of a judge of the Court, take into custody and detain a person who commits an offence under subsection (2) until the rising of the Court.*
- (6) The Court may sentence a person who commits an offence under subsection (1) to imprisonment for a period not exceeding six months, or a fine not exceeding five hundred thousand shillings, or both.*
- (7) A person may appeal against an order of the Court made by way of punishment for contempt of court as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the Court.”*

32. Section 36 of the HCOA Act on the other hand, in so far as it is relevant, stipulates as follows:

“36. (1) A person who –

- (a) assaults, threatens, intimidates or willfully insults a judge, judicial officer or a witness, involved in a case during a sitting or attendance in a court, or while the judge, judicial officer or witness is travelling to and from a court;*
- (b) willfully and without lawful excuse disobeys an order or directions of the court in the course of the hearing of a proceeding;*
- (c) within the premises in which any judicial proceeding is being heard or taken, or within the precincts of the same, shows disrespect, in speech or manner, to or with reference to such proceeding, or any person before whom such proceeding is being heard or taken;*
- (d) having been called upon to give evidence in a judicial proceeding, fails to attend, or having attended refuses to be sworn or to make an affirmation, or having been sworn or affirmed, refuses without lawful excuse to answer a question or to produce a document, or remains in the room in which such proceeding is being heard or taken after the witnesses have been ordered to leave such room;*
- (e) causes an obstruction or disturbance in the course of a judicial proceeding;*
- (f) while a judicial proceeding is pending, makes use of any speech or writing misrepresenting such proceeding or capable of prejudicing any person in favour of or against any parties to such proceeding, or calculated to lower the authority taken;*
- (g) publishes a report of the evidence taken in any judicial proceeding that has been directed to be held in private;*
- (h) attempts wrongfully to interfere with or influence a witness in a judicial proceeding, either before or after he or she has given evidence in connection with such evidence;*
- (i) dismisses a servant because he or she has given evidence on behalf of a party to a judicial proceeding; or*

(j) commits any other act of intentional disrespect to any judicial proceedings, or to any person before whom such proceeding is heard or taken, commits an offence.

(2)

(3) A person who commits an offence under subsection (1) shall, on conviction be liable to imprisonment for a term not exceeding five days, or to a fine not exceeding one hundred thousand shillings, or to both.

(4) In exercise of its powers under this section, the Court shall observe the principles of fair administration of justice set out in Article 47 of the Constitution.”(emphasis)

33. One needs no reminder that contempt of court comes through four ways. Firstly, there is deemed contempt when there is proven breach of a judgment, court order or undertaking to do or abstain from doing an act. Secondly, there is the contempt for interference with the due administration of justice. The third category is contempt in the face of the court. The fourth category, is contempt through the making of false statements of truth, often referred to as perjury.

34. A closer reading of both Section 35 of the Court of Appeal (Organization and Administration) Act 2015 and Section 36 of the HCOA Act would reveal that while the power of the two courts to punish the contempt is available, the Court of Appeal has been expressly conferred with the statutory power to punish the contempt generally (effectively of all the categories) but the same does not obtain of the High Court. Section 36 of the HCOA Act limited the power under that statute to contempt in the face of the court. It is simply an indexation of the various categories of contempt in the face of the court. The section is indeed replete with the punishment to be meted once contempt in the face of the court is established.

35. It is consequently apposite to state that the High Court still has , is so far as the other categories of contempt are concerned, the inherent power to punish for contempt of court similar to those of High Court of Justice in England.

36. It is also noteworthy that whilst the HCOA Act amended (by way of deletion) certain provisions of the Judicature Act, Section 5 was not deleted or amended. It is still intact. This should give further force to the position that the power of the High Court to punish for contempt still obtains under Section 5, save for contempt in the face of the court. Any rules or regulations promulgated pursuant to the provisions of Section 39(2) (g) of the HCOA Act would thus only be applicable to contempt in the face of the court.

37. I consequently conclude and hold that the application has been properly made under the correct provisions of the law; namely section 5 of the Judicature Act (Cap 8).

Court of Appeal or High Court ?

38. The Respondents' ultimate substantive ground was that this court has no jurisdiction to entertain the application as the Court of Appeal is seized of the matter.

39. I intend to dispose of this ground shortly.

40. First, I must appreciate that, and this was also conceded by the Petitioner, this court cannot interrogate or even interpret an order made by the Court of Appeal. The judicial hierarchy of our court system prohibits such line or course of action. Secondly, I must however also point out that the court has no doubt the power to punish for contempt once it is proven. I did not hear any of the parties contest this basic proposition of law.

41. In contending that the court lacks the necessary jurisdiction to entertain the Petitioner's application for contempt, the Respondents central stand was that once an application or appeal was made to the Court of Appeal and an order for status quo made, the entire process as concerned this court had to come to a halt. That is the extreme, as submitted by Mr. Kamau Karori. The moderate position adopted by the 2nd

Respondent is that this court's order of 29 June 2016 was subsumed in the Court of Appeal's order of 11 August 2016 and as a result there can be no talk of this court's order of 29 June 2016 until after the appeal has been determined.

42. It is not in doubt that a status quo order was issued by the Court of Appeal on 11 August 2016. A status quo order simply maintains a state of affairs between the parties. It is best suited and applied by the court when the state of affairs is pellucidly defined. Unfortunately, and with unfeigned respect to the Court of Appeal, it would not be wrong to state the state of affairs it intended to have the parties herein maintain simply left the parties in an apparent quagmire. I will however not endeavour to try and demystify the state of affairs as of 11 August 2016 which obtains till now.

43. I have no doubt however that orders of status quo do not equate stay of proceedings. It would be uncanny to suggest that when parties agree to a status quo order or the courts *suo moto* issue status quo orders then all proceedings also come to a halt. I do not and would not pledge to that school of thought. Such an approach would lead to the administration as well as course of justice being greatly hampered.

44. In my view, that position would apply to contempt of court proceedings where there is a complaint involving a court order.

45. The question where there are two court orders by the same or different courts and an application for contempt is lodged, in my view, is and should always simply be : which of the two orders is alleged to have been disobeyed.

46. I have read the application dated 23rd August 2016.

47. It was indeed filed after the Court of Appeal's order as to status quo of 11 August 2016. The application complains of disobedience of the court order of 29 June 2016. That is this court's order. It does not seek to question the Court of Appeal's order of 11 August 2016. The application does not invite any determination on the order by the Court of Appeal. It will be up to the Petitioner to point out and prove any breaches of the court order of 29 June 2016.

48. In the context of the contempt jurisdiction , which has the object of assisting to uphold the rule of law, protect the due administration of justice and maintenance of law and order all for the public good, it is my view and I so hold that unless there is an express order by a higher court for the stay of proceedings, this court and the Court of Appeal for the matter will always retain the inherent jurisdiction to entertain and determine applications for contempt. Likewise, I am satisfied that in the instance case, the court still has the necessary remit to proceed and hear the application for contempt of court as lodged by the Petitioner.

Conclusion and disposal

49. I come to the conclusion that both the preliminary objection and the Application for contempt were properly before me. I also come to the conclusion that the court has the necessary remit to hear and determine the application for contempt.

50. Contempt applications ordinarily ought to be disposed of as soon as possible. Save for the intended Interested Parties, the Petitioner and the Respondents did not divulge to me the position of the Court of Appeal proceedings. The application for contempt in the absence of any stay of proceedings order ought to be heard immediately. The court must make sure its process is not abused. It must ensure that its authority and dignity is upheld at all times by consistently interrogating the subservience or lack of subservience to its orders and judgments.

51. In the result, the preliminary objection fails and is dismissed.

52. The costs of the preliminary objection shall abide such orders on costs as may be made in the application for contempt.

Signed dated and delivered at Nairobi this 24th day of October 2016

J.L. ONGUTO

JUDGE