REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT No. 49 Of 2014

QUICK HANDLING AVIATION LTD.....PLAINTIFF

VERSUS

ADAN NOOR ADAN.....DEFENDANT

RULING

Two applications: Variation of orders; and committal for contempt

[1] By way of directions, the court ordered that the Motion by the Defendant dated 15th July, 2014; and the one by the Plaintiff dated 24th July, 2014 to be heard together. Parties were to file their respective submissions on each application. I will deal with the former application for obvious reasons; it was filed first in time and the nature of orders sought therein will have a bearing on the latter application.

Application for variation of order of 9/7/14

[2] This is the application by the Defendant and is dated 15th July 2014. The significant prayer therein is that the court reviews, vacates, varies or sets aside the orders given on 9th July 2014. It also sought for this suit to be dismissed. The Motion is supported by the affidavit of the Defendant. The Applicant advanced three major grounds of the application. The first one is that there is a mistake or error on the face of the record in that;

i) The Plaintiff's move in applying for orders of 9th July 2014 was calculated at misleading the court to have the Defendant removed as a director of the company;

ii) The said removal is ultra vires the company's Memo and Articles of Association;

iii) The documents used to obtain the orders of 9th July 2014 were falsified;

iv) There was non-disclosure of material facts especially that there was no authority to sue which was given under the seal of the company as the purported authority and stamp was a forgery. Indeed the seal of the company is and was in the custody of the Defendant;

v) The alleged assets of the company which were being misused were not specified;

vi) The court overlooked that summons had not bee served as per order 5 of the Civil Procedure Rules despite the issue having been raised by the defence counsel.

The second ground is that there has been discovery of new and important matter of evidence which could not be produced at the time and which was not fully disclosed to the court in making its conclusive finding.

The third ground is that there is sufficient cause to review the orders of 9th July 2014 as there is no suit herein the sane having abated,

[3] In the supporting Affidavit dated 15th July, 2014 the Applicant admitted that he is the sole signatory of the company accounts as well as the guarantor on various company undertakings. He also averred that he is still a director of the company and so the orders of 9th July 2014 were incapable of being issued. He annexed Form CR12 to support that allegation. According to the Defendant, the Plaintiff, therefore, abused the court process because they should have first held a meeting to pass all the necessary resolutions and file them with the Registrar of Companies. He says that he was not even notified of the meeting in which he is alleged to have been removed as a director of the company as required by section 185 as read with section 132 of the Companies Act. The Defendant stated that he has been filing returns as required under the law. He also filed a List of Authorities dated 16th September, 2014.

Determination of application dated 15th July 2014

[4] Although the Plaintiff did not file submissions on this application, I will, nevertheless, as a court of law, determine it on merits. All the issues being raised by the Defendant in its application dated 15th July 2014 were raised in their reply to the application dated 18th November, 2013 and were considered by the court on merit. See the Replying affidavit sworn on 20th February 2014, Notice of Preliminary Objection dated 20th February 2014 and Further Affidavit sworn on 22nd April 2014. The Defendant annexed documents to support his claims. These pleadings and affidavits are part of court record and were considered by the court in its ruling delivered on 9th July, 2014. The court made its decision on the issues raised. Therefore, the orders of 9th July 2014 were made conscientiously and are not tinctured with any error of any sort. Again, there is nothing new which the Defendant is raising. Accordingly, there is no discovery of new and important matter of evidence which could not be produced at the time even with great diligence or which was not within the knowledge of the Defendant. The application by the Defendant is simply inviting the court to sit on appeal over its own decision- a course that is most unfortunate. For those reasons, I find and hold that there is nothing which would impel the court to review or vary or set aside its orders of 9th July, 2014. The upshot is that the application dated 15th July 2014 is dismissed with costs to the Plaintiff. It is so ordered.

Application for contempt of court

[5] The other application is by the Plaintiff. It has been made through a Motion dated 24/7/2014 and filed in court on 25.7.2014 seeking the that Adan Noor Adan, the Defendant herein to be committed to civil jail for a period of six months for disobeying the court order granted on 9th July, 2014. They also seek for costs of the application to be provided for. The application is supported by the Affidavit of Mohamud Abdi Hussein sworn on 25.7.2014. The parties filed submissions. I have considered all the rival arguments, the pleadings, judicial decisions and affidavit evidence tendered in court, and I take the following view of the matter..

[6] Contempt proceedings are coercive and or punitive in nature yet very important in the administration of justice by courts; punishment for contempt is used to reinforce the dignity of the court and the integrity of its process. The power of the court to punish for contempt of court is drawn from Section 5 of the Judicature Act which provides:-

"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."

[7] And the standard of proof is as was set out in the case of In the case of **OCHINO & OTHERS – VS- OKOMBO & OTHERS (1989) KLR 165**, where the Court of Appeal stated at page 167:-

"…the standard of proof in contempt proceedings must be higher than proof on a balance of probabilities, almost but not exactly beyond reasonable doubt."

This is the test I will apply here.

[8] Of fundamental importance in an application for contempt, the Applicant must prove that there was an order of the court, the order in question was served personally on or the contemnor had knowledge of it, and that despite such service or knowledge, the party sought to be committed has disobeyed the order. On service and or knowledge of court order for purposes of contempt of court proceedings, see a persuasive decision in the case of **BASIL CRITICOS v A-G & 8 OTHERS [2012] eKLR** where the court stated that:

''…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''.

[9] On 9th July 2014, the court issued an injunction against the Defendant- hereafter the contemnor. The injunction was restraining the contemnor from representing and or dealing and or transacting in the plaintiff company's business or any other business on behalf of the company. He was also restrained from passing himself off as a director of the company. Another corollary order was issued against the contemnor, that is, he should release all company documents and books in his possession to enable the company file statutory returns. The Applicant avers that the order was extracted and was served on the contemnor in person. An affidavit of service by Julius Kiboen Maruja was filed as evidence of service of the order. The relevant depositions in the affidavit of service of Julius Kiboen Maruja are at paragraph 2 and 3 which state:

2) 'That on 16.7.2014 I received from Jackson Omwenga & Co. Advocates an Order from the court delivered on 9.7.2014 and dated 14.7.2014 to serve upon Mr. Adan Noor Adan".

3) "That on the same day at about 1.10pm and while accompanied with Mr. Mohamud Abdi Hussein (a shareholder and director of the plaintiff), we proceeded to Jamia Mosque situated off Muindi Mbingu street in Nairobi where I served the Defendant with the Order which he acknowledged and or accepted but did not sign the original but requested me together with Mr. Mohamud Abdi Hussein to accompany him to his advocate Mr. Ashford Muriuki Mugwimi".

[10] The service is not disputed except that the contemnor in the Replying affidavit of the Defendant at paragraph 11 doubts whether the process server is authorized to serve process. Nothing was produced to show the process server was not authorized to serve court process. The advocate for the contemnor also indicated on the order; *''received under protest because it had not complied with Order 21 rule 8 and (6) of the Civil Procedure Rules''.* After careful examination of the affidavit of service and the circumstances of the case, there is doubt that the order was served. Other than expressing doubt on the authority of the process server-and which has no basis- there is no application under Order 19 Rule 2 of the Civil Procedure Rules, or any necessity, therefore, of applying Order 5 Rule 16 of the Civil Procedure Rules. The service of the order has not been impeached at all. Accordingly, I find and hold that service of the order in question is proper. One little matter; the refusal by the contemnor orf declining to sign the order is inconsequential and cannot invalidate a service. The law deems such service as proper service. See Order 5 of CPR and the case of ***Dickson Daniel Karaba vs. John Ngata Kariuki & Ano (NRB C.A NO.125 OF 2008***), where the Court of Appeal at page 25 held:

"…we further believe the affidavit of the process server which was not challenged in cross-examination that he made his way to the 1st Respondent's offices and served him in the manner he stated he did. Again, declining or refusing to acknowledge service, was of no consequence."

The only quarrel the contemnor has fastened on the contempt application is found at paragraph 8 and 15 of the Replying Affidavit which states:

8) "That I have filed application for stay and variation of the Ruling given herein, and Orders there from pending before court

15) "That I am advised that the entire application giving rise to the Ruling were filed without authority of the Plaintiff, hence, are a nullity and incompetent, hence the resultant ruling was based on a fraudulent acts and conduct on the part of the deponent of the affidavits in support. The application ought not to be allowed to benefit from their wrong doing".

[11] I have already found and held that these matters were dealt with on merit in the application dated 18th November, 2013. In any event, for purposes of contempt of court proceedings, the allegations that the order was issued without authority or were void are not tenable defences. I have one simple answer to these allegations; the holding in the case of ***Hadkinson vs. Hadkinson (1952) 2 All ER, 567*** that:-

"It is plain and unqualified obligation of every person against, or in respect of, whom an order is made by a Court of competent jurisdiction, to obey it unless and until, that order is discharged. The uncompromising nature of this obligation by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void".

I can do no better except to say that the contemnor ought to have complied with the order as he applied for its setting aside or variation or review. Perhaps, the arguments put forth could have been potent and useful arguments. But as things stand, it was not his legal duty to determine the order was void or was issued without authority or jurisdiction, and then gives self the audacity to disobey the order of 9th July 2014. This is an illegal and arrogant posture of omnicompetent. The order was clear in its tenor and purport. It was disobeyed. Accordingly, the Plaintiff has proved on ***"…the standard of proof…higher than proof on a balance of probabilities, almost but not exactly beyond reasonable doubt*** that the contemnor is guilty of contemnor of court.

Punishment for contempt

[25] I have found the contemnor is guilty of contempt of court. Punishment for contempt of court is at the discretion of the court and takes different forms including fine or Committal to jail. See the case of ***Compania Sud Americana De Vapores Sa vs. Hin-Pro International Logistics Limited (2013) EWHC (COMM).*** See also the ***Black's Law Dictionary*** that contempt is usually punished by a fine or imprisonment. But in the circumstances of this case, I am persuaded to offer the contemnor one more chance to purge the contempt by complying with the orders of 9th July, 2014 within 7 days of today which failing he shall appear before me on 2nd day of March 2014 for sentencing. This matter shall be placed before me on 2nd March 2015 for further directions.

Dated, signed and delivered in court at Nairobi this 20th day of February 2015

F. GIKONYO

JUDGE