



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**HCCC NO. 117 OF 2013**

**KIVUWATT LIMITED**

**SMART CARGO LIMITED ..... PLAINTIFFS**

**VERSUS**

**THE COMMISSIONER KRA**

**CUSTOMS SERVICE DEPARTMENT ..... DEFENDANTS**

**RULING**

**INTRODUCTION**

1. By a Notice of Motion dated 9<sup>th</sup> September 2014 and supported by the affidavits of Jarmos Gummerus and Steven Matasi of the 8<sup>th</sup> September 2014 and 22<sup>nd</sup> September 2014, respectively, the applicant seeking the orders in terms of prayers 3, 4, 5 and 7 thereof, as follows:

**“3. [A]n Order committing Mr. J.K. Njiraini, Ms. Beatrice Memo, Joseph C. Gikonyo and Mr. Kenneth Ochola to jail for a period of six months or such other period as the Court may determine for the contempt of this Honourable Court by wilfully and unlawfully refusing to release the Applicant’s Separator from the Customs warehouse.**

**4. An Order condemning the Kenya Revenue Authority to pay such fine as this court shall deem just and expedient for contempt of this Honourable Court by wilfully and unlawfully refusing to release the Applicant’s “Separator” from the Customs warehouse.**

**5. An Order directing the Kenya Revenue Authority officer in charge of warehouses and the Police officer in charge of Makupa Police Station to supervise for purposes of securing peace and the necessary entry, including break into the customs warehouse in which the subject “Separator” is stored for the purposes of the Applicant’s agents taking, loading and departure with the subject “Separator” from the premises of customs warehouse at Civicon Ltd’s premises.**

**7. That Costs be awarded to the Applicant.”**

2. The grounds of the application were set out in the Notice of Motion of 9<sup>th</sup> September 2014. The application is opposed with an affidavit sworn by Kenneth Ochola on the 24<sup>th</sup> September 2014 being filed in reply.

**Consent Order of 18<sup>th</sup> December 2013**

3. The basis of the application is a consent order between the plaintiff and the Kenya Revenue Authority –
  1. **That the defendant undertakes to forthwith release to the Plaintiffs the separator from the Customs Warehouse in accordance with section 42 (8) of the East African Customs Management Act 2004.**
  2. **That the Plaintiffs, jointly and severally undertake to pay the Defendant's costs agreed at Kshs.200,000/- (Kenya Shillings Two Hundred Thousand Only) immediately upon the release of the Separator the subject of this suit.**
  3. **That the application dated 10<sup>th</sup> October 2013 and the entire suit be and is hereby marked as "SETTLED".**

**SUBMISSIONS**

4. The Plaintiff's case was that the release referred to in the consent order meant the physical release as opposed to systems or mere computer release of the machine, as contended by the defendants, pointing out that the system release of the goods had been done on the 27<sup>th</sup> September 2013 long before the suit was filed on the 10<sup>th</sup> October 2013 and that, indeed, the prayers of the suit were for the physical delivery of the Separator and the system release having never been in dispute, the **"outstanding issue is the access, possession, ;loading and guaranteed exit from Kenyan border of the Separator."**
5. As regards the knowledge of the order, it was contended that a party to a consent order is in the same position as a party to a contract and such a party a party must be taken to have knowledge of the consent order, reliance being placed on ***Shimmers Plaza Limited v. National Bank of Kenya Limited*** [2015] eKLR.
6. Consequently, it was contended for the plaintiff/applicant, disobedience of the court order by the named respondents to this application for contempt of court, despite fulfilment of the plaintiff of its obligation under the consent order, is, therefore, a culpable contempt of court.
7. The Defendant's case in opposition to the application for contempt for court was presented in two somewhat contradictory limbs. Firstly, the breach of the court order was presented only as a 'delay in compliance with the court' to which the applicant was partly responsible on account of the late filing of by its clearing agent, the 2<sup>nd</sup> Plaintiff, an application like other importers pursuant to section 12 of the EACCMA under the Single Customs Territory (SCT) regime for an Exit Note from the Rwanda revenue authority. This aspect of the Defendants' case is set out primarily at paragraphs 10 – 13 of the defendants Submissions dated as follows:

***10. That for the Respondents to comply with the Court Order they would release the separator under the Single Customs Territory (SCT) regime which came into effect on 1<sup>st</sup> April 2014***

***11. However, the release required the applicant through their clearing agents to lodge in the necessary documentation in the system in order to generate an Exit Note.***

***12. It is the Respondents' submission that the delay in clearance was partly occasioned by the failure on the part of the 2<sup>nd</sup> Plaintiff who were the clearing agents to seek the exit note from Rwanda Revenue Authority. They were required to trigger the process by lodging in their entries which they did on the 16<sup>th</sup> September 2014.***

***13. The Applicant cannot therefore seek to commit the contemnors fro contempt when they themselves are guilty of laches.***

8. The second aspect of the defence is that, the consent order could not in any event require the physical release of the Separator because the release referred to in the Consent was a system release which the defendants complied with upon the issuance of C2 road manifest to allow safe passage of the cargo. At paragraphs 16 -17 of the Submissions, this defence is set out as follows:

***16. As noted in paragraph 18 of the replying affidavit of Kenneth Ochola the exit note marked 'KO4' was generated on the 16<sup>th</sup> September 2014 way after the applicants approached this Honourable Court. In acknowledgement of the requirement under the customs regime, the applicant made an application for the exit note which was immediately issued and the Respondents issued instructions to the relevant exit point to allow the cargo safe passage.***

***17. By issuing the C2 otherwise known as the road manifest the role of the Respondents came to an end as the mandate under the law. That a release by customs does not extend to compelling a private warehouse operator, whom the applicants aver, is the one that stopped them from picking the Separator to physically release of any goods.***

9. The Defendants, consequently, urged that they purely enforced the statutory provisions as required by law, the compliance with which the consent order did not suspend or exempt the applicant, and there was, therefore, no deliberate breach of the order of the Court to warrant the committal for contempt of court, relying on the decision of Mumbi Ngugi, J. in ***Kenya Data Network Limited v. Kenya Revenue Authority*** [2013] eKLR wherein the learned judge adopted the note in paragraph 52/1/13 of ***The Supreme Court Practice 1999*** on Order 52 of the Rules of the Supreme Court that “casual or unintentional disobedience will not usually justify an order of Committal; it must be contumacious.... Thus an applicant who seeks to commit a person for a breach of an injunction must establish a deliberate or wilful breach of a court order beyond a reasonable doubt.”
10. Counsel for the Defendants also relied on paragraph 20 of the decision of this court in Petition No. 4 of 2014 between ***Civicon Ltd. v. KRA and Kivuwatt Ltd.*** And suggested that the court had determined that the release the subject of the Consent order was merely systems release and not physical release thereof and there could not be any contempt in its failure to deliver the physical machine under the consent order. The Defendants concluded that “as a matter of fact, the applicants had failed to show what the Respondents were required to do and intentionally failed to do.”

#### **THE ISSUE FOR DETERMINATION**

11. The issue for determination by the Court is whether the respondents are guilty of contempt of Court in failing to physically release the applicant’s separator. In its determination of the matter, the Court is obliged to determine the exact scope of activity to be done in execution of the consent order in order to determine whether the alleged contemnors are guilty of Contempt of Court for disobedience of the Consent Order.

#### **DETERMINATION**

12. The court notes with satisfaction, the spirited effort of the Court of Appeal in ***Shimmers Plaza Limited v. National Bank of Kenya Limited*** [2015] eKLR consolidating the position of the law of contempt in Kenya. On the issue of knowledge of the order and service of the order upon the alleged contemnors, the Court of Appeal in ***Shimmers*** case, supra, noted shifting emphasis on notice of an order rather than personal service thereof as follows:

*“[T]his Court has slowly and gradually moved from that service of the order along with a penal notice must be served on a person before contempt can be proved. This is in line with the dispensations under 81.8 [of the English Civil (Amendment No. 2) Rules 2012].*

*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 the*

purposes of contempt proceedings.. For instance, Lenaola J. In the case of **Basil Criticos v. Attorney General and 8 Ors.** [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.”**

This position has been affirmed by this court in several other cases including the **Wambora case (Justus Kariuki Mate & Anor. v. Hon. Martin Nyaga Wambora & Another Civil Appeal NO. 24 of 2014).**

It is important however that the court satisfies itself beyond nay shadow of a doubt that the person alleged to be in contempt committed the act complained of with full knowledge or notice of the existence of the order of Court forbidding it. The threshold is quite high as it involves possible deprivation of a person’s liberty. This standard has not changed since the old celebrated case of **Ex Parte Langley (1879) 13 Ch. D 110 (CA)** where Thesiger LJ stated as follows:

**“[T]he question in each case, and depending upon the particular circumstances of the case, must be, was there or was there not such a notice given to the person who is charged with contempt of court that you can infer from the facts that he had notice in fact of the order which has been made? And, in the matter of this kind, bearing in mind that the liberty of the subject is to be affected, I think that those who assert that there such a notice ought to prove it beyond reasonable doubt.”**

What then amounts to ‘notice’? Black’s Law Dictionary, 9<sup>th</sup> Ed. Defines notice as follows:-

**“A person has notice of a fact or condition if that person has actual knowledge of it; has received information about it; has reason to know about it knows about a related fact; is considered as having been able to ascertain it by checking an official filing or recording.”**

Would the knowledge of the Judgment or order by the Advocate of the alleged contemnor suffice for contempt proceedings? We hold 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 that, 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. This is the position in other jurisdictions within and outside the Commonwealth...”

13. Fortunately, in this application no question of knowledge or service of the court order is raised, and the court need say no more on the matter. The court will only point out its concurrence with the holding since **ex parte Langley**, cited in **Shimmers**, that on account of the possibility of loss of liberty of the alleged contemnor the standard of proof of notice of the order, and, consequently, of the disobedience, is accepted as beyond reasonable doubt. See also the paragraph 52/1/13 of the Rules of the Supreme Court cited in the **Kenya Data Network** case, supra.

#### **Remedies for Contempt of Court**

14. As noted in **Halsburys Laws of England**, 4<sup>th</sup> Ed Vol. 9 pp. 62-63, para. 104, when considering an application under the special contempt of court jurisdiction for punishment, the court has in discretion powers to make an order for the punishment of the contempt and suitable alternative or

further or complementary orders, as follows:

- a. ***Committal of the contemnor or sequestration of his property or imposition of a fine;***
- b. ***The court may, in its own discretion, grant an injunction, in lieu of committal or sequestration, to restrain the commission or repetition of a civil contempt.***
- c. ***The court may in lieu of any other penalty require the contemnor to pay the costs of the motion on a common fund basis.***
- d. ***In a doubtful case, the court may, instead of proceeding for contempt, grant an order requiring the defendant to state whether he has complied with an undertaking.***
- e. ***If an order of mandamus, a mandatory order, injunction or judgment or order for the specific performance of a contract is not complied with, the court may***
  - a. ***proceed with contempt application, or***
  - b. ***besides or instead of proceeding for contempt, direct the act to be done by some person appointed for that purpose.***

### **Conclusion**

15. There is no choice in law as to obey or not to obey a court order. This has long been the position of the law as observed by Romer LJ in ***Hadkinson v. Hadkinson*** (1952) 2 ALL E.R 567 at 569 -

*'It is the 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 is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void. LORD COTTENHAM, L.C., said in ***Chuck v. Cremer*** (1846) 1 Coop temp Cott 338 at 342, 47 ER 884 at 885): "A party, who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it .... It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid - whether it was regular or irregular. That they should come to the Court and not take upon themselves to determine such a question. That the course of a party knowing of an order, which was null or irregular, and who might be affected by it, was plain. He should apply to the Court that it might be discharged. As long as it existed it must not be disobeyed." Such being the nature of this obligation, two consequences will, in general, follow from its breach. The first is that anyone who disobeys an order of the court is in contempt and may be punished by committal or attachment or otherwise.'*

16. There was contention as to whether the release in the consent order meant system's release or physical release leading the court's interpretation of the consent order and the court ordering the physical release of the Separator. It may be that the alleged contemnor was genuinely mistaken as to the effect of the consent. In such circumstances it cannot be right to impose a penalty for the failure to comply with an order which the alleged contemnor thought he had fully complied with.

17. The Plaintiff's plaint dated 10<sup>th</sup> of October 2013 sought the following reliefs:

- a. **The Defendant be compelled to forthwith release, ensure loading and guarantee the exit from Kenyan borders of the equipment known as the separator which is the subject matter of this suit to the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs and/or his officers, agents, servants, employees, assignees and any other persons claiming through the Plaintiff.**
- b. **The Defendant be compelled to supervise and ensure that his/her officers, agents, servants, employees, assignees and any other person's claiming through 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs access and take possession of the separator being held by the Defendant.**
- c. **The defendant does pay the costs of this suit.**

The consent of 18<sup>th</sup> November 2013 could have clarified the full tenor of its terms by being expressed in the terms of the prayers in the Plaint under (a) and (b) above. Failure to do so, in my view, caused the unfortunate events of this litigation.

18. In a judgment delivered on the 25<sup>th</sup> June 2014, in the related Petition No. 4 of 2014 **Civicon Ltd v. KRA and Kivuwatt Ltd**, I expressed the dispute between the parties as to the interpretation of the Consent letter of 18<sup>th</sup> November 2013, as follows:

***18. As regards the consent letter of 18.11.13, there is contention between its makers on the understanding of the word 'release'. The 1<sup>st</sup> Respondent contends that it gave its consent to the only release it could give- which is a customs systems release and not actual physical release. The 2<sup>nd</sup> Respondent contends that the suit HCCC 117 of 2013 was about physical release of the Separator and the consent must be understood in the context of that suit. That is a matter for the court hearing HCCC NO. 117 of 2013 to determine in reaching a decision whether to accept the consent letter and adopt it as the judgment of the Court. This court cannot dictate its view to any other High Court sitting in any division or station.***

***19. It follows however that if the 1<sup>st</sup> Respondent intended and only consented to a customs release of the Separator, it need not have consulted the Petitioner over a transaction that only it was involved – the systems release of the cargo to facilitate the actual release of the goods after 2<sup>nd</sup> Respondent approached the Petitioner for that purpose. In these circumstances, the Petitioner cannot be heard to say that its right to fair administrative action under Article 47 of the Constitution and legitimate expectation to be consulted before such a consent was drawn, had been infringed. The subject matter of the consent – the systems release of the goods did not concern the owner of the transit shed where the goods were physically stored. Moreover, as contended by counsel for the 1<sup>st</sup> Respondent, if the consent to release was subject to the provision of section 42 (8) of the Act, no prejudice would be suffered by a systems release.***

***20. On account of its foregoing findings, the court does not find it necessary to make a finding as to whether the 1<sup>st</sup> Respondent has statutory power to grant or enforce a physical release of goods.***

19. I do not consider that the terms of the Consent order were sufficiently clear to found an application for contempt of Court. A party to be bound by an order of the Court must be absolutely clear as to what he is required by the Order to do, or to refrain from doing, in order to comply with the order of the court. It should not take any elaborate consideration by a party to be bound by a court order to decipher its meaning or its dos and don'ts. The true meaning of the Consent in this suit has had to be argued by the parties by deduction in counter arguments that because, in the case of the plaintiff, the systems release was accomplished before the filing of the suit and the court held that the defendant was in control of the customs warehouse, the release referred to in the consent must be physical release of the separator; while for the defendant, it is argued that, as the defendant has no statutory obligation, the release contemplated in the Consent could only have been a systems release.

20. But the court having adopted the consent order, the Defendants who were to be bound by the consent order to 'release' the separator, and faced with demand for its physical release, while they contended that 'release' meant customs release, ought to have sought settlement of the terms the consent order settled pursuant to the provisions of Order 21 Rule 8 (4) of the Civil Procedure Rules, which provides as follows:

***“(4) On any disagreement with the draft decree any party may file the draft decree marked as “for settlement” and the registrar shall thereupon list the same in chambers before the judge who heard the case or, if he is not available, before any other judge, and shall give notice thereof to the parties.”***

Having failed to seek a settlement of the terms and, therefore, making this application for contempt necessary, the Respondent KRA which was the party bound by the consent is liable in

costs to the applicant who had to seek the intervention of the court by way of contempt of court application.

21. The Court (Kasango, J.) eventually gave the 'physical release' meaning to the word 'release' in the consent order by its order of 24<sup>th</sup> September 2014 in which, after hearing this application [court was asked to disqualify itself, which it did, before ruling of the matter], it directed by its order of that the defendant with the assistance of the police do break in and take possession of the separator in these terms:

**“1. The officer in charge of Makupa Police Station shall forthwith on being served with the extracted order of today accompany the plaintiff to the Civicon Transit Shed in Mombasa and shall ensure that the machine ‘Separator’ is released to the Plaintiff or its agent.**

**2. The said Officer commanding station shall, if need be, breakdown any door or any blockage which shall impede the release of the said Separator to the Plaintiff or its agent.**

**3. Liberty to apply is granted to the Plaintiff.”**

22. The Court having so found, the defendant is now bound by a clear order to put the plaintiff into possession of the Separator. At the hearing of an application for stay of the order of the court of 24<sup>th</sup> September 2014, the court learnt that the release of the Separator had been restrained by the order of the Court (Muya, J.) in related proceedings Mombasa HCCC No. 36 of 2013. In the circumstances, the defendant may only comply with order for the physical release granted in this suit - the stay of which has been declined by both this court and the Court of Appeal - upon successful challenge of the order of injunction in HCCC NO. 36 of 2013.

### **ORDERS**

23. I do not find that the defendants are guilty of contempt of court in view of the lack of clarity of the Consent dated 18<sup>th</sup> November 2013 as to the nature of the release of the goods referred to in the Consent, and, accordingly, prayers 3 and 4 of the Notice of Motion dated 9<sup>th</sup> September 2014 are dismissed. Prayer No. 5 was already granted by the Court on 24<sup>th</sup> September 2014, and the order of 25<sup>th</sup> September 2014 staying the order of 24<sup>th</sup> September 2014 for the police intervention in terms of prayer No. 5 of the Notice of Motion was discharged on 22<sup>nd</sup> October 2014 when the Court (Kasango, J.) recused itself.

24. Having considered these circumstances of this case, I take the view that the justice of the case will be served by making, consistently with the rule of law principle that orders of the court must be obeyed as long they are not discharged, varied or perfected on review or appeal, the following orders:

**1. A MANDATORY Injunction against the 1<sup>st</sup> Defendant/respondent to compel him to give effect to the consent order by the physical release of the Separator to the plaintiff unless its release is barred by an order of competent court in any in other proceedings in that behalf. The Defendant will, accordingly, secure the physical release of the Separator once any injunctive orders thereon are discharged.**

25. For the 5<sup>th</sup> Defendant's failure, as a party bound by the consent order, to move the court for a settling of terms of the order to clarify the matter and, thereby, making this application necessary, it shall pay the costs of the application to the Plaintiff/applicant.

**DATED AND DELIVERED THIS DAY OF 23<sup>RD</sup> JUNE 2015**

**EDWARD M. MURIITHI**

**JUDGE**

In the presence of: -

Mr. Biketi for the Petitioners

Mr. Mbaye for the Respondents

Ms. Linda - Court Assistant.