



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
PETITION NO. 17 OF 2013

IN THE MATTER OF THE AIA FILING STATION LIMITED

AND

IN THE MATTER OF THE COMPANIES ACT CHAPTER 486 LAWS OF KENYA

AND

IN THE MATTER OF PETITION BY A DIRECTOR AND SHAREHOLDER UNDER SECTION 211
OF THE COMPANIES ACT

BETWEEN

MAALIM ABDI SALAM

AIA FILING STATION LIMITED.....PETITIONERS

AND

ABDULAHI ALI ADAN t/a

ABDULAHI ADAN FILING STATION.....RESPONDENT

RULING

1. By the Notice of Motion dated 3rd September 2013, filed pursuant to the leave of the court granted on 28th August 2013, the Petitioners Applicants herein sought the following orders-

(a) *An order of committal be made against Abdullahi Ali Adan t/a Abdullahi Adan Filing Station (the Respondent herein) to prison for such a period as this Honourable Court may deem fit and just because the said Abdullahi Ali Adan t/a Abdullahi Adan Filing Station has disobeyed that part of the Order made by this Honourable Court on 20th May 2013 restraining the Respondents by themselves, servants and/or agents from operating, managing the affairs of or in any manner whatsoever interfering with the operations of AIA FILING STATION LIMITED,*

(b) *an order that the costs of this application and for obtaining leave thereto be paid by the said Abdullahi Ali Adan t/a Abdullahi Adan Filing Station.*

2. The applicant relied upon the Statement, Affidavit of Maalim Abdi Salam sworn on 27th August

2013 and annexures thereto which were relied upon in support of the application for leave filed on 27th August 2013.

3. Briefly, the facts leading to this application are that the Petitioner, a director and shareholder of the company known as AIA Filing Station, filed this petition under Section 211 of the Companies Act Cap 486, Laws of Kenya. He accused the Respondent, the managing director of the company, of misappropriating and mismanaging the company and failing to perform his duties. He therefore sought various orders restraining the Respondent from further acting to the detriment of the company and compelling him to render the true account of affairs and fair inventory of the assets of the company.

4. Simultaneous with the Petition, the Applicant filed a Notice of Motion dated 17th May 2013 which was heard *ex-parte* on 20th May 2013 and allowed in the following terms-

(2) THAT pending the hearing of this application inter-parties the Respondent is restrained either by himself, servants and/or agents from operating, managing the affairs of or in any other manner whatsoever interfering with the operations of AIA FILING STATION LIMITED.

5. It was contended by the Applicant that despite being served with a copy of the above order together with the penal notice, the Respondent has, in total disregard of the same, interfered with the operation of the company. He is currently selling fuel from the company's premises under the name AA Filing Station. There were annexed to the supporting affidavit and marked MAS 4 a copy of cash sale receipt dated 5th August and photos showing ongoing activities on the suit premises.

6. In opposition to the application, the Respondent filed the Replying Affidavit of Abdullahi Ali Aden sworn on 16th December 2013. Firstly, he contended that the proceedings herein are a nullity as he was not served personally with a copies of the applications for leave or for committal for contempt against the requirements of the law.

3. The Respondent also denied having disobeyed the orders of the court as alleged by the Applicant. The Respondent did not deny being the managing director of the company or that the Applicant was also a director and a shareholder. He averred that his relationship with the Applicant became strained when the Petitioner who had become greatly indebted to the company no longer showed interest in the company's business or in co-operating with the Respondent.

6. Consequently, with the intention of carrying on business on his own upon the expiry of the lease of AIA Filing Station over the premises, the Respondent registered a business name, Abdillahi Ali (AA) Filing Station on 12th March 2012. He then entered into negotiations with the Landlord of the suit premises to lease the same to him upon the expiry of the lease granted to AIA Filing Station Limited on 1st May 2013. He was granted a lease effective from 1st January 2013 when he began carrying on business under the new name.

7. According to the Respondent, his actions did not amount to contempt of the orders as at the time when they were issued, the Respondent had already re-branded the station, obtained a fresh lease and started operating under the new name. In addition, if any receipt was issued in the name of AIA Filing Station Limited either by the Applicant or the Respondent, that would not amount to interference with the operations of AIA Filing Station but would instead be in support of its business. He therefore urged the court to dismiss the application herein for being an abuse of the court process and a nullity.

8. I have considered the rival arguments of the parties. Contempt proceedings are quasi-judicial in nature, not being criminal or civil. The standard of proof therefore is beyond the balance of probability as in civil cases and below reasonable doubt as in criminal cases. Due to their nature, it is essential that the person who is expected to comply with the order be served with a copy of the same and a penal notice notifying him of the consequences of disobedience. Indeed *Halsbury's Laws of England 4th Edition volume 9 at page 37 provide as follows:*

“37. As a general rule, no order of court requiring a person to do or abstain from doing an act may be enforced unless a copy of the order has been served personally on the person required to do or abstain from doing the act in question.”

Similarly, the explanatory notes in Order 52 Rule 3(1) of the Supreme Court Practice Rules state:

“No order will normally be issued for the committal of a person unless he has been personally served with the order, disobedience to which is said to constitute the contempt, or, if, the order is directed to a group of persons or a corporation, some appropriate member has been personally served.”

9. There is no requirement that an application seeking to enforce an order must also be served personally upon a contemnor. Such an application may be served upon an advocate who has instructions to accept service on behalf of the party, as any summons to enter appearance under Order 5 Rule 8(2). Nonetheless of importance is the fact that the Respondent has alleged that he was not personally served with the order of 20th May 2013 or that he did not know of its existence. The issue for determination in this application is whether, having knowledge of the orders, the Respondent acted in their disregard.

10. The orders issued on 20th May 2013 essentially restrained the Respondent from managing or otherwise interfering with the operations of AIA Filing Station Limited. He however alleges that he has not only been managing the company's business but he had already leased the premises on which the company's business was located and that the business thereon is under a different name.

11. Although it was argued by the Counsel for the Respondent that there was no allegation in the pleadings or the application that the fuel pumps, underground storage tanks and cash receipts being utilised were the company's it is only logical from the averments by the Respondent that this is in fact so. The Respondent admitted that he essentially took over the company's business, painted over the company's name and re-branded it with his new business name- AA Filing Station. There is no averment by him that in fact he brought onto the premises his own equipment upon leasing the premises. Further, there is evidence that even after taking over the business receipts were issued in the name of the company. Thus although being carried out under a different name, the business and operations on the suit premises, remained those of the company. In addition, by re-branding the Applicant's company and carrying on his own business thereon, he interfered with the operations of the company.

12. It is my view that the Respondent herein has acted in bad faith with an intention to circumvent the orders of this court and to defeat the interests of the Applicant. I find that his actions amount to contempt of the orders of this court. Thus, the application dated 3rd September 2013 is hereby allowed with the following orders-

(a) the Respondent shall pay a sum of Ksh 300,000/= by way of fine to the court within seven (7) days of the date hereof,

(b) that the Respondent is hereby restrained either by himself, servant and/or agents from operating, managing the affairs of or in any other manner whatsoever interfering with the operations of AIA FILING STATION LIMITED whether under the name of AIA Filing Station Limited, AA Filing Station or otherwise, pending the hearing inter- partes and determination of the application dated 17th May 2013,

(c) The Respondent is restrained either by himself, servants and/or agents from utilising the equipment owned by AIA Filing Station Limited for the purpose of AA Filing Station, AIA Filing Station Limited or otherwise pending the hearing inter-partes of the application dated 17th May 2013,

(d) The Respondent shall within 14 days hereof file in this court a statement of account of AA Filing Station from 20th May 2013 when the order of this court was issued to the date of this ruling,

(e) The Applicant shall have the costs of this application and the application seeking leave dated 27th August 2013.

There shall be orders accordingly.

Dated, signed and delivered at Nakuru this 18th day of June 2014

M. J. ANYARA EMUKULE

JUDGE