



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO 219 OF 2011

KINATWA CO-OPERATIVE SAVINGS CREDIT SOCIETY LIMITED....PLAINTIFF

VERSUS

NAKIMU CLASSIC TRAVELLERS SACCO LIMITED.....DEFENDANT

RULING

INTRODUCTION

1. The Plaintiff's Chamber Summons application dated 20th May 2013 was filed on 22nd May 2013. The same was brought pursuant to the provisions of Section 5 of the Judicature Act Cap 8 (laws of Kenya) and the Original jurisdiction of the High Court. The same sought that leave be granted to the Plaintiff to enable it commence contempt of court proceedings against the officials of the Defendant for disobeying the order and ruling of the court issued on 17th January 2013.

2. The said application was supported by the Affidavit of George Njoroge Muriu, the Plaintiff's Chairman sworn on 20th May 2013. The Plaintiff's written submissions were dated 4th February 2014 and filed on 5th February 2014.

3. In response thereto, on 20th January 2014, the Defendant filed a Notice of Preliminary Objection of even date. It also filed a Replying Affidavit sworn on its behalf by Kennedy Ng'ang'a, its Vice Chairman. Its written submissions were dated 19th February 2014 and filed on 20th February 2014.

4. On 9th June 2014, Counsel for both the Plaintiff and the Defendant orally highlighted their respective written submissions. The said submissions were in respect of both the Defendant's Notice of Preliminary Objection and the Plaintiff's aforesaid Chamber Summons application which they had agreed could be heard and determined together.

LEGAL ANALYSIS

5. The court has opted to determine the merits of the Defendant's Notice of Preliminary Objection at the outset as such an objection would ideally have had the effect of rendering the Plaintiff's proceedings obsolete in the event the Defendant was to be successful.

6. The consequence of a preliminary point of law was well spelt out in the celebrated case of **Mukisa Biscuit Manufacturing Co Ltd vs West End Distributors Ltd [1969] EA 696** in which the Court of Appeal stated thus:-

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

7. The gist of the Defendant’s case was that the injunctive orders that were issued by Njagi J on 17th January 2013 had lapsed as the Plaintiff had not prosecuted its matter within twelve (12) months of grant of the said orders and that once they lapsed, the same could not be extended. It was its contention that the Plaintiff had been “sitting” on the order and that it had made no attempt to confirm the injunction by having the matter heard.

8. The provisions of the law that the Defendant relied upon was Order 40 Rule 6 of the Civil Procedure Rules, 2010 which stipulated as follows:-

“ Where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve (12) months from the date of the grant, the injunction shall lapse unless for any sufficient reason that the court orders otherwise.”

9. The Plaintiff justified its failure to take any step towards the prosecution of the case herein as the question of integrity of the court orders needed to be determined first as the Defendant had blatantly disobeyed the court orders. It had argued that it filed its application timeously but that before the same could be heard, the Defendant filed its application seeking review of the orders that had been issued by Njagi J.

10. It was its submission that the court had the discretion to extend injunctive orders where the said orders had been disobeyed and that Article 159 of the Constitution of Kenya, 2010 and Sections 1A and 1B of the Civil Procedure Act that enjoined the court to ensure that substantive justice was not only done but that it had to be seen to have been done.

11. A careful perusal of this matter reveals that the Defendant filed its Notice of Motion application seeking a review of the orders that had been issued by Njagi J on 16th July 2013. Upon request by the Defendant’s counsel, its said application was heard first although it had been filed after the Plaintiff’s present application due to the nature of the prayers that it had sought therein.

12. It would be dishonest for the Defendant to now purport that the period of twelve (12) months as envisaged in Order 40 Rule 6 of the Civil Procedure Rules, 2010 had lapsed and that the said injunctive orders could not be extended.

13. The contentions set out in the Notice of Preliminary Objection regarding the validity or otherwise of the injunctive orders and its arguments that it had not infringed in the Plaintiff’s trademark in disobedience of the court order were completely quite misplaced bearing in mind that what was before the court for determination was an application for leave to institute contempt of court proceedings against the Defendant. Such application for leave is one that is made *ex parte* with the proposed contemnor having no role in the proceedings therein.

14. Indeed, those are arguments that would ordinarily have been advanced during the hearing of a substantive application for contempt of court but not one which was seeking leave to institute contempt of court proceedings. Whilst, the Plaintiff is at liberty to move the court appropriately, if need be for the relevant orders, the order by the learned judge was quite clear that the orders restraining the Defendant were to be in place pending the hearing and determination of the suit herein.

15. For the foregoing, reasons the court has come to the conclusion that the Defendant’s Notice of Preliminary Objection would not be successful.

16. Turning to the substantive issue herein, the Plaintiff’s Chamber Summons application was not brought under Order 40 Rule 3 of the Civil Procedure Rules, 2010. It was pursuant to Section 5 of the Judicature Act Cap 8 (laws of Kenya) and was seeking leave to commence contempt of court proceedings. Bearing

in mind that our jurisdiction does not have an Act dealing with contempt of court proceedings, the Rules of the Supreme Court in England are the ones applicable in contempt of court proceedings.

17. Section 5(1) of the Judicature Act provides as follows:-

“ 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 (emphasis court), and that power shall extend to upholding the authority and dignity of the court.”

18. It follows that the **power for the time being possessed** (emphasis court) by the High Court of Justice in England would be key in guiding the Plaintiff on how to proceed while instituting an application seeking leave to commence contempt of court proceedings.

19. Prior to amendments, Order 52 Rule 2 of the Rules of the Supreme Court provided as follows”-

“1. No application to a court for an order of committal against any person may be made unless leave to such an application has been granted in accordance with this Rule.

2. An application for such leave must be made *ex parte* originating summons or by summons in the proceedings, as the case may be, to a Judge to be supported by a statement setting out the name and description of the applicant, the name, description and address of the person sought to be committed and the grounds on which his committal is sought, and by an affidavit, to be filed when the application is made, verifying the facts relied on.

3. The applicant must give notice of the application not later than the preceding day to the Registrar and must at the same time lodge with the Registrar copies of the statement and affidavit. ”

20. It does appear from the new Order 52 of the Supreme Court Rules, that notice preceding the day of filing the application seeking leave to commence contempt of court proceedings to the Attorney General was not required as can be discerned from the many cases that abound in our jurisdiction on this issue. None was filed by the Plaintiff herein and it cannot therefore be faulted for not having failed to file the same.

21. However, a perusal of the Chamber Summons reveals that the Plaintiff did not file a statement setting out its name and description, the name, description and address of the person it sought to be committed, the grounds on which his committal is sought, and by an affidavit, to be filed when the application is made, verifying the facts relied on as was required under Order 52 of the Supreme Court Rules. These are provisions that must be strictly adhered.

22. As has been seen hereinabove, the powers of the High Court of Kenya are the same powers that the High Court of Justice in England would possess at any material time. The procedures to be adopted must be those adopted in the High Court of Justice in England. Parties and the court are expected to undertake the very difficult and odious task of establishing what exactly the powers of the High Court of Justice in England are when dealing with applications for contempt of court proceedings in our jurisdiction.

23. As was noted by H.G. Platter J and D.C. Porter Ag, J (as they then were) in **Misc Civil Case No 50 of 1983 In the matter of an Application by Gurbaresh Singh & Sons Ltd** cited with approval in the case of **Civil Application No 233 of 2007 (UR 144/2007) Christine Wangari Gachege vs Elizabeth Wanjiru Evans & 11 Others [2014] eKLR** :-

“The second aspect concerns the words of Section 5- “for the time being”, which appear to mean that this court should endeavor to ascertain the law in England at the time of the trial or the application being made. Sometimes, it is not known exactly what powers the court may have. It seems clear that the Contempt of Court Act 1981 of England is the prevailing law and that the procedure is still set out in Order 52 of the Supreme Court Rules.”

24. The 72nd update of the amended Supreme Court Rules coming into force on 22nd April 2014 provides that as follows:-

“Amendments are also made to provide for certain permission in relation to committal for interference with the due administration of justice or in relation to committal for making a false statement of truth or disclosure statement....”

25. Rule 2.3 of the Practice Direction RSC (Rules of the Supreme Court) 52 and CCR (Contempt of Court Rules) 29 – Committal application which was supplemental to RSC Order 52 (Schedule 1 to the CPR (Civil Procedure Rules)) and CCR Order 29 (Schedule 2 to the CPR) provides as follows:-

“If the committal application is one which cannot be made without permission, the claim or application notice, as the case may be, may not be issued or filed until the requisite permission has been granted.”

26. Rule 2.5 of the said Practice Direction RSC 52 and CCR 29 stipulates as follows:-

“An application to commit for breach of an undertaking to order must be commenced by the filing of an application made in the proceedings in which the undertaking or order was given.”

27. From Part 81 of the said Practice Direction which sets out the scope of applications and proceedings in relation to Contempt of Court, it is abundantly clear that no leave of the court is required when filing an application for contempt of court where the breach is for breach of a judgment, order of undertaking to do or abstain from doing an act but that that permission to commence the said proceedings is only required when committing a person for interference with the due administration of justice and for committal for making a false statement of truth or disclosure statement.

28. The Court of Appeal did arrive at a similar conclusion in the case of **Christine Wangari Gachege vs Elizabeth Wanjiru Evans & 11 Others** (Supra). This court has no hesitation therefore in finding that the Plaintiff’s application seeking leave to commence contempt of court proceedings against the Defendant for disobeying the orders issued by Njagi J on 17th January 2013 was superfluous. As the Court of Appeal observed, the court exercises ordinary criminal jurisdiction when punishing for contempt of court proceedings as a result of which the strict rules in England must be adhered to.

29. The Practice Direction RSC 52 and CCR 29 – Committal application which was supplemental to RSC Order 52 (Schedule 1 to the CPR) and CCR Order 29 (Schedule 2 to the CPR) came into commencement on 1st April 2013 and for all purposes and intent, the Plaintiff herein were required to comply with the said Order.

DISPOSITION

30. The court finds that in view of the changes in the Civil Procedure Rules in England, the Plaintiff’s Chamber Summons application dated 20th May 2013 and filed on 22nd May 2013 was incompetent and unmerited lending itself to being dismissed.

31. As seen herein, the court found the Defendant’s Notice of Preliminary Objection dated and filed on 20th January 2014 not to have been merited and as a result the same is also hereby dismissed.

32. In a nutshell, both the Plaintiff and the Defendant were not successful in their applications and in the circumstances foregoing, each party will bear its own costs.

33. It is so ordered.

DATED and DELIVERED at NAIROBI this 22nd day of September 2014

J. KAMAU

JUDGE