



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Miscellaneous Application 450 of 2012

ALKEN CONNECTIONS LIMITED.....APPLICANT

VERSUS

SAFARICOM LIMITED.....1ST RESPONDENT

BOB COLYMORE.....2ND RESPONDENT

ENID MURIUKI.....3RD RESPONDENT

RULING

On 14th August 2012, the Applicant herein filed a Chamber Summons dated 14th August 2012 seeking an order that this Honourable Court be pleased to commit to prison for a period of 6 months or any such period as it may direct **Bob Collymore** and **Enid Muriuki** as the Chief Executive Officer and Company Secretary of **Safaricom Limited** for contempt of court orders issued in Nairobi Chief Magistrate's Court CMCC No. 3476 of 2012 Alken Connections Limited vs. Safaricom Limited. The applicant also seeks an order that the respondents be condemned to pay the costs of the application.

The application is based on the following grounds:

- a) On 29th June 2012 the Court in Nairobi Chief Magistrate Court CMCC No. 3476 of 2012 issued and made orders directing the 1st Respondent to reinstate, reactivate and be restrained from interfering with the Applicant's operations, management and running of Alken Communications Utawala Store No. 831001, Alken Communications Kware Embakasi Store No. 831002, Alken Communications AA Embakasi Store No. 831003, Alken Communication Embu Store No. 831006, Alken Communications Tassia Store No. 831009, Alken Communication Stage Mpya Pipeline Store No. 831010, Alken Communications Burma Opposite City Stadium Store No. 831013, Alken Communications Tassia Embakasi Store No. 831012, Alken Communications Utawala Bypass Road Store No. 831014, Alken Communications off Outering Road Store No. 831008 ("the Stores").
- b) The 1st Respondent failed to Comply with the Court Order.
- c) Subsequently the Applicant on 20th July 2012 and moved the Court and was issued with Orders directing that the 1st Respondent would not be granted an audience until and unless it renders full compliance with the Orders made and issued by the court on 29th June 2012 and thereafter extended on 6th July 2012.

d) The 1st respondent yet again failed to render compliance and in flagrant breach of the further Court Order attempted through its Advocate to address the Court on 27th July 2012 and 1st August 2012 in flagrant disregard of the Court orders in place.

e) To date the 1st Respondent is yet to comply with the Court Order and the 2nd and 3rd Respondents are principal officers of the 1st Respondent in charge of operations and legal compliance have not even made the faintest attempt to comply with the Court Orders.

f) Leave to institute the proceedings was sought and obtained on 9th August 2012.

The same application is supported by an affidavit sworn by **Alice Wanjiru**, the Applicant's Managing Director on 14th August 2012. According to the deponent, on 29th June 2012, the said Chief Magistrate's Court in the said case issued orders directing the 1st respondent to reinstate, reactivate and be restrained from interfering with the applicant's operations, management and running of Alken Communications Utawala Store number 831001, Alken Communications Kware Embakasi Store number 831002, Alken Communications AA Embakasi Store No 831003, Alken Communications Embu Store No. 831006, Alken Communications Tassia Store No 831009, Alken Communications Stage Mpya Pipeline Store No. 831010, Alken Communications Burma Opposite City Stadium Store No. 83101, Alken Communications Hillstand Supermarket Store No. 831013, Alken Communications Tassia Embakasi Store No. 831012, Alken Communications Utawala Bypass Road Store No. 831014, Alken Communications Off Outering Road Store No. 83108 (hereinafter referred to as the Stores). That order, according to the deponent, was duly served on 2nd July 2012. However, the 1st Respondent failed to comply with the said order and on 30th July 2012 the applicant secured orders from the Court barring the 1st respondent from being heard unless it fully complied with the said orders issued on 29th June 2012 as extended on 6th July 2012. Instead the 1st respondent attempted through its advocate to address the Court on 27th July 2012 and 1st August 2012 in flagrant disregard of the existing Court orders. It is the deponent's contention that to date the 1st respondent is yet to comply with the said Court order and reinstate, reactivate and restore the Stores as ordered by the Court. The 2nd and 3rd respondents who are principal officers of the 1st respondent in charge of operations and legal compliance have equally not attempted to comply therewith hence the applicant has no other way of enforcing the said orders. In her view, the dignity of the court is at stake and it is of paramount importance that the respondents be cited for contempt for disregarding and disrespecting court orders. Hence the orders sought on this application following the leave granted on 9th August 2012.

In opposition to the application, **Daniel M Ndaba**, the Principal In-house Counsel of the 1st Respondent's Legal & Secretarial Services Department swore an affidavit on 5th November 2012. According to him on 2nd July 2012 the 1st respondent was served with a plaint and application for injunction dated 29th June 2012 as well as an ex parte Court order issued the same day requiring the 1st respondent to reinstate and reactivate without specifying what was to be reactivated which according to him is admitted in the supporting affidavit by the use of the word "imply" by the deponent to the supporting affidavit. With respect to the limb restraining the 1st respondent from interfering with the activities of Alken Stores, it is deposed that since the grant of the order, the 1st respondent has not interfered therewith. According to him whereas the 1st respondent has utmost respect and lawful authority and justice system including the subordinate courts, the orders as granted and issued were imprecise, unclear and ambiguous since they were seeking reinstatement of non-specified subject. On advice from his legal advisers the extension of the order on 6th July 2012 could only be extended pursuant to Order 40 rule 4(2) for 14 days with the result that the same expired on 20th July 2012. However on 20th July 2012 the Plaintiff made another application pursuant to Order 40 rule 3 and in breach of the rules of natural justice obtained another ex parte order which order was contrary to the provisions of Order 40 rule 4(3) of the Civil Procedure Rules, 2010 served after 4 days on 24th July 2010. The 1st respondent filed an application dated 27th July 2012 under Order 40 rule 7 seeking to set aside the said order which application was fixed for hearing on 1st August 2012 which application was due to non-attendance by the applicant was fixed for 17th September

2012 and the applicant was duly served on 1st August 2012. However, in order to frustrate the hearing of the said application, the applicant on 9th September 2012 rushed to this court to cite the 1st respondent for contempt, hence the 1st respondent's application could not be heard. In his view, the alleged contemnor has a right to be heard with regard to the allegations of contempt and cannot be shut out before the contempt is proven. It is further contended that the applicant has not complied with the mandatory requirement of proving service of the court order on the respondents and the 1st respondent being a corporate body, service of the court orders ought to have been effected personally on its principal officers. In his view the application is laced with untruths by stating that the orders alleged to be breached were consent orders when the same were granted ex parte. In the deponent's view the application should be dismissed with costs.

The application was prosecuted by way of written submissions which were highlighted by counsel. According to applicant, the 2nd and 3rd respondents are sued as the principal officers of the 1st respondent. According to the applicant it is not in doubt that the lower court granted order on 29th June 2012 directing the 1st respondent to reinstate, reactivate and reinstating the 1st respondent from interfering with the applicants operations, management and running of the applicant's said stores. Subsequently on 20th July 2012 the Court issued further orders directing that the 1st respondent would not be granted an audience until and unless it renders full compliance with the orders made and issued by the court on 29th June 2012 and thereafter extended on 6th July 2012. In the applicant's view, the 1st order was clear on what was to be restored and reactivated since the only relationship between the parties is MPESA stores and so to claim that they have no idea what the court was directing to be restored is to feign ignorance with a view to defeating the cardinal legal principle that all court orders must be obeyed to the letter otherwise total chaos and anarchy prevails as parties choose to become selectively interpretative of the court's intention and orders. Since no appeal was filed against the second order which denied the 1st respondent audience, the court is urged to assert its authority and similarly deny audience to the 1st respondent in order to restore confidence in the court's ability to enforce its orders.

On the part of the 1st respondent it was submitted that the mandatory injunction sought essentially amounted to granting of a final order as it was the main prayer in the plaint. When the order were to lapse on 20th July 2012 the applicant moved to the subordinate court and while alleging disobedience of the orders granted on 29th June 2012 obtained an ex parte order denying the Defendant audience before the Court. While reiterating the contents of the replying affidavit, it is submitted on the authority of ***Halsbury's Laws of England 4th edn vol. 9(1) reissue at 63 para 467, Nyamogo and Another vs. Kenya Posts and Telecommunication Corporation [1990-1994] EA 465*** and ***Contempt of Court by C J Miller*** that where the order is made against a company, the order may only be enforced against an officer of the company if the particular officer has been served personally with a copy of the order. It is further contended that contrary to what is stated in ***Arlidge, Eady and Smith on Contempt, 3rd edn. At 903***, the contempt proceedings have not been served on the respondents. Therefore in the absence of evidence of personal service of the orders alleged to have been disobeyed the application must be dismissed. Apart from the foregoing it is submitted that it is a cardinal rule in drafting court orders that such orders be clear and unambiguous. To the contrary the orders granted by the Court were ambiguous, nebulous and amorphous since the activity or thing that the applicant sought to reinstate and reactivate was not specified a fact which it is submitted is admitted by the applicant. Citing ***C J Miller*** (supra), ***Arlidge, Eady and Smith*** (supra), ***De Leu vs. Muteshi [1995-1998] 1 EA 25*** and ***Gatharia K Mutitika vs. Baharini Farm Ltd [1982-88] 1 KAR 863*** it is submitted that in so far as possible a person should know with complete precision what it is they are required to do or abstain from doing and should be as definite, clear and precise in its terms as possible, so that there may be no reason or excuse for misunderstanding or disobeying it; and when practicable, it should plainly indicate to the defendant all of the acts which he is restrained from doing, without calling on him for inferences about which persons may well differ. Whereas it is admitted that there has been an Mpesa Cash Merchant Agreement between the Applicant and the 1st respondent,, it is contended that the order does not make reference to the said agreement but rather mentions stores which the 1st respondent does not deal with. Further the Court instead of determining the 1st respondent's application seeking to set aside the ex parte order denied the

1st respondent audience contrary to the Court of Appeal decision in **Rose Detho vs Ratilal Automobiles Ltd & 6 Other [2007] eKLR** in which it was held that there is no absolute legal bar to hear a contemnor who has not purged the contempt to be heard and whether the court will hear the contemnor is a matter for the discretion of the court dependent on the circumstances of each case and that the rule barring right of audience to a contemnor applies to proceedings voluntarily instituted by himself in which he has made some claim and not to a case where all he seeks is to be heard in respect of some matter of defence. Since the order whose disobedience is alleged is ambiguous and imprecise, the respondent submits that compliance therewith is not possible and as such cannot be enforced by committal orders and hence the application ought to be dismissed.

The law is well established that Court orders are not made in vain and are meant to be complied with and therefore a party should not take it upon himself to decide on the validity or otherwise of Court orders. Once a Court order is made in a suit the same is valid unless set aside on review or on appeal. The validity or otherwise of the suit may constitute a ground for purging the contempt but cannot, in my view, constitute a passport for disobeying an order made by a Court of competent jurisdiction. If parties and their counsel were given a blank cheque to decide on the validity of court orders, the dignity of the courts would be severely eroded. It must always be remembered that contempt of court proceedings are meant to maintain the dignity of the Courts and therefore the validity or otherwise of the suit in which the orders are granted cannot sanitise contemptuous actions by a party or his legal adviser. In **Econet Wireless Kenya Ltd vs. Minister for Information & Communication of Kenya & Another [2005] 1 KLR 828 Ibrahim, J** (as he then was) stated:

“It is essential for the maintenance of the rule of law and order that the authority and the dignity of our Courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. 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 void”.

This position was confirmed by the Court of Appeal in **Refrigerator & Kitchen Utensils Ltd. vs. Gulabchand Popatlal Shah & Others Civil Application No. Nai. 39 of 1990.**

In **Wildlife Lodges Ltd vs. County Council of Narok and Another [2005] 2 EA 344 (HCK)** the Court expressed itself thus:

“It was the plain and unqualified obligation of every person against or in respect of whom an order was made by a Court of competent jurisdiction to obey it until that order was discharged, and disobedience of such an order would, as a general rule, result in the person disobeying it being in contempt and punishable by committal or attachment and in an application to the court by him not being entertained until he had purged his contempt. 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...If there is a misapprehension in the minds of the defendants as to the reasonable meaning of the order, then the expectation of them is that they would have made an application to the court for the resolution of any misunderstanding and this would have been the lawful course...In cases of alleged contempt, the breach for which the alleged contemnor is cited must not only be precisely defined but also proved to the standard which is higher than proof on a balance of probabilities but not as high as proof beyond reasonable doubt...The inherent social limitations afflicting most people in a developing country such as Kenya have the tendency to restrict access to the modern institutions of governance, and more particularly to the judiciary which is professionally run, on the basis of complex procedures and rules of law. Yet, this same Judiciary is generally viewed as the impartial

purveyor of justice, and the guarantor of an even playing ground for all, a perception which ought to be strengthened, through genuine respect for the courts of justice, and through compliance with their orders. Consistent obedience to court orders is required, and parties should not take it upon themselves to decide on their own which court orders are to be obeyed and which ones overlooked, in the supposition that this oversight will not impede the process of justice...Justice dictates even-handedness between the claims of parties; and if it be the case that the plaintiff/applicant has not been accorded a level playing ground for the realisation of its economic activities, a matter that of course can only be established through evidence in the main suit, then the court ought to provide relief, by applying the established principles of law, one of these being the law of contempt...An *ex parte* order by the court is a valid order like any other and to obey orders of the court is to obey orders made both *ex parte* and *inter partes* since the Court by section 60 of the Constitution is the repository of unlimited first instance jurisdiction, and in this capacity it may make *ex parte* orders where, after a careful and impartial consideration, it is convinced that issuance of such an order is just and equitable. There is nothing potentially oppressive in an *ex parte* order, since such an order stands open to be set aside by simple application, before the very same court... Where a party considers an *ex parte* order to cause him undue hardship, simple application will create an opportunity for an appropriate variation to be effected thereto; and therefore there will be no excuse for a party to disobey a court order merely on the grounds that it had been made *ex parte* and this argument will not avail either the first or the second defendant”.

Accordingly, the mere fact that an order is *ex parte* does not make it any less an order than that made *inter partes*. No Court of law would entertain the failure by a respondent to comply with a Court order simply because the order was made *ex parte*. The fact that it was an *ex parte* order or without disclosure of material facts and which in the respondent's view the Court would not have granted had all facts been placed before the Court is a ground for setting the same aside but is not a passport to disregard it with impunity.

However Musinga, J (as he then was) in *Moses P N Njoroge & Others vs. Reverend Musa Njuguna & Another Nakuru HCCC No. 247 “A” of 2004* while recognizing that the rule of law requires that orders of the Court be respected and obeyed and that duty equally applies even where a party is dissatisfied with an order and has appealed to an appellate court against the order, ruling or judgement; that contemnors undermine the authority and dignity of the Courts and must be dealt with firmly so that the Court's authority is not brought into disrepute; was, however of the view, which view I respectfully share, that recourse ought not to be to a process of contempt in aid of a civil remedy where there is any other method of doing justice, and the jurisdiction of committing for contempt should be most jealously and carefully watched, and exercised with greatest reluctance and greatest anxiety on the part of the Judges to see whether there is no other mode which is open to the objection of arbitrariness, and which can be brought to bear upon the subject.

The conditions necessary for an order of committal for contempt are now well established. It is trite law that where committal is sought for breach of an injunction, it must be made clear what the defendant is alleged to have done and that it is breached. The notice of motion must state exactly what the alleged contemnor has done or omitted to do which constitutes a contempt of court with sufficient particularity to enable him to meet the charge. The necessary information must be given in the notice itself. The slightest ambiguity to the order can invalidate an application for committal as ambiguity can in turn lead to the standard of proof, which is the criminal standard, not being attained especially on affidavit evidence. Therefore the law is that no order requiring a person to do or abstain from doing any act may be enforced by contempt unless a copy of the order has been served personally and endorsed with a notice informing him that if he disobeys the order he is liable to the process of execution. In other words the Court will only punish for contempt of injunction if satisfied that the terms of the injunction are clear and unambiguous and that the defendant has a proper notice of the terms and the breach of the injunction has been proved beyond reasonable doubt. See *Republic vs. Commissioner of Lands & 12 Others Ex Parte James Kiniya Gachira Alias James Kiniya Gachiri Nairobi HCMA No 149 of 2002* and *Jacob Zedekiah Ochino & Another vs. George Aura Okombo & 4 Others Civil Appeal No. 36 of 1989 [1989] KLR 165.*

In this case it is alleged that the respondents were not personally served. That the 1st respondent was served with the order is admitted in paragraph 3 of the replying affidavit sworn by **Daniel M Ndaba**. It is however, contended that the 2nd and 3rd respondents were not personally served with the said order. Apart from an averment by **Alice Wanjiru** that the Court order was served on 2nd July 2012, there is no evidence at all on record that the said respondents were duly served with the said order. Without evidence of service of the order on the 2nd and 3rd respondents the threshold for contempt against the said respondents has not been met and there would be no ground upon which the Court would find them guilty of contempt of Court. Accordingly, the application for contempt in so far as it relates to the 2nd and 3rd respondents is unmerited and is dismissed with costs.

With respect to the 1st respondent it is contended that the order was ambiguous, nebulous and imprecise and was incapable of compliance. I must state that the Court will not easily excuse a party who knowing very well what he was required to do by the order decides not to obey it on the ground that the said order is grammatically or typographically erroneous. However in **Victoria Pumps Ltd & Another vs. Kenya Ports Authority & 4 Others [2002] 1 KLR 708** Onyango-Otieno, J (as he then was) stated:

“The ruling said to have been disobeyed though is dated 31st January 2002, was not delivered on that day but was delivered on 8th February 2002. This in effect means that as on 31st January 2002 before the ruling was delivered there was no ruling capable of being disobeyed or obeyed as the same ruling had not been delivered and no one could be said to have known about it so as to obey it or disobey it. The Ruling could not have taken effect from 8th February 2002 and could have only been issued on 8th February 2002 or thereafter and not before that date... No orders were issued on 31st January 2002. Although the ruling was dated that date it was not delivered until 8th February 2002 and the order was extracted and issued or sealed on 11th March 2002. By 31st January 2002 no order had been delivered and none could be sealed and be disobeyed till the same order was delivered on 8th February 2002.... The law in such a case as this where a party is seeking committal to civil jail against the other party on the grounds that the order delivered by the court has been disobeyed, the party sought to be committed or cited for contempt must be personally served with a properly extracted order which must have a Penal Notice appended to it. In the instant case the Penal Notice is not properly appended, as it should have been at the very end of the order and not part of it...From the evidence it is clear that by the time the court gave the order for release of both containers to the applicant one container was no longer available and could not be released to the applicants as it was already out of reach of the applicants. The order was thus not capable of being enforced as it was, having been issued long after the same container had been removed from the possession and control of the alleged contemnors and its contents sold at a public auction advertised in the Kenya Gazette”.

Therefore where a Court order is couched on such terms as to be incomprehensible or one which is incapable of being complied with due to the fact that what is sought therein has been overtaken by events at the time of its service or is for some reason impossible to be complied with the Court will be hesitant in committing the alleged contemnor for breach thereof. The order that is alleged to have been disobeyed in its material part stated:

THAT, defendant its servants, agents and or employees or otherwise howsoever be and are hereby ordered to reinstate, reactivate and be and are hereby restrained from interfering with the applicant’s operations, management and running of Alken Communications Utawala Store number 831001, Alken Communications Kware Embakasi Store number 831002, Alken Communications AA Embakasi Store No 831003, Alken Communications Embu Store No. 831006, Alken Communications Tassia Store No 831009, Alken Communications Stage Mpya Pipeline Store No. 831010, Alken Communications Burma Opposite City Stadium Store No. 83101, Alken Communications Hillstand Supermarket Store No. 831013, Alken Communications Tassia Embakasi Store No. 831012, Alken Communications Utawala Bypass Road Store No. 831014, Alken Communications Off Outering Road Store No. 83108 pending interpartes hearing of the application on 6th July 2012.

The applicant contends that the 1st respondent knew clearly that since the relationship between the parties was that of Mpesa, and that the 1st respondent failed to read the Court Order with conjunctive word “and” to imply that it is also meant to reinstate, reactivate and restore the Stores as ordered by the Court. The question that one must ask is the reason why the applicant himself did not make its application clear enough in order not to leave room for ambiguity. To serve an order on a person and assume that the person served will “read in” conjunctions is a risk which the applicant takes when eventually he embarks on the journey for committal of the respondent for contempt. In my view, it is upon the applicant to convince the court that even without “reading in” the order was so clear about what the respondent was meant to do that it cannot be an excuse to raise the omission as warranting non-compliance thereto. That does not seem to be what the applicant herein is contending. To the contrary the applicant contends that the “reading in” ought to have been done in order that the Stores be reinstated, reactivated and restored. I must admit that in this case the distinction seems to very thin and is not clear cut. I am also cognisant of the decision of the Court of Appeal in **Gatharia K Mutitika & 2 Others vs. Baharini Farm Ltd. [1985] KLR 227**, that the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost, but not exactly, beyond reasonable doubt and that the standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is therefore not safe to extend it to offence, which can be said to be quasi-criminal in nature. The guilt has to be proved with such strictness of proof as is consistent with the gravity of the charge. See **Re Breamblevale [1969] 3 All R 1062, 1064**.

However, it is my view that where the case is equally balance, it cannot be said to meet the threshold of proof beyond peradventure. In the premises I agree that the order as extracted was not in the circumstances of this case so clear, precise and unambiguous as to be the basis upon which contempt of court proceedings can be sustained.

What then is a person confronted with such an order expected to do? Whereas to sit back to disregard such an order would invite the wrath the Court a party served with such an order ought to take necessary steps to set aside such an order. It is agreed that the 1st respondent did take such a step. However, instead of the said application being heard, the applicant took steps to lock the 1st respondent from being heard by seeking to have it from being heard on the issue. The law on whether or not a party alleged to be in contempt of court is barred from being heard is now well settled. The law as I understand it is not that a party who is alleged to have disobeyed an order of the court must not be heard. The decision whether or not the party should be heard is an exercise of discretion on the part of the Court. In the celebrated case of **Hadkinson vs. Hadkinson [1952] PD 285 [9720]** the Court stated that the fact that a party to a cause has disobeyed an order of the Court is not of itself a bar to his being heard but if his disobedience is such that, so long as it continues, it impedes the cause of justice, in the cause by making it more difficult for the Court to ascertain the truth or to enforce the orders which it might make, then the Court might in his discretion refuse to hear him until the impediment is removed or good reason is shown why it should not be removed. See also **Mawani vs. Mawani [1977] KLR 159; [1976-80] 1 KLR 607**

The Court of Appeal in **Rose Detho vs. Ratilal Automobiles & 6 Others** (supra) was of the view that:

“The general rule that a party in contempt could not be heard or take part in the proceedings in the same case until he has purged his contempt applies to proceedings voluntarily instituted by himself in which he has made some claim and not a case where all he seeks is to be heard in respect of some matter of defence or where he has appealed against an order which he alleges to be illegal having been made without jurisdiction...The Court has a discretion whether to hear a contemnor who has not purged his contempt and in deciding whether to bar a litigant, the court should adopt a flexible approach...Thus there is no absolute legal bar to hear a contemnor who has not purged the contempt to be heard and whether the court will hear the contemnor is a matter for the discretion of the court dependent on the circumstances of each case. The question which arises in this case is whether it would be a proper exercise of the court’s discretion to decline to hear the applicant on the application for stay of orders of the superior court pending appeal. Firstly, the order of stay of execution sought in the application the subject matter of the preliminary objection is a discretionary order and therefore what the applicant seeks is the exercise of judicial discretion. A preliminary objection cannot be raised where, among other things, if what is sought is the exercise

of judicial discretion. Secondly, the applicant intends to appeal against the orders of the superior court granting both leave to apply for judicial review and stay and has filed the application for stay of execution of the orders pending appeal. The applicant intends to challenge the jurisdiction of the superior court to grant both leave and stay on the grounds which ex facie cannot be said to be frivolous in that the applicant intends challenge by way of appeal to the Court of Appeal the very foundation and the legality of the orders she was found to have disobeyed. Thirdly, the applicant, in addition, intends to appeal against the order of the superior court finding her guilty of contempt on the grounds of both facts and law and she denies that she, as a matter of fact disobeyed the court orders”.

In this case, the orders which are alleged to have been disobeyed themselves are under challenge. It is the applicant's case that the orders were not served within the period stipulated by the law that the ex parte orders were extended beyond the period allowed by the law and that the same were incapable of compliance. In deciding whether or not to deny a party alleged to have disobeyed the order of the Court the nature of the order in question must be considered. In this case it is alleged that the orders granted amounted to granting the orders sought in the main suit. Whereas a Court order is effective whether made *ex parte* or *inter partes*, the fact that it was made *ex parte* may properly be taken into account in the exercise of the discretion whether to hear a party alleged to be in contempt of court or not. In other words all the circumstances of the case must be taken into account before the Court can decide that such a party ought not to be heard. Whereas I appreciate that I am not sitting on appeal in respect of the decision by the Court barring the 1st respondent from being heard under Article 165(6) of the Constitution the High Court that has the supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, other than a superior court. Further it has been held that in the exercise of the Court's powers of case management under the overriding objective stipulated in section 1A and 1B of the Civil Procedure Act the overriding objective is so called because depending on the facts of each case, and the circumstances, it overrides provisions and rules which might hinder its operation and therefore prevent the court from acting justly now and not tomorrow. **See Safaricom Limited vs. Ocean View Beach Hotel Limited & 2 Others Civil Application No. 327 of 2009.**

In the result I find no merit in the Chamber Summons dated 14th August 2012 which I dismiss with costs. I further, in the exercise of the provisions of Article 165(6) of the Constitution direct the Chief Magistrate to proceed, hear and determine the 1st respondent's pending application seeking to set aside the ex parte orders on merits.

It is so ordered.

Dated at Nairobi this 16th day of January 2013

G.V. ODUNGA

JUDGE

In the presence of:

No appearance for the applicant

Mr Esmail for the respondents