



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
MISCELLANEOUS CIVIL APPLICATION 267 OF 2011

IN THE MATTER OF: AN APPLICATION ON BEHALF OF COMMODITY HOUSE LIMITED AND STUNTWAVE LIMITED; APPLICANTS

AGAINST THE KENYA SUGAR BOARD (RESPONDENTS) CHIEF EXECUTIVE OFFICER, MR. SOLOMON ODERA AND THE COMPANY SECRETARY, MR. ANDREW OSODO FOR AN ORDER OF COMMITTAL.

THE COMMODITY HOUSE LIMITED.....1ST APPLICANT

STUNTWAVE LIMITED.....2ND APPLICANT

-VERSUS-

THE KENYA SUGAR BOARD..... RESPONDENT

R U L I N G

This ruling is in respect of an application by way of Notice of Motion dated 16th June, 2011 filed by the Applicants herein Commodity House Ltd and Stuntwave Ltd (Applicants) seeking the following orders:

1. **THAT** this Honourable court do issue an order against the Respondent's Chief Executive Officer, Mr. Solomon Odera and the Company Secretary, Mr. Andrew Osodo committing them to civil jail for being in contempt of this honourable courts order.
2. **THAT** alternatively, this Honourable Court do issue an order against the respondent's Chief Executive Officer, Mr. Solomon Odera and the Company Secretary, Mr. Andrew Osodo to show cause why he should not be cited for contempt of court.
3. Any other order deemed expedient in the circumstances.

The application is supported by a statement of facts dated 16th June, 2011 and an affidavit sworn by Masumali Gulamali, the director of the 1st Applicant.

The application is premised on the following three main grounds:

1. The Hon. Lady Justice Jeanne Gacheche in Nairobi High Court Misc. App. No.249 of 2010 made an order of Mandamus on the 4th day of April, 2011 compelling the Respondent herein to refund the Applicants a total of Kshs.87,837,000.00 being the bid monies paid by the Applicants to the Respondent for auction rights to import COMESA sugar on 8th September, 2009.
2. Despite being duly served with the said order, the Respondents have failed, ignored and/or refused to comply and persist in such refusal.
3. The blatant refusal to obey a valid court order is contempt of court.

The application is opposed through a replying affidavit sworn by Solomon Odera one of the contemnors on 29th July, 2011. Before the application proceeded for hearing, the Respondents filed a preliminary objection on 29th July, 2011 which on directions by the court was argued in opposition to the application.

The background against which the application was made as can be deduced from the pleadings filed by both parties is that the applicants were the ex-parte applicants in **Misc. App. No.249 of 2010** filed at the High Court of Kenya at Nairobi while the Kenya Sugar Board was the Respondent. The suit in **Misc. App. No.249/2010** was heard and determined on 4th April, 2011 by my sister Justice Gacheche who issued the writ of mandamus compelling the Respondents to refund a total sum of Kshs.87,837,000/- being bid monies paid by the applicants to the Respondents on 8th September, 2009 for auction rights to import Comesa Sugar. The said order was exhibited as annexure **marked GM1** to the supporting affidavit.

It is the applicant's case that the said order was served on the Respondent's Principal Officers namely; Solomon Odera, the Chief Executive Officer and Andrew Osodo, the Corporation Secretary on 28th April, 2011 as evidenced by the affidavit of service sworn by a court process server, Mr. Francis N. Matu which was annexed to the supporting affidavit and **marked as GM2**.

The applicants contend that despite being properly served with the court order, the Respondents have deliberately failed or neglected to comply with the court orders and are therefore guilty of contempt of court and should be committed to civil jail. It is the applicant's further claim that failure by the Respondents to comply with the court order undermines the authority of this court and is an obstacle to the administration of justice.

In his replying affidavit, the 1st contemnor Solomon Odera described himself as the Acting Chief Executive Officer of the Kenya Sugar Board and proceeded to depone to facts which according to him justified non compliance of the court order in issue. In paragraphs 3 -10 of the Replying affidavit, he depones that the application was misconceived and had no basis in law since as an officer of the Kenya Sugar Board, he as well as other officers of the board enjoyed immunity provided by **Section 12 of the Sugar Act No.10 of 2001** and that in failing to comply with the court order, he was executing instructions from the board which in its 126th Board Meeting resolved that an appeal should be lodged against J. Chacheche's judgement delivered on 4th April, 2011. That indeed the Respondent's advocates Messrs Ogolla Okello & Co. sought and obtained leave from the Court of Appeal to file an appeal out of time and that in exercising its right of appeal the Respondent cannot be held to be acting in contempt of court.

Advocates on record for the parties filed written submissions advancing their respective positions and briefly highlighted the same in court on 21st November, 2011.

Having carefully considered the pleadings in this matter and the submissions made by advocates on record for the parties, I find that it is not disputed that the orders of mandamus issued by J. Gacheche on 12th April, 2011 were served on the Respondents on 28th April, 2011 and that todate the said orders have not been complied with.

The Respondents have attempted to explain their non-compliance with the order by arguing that as officers of the Respondent Board, they executed the board's decision to file an appeal against the judgement in which the orders of mandamus were issued and that in the *bona fide* execution of their duties, they enjoyed immunity from liability to any action, claim or demand of any sort by virtue of Section 12 of the Sugar Act No.10 of 2010 (*hereinafter referred to as the Act*).

In order to understand the full meaning and import of this provision, it is important to reproduce it verbatim.

Section 12 of the Act reads as follows:

“No matter or thing done by a member of the Board, or by any officer, employee or agent thereof shall, if the matter or thing is done *bona fide* for executing the functions, powers or duties of the Board, render the member, officer, employee or agent personally liable to any action, claim or demand whatsoever”.

In my considered view, Section 12 of the Sugar Act, only affords immunity to member of the board, officers or agents thereof from being found personally liable in the event that any civil or criminal action is instituted against them in a court of law seeking their personal liability for actions done in the *bona fide* execution of their duties as officers or agents of the board. It does not exempt officers of the board from obeying court orders and it cannot definitely be used as a basis for justifying disobedience of a valid court order.

It is important to note that though counsel for the Respondent submitted that an appeal was filed against J. Gacheche's orders of 4th April 2011, no evidence was availed to the court to confirm that such an appeal was indeed filed. In any event, even if an appeal was actually filed as alleged, the act of filing an appeal does not in law automatically amount to a stay of execution of the decision appealed against. There is no claim or evidence to show that in this case stay of execution of J. Gacheche's orders was ever sought or obtained from the Court of Appeal. It is evident from the submissions of the parties and from the court record that the said orders have to date not been overturned on appeal, set aside or varied and in the absence of any orders from the superior court staying execution of the same, the said court orders are valid and enforceable by this court.

It was argued by the Respondent that the applicant ought to have sought execution of the said orders by way of attachment and sale of the Respondent's assets since the Respondent was a body corporate and that mode of execution had not been outlawed by any law as was the case in the execution of monetary decrees against the Government or Local Authorities.

With due respect, I do not find any merit in that submission considering that the said orders emanated from judicial review proceedings which by their very nature are not civil proceedings.

In exercising its judicial review jurisdiction under Section 8 and 9 of the Law Reform Act and Order 53 of the Civil Procedure Rules, the High Court does not exercise either civil or criminal jurisdiction and as was held by the Court of Appeal in the case of Commissioner of Lands –vs- Kuntse Hotel Ltd – Civil Appeal No.234 of 1995, the High Court's judicial review jurisdiction is *sui generis* and with the exception of Order 53 of the Civil Procedure Rules, the rest of the provisions of the Civil Procedure Act or Rules have no application in the exercise of that jurisdiction. It therefore follows that modes of execution of decrees in civil suits which include execution by attachment and sale of assets of judgement debtors are not applicable in execution of orders issued in judicial review proceedings.

The order sought to be enforced in this case is an order of mandamus not a decree issued in a civil suit. It is an order directing the Respondent in **JR. Case No.249 of 2010** to pay the applicants a specific amount of money and this is an order which the Respondents should have obeyed immediately it was served on them. It did not require any further court process to facilitate its satisfaction like would be expected in civil suits where after judgment is entered in favour of the plaintiff, execution proceedings would follow.

Even if the Respondent may have felt aggrieved by the said orders, or thought that the same were misconceived, it still had a legal duty to obey the same unless and until they were set aside, stayed or overturned on appeal. I cannot put it any better than Lord Cottenham did in Chuck V Cremer 1 (Coop temp cott 342) which was adopted in the case of Hadkinson V Hadkinson [1952] All LR 567 where he had this to say about disobedience of court orders:

“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 the Respondent was aggrieved by the orders made by J. Gacheche, instead of disobeying the said orders it ought to have appealed against the decision in the Court of Appeal and then obtain stay of execution of the orders pending determination of the appeal. As stated earlier though there is evidence to show that an application to allow the Respondent to file an appeal out of time was granted by the Court of Appeal, there is no evidence that any appeal was subsequently filed.

It is common ground that the Respondent in the main judicial review application is a board established by statute. It is established under Section 3 of the Sugar Act No.10 of 2001 as a body corporate with perpetual succession and a common seal. Being a juristic person, the board can only function or conduct its daily operation through its members and officers appointed by the board for purposes of executing its mandate.

The two contemnors in this case being the corporation Secretary and Acting Chief Executive Officers are examples of such officers.

Under Section 5 of the Act which spells out the composition of the board, it is clear that the chief executive officer acts as a secretary to the board besides being its ex-official member and under Section 10 thereof, subject to the directions of the board, he is responsible for the day to day management of the affairs of the Sugar board.

This means that Mr. Solomon Odera was in-charge of the day to day operations of the Respondent and having been served with a court order whose terms were clear and unambiguous, he ought to have ensured that he complied with the order as an Agent of the board mandated to manage the board's daily operations.

I have noted the depositions in Mr. Odera's Replying affidavit explaining why he failed to comply with the court order. He stated in paragraph 5 that in doing so he was carrying out the directions of the board that had directed him to instruct their advocates to file an appeal against J. Gacheche's orders.

However, looking at the Board's resolution on 27th May, 2011 exhibited and **marked 'A'**, it is clear that there had been an earlier board resolution in Minute KSB/118/2010 passed in the board's 113th meeting to refund importers who included the applicant's bid monies paid by them in auction rights to import Comesa duty free sugar.

The second point to note is that the Sugar board resolution relied upon by Solomon Odera only directed that a notice of appeal against the judgement be filed but it did not direct that no monies should be paid to the applicants in compliance with the order of mandamus served on the board through its principle officers. In view of the foregoing, I find that Mr. Solomon Odera being the Chief Executive Officer of the board did not have any justifiable reason to disobey the aforesaid court orders. Having had knowledge of the said orders and having so blatantly disobeyed the same, I find that he is guilty of contempt of court. To hold otherwise would be to encourage impunity and disregard for the rule of law which this court cannot condone under any circumstances.

Any person who knowingly disobeys a court order does so at great risk of being punished for contempt of court. The letter and spirit of the Constitution of Kenya 2010 buttresses this position. Article 10 (2) of the Constitution enjoins the courts to interpret the constitution and any other law in a way that promotes the national values and principles of Governance that binds all state organs, state officers and public officers. Those values and principles include respect for the rule of law.

In order to preserve and to protect the dignity and authority of the court, those who disobey court orders cannot be allowed to do so with impunity. The court must uphold the rule of law by finding those who disobey court orders guilty of contempt of court and punish them accordingly.

Lastly, I wish to record my finding that though the Corporation Secretary, Mr. Andrew Osodo was also served with the court order in question and is also cited for contempt of court, I have not been able to come across any evidence to show that as a corporation secretary he had any role in the daily management of the board that involved disbursement of funds. The Sugar Act is silent on the role of the board's corporation secretary though it is common knowledge that in practice it involves provision of legal advice. It cannot be compared to the role of a chief executive who is ordinarily in-charge of all the affairs of the board including its financial obligations.

I agree with the words of L. Denning in Re Bramblevale Ltd [1970] CH 128 at paragraph 137 when he stated that:

“A contempt of court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved. To use the time honoured phrase, it must be proved beyond reasonable doubt.....”

In this case, I find that the applicants have not demonstrated beyond doubt that Mr. Andrew Osodo though aware of the court order had any role to play in the disbursement of funds of the board and that he participated in the disobedience of the court order. In the circumstances, I will give him the benefit of doubt and find that he is not guilty of contempt of the court orders issued on 4th April, 2011.

In prayer 3 of the application, the applicants had asked the court to grant any other order deemed expedient in the circumstances. Considering the circumstances giving rise to the institution of the judicial review proceedings in ***JR Case No.249 of 2010*** and the fact that the order disobeyed by the board through its agents required it to pay substantial monies to the Applicant which have not been paid to date I find that the interests of justice will be better served to both parties if the Respondent was granted a final chance to comply with the court order and pay the applicants the money due to them without any further delay. This will give the contemnor Solomon Odera an opportunity to purge his contempt and the applicants will get the monies they are entitled to without further delay.

In the circumstances, and in the wider interests of justice I will exercise my discretion and allow the contemnor 14 days to comply with J. Gacheche's orders of 4th April 2011 by paying the applicants the money stated in the said order. I also direct that this case be mentioned on 18th February, 2011 either for the parties to confirm compliance of the orders or for mitigation and sentencing in the event that the order will not have been complied with. Mr. Solomon Odera is directed to attend the court personally on that date.

DATED and **SIGNED** by me at Nairobi this 27th day of January 2012.

C. W. GITHUA
JUDGE

In the presence of:

Mr. Gikera for Applicants
N/A for Respondent