



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL CASE NUMBER 556 OF 2011
(FORMERLY NAIROBI HCC 437 OF 2011)

BRIGHT KENIND LIMITED..... PLAINTIFF

VERSUS

ALSAI KENYA LIMITED.....DEFENDANT

RULING

1. The matter before me is a Without Notice application for leave to apply for an order of committal for contempt of court. It is brought under Section 5 of the Judicature Act, Chapter 8, as read with the Civil Procedure Rules, 2011 (RSC order 52) and the inherent jurisdiction the court.

2. In a nutshell, the Applicant seeks committal for contempt of court of Mr. Suryakant Challa for swearing to false information or documents. These include swearing a Verifying Affidavit to verify the Plaint in the suit in which this application is filed, and a Supporting Affidavit in support of a notice of motion dated 3rd October, 2011. Both affidavits, it is alleged, swore to documents containing material falsehoods that the Plaintiff's directors and shareholders were from 30th January, 2011 Vrajbhushan D. Shah, Suryakant B. Challa, Jawahar R. Mori, Rajesh J. Jethva and Juhi B . Rupani. The grounds state *inter alia*, that the said false information was likely to, and did interfere with the course of justice and the smooth administration of justice in that the court acted upon them.

3. The application was filed under urgency, which urgency was appreciated by the court. With the application there were filed the following: A statement signed by the Applicant's counsel in support of the application for permission to apply for an order of committal; A verifying Affidavit in support of the application, sworn by Salim Sultan Moloo, director of the Applicants on 21st February, 2012. The Verifying Affidavit had annexed to it various supporting documents in relation to the application.

4. The orders sought by the Applicant as contained in the application, are as follows, that:

“i. this application be certified as urgent and heard ex parte.

ii. Permission be granted to the Applicant to apply for an order of committal to commit Mr. Suryakant Challa, a resident of Nairobi and of P.O .Box 8181-00300, Nairobi, into civil jail at Shimo La Tewa Prison for a term not exceeding 6 months for contempt of court.

iii. Upon grant of leave, this honourable court be pleased to order that Mr. Suryakant Challa be

arrested and brought to court and to require him to post bail or put up a bond with sureties to secure his attendance during the hearing of committal proceedings.

iv. The cost of this application be provided for in any event.”

For clarity, I will refer to Mr. Suryakant Challa as “the Defendant.” for all purposes herein.

5. What is the case against the alleged Defendant as contemnor in respect of which the Applicant seeks his committal?

The Plaintiff in the suit filed a Plaintiff on 3rd October, 2011 between the promoters of the Plaintiff, the Defendant, and the promoters of the Plaintiffs as guarantors, for the Management of Sai Rock Beach Hotel and Spa in Mombasa. The promoters of the Plaintiff were named as Vrajbhushan D. Shah, Suryakant B. Challa, Jawahar M. Mori, Jayesh J. Jethra and Jehi B. Rupant. In the Plaintiff, this fact was stated at Paragraph 5.

Mr. Suryakant Challa swore the Verifying Affidavit on 3rd October, 2011, as a director of the Plaintiff. He deponed amongst other things as follows:

“ 2. That I have read and understood the Plaintiff filed....

3. That the averments contained in the plaintiff are true, correct and within my knowledge

4....

5....That what is deponed hereinabove is true to the best of my knowledge, information and belief save where otherwise stated.”

6. The complainant was that Defendant terminated the Management Agreement. The termination was based on allegations that: not all the five promoters were directors or shareholders of the Plaintiff; and that a letter of search setting out the five as directors and shareholders of the Plaintiff, allegedly from the office of the Registrar of Companies, dated September, 20th, 2011 was a forgery; that in fact the correct position was that the Plaintiff was incorporated on 28th January, 2011 with only Vrabhushan D. Shah and Suryakant B. Challa as Directors and shareholders of the company. In essence, that the Plaintiff had lied.

7. For the Applicant the position was confirmed by two CR 12 Companies search letters showing the position as at 29th July, 2011 and 9th September, 2011 respectively whereby there were only two directors of the Plaintiff. In addition, the Registrar of Companies on inquiry by the Defendants counsel, formally wrote, a letter dated 6th October, 2011 as follows:

“ Ref: Bright Kenind Limited

We refer to your letter dated 4th October, 2011, the contents therein duly noted. Kindly note that there has been no director change in the company and as such there are no forms that have been filled.

We do confirm that the letter dated 20th September, 2011, addressed to the firm of Odhiambo M. Adala did not originate from this office.

Yours faithfully

Wilson Rading

State Counsel

For: Registrar of Companies.”

7. The effect of these is that Mr. Suryakant Challa’s Verifying Affidavit swore to the falsehoods that the directors of the Plaintiff were five when they entered into the subject management agreement, whilst he knew for a fact, that only he and one other person had signed and registered its Memorandum and Articles of Association.

8. The second false statement alleged against Suryakant Challa is the Supporting Affidavit he swore on 3rd October, 2011 in support of a Notice of Motion of even date seeking an injunction in relation to termination of the Management Agreement. In the affidavit, Mr. Challa deponed at paragraph 11 and 12 as follows:

“11 That it is worth noting that at paragraph 8 of the aforesaid letter of termination (of the agreement) the Defendant alleges that the Plaintiff herein was incorporated with only Vrajbushan and Suryakant Challa as shareholders and directors and that the other shareholders and directors Jawahan R. Mori, Rajesh J. Jethwa and Jachi B. Rupan were excluded contrary to the arrangement between parties.

12. That it is the Plaintiff’s contention that the aforesaid allegations are not only false but without any basis in law or in fact as the Registrar of Companies has issued a list of directors which shows that at the point of incorporating the Plaintiff company the directors complied with the provisions of Clause 19.1 of the Agreement. Annexed hereto marked ‘SC4’ is a copy of CR 12 from the Registrar of Companies indicating then names of the shareholders and directors of the Plaintiff Company.”

The annexure was the letter, allegedly from the Registrar of Companies, which the Registrar disowned as not emanating from that office.

9. The above averments in the affidavit are alleged by the Defendant to be false because Suryakant Challa knew at the time of making the deposition that the said information was false, since only he and Vyajbhushan D. Shah had solely incorporated the company on 20th January, 2011 as the sole directors and shareholders.

10. I think it is important to first consider whether I have jurisdiction to try or to grant leave for committal for contempt arising out of false statements or documents verifying pleadings. To start at the beginning, Section 5 of the Judicature Act empowers a Judge of the High Court to punish for contempt under the same powers as those possessed by a judge of the High Court of Justice in England. Section 5 (1) provides:

“(1) The High Court and Court of Appeal shall have the time being possessed by the High Court of justice in England, and that power shall extend to upholding the authority and dignify of the subordinate court.”

11. To identify the nature and extent of the power so granted, our courts make reference to the jurisdiction of the High Court of Justice of England and the applicable procedure as the English Procedure. This is found in the applicable Civil Procedure Rules and under Order 52 of the Rules of the Supreme Court. Counsel had, thoughtfully, annexed with his list of authorities, the **White Book 2011** Rule 52.1 of the English Rules of the Supreme Court provides as follows:

“(1) The power of the High Court or Court of Appeal to push for contempt of court may be exercised by an order for committal.

(2) Where the contempt of court:-

(a) is committed in connection with any proceedings before a Divisional Court of the Queens Bench of Division or

(b) is committed otherwise than in connection with any proceedings.

(3) Where the contempt of court is committed in connection with any proceedings in the High Court then subject to paragraph 2, an order of committal may be made by a single judge of the Queens Bench Division.....

These provisions relate to contempt generally.

12. With regard to the power to punish for contempt of court in respect of “making a false statement in a document verified by a statement of truth” the RSC provides as follows at RSC order 52.1.16:

“Civil Procedure Rule 32.14 provides that contempt of court proceedings may be brought against a person who makes, or causes to be made, a false statement in a document verified by a statement of truth, without an honest belief in its truth. Such proceedings may be brought only (a) by the Attorney General or (b) with the permission of the court. The use of statement of truth does not introduce a new category of contempt or change the substantive law of contempt, which requires that a false statement is likely to interfere with the Court of Justice. However, it is important that flagrant breaches of the obligation to verify documents by statements of truth should be policed and enforced, if necessary by committal proceedings.”

Reference is made in that order to **Malgar Limited vs Re Leach (Engineering) Limited** [2000]of CP Rep. 39.

I am therefore satisfied that I have requisite jurisdiction and powers to try contempt proceedings in relation to false statements in or in relation to verification documents.

13. In light of the requirement that contempt proceedings in respect of false statements may only be instituted by the Attorney General or with the court’s permission, the Applicant annexed the following: documents to his Verifying Affidavit:

- A letter dated 13th February, 2012 marked “SSM8” to the Defendant’s advocates, copied to the Assistant Director of Public Prosecutions, and forwarding to him inter *alia* , a copy of the Plaintiff, the Verifying Affidavit sworn by Suryakant Challa on 3rd October, 2011. The note to the Director of Public Prosecutions contains the statement:

“Proceedings in that regard [for contempt] may be brought by the Attorney General or by a party with the permission of the Court. If you fail to commence these proceedings, we shall seek the permission of the court to do so.”

- The aforesaid letter and the statement in support of the application both bear the respective receipt stamps of the Directorate of Public Prosecution and the Attorney General. Both are dated on 22nd February, 2012.

Service to the Attorney General and the Director of Public Prosecutions was duly evidenced by an Affidavit of Service deponed on 23rd February, 2012 by one James Kimaguti, confirming service aforesaid.

14. At the *ex-parte* hearing on 27th February, 2012, counsel pointed out that he served **both** the Director of Public Prosecutions and Attorney General out of abundant caution. He explained his uncertainty on the grounds that the new constitutional dispensation (under–Chapter 9 part 4) had separated the Attorney General’s and Director of Public Prosecution’s offices. With both the constitutional offices of Director of Public Prosecutions and Attorney General co-existent but distinct and independent whether service to only one would suffice.

As for the second requirement, he stated that the application is before the court for leave, and, neither the Attorney General nor the Director of Public Prosecutions had replied his letter in which he requested them to commence proceedings against the Defendant.

15. Where, as in this case, the application seeks leave or the permission of the court, it must be brought *ex-parte*, without notice. The application must 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.
- An Affidavit, to be filed before the application is made, verifying the facts relied on.

In addition, the Applicant must give notice of the application for permission not later than the preceding day to, in England, the Crown Office, and must at the same time lodge in that office copies of the statement and affidavit. The Crown Office in the United Kingdom is the office responsible for the prosecution of crime. In the present case the application and supporting documents were all filed prior to 24th February, 2012, when the certificate of urgency was filed. Copies were served on both the Director of Public Prosecutions and Attorney General. All these requirements are detailed in RSC 52. 2 (1) – (3) and were fulfilled by the Applicant.

16. Having dealt with the procedural requirements, I now turn to the application for leave itself. I am to satisfy myself at this stage, that on the basis of the application and statement, thereof, and on the averments deponed in the verifying affidavit, a *prima facie* case of contempt is disclosed.

In the case of a statement of falsehood, no breach of an order of the court is involved. The breach for which a *prima facie* case needs be shown in this case includes; first, that there is a false statement in a document verified by a statement truth, second, the maker had no honest belief in its truth, and third, that the false statement has, or is likely to, interfere with the course of justice. See Section RSC 52.1.16.

17. In general, the court should exercise great caution before giving permission to bring private proceedings for contempt. This was so held in **KJM Superbites Limited Vs Anthony James Hinton** [2008] EWCA Civ 1280. There, Moore-Bick LJ said in a unanimous judgment at paragraph 6:

“Proceeding for contempt of the kind contemplated in this case, albeit civil rather than criminal, are public in nature and by committing an act of a kind which is liable to interfere with the course of justice the witness exposes himself to the risk of punishment by the court. When the court gives a private person permission to pursue proceedings for contempt against a witness who is alleged to have told lies in a witness statement, it allows that person to act in a public rather than a private role, not to recover damages for his own benefit but to pursue the public interest. That is why the court will be concerned to satisfy itself that the case is one in which the public interest requires that the committal proceedings be brought and that the Applicant is the proper person to bring them.”

18. What principles apply in deciding whether to grant leave to commence when contempt proceedings for the making of a false statement? In **A Barnes t/a Pool Motors and Michael Seabrook; Mandy Hill and Agnes Gough; and South Wales Fire and Rescue Service** [2010] EWHC 1849, three contempt proceedings which had been consolidated in the High Court of Justice Queens Bench Division, the court gave some guidance (paragraph 4). The guiding principles are:

“ i) A person who makes a statement verified with a statement of truth or false disclosure statement in it is only guilty of contempt if the statement is false and the person knew it to be so when he made it.

ii) it must be in the public interest for proceedings to be brought. In deciding whether it is the public interest, the following factors are relevant:

a) The case against the alleged contemnor must be a strong case (there is an obvious need to guard carefully against the risk of allowing vindictive litigants to use such proceedings to harass persons against whom they have a grievance);

b) The false statements must have been significant in the proceedings;

- c) ***The court should ask itself whether the alleged contemnor understood the likely effect of the statement and the use to which it would be put in the proceedings;***
- d) ***[T]he pursuit of contempt proceedings in ordinary cases may have a significant effect of drawing the attention of the legal profession, and through it that of potential witnesses, to the dangers of making false statements. If the courts are seen to treat serious examples of false evidence as of little importance, they run the risk of encouraging witnesses to regard the statement of truth as mere formality.***
- iii) ***The court must give reasons but be careful to avoid prejudicing the outcome of the substantive proceedings;***
- iv) ***Only limited weight should be attached to the likely penalty;***
- v) ***A failure to warn the alleged contemnor at the earliest opportunity of the fact that he may have committed a contempt is a matter that the court may take into account.”***

19. Finally, I come to the question, whether this is an apt case where leave should be granted. I must now apply the principles from the **A Barnes t/a Pool Motors** case, being careful to ensure that I do not go into substantive matters of the application itself that could prejudice the final application for contempt should I grant leave.

These are my findings:

- a) I am satisfied that a *prima facie* case has been established that Suryakant Challa has made a statement verified by affidavits – containing “statements of truth” which statements were in fact false. I am satisfied that Suryakant Challa knew them to be false or ought to have so known, as a director and shareholder of the Plaintiff Company. On the face of it, the Plaintiff company’s Articles were signed by only two persons on 20th January, 2011, and the Certificate of Incorporation is dated 28th January, 2011. By the time of entry into the Management Agreement, there were not five persons as promoters of the Plaintiff so the affidavits verifying the Plaintiff and supporting the earlier notice of motion were affirming falsehoods.
- b) Is this a matter where the public interest will be served? I think so. The case here is strong from a probative point. I do not sense any likelihood of there being vindictiveness on the part of the Applicant. I, however, warn myself that the Applicant, being a party to the suit like the alleged contemnor, there is need to guard against the spillover from the main suit staining the contempt proceedings.
- c) I believe the false statements have had a significant effect in the proceedings. The Verifying Affidavit undergirds the veracity of the plaintiff itself, whilst the supporting affidavit underpins the application for the mandatory injunction sought against the Defendant in the suit.
- d) Did the alleged contemnor understand the likely effect of his statement? I cannot see how the alleged contemnor could have been ignorant of the effects of his statements. He avers in the verifying affidavit and supporting affidavits, the truth of the very statements upon which the Defendant relied to terminate the Management Agreement. This is a central, critical and overarching point of their dispute. Yet, at the same time, the alleged contemnor, having seen the Memorandum and Articles of Association of the Plaintiff, and as Director, must be aware of the directorship positions. It strikes me that his averments on the verifying affidavit and supporting affidavit are intended to steal a match.
- e) In my view, and I believe many judges and legal practitioners share this view, there are far too many false declarations, witness statements, affidavits and so on, regularly and generally used by parties with abandon in litigation proceedings. I am not sure that there has been a case or contempt arising from this genre of document, though I may be wrong. It may be that some cases end up as criminal perjury prosecutions. However, I think it is important that the message should be sent, and this is the trumpet call, for parties to cease encouraging the use of, or treatment of, statements of truth and verifying

affidavits as mere formalities of little importance.

f) Finally, I am satisfied in terms of the principles for grant of leave, that the contemnor was warned at the earliest opportunity of the fact that he may be committed for contempt vide the Applicant's letter of 13th February, 2012 to his counsel.

20. I now come to the conclusion of this application. All the material before me reveals a substantial case against Mr. Suryakant Challa that he knowingly made false statements. I am careful to point out that this is a preliminary finding, as the application has not yet been put forth. Only leave is now sought.

For the many reasons given herein, I am persuaded to grant leave to the Applicant to apply for an order of committal. The order shall read as follows:

- 1. The Applicant is hereby granted permission to apply for an order to commence committal proceedings against Suryakant Challa in terms of prayers ii and iii in Part A of the Without Notice Application herein dated 21st February, 2012.**
- 2. This order for leave, the claim form or application notice, as appropriate, and committal shall be served personally on the said Suryakant Challa forthwith without undue delay.**
- 3. The hearing of the application inter partes shall be held within 14 days from the date of grant of leave herein.**
- 4. Costs in the cause.**

Orders accordingly.

Dated and delivered this...29th Day of March, 2012

R.M. MWONGO

JUDGE

Read in open court

Coram:

1 Judge: Hon. R. Mwongo

2 Court clerk: R. Mwadime

In Presence of Parties/Representative as follows:

- a)
- b)
- c)
- d)