REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT 399 OF 2012

TRICON INTERNATIONAL LIMITED ……..…… PLAINTIFF

VERSUS

GIRO COMMERCIAL BANK LIMITED …….. DEFENDANT

R U L I N G

On 25th June, 2012 this court made an order to the effect that:-

"It is hereby ordered that:-

1. That the order made herein on 20th June, 2012 be and is hereby set aside.

2. THAT the Defendant be and is hereby directed to allow the Plaintiff to operate its a/c numbers 4002127/CD/1 and 4002127/CDF-$2 held with itself through the mandate and or instructions properly executed by Miren Amin, Urvesh Patel and Sharad D. Patel as contained in the specimen Signature Card dated 17/05/2012 and exhibited as Exhibit "AM5" to the affidavit of Miren Amin sworn on the 25th June, 2012."

3. THAT the said Miren Amin, Urvesh Patel and Shard D. Patel to execute personal undertakings as to damages to jointly and severally indemnify the Defendant for any loss that the Defendant may suffer incompliance of this order.

4. THAT the undertaking in (3) above to be executed and filed with the court within 24 hours of the date hereof. The said undertaking to be served together with this order upon the bank. This undertaking is in addition to the one given by the Plaintiff.

5. THAT this Order shall remain in force until further Orders of the court.

6. THAT the Motion dated 19th June 2012 to be heard on 24th July, 2012."

The Plaintiff has contended that, that order was served upon the Defendant but the Plaintiff's directors named in that order have not been allowed by the Defendant to operate the Plaintiff's account Nos.4002127/C/1 and 4002127/CDF -S/2 held with the Defendant as ordered by the court.

Accordingly, on 3rd July, 2012 having obtained leave of court, the Plaintiff commenced contempt proceedings against Mr. T.R. Krishnan and Mr. Tilas Nthia Murigi, the Managing Director and Risk Manager of the Defendant, respectively. The Plaintiff sought that the duo be committed to civil jail for a

period not exceeding six (6) months for contempt of court and that the Defendant's property be attached for disobedience of the said order. That application was supported by the Affidavits of Sharad Patel and Miran Amin sworn on 3rd and 12th July, 2012, respectively.

It was contended by the Plaintiff that the order of 25th June, 2012 was served upon T.R Krishnan and Tilas Nthis Muringi (hereinafter "the alleged contemnors") on 26th and 30th June, 2012, there were Affidavits of service by Samson Wambua and Alphonce Mutinda, Advocate on record to that effect, that the Directors of the Plaintiff went to the Defendant bank and signed a new signature specimen card, that they were told to sign new opening account forms which they refused because this was an account that was already existing and in operation, that on 27th June, 2012 the Plaintiff's Managing Director presented a cheque for US$3000 for payment but was rejected without any reasons being assigned therefor, this necessitated his writing a letter of protest dated 27th May, 2012.

Mr. Mutinda, learned counsel for the Plaintiffs submitted that the order of 25th June, 2012 had not required the signing of new account opening forms, that the Defendant and the alleged contemnors were in contempt of the court order, that an order must be obeyed even if one disagrees with it. Counsel referred the court to the cases of **Hadkinson –vs- Hadkinson** and **Mawani –vs- Mawani** on the proposition that a party who is in contempt should not be heard. Counsel concluded that the application was properly before the court as the Plaintiff had complied with all the procedural requirements of the law. Counsel therefore urged that the application be allowed with costs.

The Defendant and the alleged contemnors filed two Replying Affidavits sworn by Tilas Nthia Muringi and T.K Krishnan, respectively. They contended that the application was incurably defective as it should have been commenced by a separate miscellaneous proceedings, that the Plaintiff wanted to coerce the Defendant to act against the law, banking rules and practice. That on the order of 25th June, 2012 being made, Mr. Nthia Murigi requested the directors of the Plaintiff to go to the bank to execute proper and fresh mandate in the presence of a bank official in accordance with banking practice and for them to produce their respective identification, that the said directors executed the fresh specimen signature card on 26th June, 2012 before a Mr. David Mbugua of the Defendant and furnished certain documents which were requested, that however, they refused to furnish certain identification documents requested by the bank which has hampered the Defendant's efforts to comply with the court order, that the execution and supply of the requested documents will enable the Defendant enter with the new directors into a valid contract, that since the previous directors mandate had been withdrawn it was imperative that the bank did have the documents executed by the new directors, that the Defendant was willing to comply with the court order but the appointed directors had declined to supply the requisite documents to allow compliance and finally that there was no evidence to show that the cheque of US$3000 produced by the Plaintiff was ever presented for payment.

Mr. Kang'ethe, learned counsel for the Defendant and the alleged contemnors submitted that the Plaintiff was no ready to agree on production of identification documents from its directors for the operation of the account, that the provision of signing of fresh terms and conditions was for purposes of streamlining contractual obligations between the bank and the Plaintiff since instructions were hitherto being received from another director who was no longer allowed to issue instructions, that the bank cannot use the documents previously in its possession due to the change on the mandate, that it was a regular exercise of updating records in the possession of the Defendant, that neither the Defendant nor the alleged contemnors were obstructing the court order. Counsel took the court through the requirements by the Central Bank of Kenya which the Defendant as a bank is to adhere to in order to show that the Defendant was only trying to cover its back and not breach or flout the law. Counsel urged that the application be dismissed with costs.

I have carefully considered the application, the Affidavits on record and the submissions of counsel. I have also considered the authorities relied on by the parties.

The law on contempt is clear. Once a court order has been issued, a party against whom it is directed at **MUST** obey and comply therewith even if he is not agreeable with it. Any disobedience of a court order

is a recipie for chaos. The principle of the rule of law presupposes that the law will be administered and applied throughout the jurisdiction without fear or favour, without bias or any other consideration. Once the law has been applied, the consequences thereof which include court orders must be vigorously enforced without any regard whatsoever to the persons concerned or the consequences arising therefrom. For it is in the public good that the rule of law and therefore compliance with the court orders is upheld. For this reason, once there is an allegation that a court order has been disobeyed, the courts of this country should down and suspend all other business and move with speed to deal with such a breach, disobedience or contempt. Indeed contempt of court proceedings should take precedence over all and every judicial proceeding. For it is in having their orders complied with unquestionably, that the existence of courts as institutions that exist in society for the regulation and maintenance of social equilibrium, may be justified. Anything short of that would be to encourage the application of the law of the jungle which mankind, through civilization, has long decided to discard in favour of an organized society whose competing interests are lubricated by the rule of law. For that reason, disobedience of a court order is a very serious issue which must be dealt with seriously.

The principles applicable in dealing with an application for contempt are well known. There must be an order in existence, the same must contain a notice of penal consequences, that order must be served upon the person required to comply therewith or its contents must be known to such a person and the person required to comply therewith must have had an opportunity to comply with the order but deliberately declined or refused to comply. The consequences are dire. It may lead to a citizen losing his liberty for as long as six (6) months. For that reason, there have been developed safeguards which I have pointed out hereinabove when dealing with contempt proceedings.

It is for this reason that as early as 1952, the Court of Appeal for England in the case of **Hadkinson –vs- Hadkinson (1952) 2 All ER 567** held at page 569 thus:-

"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 even void. Lord Cottehnham, L.C., said in Chuck –vs- Cremer (1) Coop, temp. Cott.342):

'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 why 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 discharged. As long as it existed it must not be disobeyed.'

Such being the nature of this obligation, two consequences will, in general, follow from its breach. The first is that anyone who disobeys an order of the court (and I am not now considering disobedience of orders relating merely to matters of procedure) is in contempt and may be punished by committal or attachment or otherwise. The second is that no application to the court by such person will be entertained until he has purged himself of his contempt."

The Defendant and the alleged contemnors contended that the application before me was incurably defective as there should have been a separate application for contempt under a miscellaneous proceeding.

I do not think so. The motion before me has been brought under both the Civil Procedure Act and the Judicature Act. In this country, there are two jurisdictions available for punishing for disobedience of a court order. The first jurisdiction is under Section 5 of the Judicature Act which empowers this and the Court of Appeal to punish for contempt. Under this jurisdiction, the practice and procedure to be followed is that obtaining in England. Currently in England, a party is required to commence proceedings by way of Application Notice with a statement of facts and a Verifying Affidavit. That application notice is by way of forms which are set out in the Supreme Court Practice otherwise known as **"the White**

Book". Under this procedure, the Application Notice is made ex-parte for leave to commence contempt proceedings. Under this procedure, contempt proceedings are commenced separately from the proceedings in which the contempt is alleged to have the been committed. My view is however bringing such proceedings on the pending proceedings does not cause any hardship, prejudice or injustice.

If, however, the order sought to be enforced is that given by a subordinate court, then a separate miscellaneous proceeding will be called upon to commence the contempt proceedings. It is under this jurisdiction that personal service, the order having the Notice of Penal consequences appended thereon and leave to commence contempt proceedings are but a strict requirement.

The second jurisdiction is under the Civil Procedure Act. This procedure however is where the order disobeyed is of an injunctive nature only. The jurisdiction is to be found in Section 63 (c) of the Act which provides:-

"63. In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed –

a) ……

b)……..

c) grant a temporary injunction and in case of disobedience commit the person guilty thereof to prison and order that his property be attached and sold."

Then Order 40 rule 3 which prescribes the procedure provides:-

"3 (1) In cases of disobedience, or of breach of any such terms, the court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the court directs his release.

(2) ……

(3) An application under this rule shall be made by notice of motion in the same suit."

Therefore, where the issue is breach of an injunction, there is no requirement of leave to punish, the long requirements set out in the White Book in my view are not required. These are specific provisions of the law as enacted by our own legislature. Those other technical requirements in the English law in my view therefore do not apply when one applies to punish a party for disobeying an order of injunction under Order 40 Rule 3 of the Civil Procedure Rules. This is for good reason in that before one can apply for another to be punished, the law presumes that the person to be punished must have been notified of the injunction and the terms thereof which he has had an opportunity to obey but has failed to obey.

Accordingly, my view is and I so hold, that the jurisdiction to punish for contempt under Section 5 of the Judicature Act is different and distinct from the jurisdiction to punish for disobedience of an injunction under Section 63 (c) of the Civil Procedure Act. The procedure to be followed under Section 5 of the Judicature Act is the one obtaining in England whilst the one to be followed under Section 63 (c) of the Civil Procedure Act is Order 40 Rule 3 of the Civil Procedure Rules which provides that such an application shall be a motion in the same suit.

Accordingly, since the motion seems to have been brought under both jurisdictions, I do not see anything invalid about it. This is so because, leave was properly sought and granted, a motion has been filed and Affidavit of service by Alphonse Mutinda sworn on 29th June, 2012 is on record to signify service of the order upon the alleged contemnors.

I have seen the order of 25th June, 2012. Attached thereto is a Notice of Penal consequences. Mr. Alphonse Mutinda has sworn that the said order was served together with the notice of penal

consequences. I have noted that the order of 25th June, 2012 covers the whole page and that may be the reason why the notice of penal consequences is on a separate page. Ideally, such notice is supposed to be appended on the order itself not on a separate page as is in this case. If the application had been brought only under Section 5 of the Judicature Act, I would have rejected the application on that ground alone. However, since the jurisdiction of this court under Section 63 (c) has been invoked, which jurisdiction does not require that an injunction order do have a notice of penal consequences appended thereon, I will admit the application as being in order and consider it on merit.

The order of this court of 25th June, 2012 directed, inter alia, that:-

"2. THAT the Defendant be and is hereby directed to allow the Plaintiff to operate its a/c numbers 4002127/CD/1 and 4002127/CDF-$2 held with itself through the mandate and or instructions properly executed by Miren Amin, Urvesh Patel and Sharad D. Patel as contained in the specimen Signature Card dated 17/05/2012 and exhibited as Exhibit "AM5" to the affidavit of Miren Amin sworn on the 25th June, 2012."

That order was very specific. It was unequivocal that the Defendant was to allow the named directors of the Plaintiff to operate the plaintiff's named two (2) accounts with itself **"through the mandate and or instructions properly executed by"** the named directors.

The issue which this court has to consider is whether on the evidence before it, there has been deliberate disobedience of its order of 25th June, 2012

In the text relied on by the Defendant of the **Law of Contempt 3rd Edition**, **Butterworths 1996 at page 560**, the learned authors have observed that:-

"Thus although persons are under a duty to comply strictly with the terms of an injunction, the courts will only punish a person for contempt upon adequate proof of the following points. First, it must be established that the terms of the injunction are clear an unambiguous; secondly, it must be shown that the Defendant has had proper notice of such terms; and thirdly, there must be clear proof that the terms have been broken by the Defendant. There is also a fourth issue, namely, the mens rea required in such cases. We will also refer, fifthly, to the question of who is responsible for the breach." (Emphasis supplied)

It is clear that what is required for one to prove contempt is threefold. That the terms of the injunctive order must be clear and unambiguous, the Defendant must have notice of what is required of him and that there has been breach.

On the terms of the order of 25th June, 2012, none of the Defendant has stated that they were not clear and unambiguous. Indeed they knew what was required of them. As to notice of the same, I am satisfied that Mr. Alphonse Mutinda Advocate effected service of the order upon the two alleged contemnors. He swore that on 26th June, 2012 at the Defendant's premises he served the order upon Mr. T.K. Krishnan who accepted the same and directed Mr. Tilas Nthia to acknowledge service thereof. The fact that Mr. Krishnan did not sign the same in acknowledgement thereof is no defence. He saw the order and he directed the 2nd alleged contemnor to acknowledge service. In his Replying Affidavit sworn on 11th July, 2012, Mr. Krishnan does not specifically deny what Mr. Alphonse Mutinda has deponed in his Affidavit of service that, he Mr. Krishnan is the one who directed Mr. Nthia Muringi to acknowledge service of the order. What Mr. Krishnan has deponed in paragraphs 9, 10 and 13 of his Replying Affidavit is but evasive. To my mind, the alleged contemnors were properly served with the order.

In any event, once Nthia was served, Mr. Krishnan as the Managing Director of the Defendant is expected to steer the Defendant towards compliance. As the Chief Executive Officer of the Defendant, the buck starts and stops with him. I reject the allegation of non-service upon |Mr. Krishnan.

Service having been proved, has breach of the order been proved?

In **Re Bramblevale (1970) Ch 129 at page 137**, Lord Denning held 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 all reasonable doubt. It is not proved by showing that, when the man was asked about it, he told lies. There must be further evidence to incriminate him. Once some evidence is given, then his lies can be thrown into the scale against him. But there must be some other evidence." (Emphasis supplied)

Further, in **Knight –vs- Clifton (1971) ch 700 at page 707** the English Court of Appeal (Russell L J) held:-

"Contempt of court, even of the type that consists in breach of an injunction or undertaking, is something that may carry penal consequences, even loss of liberty and the evidence required to establish it must be appropriately cogent."

What evidence is before me? The terms of the order were unequivocal. The Defendant was to allow the named directors to operate the named accounts operated by the Plaintiff with the Defendant **"through the mandate and or instructions properly executed,"** by the named directors. That order was served upon the Defendant and the alleged contemnors. However, they did not allow the Plaintiff's named directors to operate the accounts.

The Defendant and the alleged contemnors have contended that they have at all times been able, ready and willing to comply with the court order. Indeed on 28th June, 2012, Mr. T.N Muringi wrote an electronic mail to the Plaintiff requesting the submission of certain documents in the following terms:-

"(i) Your original passports to facilitate comparison with the copies submitted,

(ii) The original and copies of Alien certificates of Mr. Sharad D. Patel, Urvesh Patel and Miren Amin,

(iii) Original and copies of PIN certificates of three persons named in 2 above,

(iv) Copies of the utility bills of the three named above,

(v) Duly signed account form containing the General Terms and Conditions of operating your account with the bank,

(vi) Bills form to facilitate collection of cheques and other negotiable instruments transacted through your account."

This e-mail was followed by a letter dated 28th June, 2012 by the Defendant's Advocates Ms Kegwimi Kang'ethe & Co to the Plaintiff's Advocates. The relevant portion reads:-

"We are however, instructed that your clients have adamantly refused to provide the above documents for reasons (as you state in your letter dated 27th June, 2012) that the court order was very specific and that the account was opened in 2005.

Please note that by virtue of the fact that the signatories to the account have changed the above documents MUST be provided before the account can resume operations. Please also note that this is a requirement of Central Bank of Kenya which is meant to identify the account holders."

The two letters were explanatory. They explained that due to the change of the mandate, it was imperative that those documents be supplied by the Plaintiff. That for a contractual relationship to be sealed between the Plaintiff, through the newly mandated directors with the Defendant, the documents were required. That the Central Bank of Kenya had made this a requirement. However, this e-mail and letter were not responded to by the Plaintiff. The Plaintiff's answer to the Defendant's contention is that,

they provided the documents Nos. (i), (ii) and (iii) but objected to provide documents listed as Nos. (iv), (v) and (vi) for the reason that this was an already existing account and they did not require to execute fresh documents. That it meant that they would be opening a new account.

I have carefully considered the rival submissions. Mr. Kang'ethe learned counsel for the alleged contemnors and Defendant took the court through the Central Bank of Kenya Prudential Guidelines for Banks of March, 2006. I am satisfied on my part that what the Defendant was asking to be supplied with was a legal requirement. Indeed, the Defendant cannot be expected to act on the documents in its possession which were executed years ago by a director whose mandate has since been withdrawn by the Plaintiff itself. It is imperative in banking business that the full particulars of the human face of a Corporate Customer be in the records of the bank. Indeed Mr. Kang'ethe submitted that in this age of money laundering and terrorism, banks are cautious as to whom they are dealing with.

Taking everything into consideration, my view is that, that portion of the order of 25th June, 2012 that ***"mandate and or instructions properly executed by...."*** meant that the named directors of the Plaintiff were to execute all the relevant and necessary documentation that are required in the operation of an existing account. I do not believe that executing the documents objected to which the Defendant has exhibited in its Replying Affidavit would have meant opening new accounts. If a different account was opened other than the ones directed, that would be outright contempt and no further proof would have been required.

For the foregoing reasons, I am of the view that the Defendant's insistence as to the execution and supply of identification papers for the operation of the named accounts did not amount to deliberate disobedience of the order of 25th June, 2012. Accordingly, the Plaintiff should comply with the requirements of banking regulations before it can charge the Defendant of being in disobedience of the order of this court of 25th June, 2012.

The upshot of it, is that the Plaintiff's Motion dated 3rd July, 2012 is without merit and is dismissed with costs.

DATED AND Delivered at Nairobi this 19th day of July, 2012.

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A. MABEYA
JUDGE