



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Case 902 of 2009

**KANCHANBEN RAMNIKLAL SHAH
(As Administratrix of the non-Kenya or Foreign Estate of PREMCHAND KANJI SHAH
(DECEASED) and an Executor of the Kenya will of PREMCHAND KANJI SHAH
(DECEASED) and as beneficiary of the non-Kenya or Foreign Estate of PREMCHAND
KANJI SHAH (DECEASED)PLAINTIFF**

VERSUS

**SHAMIT SHANTILAL SHAH.....1ST DEFENDANT
SHANTILAL SHAH.....2ND DEFENDANT
AMIT SHANTILAL SHAH.....3RD DEFENDANT
HASIT SHANTILAL SHAH.....4TH DEFENDANT
SUNRIPE (1976) LIMITED.....5TH DEFENDANT
FREIGHT IN TIME LIMITED.....6TH DEFENDANT
TERRAFLEUR LIMITED.....7TH DEFENDANT**

RULING

This application is for an order of committal to imprisonment or such other punishment as this court may deem fit in the circumstances against each of the 2nd, 3rd and 4th defendants for their respective contempt of court. It also seeks that the costs thereof be awarded to the Plaintiff/Applicant.

The application is dated 6th January, 2010 and is made under **Section 5(1)** of the **Judicature Act (Cap. 8, Laws of Kenya)** incorporating **Order 52 Rule 3** of the **Rules of the Supreme Court of England and Wales**, **Section 3A** of the **Civil Procedure Act** and **Order 50 Rule 1** of the **Civil Procedure Rules (Cap.21, Laws of Kenya)**. The application is supported by the annexed affidavits of **ZULFIKAR HASSANALI ALIBAHI, JUDY CHERUIYOT, ALIAHMED HASSANALI** and **SILVANUS KATIMU** and is based on the grounds that -

(1) By orders of the court issued on 15th December 2009, this court ordered all the Defendants and each one

of them, their officers, servants or agents or otherwise to, inter alia -

“permit such persons not exceeding five (5) from any reputable firm of public accountants and the Plaintiff’s advocates as may be duly authorized by the Plaintiff under the supervision of at least one (1) but not more than two (2) advocates at any given time from the Plaintiff’s Advocates firm to forthwith enter without let, hindrance or obstruction the premises of the 5th Defendant, the 6th Defendant and the 7th Defendant at 2nd Avenue Cargo Village, Jomo Kenyatta International Airport, Nairobi, and such other premises as the 5th, 6th and 7th Defendants may occupy or use, at any time between the hours of 8.00 a.m. and 7.00 p.m., for the purpose of inspecting and if they think fit photocopying, printing downloading outside the said premises all documents, record files, books of account, computers, computer servers, computer programmes, and computer databases, computerized records, accounts and information including any electronic information, containing all information and details relating to the trade and business activities of the 5th, 6th and 7th Defendants and the other foreign companies listed in the said Orders, the commercial activities, business, management, shareholding, directorships, monies, properties, assets, their financial statements and other matters of and concerning the 5th, 6th and 7th Defendants and the foreign companies listed and any other assets, property, beneficial interests, monies and benefits to which the Estate of Premchand Kanji Shah, Deceased, was entitled (an “Anton Piller Order”).

(2) The 4th Defendant Hasit Shah, despite being personally served with the said Court Orders at the premises of the 5th Defendant, 6th Defendant and (to the best of the Plaintiff’s knowledge) the 7th Defendant at Cargo Village, Jomo Kenyatta International Airport, Nairobi and being fully and repeatedly explained the nature and purport of the Court Orders and the consequences of refusing to obey or facilitate the implementation of the said Court orders by giving the necessary access to the Plaintiff’s representatives to the documents and material listed therein did deliberately, flagrantly and consciously violate, breach, disregard and disobey the Court Orders whilst displaying utter contempt for the said Court Orders and this Honourable Court and refused to give the Plaintiff’s representatives access to the documents and other material as required by the Court orders for the purposes set out therein.

(3) The said 4th Defendant in further conscious and flagrant violation of the Court Orders and in contempt thereof did prevent the Plaintiff’s Advocates from personally serving the Court Orders on Shantilal Shah, the 2nd Defendant herein, who he admitted was present at the said premises at the time. The 4th Defendant insisted on being served with the Court Orders on behalf of his father the 2nd Defendant.

(4) The 3rd Defendant Amit Shah, despite being personally served with the said Court Orders at the premises of the 6th Defendant at Westlands Office Park on Waiyaki Way, Nairobi and being fully explained the nature and purport of the Court Orders and the consequences of refusing to obey or facilitate the implementation of the said Court orders by giving the necessary access to the Plaintiff’s representatives to the documents and material listed therein did deliberately, flagrantly and consciously violate, breach, disregard and disobey the Court Orders whilst displaying utter contempt for the said Court Orders and this Honourable Court and refuse to give the Plaintiff’s representatives access to the documents and other material as required by the Court Orders for the purposes set out therein.

(5) The 2nd Defendant Shantilal Shah, being served with his authority, to his knowledge and on his behalf with the Court Orders through his son the 4th Defendant Hasit Shah, at the premises of the 5th, 6th and 7th Defendants and being aware of the nature of the Court Orders being served at the said premises at a time when he was present and aware of the service did decline, neglect and consciously refuse to implement the Court Orders although directed at him thus displaying contempt for this Honourable Court.

(6) By the disregard, violation and contempt of the 2nd, 3rd and 4th Defendants in respect of the Court Orders issued by this Honourable Court, the Plaintiff has been wrongfully and unlawfully deprived of the benefit of the Anton Piller Order granted by this Honourable Court and lost the opportunity to obtain the full information that she was entitled to. By their flagrant disregard and refusal to obey the Court Orders, the said Defendants are not able to conceal, transfer or destroy vital information and evidence, and to conceal and transfer assets and monies rightfully owned by or owing to the Estate of Premchand Kanji Shah, Deceased.

In opposition to the application, each Respondent filed a replying affidavit and all the affidavits traverse some common terrain. This is that the contents of the application(s) were read out to all the deponents by their Advocate, Mr. Chacha Odera, who advised that the

application dated 5th January, 2010 was fatally defective as it had been filed without leave of court; that the same was an abuse of the court process as it sought orders similar to those sought by an earlier pending application; that the application dated 6th January, 2010 was supported by the same affidavits as those propping the application dated 5th January 2010; and that the order alleged to be breached was not served accompanied by a penal notice as required by the law. Another common thread in all the affidavits is that the accountants accompanying the Advocates came from a firm known as RSM Ashvir whose reputation was unknown to the Respondents. It was further common among the Respondents that they were advised by their Advocates that under the practice of enforcing **Anton Piller Orders**, a Respondent was at liberty not only to seek legal advice before complying with the orders, but also to apply to the Court for the discharge of the said orders. That was the basis upon which the Respondents sought and obtained stay of the **Anton Piller Orders** on 17th December, 2009.

Against that background, the main issues to be determined are whether there was an order issued by the Court; if so, whether it was served upon the Respondents; whether it was regular; whether it was obeyed; and what orders the Court should make. There is no gainsaying that a Court Order was made, which was meant to be obeyed by the Respondents. Service of the documents was duly effected upon the Respondents, but the Respondents declined to grant the Applicants access for the purpose for which it was ordered by the Court. The Court's orders were, however, stayed on 17th December, 2009. What is the lot of the Respondents?

Generally speaking, a Court order must be obeyed. It cannot be compromised as that is the only by which to uphold the authority and dignity of the Court. A Court order is valid and effective from the moment it is made. It is born mature and has no period of infancy, and therefore commands obedience forthwith. In this case, although the order enjoyed a short life of less than one day, under normal circumstances, it should have been obeyed while it lasted and the Respondents could not arrogate unto themselves the onus to stay those orders until the same were stayed by the Court. Until the moment they were stayed, they were in force and ought to have been obeyed before then.

The Respondents argue, however, that they were entitled to time to consult their Advocates. The Court grants that they are so entitled. From none other than the case of **ANTON PILLER K.G. v. MANUFACTURING PROCESSES LTD. & OTHERS [1976] 1 All E.R. 779**, Lord Denning is reported at page 783 as having rendered himself thus –

“Nevertheless, in the enforcement of this order, the Plaintiffs must act with due circumspection. On the service of it, the Plaintiffs should be attended by their Solicitor, who is an officer of the Court. They should give the Defendant an opportunity of considering it and consulting their own solicitor. If the Defendants wish to apply to discharge the order as having been improperly obtained, they must be allowed to do so. If the Defendants refused permission to enter or to inspect, the Plaintiffs must not force their way in. They must accept that refusal, and bring it to the notice of the Court afterwards, if need be on application to commit.” (Emphasis added)

In addition to the above, in the case of **BHIMJI v. CHATWANI [1991] 1 All E.R. 705**, the order required the Defendant to permit the Plaintiffs representatives to enter the premises to be searched “forthwith”. It was held that this did not mean that the Defendant must allow such entry at once or immediately, but only after there had been a reasonable period of time for him to obtain legal advice. Obviously, some provision should be made for enabling the Defendant to obtain legal advice provided the interests of the Plaintiff in effectively executing the order are not prejudiced by any delay that might be involved, for instance, by a Defendant taking advantage of the delayed commencement of the search to remove or destroy listed items in breach of the order. The standard form requires the Defendant “**to permit entry to the premises immediately**”, but that before permitting entry by any person other than the supervising solicitor, the Defendant may seek legal advice and apply to the Court to vary or discharge the order provided he does so at once.

In the instant case, it is not clear whether the Respondents intimated their desire to apply for discharge of the orders. But that was exactly what they did the day following service of the order, and they obtained a temporary stay of those orders. This led to the orders granted by the Court having lived for less than one day. In my view, the time taken by the Respondents to consult their lawyers, who advised that they needed time to study the documents served on the Respondents, and followed this with an application to discharge the orders the very next day, was not unreasonable. Furthermore, it is stated in Volume 1 of the Supreme Court Practice, 1999 at page 603 that –

“Defendants against whom an Anton Piller Order is made ex parte, can refuse immediate compliance and make an urgent application to have the order set aside, but they will do so at their peril, since if they fail they may be liable to penalties for contempt of Court and if they use the interval to breach the order e.g. by destroying records, the consequences will be extremely grave ...”

In this case, the Respondents were lucky to obtain a stay of execution of the **Anton Piller Order** upon them, and since the order was stayed only the following day, which I have observed was within a reasonable time, they were thereafter exonerated from having to obey the order.

A salient point raised by Mr. Chacha Odera for the Respondents was that the application did not have a Penal Notice, which requirement is deeply embedded in our judicial system, and consequently, he submitted, the application was incompetent. To this position, Mr. Alibhai for the Applicant responded by stating that the Courts in Kenya regard Penal Notice as important because that was the law in England in the past. However, England has moved away from there and he referred the Court to a decision by Justice Kimaru in the case of **GATIMU FARMERS CO. v. GEOFFREY KAGIRI KIMANI, HIGH COURT (NAKURU) CIVIL SUIT NO. 302 OF 2004** wherein the learned Judge quoted paragraph 65 of Halsbury's Laws of England, 4th Edition, Volume 9 wherein it is stated –

“Where an order requires the person to abstain from doing an act, it may be enforced, notwithstanding that service of a duly indorsed copy of the order has not been served, if the Court is satisfied that, pending such service, the person against whom enforcement is sought has had notice of the terms of the order either by being present when the order was made, or by being notified of the terms of the order, whether by telephone, telegram or otherwise.”

I notice from the wording of this quotation that the same refers to orders which require persons to abstain from doing specified acts. In the instant matter however, we are dealing with the opposite whereby a person is compelled to do and not to abstain from doing an act. Even worse, the order dealt with in this matter is not an ordinary order to do an act, but an **Anton Piller Order** which, under normal circumstances, takes the Respondent by surprise without any prior notice. Secondly, Mr. Alibhai contends that England has moved away from the regime of providing Penal Notices. He did not refer to any specific authority on that point except, indirectly, to the case of **NICHOLLS v. NICHOLLS [1997] 1 WLR 314** which deals with a modern approach to the exercise of discretion in which Lord Woolf MR said at page 326 –

“Like any other discretion, the discretion provided by the Statutory provisions must be exercised in a way which in all the circumstances best reflects the requirements of justice. In determining this the Court must not only take into account the interests of upholding the reputation of civil justice in general. Today, it is no longer appropriate to regard an order for committal as being no more than a form of execution available to another party against an alleged contemnor. The Court itself has a very a substantial interest in seeing that its orders are upheld. If committal orders are to be set aside on purely technical grounds which have nothing to do with the justice of the case, then this has the effect of undermining the system of justice and the credibility of the Court orders. While the procedural requirements in relation to applications to commit and committal orders are there to be obeyed and to protect the contemnor, if there is non-compliance with the requirements which does not prejudice the contemnor, to set aside the order purely on grounds of technicality is contrary to the interests of justice. As long as the order made by the Judge was a valid order, the approach of this Court will be to uphold the order in the absence of any prejudice or injustice to the contemnor as the consequence of doing so.”

With respect, to the extent that these words relate to the setting aside of a Court order, it is premature to use it in the context of this application which deals with committal for alleged disobedience of a Court order rather than the setting aside of that order. The time for that is still to come. Meanwhile, if this Court had a discretion as to whether an **Anton Piller Order** should bear a Penal Notice or not, it would take the direction that such an order should have such a notice. An **Anton Piller Order** is a draconian order in the sense that it takes the Respondent by surprise, and this is the more reason why such a Respondent should be forewarned of the dire consequences of disobeying such an order.

In view of the fact that the law allows Respondents such as those in this case some time to consult with their lawyers, and take appropriate steps within a reasonable time to discharge the **Anton Piller Orders**, I find that the Respondents herein are not guilty of laches as they applied for the orders to be set aside the following day and the orders were stayed. I therefore find that the Respondents are not in breach of the Court order and that this application accordingly fails. Given the nature of this matter, and in the circumstances of this case, I don't find it prudent to order costs in favour of the Respondents. Each party will therefore bear its own costs.

It is so ordered.

Dated and delivered at Nairobi this 17th day of May, 2010.

L. NJAGI
JUDGE