



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

(NAIROBI LAW COURTS)

Miscellaneous Application 1623 of 2005

IMAGE APPARELS LIMITEDPLAINTIFF

Versus

FREIGHT IN TIME LIMITED.....DEFENDANT

RULING NO. 2

On the 3rd day of October 2008 this court, delivered a ruling herein and made the following final orders:-

1. *“Prayers 3 where of which prayed for an attachment of the respondents property to the tune of Kenya shillings 8 (eight) million scaled down to Kshs. 1,351,430.00 as at the time of argument is disallowed for the reasons given.*

2. *prayer 2 thereof which seeks to commit:*

(i). *Mr. Karim Sayed*

(ii). *Shantilal. Barma, Shah*

(iii). *Linah Bharat Shah*

(iv). *Hasit Shantilal Shah*

(v). *And Amit Shah*

To civil jail as officers and general managers and or Directors of the Respondent company is allowed to the extend that each of the persons named is fined Kshs. 350,000.00 each in default each to serve 6 months imprisonment in jail.

3. *The fines in number 2 above to be paid within 14 days from the date of the making of this order.*

4. *In default of number 3 above, each of the persons named in number 2 above to be arrested immediately and then committed to jail to serve the 6 months civil jail ordered*

5. *The applicants will have costs of the proceedings”*

The respondent became aggrieved by the said orders and moved to the Court of Appeal and filed a notice of appeal, dated 8th day of October 2008 and lodged on the same date, marked as annexure AS4 annexed to the affidavit in support of the application. Then as a precautionary measure to avoid execution before the disposal of the appeal, the Respondent/applicant moved to this court, under certificate of urgency, and presented an application dated 13th October 2008 and filed the same date. It is brought under order XLI rule. 4 and order L rule 1 CPR. 4 prayers are sought

1. *“That this application be certified as urgent and service thereof be dispensed within the first instance and the matter be heard exparte.*
2. *That a temporary stay of execution of the decision, Ruling orders delivered on 3rd October, 2008 be granted pending inter partes hearing and determination of this application.*
3. *That there be a stay of execution of the decision, ruling or order delivered on 3rd October 2008, pending the hearing and determination of the applicants’ application and then filing and hearing of intended appeal from the ruling dated 3rd October 2008.*
4. *That the costs of this application be provided for.”*

The grounds in support are set out in the body of the application, supporting affidavit, further affidavit and oral highlights in court. The major points high lighted by the Applicant/respondent are simply a reiteration of the content of the grounds, in the body of the application and supporting affidavit as well as further affidavits and these are:-

- They were aggrieved by the decision of this court, dated 3rd October 2008, and are desirous of appealing against the same, and in fulfillment of that desire, they have already filed a notice of appeal in the Court of Appeal, dated and filed on 8/10/2008. They have gone further and applied for proceedings for purposes of preparations of the record of appeal.

- That they applied orally for stay pending appeal, soon after the delivery of the ruling, but the court, declined to grant the same hence, this application. It is their stand that if stay is not granted, the execution which is imminent will be carried out and the Applicant /Respondent stands to suffer irreparable loss and damage because of the following:-

(i) That operation of the applicant will be greatly affected and brought to a halt in the event that the Director and persons cited in the ruling are committed to civil jail.

(ii) That one Karim Sayed cited for contempt was not even a Director of the company at the time of the alleged breach, and the rest were not personally served with the documents.

(iii) The intended appeal will be rendered nugatory if stay is not granted and payment of a fine effected and or civil jail served as at the time the appeal will be heard, and determined more so when service of civil jail cannot be reversed should the appeal succeed.

(iv) They maintain that, maintaining the status quo pending appeal will not prejudice the Applicant/respondent in any way, compared to the prejudice and hardship that the Respondent/Applicant will suffer if the execution of the said orders is carried out.

- They are willing to deposit security for the due performance of the decree should the appeal fail.

- They also maintain that they have an arguable appeal with a likelihood of success, because according to them, the learned judge misdirected herself in her findings on the following:-

(i) That the Applicants had acted in contravention of court orders dated 9th March 2005 and 27th October 2005, yet the applicants’ were never personally served with court documents and orders, above,

orders having been varied and directed to the Auctioneers Jumbo Air Link.

- (ii) In failing to appreciate that committal orders are to be issued sparingly in most plain and obvious cases, and only in special circumstances which did not exist in the instant case.
- (iii) In failing to take into account the fact that the Respondent/applicant did not also file a written authority on behalf of the company as, she wrongly held in striking out the Respondents affidavit dated 26th February 2007.
- (iv) In failing to take into account the pleadings filed by the applicant.
- (v) In taking into account extraneous matters in arriving at her decision.
- (vi) In finding that the respondents proved that the persons cited were directors and or officers of the company as at the time of the alleged breach.
- (vii) In finding that the applicants had satisfied the conditions as required in the contempt proceedings under the law in force in Kenya.

In his oral high lights counsel for the Respondent/Applicants simply reiterated the content of the grounds in the body of the application, and the supporting affidavit, and annexures namely allegations that only one contemnor was served, response was struck out for failure of securing authority from the company, and yet the Applicant/respondent affidavits also had no such authority, there was no proof that the persons cited were directors of the said company, as at the time they were cited, court, orders, that were operational then, had been varied, and directed at the Auctioneers and as such there was no orders capable of being breached by the Applicants/Respondents, as they had been absolved. The application for contempt was defective, as the application for leave had been withdrawn, and as such the applicant/Respondent did not comply with the conditions laid down in order 52 of the supreme court of England. The court, also took into consideration matters which had not been canvassed in that the Applicants/Respondent never faulted the Respondent/applicants affidavit and yet the court went a head on its own to fault it. They also complain that the fine was excessive, which if paid will cripple the operations of the Respondent/applicants, and will thus be greatly prejudiced. The court failed to note that the decree of the lower court, sought to be executed by contempt of court proceedings was never annexed by either party, and also failed to note that the judgement which had given rise to the release orders had never been set aside.

Turning to the Applicants/Respondent replying affidavit, they contend that the replying affidavit does not answer or controvert the content of their depositions. It is faulted in that it has no authority to depone, the same either filed or served. Further that contrary to the depositions of the applicant Respondent, it is not for this court, to determine the merits and the demerits of the appeal, as that is the preserve of the court of appeal. Add that as stated in their papers filed, they are willing to abide by any condition for stay that may be set by this court.

The Applicant/Respondent have moved to oppose that application for stay, on the basis of the grounds set out in the Replying affidavit sworn by one Remesh Shah on 7th day of November 2008 and filed the same date. The salient features of the same are as follows:-

- The supporting affidavit to the application has been sworn by a person on behalf of others who have not given him authority to do so.
- The appeal filed has no merit because:-
 - (i) All the contemnors were served and R/S filed in court, and there is no way these were ever challenged or the process server called for cross-examination and therefore the Respondent/Applicants belated complaint on lack of service is mischievous and cannot stand .

- (ii) Failure to call the process server for cross examination is sufficient proof that there was proper service and the R/S filed in court, stood as they were.
- (iii) Maintain that it is not true that the orders of 9/3/2005 and 27/10/2005 were varied to exclude the Respondent/applicant, but they only joined the Auctioneer as a 3rd party, but stood to bind the Respondent /applicant as the principal party to the suit, because the Auctioneer was its agent.
- (iv) Deny the contention that committal orders are to be granted sparingly and only in very clear and special circumstances. These are meant to issue to protect the dignity and integrity of the court, once there is confirmation of the disobedience of the court, orders is made. These therefore cannot be issued sparingly, when the dignity, and integrity of the court, suffers.
- (v) The allegation that the persons committed for contempt of court, orders, are not directors, is belated and cannot be raised now.
- (vi) Allegation of suffering of substantial and irreparable loss by the Respondent/Applicant, if the orders of stay are not granted, has not been demonstrated as no evidence has been put forward to support the same.
- (vii) This is further proved by the fact that if the fine is paid, and the Respondent/applicants succeed on their appeal, the money which will be in the safe custody of the court, will be refunded back to them.
- (viii) Still maintain that to date the Respondent/applicants have refused to purge the contempt much to the great prejudice, detriment and suffering of the applicant/respondent whose goods were unlawfully attached and when the court, ordered their return, the Respondent/applicants refused to return the same.
- (ix) Contend that in fact the Respondent/applicant should not be given any audience in this court, before they purge their contempt.
- (x) Contend that granting a stay of the orders complained of, will amount to confirming that the Respondent/applicants can act in contempt and with impunity to court orders and then hope to get away with it.

In their oral high lights, learned counsel reiterated the content of the affidavit, namely, that the applicable ingredients such as offering of security have not been met, the ruling had an option either to pay a fine or go to civil jail, there is no way the money will get lost as it is being paid into court. The citing of the applicants for contempt was proper as the Respondent/Applicant cannot dispute the fact that they appealed against the release orders, and the appeal was dismissed, still maintain that proof of directorship was never an issue before this court, during the contempt of court orders proceedings, and as such it cannot be raised at this stage. Neither can it be raised on the intended appeal stage as it is a new issue. There was nothing wrong in the variation of the lower court, orders, to include the Auctioneer, because he was an agent of the principal, and the court as well. They have not flouted the procedure, because leave was sought and obtained before presentation of the substantive application against the same persons. The courts', digression and dealing with issues not raised by the party, is defended because the court, has inherent jurisdiction to deal with any issues on the record, whether canvassed or not, and as such the court, cannot be restricted in the exercise of its judicial discretion. Still maintain that service was proper, as the same was not challenged at the appropriate time, whereby the process server could have been called to be cross-examined on the same. The court, urged not to grant an order of stay because in doing so the courts' will just be extending the Respondents/applicants action in contempt. The court, was lastly urged to note that the applicant/Respondent has suffered for long at the wrongful action of the Respondent/Applicant and as such they have come to this court with unclean hands and they should not be indulged.

In response to that submission the Respondent/applicants counsel, maintains that they are within the ingredients established for the granting of relief sought, because, it has been made first to the court, which made the orders complained of in the first instance, appeal has already been filed and the amount ordered

to be paid is high. Still maintain that the people cited were not proved to be Directors. That the moment the orders stood varied, the Principal stood absolved from responsibility as it had no tool with which to force the agent to act. Still maintain that since the application for leave was withdrawn the leave granted lapsed and as such fresh leave was required before the substantive application could be presented.

Still maintain that the general rule is that each contemnor should have been served. As for the merits and demerits of whether there was contempt or not, this will be determined by the court of appeal. They have also moved to this court, without unreasonable delay, and as such they have acted diligently and have also demonstrated the likelihood of suffering irreparable loss and prejudice if stay is not granted.

On the courts assessment of the facts herein, it is clear that what is before this court, is an application for stay pending appeal, which appeal as per the documents exhibited herein, it has already been filed firstly by lodging of the notice of appeal, and secondly by lodging the appeal itself. As such there is no doubt that an appeal has been lodged to the court of appeal. This being the case, what this court, has to bear in mind is that having lodged the said appeal, the Respondent/applicant is entitled to exercise his undoubted right of appeal the exercise of the said undoubted right of appeal is not being hindered by the applicant/Respondent herein. The reason why the parties are still battling in this court, as opposed to the court of appeal, is because the Respondent/applicant intends to seek stay of execution of the order appealed against and is simply complying with the requirements of the rules, that stay be sought in the court, appealed from first before seeking the same from the court, appealed to, whether granted or declined by the court appealed from. This being the case, the obligation of this court, is simply to determine whether the ingredients for granting the same have been satisfied or not.

These ingredients are found in the provisions of law cited namely order 41 rule 4 (2) of the CPR. These stipulate that, “*no order for stay of execution shall be made under this rule unless:-*

1. (a) *The court, is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay, and*
- (b) *Such security as the court, orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”*

Applying these ingredients to the rival arguments herein, the court is satisfied that the ingredient of presentation of the application without undue delay has been satisfied, as the ruling was delivered on 3/10/2008, where as the application for stay was in the first instance presented orally in court, on the same date, declined by the court, prompting the presentation of the formal one on 13th October 2008 which is the subject of this ruling.

As for offer of security indeed, all that the Respondent/applicant has told the court, is that they are willing to offer the same and abide by any conditions that may be set by the court. This court, is of the opinion that failure to specify the nature, and extend of the security to be offered does not disentitle the Respondent/applicant to the relief sought, as the court, has jurisdiction to turn that commitment into tangible security by setting the terms to be complied with should the court, arrives at the conclusion that stay sought should be granted.

The 3rd ingredient relate to a demonstration of likelihood of suffering substantial loss. The argument presented by both sides is on the record. The applicant asserting substantial loss will arise because if the fine ordered is paid, then the operations of the applicant will be crippled. As submitted by the Respondents’ counsel, this has not been demonstrated. The court, agrees with the respondents assertion of lack of demonstration of suffering of substantial loss because the liquidity position of the applicant was not laid before the court, to enable the court, assess the effects of taking out that money from the applicant would have on its operations.

Further it has been argued by the applicants’ counsel that it was not proved that all those cited were directors. If indeed it is true that most of those cited are not directors, then how will their fact of paying fines of those who were not directors go to affect the operations of the company. The foregoing reasons

coupled with the fact that fines were going to be paid into court, and should the applicant succeed on appeal, the same can be ordered to be refunded to the applicants dislodges the assertion of these being a likelihood of suffering irreparable loss.

For this reasons, the court makes a finding that on the facts presented, no substantial loss can be suffered by the applicants if the fines are paid and this finding disposes off the first limb of substantial loss.

There is however the second limb of substantial loss, and that is going to civil jail, should the fine not be paid. In this courts, opinion, serving civil jail is irredeemable should the applicant succeed on appeal. Once 6 months are served, there is no way the universe can be reversed by the court, through the civil process, have it commanded to rewind itself and then compensate the contemnors for the period they were in carcerated. The court, is therefore satisfied that this is a genuine concern that the court, should not loose sight of.

Besides the statutory ingredients, there are those that have been developed by case law namely:

- (a). *“Demonstration of existence of an arguable appeal with a probability of success and;*
- (b). *Prevention of the appeal from being rendered nugatory should the appeal succeed.”*

Applying these to the rival arguments herein, the court, is satisfied that in so far as the civil jail is concerned, the appeal is likely to be rendered nugatory if the same will be allowed after the jail term has been served. As for the arguability of the appeal, this court is not in apposition to assess that as the orders appealed against emanate from this court. It therefore follows that the best forum for this is the court, of appeal. The justification for saying so is found in the following factors:-

1. Service of the court, orders on the intended contemnors. This court gave reasons as to why it was satisfied with the content of the return of service. The Respondent/Applicant challenges that because there was no personal service. It is on record that the process server alleged that when he called at the Respondent /applicants’ offices, he asked for the Managing Director, and upon explaining the purpose of the visit the Managing Director, directed the process server to serve the secretary at the counter and that is what the process server did. Whether the upholding of service by this court, was erroneous or not it is for the court of appeal to decide.

2. Issue has been raised about failure to require proof that those cited were indeed Directors of the Respondent/applicant. It is on record that the substantive application sought orders from the court, to commit the persons named. The replying affidavit deponed that the deponent was a director and had authority to depone on his own behalf and on behalf of the other directors. Whether this court, should not have taken that information on its face value, and whether it should have gone further to require proof is for the CA to determine.

3. There was also mention about failure to comply with the requirements of the provisions of the order 52 of the supreme court of England rules thus making the application for contempt defective. A reading of the provisions of that order, makes it clear that there are two distinct procedures for accessing the relief of punishment for contempt of court orders. Namely one to the Divisional court, and the other one to the other courts of England. It specifies that application for contempt of court orders, directed to the Divisional court, have to be preceded with the lodging of statement to the office of the Crown, which is the equivalent of the Attorney General’s office, followed by an application for leave. Issue will arise for determination as to whether the high court of Kenya, is equivalent to a Divisional court in England. Azangalala J in a ruling delivered on 25th July 2008 in the case of ADOPT A LIGHT VERSUS NAIROBI CITY COUNCIL NAIROBI HCCC NO. 637 OF 2006. Was of the opinion that, *“a wholesale adoption of the entire English procedure would impede the proper administration of justice.”*

Ransley J as he then was in the case of FIDELITY COMMERCIAL BANK LIMITED VERSUS SHAM SHEVALI KARIM KURJI AND ANOTHER NAIROBI MILIMANI COMMERCIAL COURT CASE

HCCC NO. 1276 OF 2001, decided on 30th day of January 2006 opined that “*there are no Divisional courts’, in Kenya and that the high court, of Kenya, is equivalent to the Queens Bench of England.*”

Where as Bosire J as then was (now JA) in the case of ISAA WANJOHI AND ANOTHER VERSUS MACHARIA NAIROBI HCCC NO. 450/95 made the following observation:-

“It would appear to me that applications for committal for contempt of court made in this country fail in the category of those applications in England made to courts other than the Divisional courts. Consequently no leave would ordinarily be necessary although it is common practice in Kenya improperly so, in my view to commence committal proceedings in every case by an application for leave. The authority for that cannot be possibly the rules of the supreme court of England”

The afore set out divergent views of the superior courts inclusive of this one can only be harmonized by the CA.

4. There was also issue raised about taking into account extraneous matters. It is for the CA to decide whether this court, exercised its inherent jurisdiction judiciously and with reason or not. The same reasoning applies to the requirement for the filing of the authority to depone as to why the court, was biased in penalizing one party and leaving another or whether it was a case of in advertence.

For the reasons given, touching on issues raised on the arguability of the appeal, this court, is of the opinion that it is not the right forum to decide conclusively on the issue of stay pending appeal. The best forum for the assessment is the CA as it will be in a position to determine the arguability of the appeal, and there after make appropriate orders for stay pending appeal.

It is on record that the proceedings are already ready, and the appeal has been filed. This being the case, all that the applicant needs is a temporary order of stay pending presentation of an application to the CA to seek the same stay orders from the court appealed to. In this courts, opinion, a period of 45 days, from the date of the reading of the ruling will be sufficient.

The court therefore grants the Respondent/applicant 45 days stay pending appeal from the date of the reading of the ruling.

(2) Thereafter the Respondent/Applicant will be at liberty to seek stay from the court of appeal as the court appealed to.

(3) The Applicant/Respondent who was responding to the application will have costs of the application.

DATED, READ AND DELIVERED AT NAIROBI THIS 15TH DAY OF MAY 2009.

R.N. NAMBUYE

JUDGE