

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISCELLANEOUS CIVIL APPLICATION 214 OF 2005

KENYA REVENUE AUTHORITY RESPONDENT

A N D

DEVJI MEGHJI & BROTHERS LTD..... INTERESTED PARTY

EX PARTE

W. E. TILLEY (MUTHAIGA) LTDAPPLICANT

R U L I N G

By this application, the plaintiff in this matter seeks orders that-

- 1. One Vallabdas Devji Patel be committed to civil jail for a period not exceeding 2 years for willfull disobedience of the court order given on 4th May, 2005; and*
- 2. An order of sequestration be given to sequester assets and property of Devji Meghji & Brothers Ltd of a value equivalent to Kshs. 25,000,000/- for willfull disobedience of the consent order recorded on 4th May, 2005; and*
- 3. The costs of this application and of the application for leave be provided for.*

The background to this application is that Vallabdas Devji Patel is alleged to be a director of Devji Meghji & Brothers Limited, which is in this matter as an interested party. Its interest arises from an auction sale conducted by Kenya Revenue Authority on 19th October, 2004, at which Devji Meghji & Brothers bought some goods. It is the Plaintiff's case that those goods rightly belonged to them and that the same were unprocedurally sold by Kenya Revenue Authority to the Interested Party. Following an application for an order of certiorari to bring to the High Court and quash the decision of the Kenya Revenue Authority to sell the goods and also quash the subsequent sale, the court made an order by consent of the parties on 4th May, 2005. The essence of that order was that the goods in dispute would remain in the possession of the Interested Party and would not be sold or removed until 9th June, 2005, which was the date on which the application was fixed for hearing. A copy of that order complete with a Penal Notice was served on Vallabdas Devji Patel on 12th May, 2005.

The plaintiff now alleges that the Interested Party has sold the goods to a third party in breach of the court order and thereby committed contempt of court. After considering all the pleadings especially the affidavits filed in this matter, I find that the basis of the alleged breach of the court order is a letter dated 4th May, 2005 and addressed by Devji Meghji & Bros. Ltd to Eldoret Parkers Limited. The letter refers to an agreement between the two parties for the sale of the machinery which was the subject matter of the court order of 4th May, 2005. This letter cannot be construed as contemptuous of the court order since the order was served on Vallabdas Patel on 12th May, 2005, which was long after the letter had been written. If the sale had been agreed upon on or before 4th May, 2005, the subsequent letter dated 30th May, 2005, enclosing a receipt for Kshs. 1.5million would be of no probative value to this application since the sale had taken place before the receipt was issued and, possibly, even before the order was made.

It is significant that in paragraph 7 of his affidavit sworn on 7th June, 2006, the Plaintiff's Operations Manager, William Kinyanjui, avers that-

“If it is true that the interested party sold the said equipment then it did so in contempt of the order given by this court on 4th May, 2005 ...”

The deponent betrays himself by engaging in speculation. He is not certain whether or not the Interested Party sold the equipment. Otherwise he would not be saying *“If it is true ...”* And yet, O. XVIII rule 3(1) of the Civil Procedure Rules requires that affidavits be confined to such facts as the deponent is able of his own knowledge to prove!

In Mombasa HCCC No. 128 of 2006, the Plaintiff filed suit against the Devji Meghji & Bros Ltd, Eldoret Packers Ltd, and Kenya Revenue Authority in respect of the same equipment. In that case, on 30th July 2007, Counsel for Plaintiff is on record as saying both Devji Meghji & Bros Ltd, on the one hand, and Eldoret Packers Ltd, on the other hand, were agreed that there was no sale – a factor which led to an application for the suit against Eldoret Packers Ltd to be withdrawn. If there was no sale, then there was no breach of the court order and, ipso facto, there was no contempt of court.

In the context of these disparities, I don't think that the plaintiff has adequately demonstrated a case for contempt of court. Let it suffice to quote from MUTITIKA v. BAHARINI FAM LTD [1985]KLR 227 in which the Court of Appeal said, at page 234, of the standard of proof in contempt of court proceedings-

“... In our view the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt ...”

Applying that standard to this case, I am satisfied that the plaintiff has not established breach of the court order even on a balance of probabilities. By reason thereof, this application must fail and it is hereby dismissed with costs to the Interested Party.

Dated and delivered at Mombasa this 26th day of June, 2009

L. NJAGI

JUDGE