REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Misc. Appli. 114 of 2007

ALLDEAN SATELLITE NETWORK (K) LTD……APPLICANT

Versus

THE KENYA ANTI-CORRUPTION COMMISSION & ANOTHER……....
……RESPONDENT

RULING

By a Chamber Summons dated 19th February 2007, the ex parte Applicant Alldean Satellite Networks (K) Ltd. moved this court under Section 8 of the Law Reform Act Chapter 24 Laws of Kenya and order 53 Rules 1, 2, 3 and 4 seeking several Judicial Review Orders of certiorari, mandamus and prohibition (2 (a) – (i)). At prayers J and K the applicant sought that the leave if granted do operate as stay of all the proceedings in the Chief Magistrate's Court (CM CR.) Kibera Nairobi in Misc Crc App 55 of 2006 until the hearing and determination of the proceedings herein and secondly that the leave do operate as stay of the magistrate's order made on 7th February 2007 in Misc Application 55/06.

The court granted leave in terms of prayers 2(a) (b) (c) (d) (g & i) and also granted prayer (j) and (k) that the leave granted do operate as stay for 45 days. The court directed that the substantive Notice of Motion be filed and served within 10 days. The substantive Notice of Motion was filed on 28th February 2007

On 20th April 2007, the applicant filed this Notice of Motion pursuant to S. 5 of the Judicature Act seeking orders that Henry Mwithia, Julie Adell Owino, Kipsang Sambai and the Senior Principal Magistrate Kibera, K.W. Kiarie be committed to prison for failure to comply with the order of the court given by this court on 20th February 2007 and also costs of the application.

That Notice of Motion is supported by an affidavit sworn by David Raffiman on 20th April 2007 and filed in court on the same day. The Notice of Motion was opposed and Henry Mwithia, Kipsang Sambai, Jullie Adekll Owino all filed Replying Affidavits dated 10th May 2007 and filed in court on the same date. The 1st Respondent also filed a notice of Preliminary Objection dated the same day and skeleton submissions, Mr. Kiage also filed a Notice of Preliminary Objection on 14th September 2004 dated 3rd September 2007 in opposition.

Mr. Shah appeared for the Applicants with Mr. Kurgat and Mr. Ongicho , Prof Muigai for the 1st Respondent and Mr. Kiage for the 2nd Respondent.

It is the Applicant's case that on 27th March 2007 Kenya anti Corruption Commission (KACC) raided the premises of the Applicant and took away some documents and materials armed with a warrant from the Chief Magistrate's Court Kibera. That this is despite the fact that the Respondents had been served with the Notice of Motion dated 19th February 2007 and order of the court dated 20th February 2007 (DR 1); The process server Samuel Mwaura Kimani swore the affidavit dated 22nd February 2007 (DR 2 b). Mr. Shah submitted that though all the contemnors have denied having been served in their replying affidavits, once the 1st Respondent was served, that bound all its officers and that none can claim lack of service. That the order had a penal notice on the 2nd page of the order and that the Penal Notice can never be part of the order as urged by the Respondents. Counsel relied on the case of **VICTORIA PUMPS LTD V KPA (2002) 2 KLR** for the proposition that the Penal Notice need not be part of the order but can be appended.

In respect to the issue of service, it was the Applicants submission that there are two affidavits sworn by Martin Njau Njuguna dated 27th April 2007 and a supplementary affidavit dated 24th May 2007 in which the process server depones that when he went to serve KACC offce, one Asha Hamisi received the documents perused them and indicated she was going to call the contemnors but returned claiming to have been authorized to sign them and a stamp was affixed. That the said service amounts to personal service on the three KACC officers. Further to above it was submitted that in Jullie Adell's affidavit of 16th March 2007 she referred to the said order at paragraph 7 and was therefore aware of the stay order. Further that Mr. Raffman has deponed that when the search was conducted, the officers attention was drawn to existence of the stay order. Counsel relied – **ROYAL MEDIA V TELCOM (2001) 1 EA 210** where the court held that once one is aware of the court's orders they can be punished for contempt.

It is the applicants contention that the Chief Magistrate's Court Kibera was in contempt of the court's order in that the Respondent filed Misc Cr. Appeal 81/07 on 27th March 2007 which sought a search warrant to investigate premises of Raffman, Dhanji, Elms and Virdee in connection with Anglo-Leasing Type contracts and that the Notice of Motion was supported by a lengthy affidavit of one of the contemnors, Kipsang Sambai and that the said Sambai referred to documents and materials obtained from the Applicant during the 1st search which is subject to an order of stay of 20th February 2007 as the court had stayed any other further searches of the Applicants premises with the same effect and that the magistrate's court disobeyed the court's order by giving orders issuing the search warrants on 27th March 2007. That all contemnors were in contempt of the court's order as Kipsang swore an affidavit in support of an application for a search warrant while Adell and Mwithia when searching the Applicants premises were made aware of the court's orders. Counsel submitted that whereas judges may not be punished for disobedience of Court's orders, Magistrates can and for that proposition he relied on the case of **R V WIMBLERON JUSTICES (1953), ALL ER 390** which counsel said, it was held that judges are subject to orders of prohibition if they act in excess or without jurisdiction. That the Chief Magistrate's Court is subject to this court's jurisdiction and does not have the same protection as the High Court and can be punished for contempt.

In addition to the above, it is the Applicants submission that the contemnors have produced information and documents obtained from the Applicant's premises contrary to the court's order of 20th February 2007 by Kipsang swearing an affidavit and annexing those same documents confiscated from the Applicant's premises.

Prof. Muigai, Counsel for the 1st Respondent in opposing the motion relied on submissions filed in court on 3rd December 2007 and affidavits of Adell Owino, Kipsang Sambai and Henry Mwithia. Counsel addressed 6 questions to be addressed by the court;

(a) Whether S. 5 of the Judicature Act has been properly invoked;

(b) Whether the alleged contemnors were served with the order of 20th February 2007 that was allegedly breached by them;

(c) Whether a Penal Notice was properly endorsed on the Order of 20th February 2007;

(d) Whether the order of 20th February 2007 is unambiguous and intelligible;

(e) Whether the alleged contemnors were served with the Application for committal to prison for contempt;

(f) Whether the second warrant issued by the chief Magistrate's Court in 81/07 Kenya Anti-Corruption Commission v Guy Spencer Elms, David Raffman, Dhanji Virdee and Primarosa Flowers Ltd were obtained in circumvention of the order of 20th February 2007.

It was Counsel's submission that the application is inviting this court to ignore the entire jurisprudence on contempt of court procedures on the basis that they are undue technicalities.

That the jurisdiction invoked is under the Judicature Act and it is up to the Respondents to demonstrate that they came under S. 5 of the judicature Act. That our law is Order 52 of the Supreme Court Practice Rules and that they have to comply with order 52 R 2 (3) of these Rules. That the rule is couched in mandatory terms. Counsel relied on the cases of **CHILTERN DISTRICT COUNCIL V KEANE (1985 1 WLR 619. OSOTHO & CO ADV V LABHSONS LTD MILIMANI MISC 160/05** and **NYAMODI OCHIENG NYAMOGO V KP & TC CA 264/03** where the Court's held that failure to conform to the Rules renders the application fatal and rules have to be strictly complied with. That having failed to comply with the said Rules it should be struck out.

On the 2nd issue of whether the order of 20th February 2007 was served on the cited contemnors, Counsel observed that in such cases, service of the order is critical and that the applicant did not seem to be sure of their stand in that they claim that personal service is not necessary and at the same time claim to have served. That the process server claimed to have been directed by the legal officer to a clerk on 21st February 2007. Counsel however urged that an application for contempt should not have been served on a clerk in an institution like KACC and there was no indication that any attempt was made to serve the contemnors personally. Counsel relied on the case of **IBERIAN TRUST LTD V FOUNDERS TRUST INVESTMENTS CO LTD. (1932) 2 kb 97-91** for the proposition that for a corporate body service has to be on the directors. Counsel also relied on **NYAMODI CASE; - HALSBURY'S LAWS OF EVICTION 4TH ED VOL 9 page 37 Page 6** and **MCKEOWN V JOINT STOCK INSTITUTE LTD (1899) 1 CH 671 & NRB HCC 23/04 BEDROCK HOLDINGS V ERICK OKEYO.** The courts in the above cited cases emphasized personal service because one cited for comptempt must know what he/she is alleged to have breached as he is likely to face penal consequences.

As regards the Penal Notice, Counsel relied on the **VICTORIA PUMPS CASE (SUPRA)**. Counsel said that the Penal Notice was not apprehended to the order and that it was not part of the documents served.

On the 4th issue it was Prof. Muigai's contention that for one to be in contempt of court order, the order must be capable of being understood by the person to whom it is directed. That the stay order issued on 20th February 2007 stays further proceedings in 55/06 and KACC has no capacity to proceed with proceedings. That the KACC officers went for investigations at the Applicant's offices. That this is not disobedience but a complicated case of what a stay of proceedings means in respect of an investigating body like, KACC.

That the order is not clear as to whether it was supposed to stop any other investigation relating to the Applicant company. It was the Respondent's view that the order was not capable of obedience and that the subject that was taken to court was different from what was under investigation. It was also urged that if the Respondents were to be stopped, then the operations of the Respondent would be brought to its knees as there can be no order as to cover everything. It had to be specific.

As regards service of the motion on the Respondent's Counsel submitted that like the order of the court the service of the notice violated the rules on service.

In response to the allegation that the orders of 27th March 2007 were meant to circumvent the order of 20th February 2000 it was submitted that as per depositions of Sambai, the complaint under investigation involved Prima Rose Flowers Ltd which KACC was interested in and lastly that there is no evidence to suggest willful disobedience of the court's order.

Mr. Kiage opposed the application and associated himself with Prof. Muigai's submissions and relied on his Preliminary objection which had 4 points:

a) That the application constitutes a vile and untenable assault on judicial independence in so far as it seeks to punish bona fide exercise of judicial office;

b) That the 2nd Respondent is statutorily and on first principles immunized from the proposed sanctions in the exercise of his office;

c) That the application is incompetent bad in law and misconceived as it seeks to pierce the 2nd Respondent's judicial privilege.

(d) The Applicants have by their own showing failed to meet the basic prerequisites of personal service complete with notice of penal consequences absent which renders the application a non starter.

Counsel urged that it was clear and paradventure that the order allegedly disobeyed was never served. That as per affidavit of Samuel Mwaura dated 22nd February 2007, service was made on the Chief Executive Officer – Kagwi who did not state that he received it on behalf of Mr. Kiarie. Mr. Kiage also relied on the **VICTORIA PUMPS CASE** where it was held that personal service was a prerequisite to a case of contempt.

The 2nd limb of his objection is that the application pierces the 2nd Respondent's judicial privilege provided by S.128 of the Evidence Act and that the 2nd Respondent need not say anything.

Counsel urged that the magistrate presided over Misc. 81/07 which was made pursuant to S.118 of the Criminal Procedure Code which allows a magistrate to issue a search warrant. That even though Mr. Raffman says that the magistrate should have taken notice of the order of 20th February 2007 he could only do so if he was aware of the said order.

In the case of **RE BRAMBLEVALE LTD (1969) ALL ER 1062**, the court said:-

"**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 reasonable doubt……"**

See also **GATHARIA MUTITIKA V BAHARINI FARM LTD (1982-88) 1 KAR 863** The Court of Appeal reiterated that the standard of proof is higher than on a balance of probability but not as high as proof beyond reasonable doubt. Guided by the above decisions, it is upon the Applicants to prove that the contemnors willfully disobeyed the court's order of 20th February 2007 and the standard of proof is higher than the normal one in civil cases, that is on a balance of probability but lower than that required in criminal cases.

The law of contempt is that there must be personal service of the motion and order that has been allegedly disobeyed, on the contemnor. This is so that the contemnor knows which charge he is going to meet. That was the decision of the court in

(1) VICTORIA PUMPS CASE (supra);

(2) HCC 1333/03 HON. MWANGI KIUNJURI V WANGETHI MWANGI

(3) CHILTERN DISTRICT COUNCIL V KEANE (1985) CA 619 to list but a few.

The key question in this case is whether the 4 contemnors were personally served with the order of 20th January 2007 and the motion that was subsequently filed and if not, whether they fall under the exception to the generally accepted standard that the contemnor had sufficiently been notified of the order, that personal service would be done away with.

In the **ROYAL MEDIA V TELCOM KENYA (2001) 1 EA 210(213)** the court held that personal service may be dispensed with in situations like when the order is made in the presence of the contemnor.

In respect of Julie Adell, Henry Mwithia and Kipsang Sambai who have denied having been served, there is an affidavit sworn by Martin Njuguna Njeru dated 24th May 2007 in which he deposes that he arrived at Intergrity Centre on 20th April 2007, was directed to the legal officer Asha Hamisi, he informed her that he wished to serve the Notice of Motion dated 20th February 2007, she took them perused the Notice of Motion and claimed to be going to call the contemnors . She came back and said she had been authorized to accept service on their behalf and signed the reverse of the Notice of Motion and appended a stamp indicating she received them on behalf of the Director KACC and the names of the three were placed in brackets.

It is apparent that the three contemnors were never personally served with the Notice of Motion and no effort was made by the process server to do so.

In respect of the court order dated 21st February 2007, Samuel Mwaura Kimani the process server, in his affidavit dated 23rd February 2007, deponed that he went to Integrity Centre on 22nd February 2007 found a legal officer by name of S.M. Kimani who he served with the court order and that the said Kimani directed a clerk Peter Mbithi to accept service stamp and sign it. Again like with the Notice of Motion the process server made no effort to serve the contemnors personally.

The process server can not be said to have served KACC because KACC being a public body, the Director should have been served as that is the law regarding service of public or corporate bodies. In **MCKEOWN V JOINT STOCK INSTITUTE LTD (1899) 1 CH,** the court held that a corporation could only be held to have disobeyed an order if it was served on the director. See also **IBERIAN TRUST LTD V FOUNDERS TRUST & INVESTMENT CO. LTD – (1932) 2 K B 87:** I do find and hold that there was no personal service effected on the three contemnors either of the order or the Notice of Motion and they cannot be said to have been served or notified of the court's order or Notice of Motion when the contemnors went to do a search on 27th March 2008 as there is no evidence in support of that allegation. There was no attempt made to serve as required by the rules of service and these contemnors cannot be held to have wilfully disobeyed what they were not aware of. Even if one were to claim as alleged, that it is difficult to serve one at Integrity Centre. Sufficient effort should have been made to serve the parties concerned but not visit the place once., hand over the documents to strangers and purport to have served.

What of Mr. Kiarie the Chief Magistrate Kibera, was he served with the Notice of Motion and order of 21st February 2007? Again Samuel Mwaura, the process server swore an affidavit dated 22nd February 2007 in which he deposes that on arrival at Kibera Court he introduced himself to the Chief Executive Officer Mr. C.C. Kagwi and served him. Whereas the Executive Officer will usually receive process on behalf of the court, this was not the normal process. This service called for the attention of the magistrate personally as he could be subject to imprisonment if he did not obey. The process server should have endeavoured to serve the magistrate personally so that he may have known and been made aware of what was in store for him. Mr. Kiarie might have never known of the court's order and he cannot be said to have disobeyed it.

It is a prerequisite of the law of contempt that such an order bears a penal notice. The Respondents contend that there was no penal notice appended to the court order. Prof. Muigai submitted that what was served was not appended to the documents of 20th February 2007. Mr. Shah urged that the penal notice

was attached to the order at the last page. He relied on the **VICTORIA PUMPS CASE (supra)** in which the court said that the Penal Notice only needs to be appended I have seen the order that was exhibited. The penal notice is annexed on a separate page at the back.

In the **NYAMODI CASE (supra)** which Justice Warsame adopted in his decision in **BEDROCK HOLDINGS V ERIC OKEYO, NG 23** the courts held that the Penal Notice has to be endorsed on the order. In **VICTORIA PUMPS CASE** the court held that the Penal Notice should not have been part of the order but at the very end of the order, the court did not say that it has to be on a separate page attached to the order. As it is, one cannot rule out the possibility of the Penal Notice being attached to the order later. I believe the correct position should be and the practice is that the Penal Notice is endorsed on the order at the end of the order so that anybody reading the order cannot miss to notice the Penal Notice.

In the state in which the court order and Penal Notice were arranged this court is persuaded that the same was not served with the court order and hence the order as served was defective and could not have warned the contemnors of the consequences of disobedience.

Can the Chief Magistrate Mr. Kiarie, be cited for contempt? S.6 of the Judicature Act immunizes judicial officers (judges and magistrates) from civil liability for acts done during performance of their duties. For clarity, the Section reads "**S. 6 No judge or magistrate, and no other person acting judiciously shall be liable to be sued in a civil court for an act done or ordered by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction, provided he at the time, in good faith believed himself to have jurisdiction to do or order the act complained of; and no officer of a court or other person bound to execute the lawful warrants; order or other process of a judge or such person shall be liable to be sued in any court for the execution of a warrant, order or process which he would have been bound to execute if within the jurisdiction of the person issuing it."**

I emphasise this section because of Mr. Shah's submissions that whereas a judge has protection from civil liability for act done during the performance of his duties, magistrates do not have such protection. I have not seen any finding of the court in the **WIMBLEDON JUSTICES CASE (supra)** upon which Counsel relied for that proposition, that magistrate can be punished for contempt Mr. Kiarie is protected by S. 6 of the Judicature Act and in any event there is not sufficient evidence that he was aware of the court's order of 20th February 2007 when he allowed search warrants to issue against the Applicants on 27th March 2007.

It is the Respondent's submission that S.5(1) of the Judicature Act was not properly invoked S. 5 (1) of the Judicature Act stipulates as follows:

"**The High Court and the Court of Appeal shall have the same power for contempt of court as is for the time being possessed by the High Court of Justice in England and that power shall extend to the upholding the authority and dignity of subordinate courts."**

The Judicature Act does not provide the procedure by which an Applicant can move the court and the court refers to the Supreme Court Practices of England, Section 52 thereof. Basically that Section provides that contempt of court applications should be made like a judicial review application by the ex parte Applicant seeking the leave of the court ex parte, serving notice of the intention to commence proceedings on the Registrar, after leave is granted, the Applicant then files the notice of motion and the documents that support the Notice of Motion shall be the statement and the affidavits that accompanied the Chamber Summons application and the Notice of Motion has to be personally served on the person to be committed. Prof. Muigai submitted that the Applicant did not serve the mandatory notice under S.52(2)(3) of the Supreme Court Practice Rules of England. That therefore the Notice of Motion is fatally defective. The cases that were cited do indicate that there is a requirement of strict compliance with the said rules.

In the **CHILTERN CASE (supra)** the court said; "**where the liberty of the subject is involved, this court has time and again asserted that the Procedural Rules will be strictly complied with."**

In **HON MWANGI KIUNJURI'S (supra)** Justice Nyamu set aside the ex parte order for leave on grounds that the required service had not been complied with. I do agree with Prof. Muigai that the law applicable to contempt proceedings is that under S.5(2) of Judicature Act and the Section being silent on Procedure, the court invokes the Supreme Court Practice Rules, England and in my view not only did the Applicant flout the rule regarding the notice but did not approach the court by way of Chamber Summons as required but by Notice of Motion and even after the Notice of Motion was filed, the Applicant did not rely on the affidavit of the David Raffman which was filed in support of the Chamber Summons dated 11th April 2007 for leave, but Mr. Raffman filed another dated 20th April 2007 supporting the Notice of Motion. All procedure as per order 52 Supreme Court Practice Rules of England was thrown out of the window by the Applicant and that renders the whole Notice of Motion fatally defective. As observed in the cases referred to, this application touches on the liberty of persons and the rules should be strictly observed.

The Respondents also urged that the order that was obtained was not unambiguous and intelligible and the effect was only to stay the proceedings in the Chief Magistrate's Court Kibera, CRC 55/06 but nothing else. In the case of **MINISTER OF FOREIGN AFFAIRS TRADE and INDUSTRY V VEHICLES SUPPLIER LTD (1991) 4 ALL ER 65,** Lord Oliver had this to say of a stay Order;

"**A stay of proceedings is an order which puts a stop to further conduct of the proceedings in court or before a tribunal at the stage at which they have reached the object being to avoid the hearing or trial taking place. It is not an order enforceable by proceedings for contempt because it is not in its true nature, capable of being breached by a party to the proceedings on any one else……"**

In the **IRERIAN TRUST LTD CASE (supra)** the court held;

"**If the court was to punish anyone for not carrying out its order, the order must in unambiguous terms direct what is to be done."**

I am in agreement with the 1st Respondent's submission that on 20th February 2007 when the Applicants came for stay orders, the search warrants had already been issued by the Chief Magistrate's Court on 7th February 2007 and executed on the same day. The stay order could not prohibit any further proceedings in Misc 55/06 because those proceedings had been concluded. There were no proceedings in CRC 55/06 capable of being stayed. I recall that the thrust of the Applicants arguments in the Chamber Summons application for leave was that the Chief Magistrate did not have jurisdiction to issue the orders as he was not gazetted to handle KACC matters. Had the Applicants wanted to prohibit him from further dealing with any matter relating KACC in relation to them, they should have specifically sought such orders which they did not.

From the pleadings it is clear that the search allegedly conducted on 27th March 2007 pursuant to the warrants issued in CR App 81/07 relates to a company by name **PRIMA ROSA FLOWERS LTD**. It was a different investigation involving another entity all together the only common being the parties named as Guy Spencer Elms, David Raffman and Davinder Virdee. If the magistrate had not yet been gazetted as alleged in the present matter, then the Applicants should have filed a fresh application seeking Judicial Review orders, separate from the present one.

From all the observations in this ruling, the fact that the Application is not properly before this court, that the orders were not served on the contemnors and there was really nothing to be stayed that the contemnors could have disobeyed, I hereby dismiss the Notice of Motion dated 20th April 2008 with the Applicant bearing the costs.

Dated and delivered this 30th day of June 2008.

R.P.V. WENDOH

JUDGE

Read in the presences of:

Mr. Kurgat and Mr. Ongicho for the applicant

Mr. Ruto for the Respondents

Daniel: Court Clerk