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

CIVIL CASE 637 OF 2006

ADOPT A LIGHT ……PLAINTIFF

VERSUS

NAIROBI CITY COUNCIL ……..…….DEFENDANT

RULING

In a plaint filed on 21.11.2006, the plaintiff claimed ***inter alia*** an injunction restraining the defendant through its servant or agents from removing any advertising media placed by the plaintiff on authorized streets. And in a Chamber Summons filed simultaneously with the plaint under ***inter alia*** 9 Sections 3, 3A of the Civil Procedure Act and Order XXXIX Rules 1 of the Civil Procedure Rules, the plaintiff sought on a temporary basis an injunction to restrain the defendant from the same acts until the hearing and determination of the suit. The application was made on grounds which were set out on the face of the application.

On the same date the application was placed before Hon. Waweru, J who certified the same as urgent but declined to issue ex parte an interim injunction but directed that the application be heard inter parters on 27.11.2006.

On being served, the defendant instructed M/S Wetangula Adan Makokha & Company Advocates. It was Mr. Wetangula of that firm who appeared for the defendant on 27.11.2006. Mr. Havi also attended and informed the Court that he was representing – Outdoor Advertising Association of Kenya and Magnate Ventures Limited, intended 2nd and 3rd defendants respectively.

The defendant sought an adjournment which was granted and the application was fixed for inter partes hearing on 30.11.2006. In the interim the Learned Judge granted an interim injunction in the terms stated above. For the avoidance of doubt the Learned Judge clarified that the interim injunction did not authorize the plaintiff to re-erect bill boards that may have already been pulled down by the defendant and the interim injunction was to remain to force until the inter partes hearing of the application. Each party had liberty to apply.

On 22.2.2007 the plaintiff lodged a Chamber Summons expressed to be brought under the provisions of Order XXXIX Rule 2A (2) of the Civil Procedure Rules, the inherent power of the court and all other enabling provisions of the law. The main orders which the plaintiff sought were as follows:-

(1) That the Town Clerk of the defendant be arrested and committed to prison for a term not exceeding six months.

(2) That Alternatively the Legal Officer of the defendant, Mr. M. N. Ngethe, who was served with

the order of 27.11.2000, be arrested and committed to prison for a term not exceeding six months.

(3) That the court do make such other or further order under Order XXXIX Rule 2 A of the Civil Procedure Rules as may be necessary to meet the ends of justice.

The application was based on three grounds expressed as follows:-

(1) That the defendant has refused and/or failed to comply with the order of the Court made on 27.11.2006.

(2) That the defendant has proceeded to remove advertising frames placed by the plaintiff within the streets of Nairobi.

(3) That the defendant is exposing the plaintiff to civil action by removing the advertisement placed on the said roads which are subject to advertising contracts between the plaintiff and third parties.

The application was supported by two affidavits of one Esther Muthoni Passaris, the plaintiff's Managing Director and on Zacharia James Waweru, the plaintiff's Deputy Operations Officer. Both affidavits were sworn on 22.2.2007. The said Managing Director swore two further affidavits on 9.3.2007 and 27.3.2007.

On 16.5.2007, Counsel for the Town Clerk filed a notice of Preliminary Objection to the application on the following grounds:-

(1) That the application did not comply with the mandatory provisions of Section 5 of the Judicature Act.

(2) That the application is misconceived, incompetent, bad in law and fatally defective for being instituted without the leave of the court.

(3) That the application does not comply with the mandatory and applicable provisions of Order 52 of the Rules of the Supreme Court of England.

(4) That the applicant did not comply with the mandatory procedural requirements in instituting the contempt proceedings.

(5) That there was no personal service of the order allegedly disobeyed duly as required by the law.

On 22.9.2007, the advocates for Mary N. Ngethe also filed a notice of preliminary objection to the application on the following grounds:-

(1) That the application is misconceived and incurably defective as no leave of the court was sought or obtained by the plaintiff before commencing the contempt proceedings.

(2) That the application does not disclose any reasonable cause of action or grounds showing any contempt of the court order by the respondent and especially by the Director of Legal Affairs who is in any event improperly cited for contempt.

(3) That the application is based on a wrong and erroneous interpretation of the court order of 27.11. 2006 by the plaintiff.

(4) That the plaintiff having commenced arbitral proceedings with its dispute with the respondent in which it seeks damages, for the respondent's alleged breach and violation of the court order of 27.11. 2006 is stopped and precluded from prosecuting the application dated 21.2. 2007. The plaintiff is in effect conducting parallel proceedings in seeking damages against the respondent in the arbitral proceedings while seeking to cite the respondent's chief officers in respect of the same

matter. The plaintiff cannot have his cake and eat it. It must elect.

The Preliminary Objection were canvassed before me on 29.5.2007 by Mr. Kilukumi, Learned Counsel for Mr. Gakuo, the Town Clerk, Mr. Adan, Learned Counsel for Ms Ngethe, the Director of Legal Services of the defendant and Mr. Kiragu, Learned Counsel for the plaintiff.

From the arguments of counsel, I think the primary objection was that the plaintiff's application was misconceived incompetent, bad in law and fatally defective for failure to comply with the mandatory provisions of sections 5 of the Judicature Act which provides as follows:

"**5. The High Court and the Court of Appeal shall have the same power to punish 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 upholding the authority and dignity of subordinate courts."**

AND Order 52 provides the following procedure to be followed in contempt proceedings:

2. (1) No application to a Divisional Court for an order of committal against any person may be made unless leave to make such an application has been granted in accordance with this rule.

(2) An application for such leave must be made ex parte to a Divisional Court except in vacation when it may be made to Judge in Chambers and must be supported by a statement setting out the name and description of the applicant, the name, description and address of the person sought to be committed and the grounds on which his committal is sought and by an affidavit to be filed before the application is made verifying the facts relied on.

(3) The applicant must give notice of the application for leave not later than the preceding day to the Crown Office and must at the same time lodge in that office copies of the statement and affidavit.

(4) Where an application for leave under this rule is refused by a Judge in Chambers the applicant may make a fresh application for such leave to a Divisional Court.

(5) An application made to a Divisional Court by virtue of paragraph (4) must be made within 8 days after the Judge's refusal to give leave or if a Divisional Court does not sit within that period, on which its sets thereafter.

The same Order continues in Rule 3 thereof as follows:-

3. (1) When leave has been granted under rule (2) to apply for an order of committal, the application for the order must be made by motion to a Divisional Court and unless the Court or Judge granting leave has otherwise directed, there must be at least 8 clear days between the service of the notice of motion and day named therein for the hearing.

(2) Unless within 14 days after such leave was granted the motion is entered is entered for hearing the leave shall lapse.

(3) Subject to paragraph (4) the notice of motion, accompanied by a copy of the statement and affidavit in support of the application for leave under rule (2) must be served personally on the person sought to be committed.

(4) Without prejudice to the powers of the court or Judge under Order 65 rule (4) the court or judge may dispense with service of the notice of motion under this rule if it or he thinks it just to do so."

The respondents' advocates argued quite strongly that the above procedure must be strictly followed before committal for contempt proceedings can be entertained. Their position was buttressed by several

decisions of the High Court and two decision of the Court of Appeal. I will refer to the Court of Appeal decisions shortly.

On his part, Counsel for the plaintiff vigorously resisted the preliminary objections. He argued again forcefully that Order XXXIX Rule 2A (2) of the Civil Procedure Rules as read with Order L Rule (1) of the same Rules are self sufficient and the English procedure was not contemplated. For that proposition he cited several decisions of the High Court.

Having considered counsels' submissions for and against the preliminary objections including the authorities cited, I take the following view of the matter. Some of the grounds set out in the two notices of preliminary objections do not in my view constitute true preliminary objections as defined by the East African Court of Appeal in **Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd. [1969] EA 696.** The Learned Judge of Appeal Law as he then was stated at page 700 as follows:-

"**So far as I am aware a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.**

And Sir Charles Newbold P. stated as follows at page 701:

"**A preliminary objection is in the nature of what used to be a demurer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the opposite side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."**

In view of the definition given by their Lordships in the said case, ground 5 of Mr. Gakuo's objection is not a true preliminary objection and so are grounds (2) and (3) of Ms Ngethe's objection because a determination of the same must involve ascertaining of facts. With regards to ground 4 of the latter's objection, it is my view that even if there are arbitral proceedings in progress, proceedings for punishment for disobedience of a court order are still available to the plaintiff. Arbitration per se would not defeat an application for committal for disobedience of a court order.

Turning now to the more serious objection to the plaintiff's application that there was no compliance with the mandatory provisions of Section 5 of the Judicature Act, I have found as follows:-

Rule 2 A (2) of Order XXXIX of the Civil Procedure Rules is in the following terms:-

"**(2) In cases of disobedience, or 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 be detained in prison for a term not exceeding six months unless in the meantime the court directs his release."**

And Rule 9 of the same Order reads as follows:-

"**9. Applications under rules 1 and 2 shall be by summons in Chambers."**

To my mind Order XXXIX rules 2 A (2) and 9 adequately deal with the manner of proceeding where disobedience of an order of injunction is alleged. It is plain to me that a party aggrieved by such disobedience may by Chamber Summons apply that the offending party be detained in prison for a term not exceeding six months. The jurisdiction to punish for disobedience of an order of injunction under Order XXXIX Rule 2 A (2) appears therefore to be independent of the jurisdiction donated under Section 5 of the Judicature Act. The Rules Committee in my view did not envisage compliance with the English Procedure by a party invoking the jurisdiction under Order XXXIX Rule 2 A (2).

In coming to the above conclusion, I am painfully aware that some of my Learned brothers in the High Court have held that a party aggrieved by the disobedience of an injunction order made under Order XXXIX Rules 1 and 2 of the Civil Procedure Rules must follow the English Substantive Law and procedural rules. Hon. Aluoch, J was of that persuasion in **Andalo & Another vs. James Gleen Russel Ltd [1990] KLR 54** and so was Hon Sergon, J in **Awadh vs. Mammbu [2004] 1 KLR 454.**

The Court of Appeal in **Jacob Zedekiah Ochino & Another vs. George Anra Kombo & Others – C.A. No. 36 of 1989 (UR)** and **Mwangi H.C. Wangondu vs. Nairobi City Commission C.A No. 95 of 1988 (UR)** appears to hold the same view. In the former their Lordships stated as follows:-

"**The Power to deal with contempt of Court is provided for under Section 5 of the Judicature Act (Cap. 8) and Order 39 (rule 2 (3) of the Civil Procedure Rules. We have to follow the procedure and practice in England"**

And in the latter their Lordships made the following observation:-

"**The power to deal with contempt is provided for under Section 5 of the Judicature Act (Cap 8) … In view of the clear provisions of Section 5 (1) of the Judicature Act, we have to turn to the practice and Procedure in England in order to discover how the Power to punish for contempt of court is exercised."**

I have perused the entire decision of the Court of Appeal in **Mwangi H.C. Wangondu vs. Nairobi City Commission (supra).** It is clear beyond peradventure that the appellant had invoked both the provisions of Order XXXIX and Section 5 of the Judicature Act. He did not make an election on how to proceed. Having himself invoked Section 5 of the Judicature Act it is not surprising that their Lordships held that they had to turn to the practice and procedure in England in order to discover how the power to punish for contempt of court was to be exercised. Besides it is not clear whether their Lordships were addressed on the provisions of Rule 9 of Order XXXIX of the Civil Procedure Rules which provides the manner of invoking the Court's jurisdiction. It is also quiet clear that their Lordships were concerned that a copy of the order allegedly disobeyed did not carry a notice of the penal consequences of disobedience. Such a determination cannot be made on a preliminary objection unless it is expressly admitted by the applicant. That is reinforced by the penultimate paragraph of their decision which reads as follows:-

"**Even assuming for the purpose or argument only that there was a competent application before the Judge, he was in our view perfectly justified in holding that the respondent could not be driven from the judgment seat on the bare allegation of the appellant unless and until it had been established by credible evidence that the respondent had indeed committed a contempt of court. This is in consonance with the language of Order 39 rule 2 (3) which gives the court power in cases of disobedience to be attached."**

In **Jacob Zedikiah Ochino & Another vs. George Aura Okombo (supra)** – the Court of Appeal clearly acknowledged that the power to deal with contempt is provided for under Section 5 of the Judicature Act and Order 39 rule 2 (3) of the Civil Procedure Rules. With regard to procedure to follow, the Court held that it was the procedure and practice in England to be followed. It is not clear whether the court was addressed on the procedure provided under the Civil Procedure Rules. It is also not clear whether Section 5 of the Judicature Act has also been invoked. It appears to me that the primary concern of the Court was failure to serve a copy of the order allegedly disobeyed with an endorsement of the penal consequences in case of disobedience before the application for committal was made.

It is also illustrative that notwithstanding the use of what the court found to be incorrect procedure, part of the Order made pursuant thereof was not disturbed.

"**With regard to the order directing the Registrar of Trade Unions to restore the position to the situation prevailing prior to the meeting of the Executive Committee held on 27th April 1988 we would not disturb that order as by doing so we would be lending judicial support to the first appellant's disobedience of the Order of a competent court made on 26th April 1988, and which he**

sought to circumvent by filing the notification of change."

I must also confess that on my reading of the two Court of Appeal decisions the same do not direct a wholesale adoption of the entire English procedure and practice as in my view such a direction would impede the proper administration of justice. Their operation would indeed result in injustice – taking into account the circumstances of certain parts of this country where litigants may not readily access the High Court and the Office of the Attorney General. I dare say it is on that basis that their Lordships were concerned with the aspect of service of the order disobeyed to be duly endorsed with the penal consequences in case of disobedience.

It must now be obvious that the Preliminary Objections are for dismissal. The plaintiff's application having been brought under Order XXXIX rule 2A (2) of the Civil Procedures Rules and there having been no reference to Section 5 of the Judicature Act is competent as the provisions of Order 52 of the Rules of the Supreme Court of England need not have been complied with.

The Preliminary Objections are overruled with no order as to costs.

Order accordingly.

DATED at NAIROBI this 25th day of July 2007

F. AZANGALALA

JUDGE

Delivered at Nairobi this …….. day of July, 2007

M.A. WARSAME

JUDGE