



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

Civil Case 1276 of 2001

FIDELITY COMMERCIAL BANK LTDPLAINTIFF

V E R S U S

1. SHAMSHERAWI KARIM KURJI

2. ZAHERALI KARIM KURJIDEFENDANTS

R U L I N G

There has been considerable delay in preparation and delivery of this ruling. The same was occasioned by my serious illness in 2006 and the long attendant recuperation. The delay is regretted.

On 28th January, 2002 the chamber summons dated 17th August, 2001 came up for hearing. It was an application by the Plaintiff. In prayer No. 3 thereof an order of injunction was sought to restrain the Defendants from transferring, selling, alienating or dealing in whatever manner with their shares in the MERIDIAN HOLDING LIMITED. It was not stated that the injunction was sought pending any event, for instance, hearing and determination of the suit.

There was no appearance for the Defendant. The court (Ringera J.) was informed that the hearing date had been taken by consent. No inquiry was thus made whether the Defendants had been duly served. The court record reveals that the hearing date was in fact taken *ex parte* by the Plaintiff's counsel on 29th November, 2001. As it transpired, the court granted the application as sought in prayer No. 3. It was not stated that the injunction, which appears to have been temporary, was granted pending what event. It will be noted that one of the reliefs sought in the plaint (No. 3) is an order to enable the Plaintiff to attach the Defendants' shares in Meridian Holdings Limited. In the replying affidavit filed in opposition to the application the Defendants deponed that the shares had already been transferred by the time application was made. The injunction granted on 28th January, 2002 was extracted and issued on 19th February, 2002.

By the present application (notice of motion dated 28th July, 2005) the Plaintiff alleges that the Defendants were in contempt of the said order. It therefore seeks their committal to prison for a term not exceeding six (6) months

“for disobeying court order issued on 19th February, 2002 or any other order issued earlier by this court inclusive of the order made on 13th September, 2002.”

The order entered on 13th September, 2001 was

“Order: By consent matter s.o. to 12th October 2001. Status quo to be maintained.”

As can be seen, the status quo was not defined or stated. In the alternative the Plaintiff seeks an order

“to reverse the transfer if already made and/or to attach the shares of Meridian Hotel Limited as held or as previously held by the Defendants, and/or the certificates in relation to the shares in question be deposited in this court pending hearing and determination of the suit”.

The application is brought under section 5 of the Judicature Act, Cap. 8 and section 3A of Civil Procedure Act, Cap. 21. The grounds of the application appearing on the face thereof are, that the Defendants were duly served with the order in question; that nevertheless they proceeded to transfer the shares held by them in Meridian Holdings Limited in contravention of the court order; that the transfers were calculated to diminish the Defendants’ assets so as to avoid payment of the Plaintiff’s claim, or to frustrate the Plaintiff’s effort to attach the same if judgment is entered in the Plaintiff’s favour; and that the transfers are *mala fides* and an attempt to defeat justice. The application is supported by the affidavit of one **PHILIP MUOKA**, an advocate of this court and the legal officer of the Plaintiff.

The Defendants have opposed the application as set out in the replying affidavit of the 1st Defendant filed on 17th October, 2005. Their case is that when the injunction was obtained on 28th January, 2002 and issued on 19th February, 2002 the shares in question had long been transferred. Further, at the time of the transfer there was no court order prohibiting the transfer.

I have considered the submissions of the learned counsels appearing, including the authorities cited. I have also read the supporting and opposing affidavits. Finally, I have perused the court record herein.

The affidavit of service dated 28th October, 2004 annexed to the supporting affidavit shows that the order of 28th January, 2002 (as extracted and issued on 19th February, 2002) was served (together with a penal notice) upon the 2nd Defendant on 21st October, 2004. There is no evidence of service of the order and penal notice upon the 1st Defendant. The transfer deeds annexed to the supporting affidavit (in respect to the Defendants shares in Meridian Holdings Limited), which were allegedly done in contravention of the order of the court of 28th January, 2002, are dated 28th May, 2001. The transfer deeds were stamped on 23rd August, 2001. It is therefore clear that the transfer deeds were executed and stamped before the order of 28th January, 2002 was issued. How then could the Defendants have been in contravention of an order that was yet to be issued? As already seen, the order of 13th September, 2001 for maintenance of the *status quo* did not state what that *status quo* was. An earlier similar order of 23rd August, 2001 also did not state what the *status quo* was. I dare say that an order for maintenance of the *status quo* that does not state or define that *status quo* is not of much use.

The offence of contempt of court, attracting penal consequences as it does, must be proved beyond reasonable doubt. The application before me substantially alleges that the Defendants were in contempt of the order of 19th February, 2002. Their actions allegedly constituting that contempt were transfer of their shares in Meridian Holdings Limited to a third party. We have seen that the transfers were done before the order was issued. The orders for maintenance of the *status quo* did not state what that *status quo* was. In any event there is no proof of service of any of those orders upon the Defendants. There was an earlier interim order in terms of prayer No. 3 of the application dated 17th August, 2001. It was issued *ex parte* on the same date, 17th August, 2001. This order was to last 14 days and would have covered the date on which the transfers were stamped, that is, 23rd August, 2001. But again, there is no evidence of service of this order, together with a notice of penal consequences, upon the Defendants.

The long and short of it all is that the offence of contempt of court alleged against the Defendants has not been proved beyond reasonable doubt as required. I am not satisfied that the Defendants were in contempt of any court order issued in this matter. I must therefore refuse the application by notice of motion dated 28th July, 2005. It is hereby dismissed with costs to the Defendants. It is so ordered.

DATED AT NAIROBI THIS 14TH DAY OF AUGUST, 2007

H. P. G. WAWERU

J U D G E

DELIVERED THIS 17th DAY OF AUGUST, 2007