REPUBLIC OF KENYA

IN THE HIGH COURT

AT MOMBASA

Civil Suit 263 of 2006

SIFA INTERNATIONAL LTD…….....……....PLAINTIFF/ APPLICANT

- Versus -

NATIONAL SOCIAL SECURITY FUND BOARD OF TRUSTEES ……DEFENDANT/RESPONDENT

CORAM: Before Hon. Justice L. Njagi

Mr. Muteti for Applicant

Mr. Lumatete for Respondent

Court clerk - Ibrahim

R U L I N G

Upon application made under a certificate of urgency, the plaintiff in this matter, Sifa International Limited, obtained an ex parte temporary injunction against the defendant on 21st November, 2006. the injunction restrained the defendant itself or through its agents, servants or assigns from offering for sale, advertising, selling, transferring or in any manner alienating the suit properties namely sub-division Numbers 982, 2535, 2537, 2539 and 2540 situate in Section Number 1 (Mainland North) Mombasa to any third party or in any way interfering with the peaceful and quiet enjoyment and possession of the suit properties pending the hearing and determination of the application. The application itself was filed under Order XXXIX Rules 2(1), 7(1)(a) and 9 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act, Section 7 of the Arbitration Act and all enabling provisions of the Law.

When the application came for hearing inter partes on 6th December, 2006, by consent of the parties, it was stood over for mention on 20th December, 2006 with a view to recording a consent. When the matter came for mention, no settlement had been reached. The matter was accordingly adjourned generally and the interim orders made on 21st November, 2006 were extended to the next hearing date. While the interim orders were so extended, the plaintiff came back to court on 21st February, 2007, alleging a breach of the said orders, and praying that the defendant's certain specified properties be attached, and that the defendant's managing trustee be committed to prison for disobeying and breaching the court order made on 21st November, 2006.

To the above application, the defendant filed a notice of preliminary objection. It was this preliminary objection which was argued before this court and which is the subject of this ruling.

At the hearing of the application, Mr. Lumatete appeared for the defendant, while Mr. Mutuli appeared for the plaintiff. The points raised by Mr. Lumatete in his preliminary objection were that the application for attachment of the defendant's property and committal of the defendant's managing trustee to prison was made without leave contrary to Order 52 rule 2 of the Rules of the Supreme Court of England; that the said application was not personally served upon the defendant's managing trustee in terms of Order 52 rule 3 of the aforesaid rules; that no notice was served upon the Registrar; and that the application for committal is brought by way of a chamber summons as opposed to a notice of motion contrary to the aforesaid rules. He therefore submitted that the plaintiff's application for committal was incurably defective, incompetent, an abuse of the process of the court, and thereupon invited the court to dismiss it with costs.

Opposing the application, Mr. Mutuli for the plaintiff urged that Mr. Lumatete had failed to distinguish between contempt per se and breach of injunction under Order XXXIX. He submitted that nowhere in Order XXXIX is leave made a prerequisite to the making of such an application and that no such leave is required. He referred the court to SHIPIRI v. MUIGAI, HCCC No. 2906 of 1981 (Unreported), and also to WILDLIFE LODGES LTD. v. COUNTY COUNCIL OF NAROK & ANOR. [2005] E.A. 344. On the point raised by Mr. Lumatete that the notice of motion by which the applicant seeks the respondent to be punished should be personally served on the person to be cited, Mr. Mutuli submitted that recent authorities suggest that it is knowledge that counts, and that anyone aware of a court order is bound by it. He relied on SEAWARD v. PATERSON [1895] ALL ER 1127 and also on WILDLIFE LODGES LTD. v. COUNTY COUNCIL OF NAROK & ANOR. (supra) Mr. Mutuli also argued that service of the application on the Registrar was not a requirement under Order XXXIX, and that the procedure under this Order is for an application by chamber summons and not by Notice of Motion as suggested by Mr. Lumatete. He thereupon urged the court to dismiss the preliminary objection.

In reply, Mr. Lumatete maintained that the power of the High Court to punish for contempt of court was derived from Section 5 of the Judicature Act, and therefore the procedure provided therein should be followed to the letter. Failure to do so would render the court powerless to punish for contempt. He finally submitted that the Civil Procedure Rules were subsidiary legislation, and since there is no provision in the main Act authorizing punishment for contempt, we have to revert to Section 5 of the Judicature Act for that authority. Any argument to the contrary, he argued, was per incuriam.

I have considered the rival submissions by counsel and examined all the authorities cited. In my view, it is not necessary to fragment the preliminary objection into any pigeon holes. The issue arising for adjudication is simply whether an application for contempt made under Order XXXIX rule 2A (2) of the Civil Procedure Rules should comply with Order 52 of the Rules of the Supreme Court of England as mandated by Section 5 of the Judicature Act, Cap 8 of the Laws of Kenya. Suffice it to say that Order XXXIX of the Civil Procedure Rules of Kenya deals with temporary injunctions and interlocutory orders. It does not go beyond that. It spells out the circumstances under which the court may grant a temporary injunction in respect of any suit property which is in danger of being wasted, damaged or alienated, such injunction to remain in force until the disposal of the suit or until further orders. In the event that such an injunction is disobeyed, Rule 2A (2) prescribes as follows –

"In cases of disobedience, or of 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 also order such person to be detained in prison for a term not exceeding six months unless in the meantime the court directs his release."

The application which is the subject of the objection herein seeks both these remedies i.e. the attachment of the defendant/respondent's properties as well as the imprisonment of the defendant's managing trustee.

It is notable that Rule 2A (2) does not prescribe the manner in which the application thereunder

should be prosecuted. It is equally noteworthy that Rule 9 of Order XXXIX explicitly provides that –

"Applications under rules 1 and 2 shall be by summons in chambers."

If one were to share Mr. Lumatete's concerns, then one would expect that rule 9 would have directed that applications under rule 2 would be made in accordance with the procedure laid down in Section 5 of the Judicature Act Cap 8 of the Laws of Kenya. That is the procedure which ordains that, inter alia, the application be served personally on the person guilty of the breach of the court order, that notice be given to the Registrar, and that the application be commenced by notice of motion. If the Rules Committee intended that this was the procedure to be adopted, then nothing would have been easier than for them to say so. But they did not say so, and yet they were alive to the provisions of section 5 of the Judicature Act. This would mean only one thing, to wit, that their intention was to provide a procedure which would lead to a speedy disposal of cases of disobedience of court orders.

It is not correct, therefore, for Mr. Lumatete to suggest that any proposition that the powers of the High Court to punish are not

derived from the Judicature Act is made per incuriam. The position is that Order XXXIX deals only with disobedience of court orders of temporary injunction, and specifically provides its own procedure for dealing with such breaches. If anything, it is Mr. Lumatete's submission which is per incuriam insomuch as it purports to contradict some judicial statements made within our jurisdiction. In WILLIAM MARK SHIPIRI v. JAMES NGENGI MUIGAI & ANOR., Nairobi HCCC No. 2906 of 1981, a similar preliminary objection was taken against the hearing of an application under Order XXXIX rule 2. It was argued that contempt jurisdiction could not be invoked before leave of court had issued, and that Order XXXIX did not provide for enforcement of a court order, and that the court's jurisdiction to punish for contempt is invoked only as provided under section 5 of the Judicature Act. The defendant/respondent's arguments in this matter are a replica of those in the above case. Responding to those arguments, Justice Nyarangi, as he then was, said –

"In my judgment no leave of court is necessary before any case of disobedience or of breach can be listed before the court granting an injunction. The fact that the complaint of disobedience or of breach has to be dealt with by the judge who granted an injunction is relevant and significant. It means that the court would already be seized of the matter and would therefore require no leave to proceed. It would be strange if a court aggrieved by disobedience or of a breach of its order were to

stay action against the guilty party until after leave is granted. Order 53 rule 26 of the English Rules of the Supreme Court does not apply …"

Similar sentiments were expressed by Justice Bosire, as he then was, in the case of WANJOHI & ANOR. v. MACHARIA, Civil Case No. 450 of 1995, in which his Lordship said –

"It would appear to me that applications for committal for contempt of court made in this country fall 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 to bring the application …"

I share this view in its entirety. In my considered opinion, that where an Order in the Civil Procedure Rules sets out its own procedure, it is that procedure alone that ought to be applied. Where one is dealing with an application for disobedience of a court order under Order XXXIX, then the rules therein apply to the exclusion of any other provisions. If however, one is dealing with any other mode of contempt of court, then section 5 of the Judicature Act sets out the route to be taken.

In the instant application, I am satisfied that the applicant has followed the stipulated procedure and the preliminary objection has no merit. The objection is accordingly dismissed with costs, and the

application shall proceed to hearing. It is so ordered.

Dated and delivered at Mombasa this 19th day of October, 2007.

L. NJAGI

JUDGE