REPUBLIC OF KENYA

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

CIVIL CASE 515 OF 2003

RAMESH POPATLAL SHAH & SUREKHA SHOBHAGCHANDRA SHAH suing in their capacity as the Administrators of the Estate of the late SHOBHAGCHARA

RATILAL SHAH

T/a LENTO AGENCIES ……..…..PLAINTIFFS

V E R S U S

NATIONAL INDUSTRIAL CREDIT BANK LIMITED……..……DEFENDANT

R U L I N G

The background to this application is that on 23rd January, 2004, this court made certain orders pursuant to some two applications. The first application was dated 31st July, 2003 and filed in court on 1st August, 2003, and the second application was dated 17th October, 2003 and filed in court on the same day. The two applications were heard together.

The main thrust of the court orders was that the defendant/respondent (i.e. the defendant in this cause) do, within 14 days of the date of service of those orders, release and deliver to the plaintiffs (i.e. the administrators of the estate of the late Shobhagchandra Ratilal shah) the motor vehicle registration number KAH 758C: deposit in court all the payments they received from M/s Axa Equity and Law in respect of the deceased's policies numbers J/H64793, J/H64794, J/H64795 and J/H64796 pending the determination of this suit; and to render to the plaintiffs a full, true and accurate account of all its financial dealings with the late Shobhagchandra Ratilal Shah as prayed in the plaint and particularized in the orders.

On 3rd February, 2004 the applicants served the formal court order and a penal notice dated 2nd February, 2004, upon the respondent. The respondents did not immediately comply with the court order within the prescribed period. The applicants thereupon filed an originating Notice of Motion dated 27th February, 2004 seeking an order, inter alia, that the respondents managing director and unspecified principal officers of the respondent be committed to jail for contempt of court. While that application was still pending, the respondents filed an amended chamber summons application dated 11th March, 2004. The application seeks the following main orders-

1. THAT the interlocutory judgment entered herein on 26th October, 2003, be set aside. 2. THAT the orders granted by this court on 23rd January, 2004 be set aside. 3. THAT the defendant be granted leave to file its defence to the plaintiff's claim out of time. To that application, the applicants filed on 29th April, 2004, a notice of preliminary objection dated 26th April, 2004. It raises the following issues- (a)

That the applicant has not right of audience in this Honourable Court as it is in contempt of the orders of this court issued in the instant suit on 23rd January, 2003(sic) (b) That this Honourable Court ought not to entertain the applicant's application dated 11th March, 2004 before the applicants purge the contempt of the orders of this court issued on 23rd January, 2004. (c) That the applicant's application dated 11th March, 2003 (sic) is an abuse of the process of court, frivolous, incompetent and vexatious. It is this preliminary objection which is the subject of this ruling. At the oral canvassing of the application, Mr. Kamau with Mr. Bengi appeared for the plaintiffs/respondents while Mr. Ougo appeared for defendant/applicant. Mr. Kamau referred to the background to this matter, first outlined herein above.

He submitted that the orders made on 23rd January, 2004 were still in force as there was no stay granted. The defendant is aware of those orders, and that is why it has come to court trying to set them aside. Counsel then referred to HADKINSON v. HADKINSON [1952] 2 ALL E.R. 567 in which the general rule was laid down to the effect that it is the duty of everyone in respect of whom a court order is made to obey such an order unless and until it is discharged, and disobedience of such an order results in the person disobeying it being in contempt, and in a application to the court by him not being entertained until he has purged his contempt.

He also referred to MAWANI v. MAWANI [1977] Kenya Law Reports, 159, in which the above case was applied and the court upheld the preliminary objection taken that the applicant should not be heard until the contempt was purged. Mr. Kamau also referred to Halsbury's Laws of England, 4th Edition, Vol. 9 paragraph 9 on civil contempt in general and emphasized that by failing to do what was ordered, the defendant was clearly in contempt of court. He urged the court to hold that the defendant was in contempt of court and that its application should not be heard until it purges itself of that contempt by obeying the court orders of 23rd January, 2004.

Opposing the preliminary objection on behalf of the defendant, Mr. Ougo submitted that the principle of law that a person who has disobeyed an order of the court should not be heard is a general rule which is subject to exceptions, and that the defendant falls within those exceptions. He argued that evidence will be required to establish that the defendant is in contempt, and that this takes the matter out of the realm of a preliminary objection. He further submitted that a preliminary objection is a matter of pure law and should never be entertained if there is any matter of fact which needs to be established. He then cited MUKISA BISCUITS MANUFACTURING CO. LTD. v. WEST END DISTRIBUTORS LTD [1969] E.A. 696 in support of that proposition, and submitted that whether a party should be heard or not is a matter for judicial discretion.

He also referred to N.A.S. AIRPORT SERVICES LTD. v. THE ATTORNEY GENERAL [1969] E.A. 59 in support of the proposition that a situation in respect of which a matter will require evidence does not pave the ground for a preliminary objection. In the same vein, he also relied on EL-BUSAIDY v. COMMISSIONER OF LANDS & ORS [2002] I E.A. 508 and also NAIZSONS (K) LTD., v. CHINA ROAD BRIDGE CORPORATION (K) LTD. [2001] 2 E.A. 502 and submitted that the plaintiffs have filed an application citing defendants for contempt and that by filing that application the plaintiffs acknowledged that the issue as to whether the defendant was in contempt or not needs to be established.

Authorities establish that there are exceptions to which the general rule is subject, and the court has a discretion, and if it is a matter of discretion, then it cannot at the same time be a matter for a preliminary objection. He referred to X LTD. v. MORGAN GRAMPIAN LTD. [1990] 2 ALL E.R. 67 as an authority on that point, and added that the defendant is entitled to demonstrate that the orders the disobedience of which the defendant is accused is accused of being in contempt should never have been made. He then gave a brief account of the case before the court, referred to GORDON v. GORDON [1904-7] ALL E.R. 702 and submitted that given the chance to do so, the defendant will demonstrate that the orders in issue should not have been made as the court had no jurisdiction to do so, and that this is an exception to the general rule. In total, the defendant blames its plight on its erstwhile counsel, and asks for an opportunity to demonstrate its version of the matter.

In reply, Mr. Kamau submitted that in the defendant's amended chamber summons application, the issues raised deal with mistakes of counsel, and that issues of irregularity of the court order are not alluded to,

and also that the issue of want of jurisdiction of the court is not a ground. The defendant has not sought a stay of the court orders, as it should have done. If this were an application by the plaintiff to enforce the order, the defendant would be entitled to be heard in defence, but this is an application made voluntarily by the defendant. The defendant cannot be heard to say that the order for deposit of money should not have been made. It has disobeyed that order and should not be heard until it purges that contempt.

I have considered these submissions by counsel and read the authorities referred to. The general principle of law in matters of contempt is not in dispute. It is summed up in the early case of GORDON v. GORDON [1904-7] All E.R. Rep. 702 where it was held that the general rule that a party in contempt cannot be heard, or take any proceeding in the same cause until he has purged his contempt applies to proceedings voluntarily instituted by himself in which he makes some claim and not to a cause where all he seeks is to be heard in respect of some matter of defence, or where he appeals against an order in the cause which he alleges to be illegal as having been made without jurisdiction. On the facts of this case, the court made some very clear orders on 23rd January, 2004.

The defendant states that it has complied with some of those orders, but there is one order in particular in respect of which the defendant has not made even the faintest attempt to comply. That is the order pertaining to the deposit of money in court. Mr. Kamau submits that failure to do so is a contempt of court, and Mr. Ougo counters that submission by submitting that the court acted in excess of its jurisdiction in making that order. Indeed, he submits that the defendant will be able to demonstrate that the orders the disobedience of which is complained of should never have been made. It is for this reason that the defendant has applied for these orders to be set aside and, in their turn, the plaintiffs contend that by failing to obey those orders, the defendant is in contempt of court and should not be heard until lit purges that contempt.

The general principle governing matters of contempt of court was reiterated in HADKINSON v. HADKINSON [1952] ALL E.R. 567, in which Romer, L.J. said at p.569- “It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made against by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void. LORD COTTENHAM, L.C., said in CHUCK v. CREMER (1846) 1 Coop. temp. Cott. 342:- ‘A party, who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it… It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid – whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question. That the course of a party knowing of an order, which was null or irregular, and who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it existed it must be obeyed.”

Pausing there for a while, it seems that unless and until a court order is discharged, it ought to be obeyed. A question that immediately arises is this – what happens between the making of the order(s) and the date of the discharge? Simple logic dictates that as long as the orders are not discharged, they are valid. And since they are valid, they should be obeyed, in observance, not in breach. That being the case, it seems to me that the only way in which a litigant can obtain a reprieve from obeying a court order before it is discharged is by applying for and obtaining a temporary stay. As long as the order is not stayed, and is not yet discharged, then a litigant who elects to disobey it does so at the pain of committing a contempt of court. In the instant case, there is no stay of the orders made on 23rd January, 2004 nor are the orders yet discharged.

The application to set them aside was filed on 12th March, 2004. This was a good 7 weeks after the date of the orders and about 5 weeks after service thereof on the defendant. That was also after the plaintiff had already filed contempt proceedings against the defendant. Prima facie, a disobedience of those orders, which are still in force to this moment, constitutes contempt of the court. While acknowledging that the general principle governing matters of contempt of court is that set out in Gordon V. Gordon (supra) , the court in HADKINSON v. HADKINSON (supra) further said that there exist exceptions to that general principle. Continuing with his speech at p.570, Romer L.J. said-

"… One of such exceptions is that a person can apply for the purpose of purging his contempt, and another is that he can appeal with a view to setting aside the order on which his alleged contempt is founded…" The defendant does not come within any of these exceptions. However, after summarising the history of the rule through the ecclesiastical courts to the modern times, Denning, L.J., said, at pp574-575-

"…It is a strong thing for a court to refuse to hear a party to a cause and it is only to be justified by grave considerations of public policy. It is a step which a court will only take when the contempt itself impedes the course of justice and there is no other effective means of securing his compliance… I am of opinion that the fact that a party to a cause has disobeyed an order of the court is not of itself a bar to his being heard, but if his disobedience is such that, so long as it continues, it impedes the course of justice in the cause, by making it more difficult for the court to ascertain the truth or to enforce the orders which it may make, then the court may in its discretion refuse to hear him until the impediment is removed or good reason is shown why it should not be removed." At least one of the orders made herein on 23rd January, 2004, has not been obeyed. It involved the deposit in court of certain moneys. Failure to deposit that money in court makes it impossible to make any further orders in respect thereof, and to that extent it impedes the course of justice in the cause. The position of the defendant on that issue is that the order for deposit of funds will be attacked on the ground that it should never have been made. It may be pertinent to remind ourselves that the application leading to the orders made on 23rd January proceeded ex parte as the defendant did not respond by filing any papers or by attending court. And in exercise of its discretion, the court opted to proceed ex parte.

This takes me back to the words of Vaughan Williams, L.J., in GORDON v. GORDON quoted herein above. At the risk of repeating myself, the learned Lord Justice made it clear that it is not every matter of defence which entitles a person in contempt to be heard. He said at p.705- "I do not for one moment suggest that it is every matter of defence which entitles a person in contempt to be heard. For instance, if an order has been made in the exercise of the discretion of the court, and someone who thinks himself oppressed by that order appeals, saying that the court has exercised its discretion wrongly, that person if he is in contempt, cannot be heard to say anything of the sort until he has purged its contempt. Gardstin v. Gardstin [1865] 4 SW. & Tr. 73, is an instance of that kind.

If this proposition is anything to go by, and if the orders complained of were made, as I think they were, in exercise of the court's discretion, then the defendant should not be heard to complain. His Lordship then continued "But when you come to an order which it is suggested may have been made without jurisdiction, if, upon looking at the order one can see that that is the ground of the appeal, it seems to me that such a case has always been treated as one in which the court will entertain the objection to the order, though the person making the objection is in contempt…"

Learned counsel for the defendant submitted from the bar that on the face of the record, the orders granted went beyond the court's jurisdiction, and that this is what the defendant seeks to demonstrate. As stated above, he also said that the order for deposit of funds should not have been made. A cursory glance at the grounds upon which the defendant's application dated 11th March, 2004, is predicated does not disclose any reference to want of jurisdiction on the part of the court. Counsel for the defendant did point out perhaps correctly so, that if the facts had been brought to the court's attention, the court would not have made the order it did.

That may be so. It was the defendant's duty to bring out all the relevant facts to the court. This was not done, and the defendant knows very well where the fault lay – it lay with its agent. I don't wish to put the matter any higher than that. As stated earlier, the jurisprudence on this aspect of the law was summed up by Denning L.J. in HADKINSON'S CASE (supra) where his Lordship stated that "… the fact that a party to a cause has disobeyed an order of the court is not of itself a bar to being heard, but if his disobedience is such that so long as it continues, it impedes the course of justice in the cause by making it more difficult to enforce the orders which it may make, then the court may in its discretion refuse to hear him until the impediment is removed…" These words won approval in the judgment of LORD BRIDGE OF HARWICH in X LTD v. MORGAN GRAMPIAN LTD., [1990] 2 ALL E.R. I in which he said at p.11- "I cannot help thinking that the more flexible treatment of the jurisdiction as one of discretion to be

exercised in accordance with the principles stated by Denning L.J. better accords with judicial attitudes to the importance of ensuring procedural justice than confining its exercise within the limits of a strict rule subject to defined exceptions.

But in practice in most cases the two different approaches are likely to lead to the same conclusion as they did in Hadkinson's case itself and would have done in the Messiniaki Tolmi [1981] 2 Lloyds Re. 595." The purpose of according the court a discretion is to ensure that there is a flexible approach in determining whether to hear a contemnor who has not purged his contempt. In this case, the court made an order. That order has not been obeyed. By filing their application dated 27th February, 2004, the plaintiffs are not seeking a determination from the court as to whether the defendant is in contempt or not. Their object was to have the defendant punished on the ground of being in contempt of court.

The preliminary objection raised in this matter does not subscribe to the category of preliminary objections in the nature of MUKISA BISCUIT MANUFACTURING CO. v. WEST END DISTRIBUTORS LTD. (supra) I understand it to be a different breed of a preliminary objection for a litigant to be stopped in its tracks where it is denied a hearing until it purges its contempt. In the circumstances of this case, a court order has not been obeyed, and is still to be obeyed.

The plaintiff has already filed an application for the punishment of the defendant for contempt of court and the application was filed before the defendant filed its application for setting aside the orders of which it stands indicted for disobeying. In the defendant's application, there is no ground for suggesting that the said orders were made without or in excess of jurisdiction. The defendant has obeyed some of the orders, but at least one of them has been confined to the dustbin. It is, generally, not proper for a litigant to choose from the same ruling which orders to obey and which ones to ignore. In total, the preliminary objection is upheld and the defendant is given 14 days from today with which to purge its contempt.

Costs in the cause.

Dated and delivered at Nairobi this 8th day of March 2005

L. NJAGI

JUDGE