



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI**

Misc Civil Suit 683 of 2005

**ARROW HI-FI (E.A.) LIMITED.....
..... APPLICANT**

VERSUS

**S.G. MBAABU & E.A. BEGI)
T/A MBAABU & Co. ADVOCATES)
RICHARD NYARORI, PATRICK NYARORI &)
RESPONDENTS
PATRICK WAMULA T/A PATROS AGENCIES
LIMITED**

**ARISING OUT OF
MILIMANI CHIEF MAGISTRATE'S COMMERCIAL
COURTS AT NAIROBI**

Civil Suit 5527 of 2001

PETRO-CHEMICAL & CARGO SERVICES..... PLAINTIFF

VERSUS

ARROW HI-FI EAST AFRICA LIMITED DEFENDANTS

RULING

What is before me for consideration is a chamber summons application dated 10.05.05 and filed on 12.05.05 brought under section 5 (1) of the Judicature Act (Cap.8, Laws of Kenya), sections 3, 3A, 63 (c) & (e) and 89 of the Civil Procedure Act (Cap. 21, Laws of Kenya), Order XXI rule 28 of the Civil Procedure Rules of Kenya and Order 52 rule 2 of the Rules of the Supreme Court of England 1999. The application sought the following substantive orders:-

a) That leave be granted to the applicant to apply for an order of committal to prison against S.G. Mbaabu Advocate, E.A. Begi Advocate, Richard Nyarori, Patrick Nyarori and Patrick Wamula all auctioneers for such period of time as this honourable court may deem fit and just and/or for the

sequestration of any such of their property as would be sufficient to compensate the applicant's loss.

b) That pending the hearing and determination of the motion of committal to be filed herein, the respondents be restrained from trespassing, visiting and/or entering upon the applicant's premises at Arrow Centre off Mombasa Road, for purposes of proclaiming and/or attaching the applicant's property in execution of the decree dated 15.10.04 issued in Milimani CMCC No.5527 of 2001, Petro-Chemical & Cargo Services -vs- Hi-Fi (EA) Limited.

c) That the Officer Commanding Police Station in Industrial Area do provide the applicant with police assistance in enforcing the order at (b) above.

d) That the costs of this application be awarded to the applicant and to form part of and abide the result of the motion of committal to be filed subsequent hereto.

Some 8 grounds are cited in support of the application, namely:-

1. That there is no plaintiff properly before the court in Milimani CMCC No.5527 of 2001, Petro-Chemical & Cargo Services -vs- Arrow Hi-Fi.
2. That in spite of the said plaintiff having been put under liquidation and/or wound up and despite having failed to obtain the court's leave to continue with the prosecution of the said suit in the name of the liquidator and/or official receiver of the said plaintiff, the firm of S.G. Mbaabu & Co. Advocates has purported to prosecute the said suit and obtained an ex parte judgment in respect thereof on 15.09.04.
3. That the said advocates have in conjunction with the auctioneers named hereinabove purported to execute the decree against the applicant despite an order of stay of execution issued by the subordinate court on 17.12.04.
4. That the applicant's application seeking to set aside the ex-parte judgment is scheduled for hearing on 18.05.05 before the subordinate court.
5. That despite the order of stay of execution and the deposit of the amount decreed in court, the respondents proclaimed the applicant's goods on 09.05.05 and have threatened to attach and sell the same upon expiry of seven (7) days from the said date.
6. That the respondents have on previous occasions disobeyed court orders issued in the said suit and there is a real danger that they will proceed to attach and sell the proclaimed goods unless restrained by order of this court to be enforced with the assistance of the police.
7. That as a consequence of the respondents' actions, the authority and dignity of the subordinate court as well as this honourable court has been, and continues to be exposed to ridicule and disrepute and S.G. Mbaabu Advocate, E.A. Begi Advocate, Richard Nyarori, Patrick Nyarori and Patrick Wamula all auctioneers have refused to comply with the said order of 17.12.04.
8. That the subordinate court does not have jurisdiction to punish the respondents for contempt.

The application was further supported by the verifying affidavit of Aakif N. Virani, Managing Director of the applicant.

The application came up for the inter-partes hearing before me on 19.05.05 whereat the applicant was represented by learned counsel, Mr. N. Mungai while the respondents were represented by learned counsel, Mr. E.A. Begi.

Respondents' counsel informed the court that he had filed a replying affidavit by Stephen Gitonga Mbaabu on 17.05.05 but had just filed replying affidavits of other respondents which had not yet been served and asked that the latter replying affidavits be deemed as duly filed. Applicant's counsel informed the court that the replying affidavits of the other respondents had just been served on him and that he had no objection to the said affidavits being admitted. The replying affidavits of other respondents were admitted and hearing of the application re-scheduled for 2.30 p.m. the same day.

At the rescheduled hearing at 2.30 p.m. on 19.05.05, applicant's counsel submitted that service of the order of stay of execution of decree dated 15.09.04 was not in dispute, pointing out that respondent S.G. Mbaabu had acknowledged service vide paragraph 9 of his replying affidavit sworn on 16.05.05 while respondent Patrick Wamula had acknowledged service vide paragraph 9 of his replying affidavit sworn on 19.05.05. I have read the said respondent's replying affidavits and note that S.G. Mbaabu acknowledged service of the subject order upon his office on an unspecified date while Patrick Wamula acknowledged service of the order upon himself on 20.12.04.

Applicant's counsel complained that notwithstanding the stay order, 1st respondent instructed 2nd respondent to execute the decree stayed by the order. Counsel referred to paragraph 9 of Aakif Virani's verifying affidavit to the effect that the stay order was given to respondent Richard Nyarori when he went to proclaim upon the applicant on 09.05.05.

Applicant's counsel submitted that the respondents were in clear breach of the stay order and urged the court to grant the leave sought to commence contempt proceedings against the respondents.

Commenting on respondent Begi's contention vide paragraphs 34 – 37 of his affidavit to the effect that the stay order was ex-parte and could only last for 14 days and that there was, therefore, no stay order after the 14 days, applicant's counsel submitted that Mr. Begi was wrong and referred the court to *Hadkinson -vs- Hadkinson* [1952] 2 all ER 567 to make the point that there is an obligation on every person against, or in respect of, whom an order is made by a court of competent jurisdiction to obey such order unless it is discharged and that disobedience of such order would, as a general rule, result in the person disobeying it being in contempt and punishable by committal or attachment. Applicant's counsel pointed out that under section 5 of the Judicature Act, the High Court or Court of Appeal of Kenya has 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 the power shall extend to the upholding of the authority and dignity of subordinate courts.

Applicant's counsel also submitted that whether or not Mr. Begi is right as to whether there was a stay order or not, that is a matter to be addressed during hearing of the substantive application for contempt; but for now the court should concern itself with the fact that the stay order has not been set itself with the fact that the stay order has not been set aside, reviewed or appealed from.

On the other hand respondents' counsel, Mr. Begi, who is one of the respondents, opposed the application. He relied on Stephen Gitonga Mbaabu's affidavit, his own and on Patrick Wamula's affidavit. Counsel submitted that before the applicant can commence contempt proceedings, he had to show there is valid order in force at the time of the alleged contempt and also show that the order was served on the persons against whom the contempt proceedings should commence. He added that the applicant should also show there was a penal notice indicating the effect of non-compliance. He said that since contempt is of both civil and criminal nature, the liberty of alleged contemnors is involved and that the applicant's duty has to be discharged beyond reasonable doubt. Counsel said no evidence was adduced to show that Edward Aboki Begi was served personally with the subject order and added that the same applied to Stephen Gitonga Mbaabu, Richard Nyarori and Patrick Wamula. He maintained that the orders were served in the respondents' offices and not on them personally and said there was nothing to show that he, Edward Aboki Begi and Richard Nyarori were connected with S.G. Mbaabu & Co. Advocates or Patros Agencies Ltd.

Respondents' counsel also said that the genesis of the present application lies in the second limb of the order of 17.12.04. He drew attention to Order XXXIX rule 3 (2) to the effect that an ex-parte order may

be granted only once for not more than 14 days and that it shall not be extended thereafter and submitted that the order was invalid. He referred to Court of Appeal Civil Appeal No.59 of 1993, Omega Enterprises (Kenya) Ltd -vs- Kenya Tourist Development Corporation & 2 others to make the point that if the order was invalid, there was no need to set it aside.

Respondents' counsel urged the court to deny the applicant leave to file contempt proceedings against the respondents and award costs against the firm of Muriu Mungai & Co. Advocates for the applicant personally. He relied for his proposal on the Tanzanian case of Karmali -vs- Tanzania Development Finance Co. Ltd [2002] 2 EA 418 submitted that the applicant's lawyers had abused the court process in an attempt to subvert the cause of justice, hence his proposal that the law firm be condemned to costs.

In reply, applicant's counsel pointed out that the order in question was not an injunction under Order XXXIX, so rule 3 (2) thereof does not apply. He pointed out that the subject order was obtained pursuant to an application under Order XXI for stay of execution and that there is no 14 day limit under Order XXI.

I have duly considered the rival submissions of the parties' counsel including the authorities cited by them. The order in question was for stay of execution of decree and it was issued by the Principal Magistrate at the Chief Magistrate's Court at Milimani Commercial Courts, Nairobi on 17.12.04. The order ran thus:

“IT IS ORDERED THAT:-

1. The application be and is hereby certified as urgent.
2. The execution of the Decree herein dated 15th September 2004 be and is hereby stayed pending the inter partes hearing and final determination of the application.
3. The application be and is hereby fixed for inter partes hearing on 10th January 2005.”

The order was made pursuant to a chamber summons application filed on 17.12.04 under certificate of urgency seeking, inter alia the said order and an order for the ex parte judgment in favour of the plaintiff as against the defendant in that case, i.e. Milimani Chief Magistrate's Commercial Court Civil Case No.5527 of 2001, Petro – Chemical & Cargo Services - vs – Arrow Hi – Fi (E.A.) Ltd. Order XXXIX, which relates to temporary injunctions, was not among the provisions under which the application was made and I hold that Order XXXIX rule 3 (2) is inapplicable to the application now before me. The second limb of the order was that it was to last until the hearing and final determination of the application. Under the third limb of the order, the learned magistrate also ordered that the subject application was to be heard inter partes on 10.01.05. Evidence availed so far is to the effect that the subject application had not been heard and determined when the present application came up for hearing before me.

The respondents, through their counsel, have raised a variety of technical points challenging the prospects of success of the application to set aside the ex-parte judgment entered against the defendant in Milimani Chief Magistrate's Commercial Court Civil Case Case No.5527 of 2001 which gave rise to the application now under consideration. The respondents equally challenge the prospects of success of the contemplated contempt proceedings. Both challenges and rejoinders thereto ought to be fully ventilated at the hearing of the application for setting aside and at the hearing of the contemplated contempt proceedings. The court's principal concern at this stage is whether a prima facie case has been raised by the applicant herein regarding breach of the stay order and, in my humble view, the totality of the evidence before court indicates that such a case has been raised and the same ought to go to trial.

The applicant's application is allowed and substantive prayers (a), (b) and (c) hereinabove are hereby granted. The motion for committal to be filed within 21 days. Costs prayed for in substantive prayer (d) hereinabove shall be in the cause.

Orders accordingly.

Delivered at Nairobi this 13th day of July, 2005.

B.P. KUBO

JUDGE