



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL SUIT NO 18 OF 2004

DONHOLM RAHISI STORES (suing as a firm) PLAINTIFF

VERSUS

EAST AFRICA PORTLAND CEMENT LTD DEFENDANT

RULING

By a Chamber Summons dated 12th February, 2004 the Plaintiff moved this court under Order 39 Rules 2 (2) and (3) and 9 of the Civil Procedure Rules and Sections 3A 63(c) and (e) of the Civil Procedure Act Cap 21 of the Laws of Kenya for the following reliefs:-

- 1. That this Honourable court be pleased to certify this matter as urgent and dispense with service of the same in the first instance.***
- 2. That this Honourable court be pleased to order that all the moveable properties of the defendant/respondent herein including but not limited to automobiles furniture, machines and all other properties be attached for its disobedience of the court order of 13 th January, 2004.***
- 3. That this Honourable court do order that the acting Managing Director of the defendant/respondent Ms Mary Wairimu Ngari and/or any person holding that position in the defendant/respondent company at the time of hearing and determination of this application be committed and/or detained in prison for 4 (four) months for disobeying the court order of 13 th January, 2004.***
- 4. That the defendant do pay the costs of this application in any event.***

The Plaintiff's application was set for hearing on 4th March, 2004. Before the date of hearing the defendant on 1st March, 2004 filed a Notice of Preliminary Objection to the Plaintiff's application.

At the commencement of the hearing of the Plaintiff's said chamber summons counsel for the defendant applied to raise the said preliminary objection. Counsel for the Plaintiff did not object to the preliminary objection being taken up first and I allowed arguments on the objection.

Mr Oyatsi counsel for the defendant submitted that the Plaintiff had not complied with procedural safeguards in bringing its application. The application was therefore incurably defective for want of correct procedure. The applicant/Plaintiff had not invoked section 5 of the Judicature Act. It had gone straight and invoked the provisions of the Civil Procedure Act and Rules. Consequently leave to commence the

current contempt proceedings had not been sought or obtained. The Plaintiff had not also effected personal service of the application upon the defendants but had instead served the defendants advocates directly. The Plaintiff had also not prepared a statement of facts verified by an affidavit and filed the same in court let alone serve the same upon the defendants.

Mr Oyatsi learned counsel for the defendant submitted further that the Plaintiff's application for leave to commence contempt proceedings if it had been made should have been served upon the Attorney General before leave was sought.

Mr Oyatsi submitted that this procedure is provided for under the Supreme Court Practice Rules of England which are applied here under Section 5 of the Judicature Act. As the said procedure was not followed, the Plaintiff's application is incompetent and should be struck out.

Counsel for the defendant relied on *NAIROBI C A No 36 of 1989 (Unreported) JACOB ZEDEKIAH OCHINO & ANOTHER VS GEORGE AURA OKOMBO & OTHERS* . The Court of Appeal held that:-

“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. As we read the Law the effect of the English provisions is that as a general rule, no order of court requiring a person to do or abstain from doing any act may be enforced by committing him for contempt unless a copy of the order has been served personally on the person required to do or abstain from doing the act in question. The copy served must be endorsed with a notice informing the person on whom the copy is served that if he disobeys the order he is liable to the process of execution to compel him to obey it.”

Mr Oyatsi further relied on *NAIROBI HCCC No 1333 of 2003 (Unreported) HON J MWANGI KIUNJURI vs WANGETHI MWANGI & OTHERS* . This is a High Court decision and Nyamu J held that the entire English practice applies here and the applicant had to –

- (a) Obtain leave to commence proceedings**
- (b) The application must set out particulars of the applicant and the respondent and the grounds for the application and must be accompanied by a verifying affidavit**
- (c) The applicant must give notice of the application for leave to the Attorney General not later than the preceding day.**
- (d) The respondent must be personally served with both the application and the order.**

Mr Ahmednasir Learned Counsel for the Plaintiff opposed the preliminary objection and from the outset submitted that the defendants preliminary objection is the type discouraged by the case of *MUKISA BISCUITS VS WEST END BAKERY (1969) E A page 696* :

The East African Court of Appeal the predecessor of our present Court of Appeal held that a preliminary objection raises a pure point of law which is argued on the assumption that all the facts pleaded by the other 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.

Counsel for the Plaintiff submitted that the Plaintiff's application is brought under Order 39 Rule 2 (2) and (3) of the Civil Procedure Rules and Sections 3 A and 63 (c) and (e) of the Civil Procedure Act. The applicant did not come to court under the Judicature Act but elected to come under Order 39 Rule 2. Counsel submitted that in Kenya there are two distinct procedures provided in respect of applications for contempt. An applicant can elect to proceed either under Section 5 of the Judicature Act or under Order 39 Rule 2 where there is disobedience of a court order. He relied on *NAIROBI HCCC No 3697 of 1995 (Unreported) JOHN SACHIA NDIRANGU vs PETER NGANGA NJENGA AND ANOTHER: J V*

Juma J held that –

“In contempt proceedings one has to elect whether to proceed under Section 5 of the Judicature Act or under Order 39 Rule 2 of the Civil Procedure Rules. It should be now clear that for breach of injunction one has to proceed under Order 39 Rule 2. You do not require leave to institute proceedings for contempt under this order. All other proceedings for contempt are brought under Section 5 of the Judicature Act and one requires leave to institute such proceedings.”

J V Juma J agreed with the decision of Bosire J as he then was in *NAIROBI HCCC No 450 of 1995 (Unreported) ISAAC J WANJOHI & ANOTHER VS ROSALINE MACHARIA*. Bosire J as he then was held that:

“The application is expressed to be brought under Order 39 Rule 2 (3) Order 21 Rule 28 (1) (5) and Order 50 Rule 1 of the Civil Procedure Rules. Section 5 of the Judicature Act, Cap 8 Laws of Kenya and Section 3 A of the Civil Procedure Act, Cap 21 Laws of Kenya. I would like to point out at the outset that the leave which was applied for and granted on 18 th September, 1995, was pursuant to the power donated by Section 5 of the Judicature Act. As I propose to demonstrate later on, no such leave was in my view necessary considering that the Plaintiffs complain that the defendant breached an order of injunction which was made under Order 39 Rule 1 of the Civil Procedure Rules.”

Mr Ahmednasir learned counsel for the applicant argued that on the authority of the above cases, the Plaintiff is properly before the court. The defendant was served with a copy of the order of injunction as required by Order V of the Civil Procedure Rules. He urged me to reject the preliminary objection.

Mr Oyatsi learned counsel for the defendant in a brief reply urged me to allow the preliminary objection on the authority of the Court of Appeal decision of Jacob Zedekiah Ochino & Another vs George Aura Okombo (supra) since the said decision is binding on me.

Having set out the rival submissions by Counsel I take the following view:

The Court of Appeal in the Jacob Zedekiah Ochino case (supra) appears to have dealt with an appeal from committal proceedings as if commenced under Section 5 of the Judicature Act (Cap 8). This is the provision that mentions “the power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England.” This reference must be for punishment for contempt other than of disobedience or of breach of terms of an injunction granted under Order 39 (2) of the Civil Procedure Rules.

In my view disobedience of or breach of terms of an order of injunction granted under Order 39 (2) should be dealt with as provided for under the order i.e. by an application made by way of chamber summons as Rule 9 of the Order provides. Leave to commence the proceedings or file the application for contempt is not required.

The appeal against the order for committal was allowed in the Jacob Zedekiah Ochino case (supra) on the ground that the copy of the order of injunction served did not have a penal notice i.e. the notice informing the appellant that if he disobeyed the order he would be liable to the process of execution to compel him to obey it. The elaborate preconditions obtaining in England were not in issue and were not considered. This case is therefore not authority for saying that the entire English procedure and the entire English practice must be followed where a party is in disobedience of an order of injunction under Order 39 Rule 2.

In my view the only procedural step that must be complied with under Order 39 (2) that has origins in England is the requirement that a penal notice be endorsed on the copy of the order to be served upon the party in disobedience to put him or her on notice of the consequences of disobedience. In my opinion to insist on slavish adherence on the elaborate procedural steps obtaining in England for an application for

contempt under Order 39 (2) would result in blatant disregard of orders of injunction made there under. This is particularly so for parties litigating far from the offices of the Attorney General.

From the above it is clear that I agree with the interpretation given to the provisions of Orders 39 (2) by Bosire J as he then was in the Isaac J Wanjohi case (supra) and Juma J in the John Bachia Ndirangu case. It is illustrative to note that these decisions were made after the Court of Appeal case of Jacob Zedekiah Ochino (supra).

Nyamu J in Hon J Mwangi Kiunjuri vs Wangethi Mwangi and others case (supra) was faced with an application made under Section 5 of the Judicature Act Cap 8 of the Laws of Kenya and had his reasons for finding that the English practice rules were applicable in the manner he proposed. The present application is made under Order 39 Rule 2.

In the result I dismiss the preliminary objection raised by the Respondent with no order as to costs.

Dated and delivered this 18th March, 2004.

F. AZANGALALA

JUDGE

18.3.2004