REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL CASE NO. 875 OF 2001

IN THE MATTER OF AN APPLICATION FOR ORDERS OF

COMMITTAL FOR CONTEMPT OF COURT

BETWEEN

TRUST BANK LIMITED (In Liquidation)…….....……..…APPLICANT

VERSUS

SHANZU VILLAS LIMITED……..….....…..…1ST RESPONDENT

RAJENDRA TARILAL SANGHANK…….…..….....….2ND RESPONDENT

PRFUL MEGHJEE VIRJEE DODHIA……...….…..….....3RD RESPONDENT

SAMITA PRADEEP SHAH…….....……..4TH RESPONDENT

RULING

The Originating Notice of Motion, under section 5 of the Judicature Act (cap 8 Laws of Kenya): order 52 Rules of the Supreme Court of England: section 3A Civil Procedure Act (cap 21 Laws of Kenya) and order 50 rule 1, Civil Procedure Rules, dated 2.10.2003 seeks the following orders:

1. That (a) Shanzu Villas Limited: (b) Rajendra Ratilal Sanghani: (c) Praful Meghjee Virjee Dodhia and (d) Samita Pradeep Shah be committed for their several contempts for disobeying this Court's orders and obstructing or impeding the course of justice in proceedings before this Court.

2. That the said 2nd, 3rd and 4th respondents be committed to prison or fined for the said contempts.

3. That the property of Shanzu Villas Limited be sequestrated.

4. That the costs of this application be provided for.

The application is on the grounds that:

a. The respondents have flagrantly and contumaciously breached or disobeyed this Court's orders.

b. The above actions of the respondents are offences against the administration of justice.

c. That said actions impede and obstruct the course of justice.

d. These contempt proceedings are necessary in order to maintain the dignity of this Court and the proper administration of the law.

The application is supported by the matters set out in the statement and affidavit of Clement Kinuthia Nduru dated 2.10.2003 and annexed to the Originating Notice of Motion.

Prior to the filing of the Originating Notice of Motion herein, the plaintiff/ applicant, Trust Bank Limited, had applied, on 2.9.2003, seeking orders for leave to apply for committal for contempt of court, which orders were granted and issued on 1.10.2003.

In their replying affidavit sworn on 9.10.2003, by Rajendra Ratilal Saghani, the 2nd respondent herein, on behalf of the 1st, 3rd and 4th respondents the deponent gives details showing why and how one Nitin Chandaria owned 25% of the share capital in the 1st respondent/company and that the said shares had not been paid for and that the same were liable, under the Articles of Association of the company, to cancellation by the company and how the same had been cancelled on 30.1.1997, and hence Nitin Chandaria was not a shareholder in the 1st respondent.

The replying affidavit is controverted by the supplementary affidavit of Clement Nduru, dated 13/1/03, through exhibit CN 8, a letter by the 2nd respondent dated 21/9/2001 to the applicant, which letter admits that:

a. the judgment debtor, Nitin Chandaria, was a shareholder of the 1st respondent company;

b. the paid up capital of the company was Kshs 100,000/ - and that

c. the present directors had offered to pay 24% of the shares in the respondent company held by the judgment debtor.

The above is alleged to be an effort to deceive and mislead the Court. However, this will be dealt with in the course of the main ruling in this Originating Notice of Motion.

What follows is a ruling on an application by Mr J Rach, on 8.7.04 which, though oral, prayed for three things:

a. That the judge in these contempt proceedings do disqualify himself because of bias and prejudice towards the 4th respondent.

b. That the judge in these proceedings should refer the file to the Chief Justice for directions as to how these proceedings should proceed, and especially, which aspects of the proceedings should be heard first.

c. Failing (b) above he wished to withdraw from further representation of the 4th respondent.

I wish to deal with the three prayers, sequentially, but before doing that, it is important to state a few factual matters, to put the ruling on those prayers in a proper perspective.

The first matter has to do with legal representation in these proceedings. When these contempt proceedings commenced on 2.10.03, Mr Oyatsi represented, and has continued to represent, the applicant, while Mr A W Omolo represented all the four respondents until 13.10.03 when the 3rd respondent appointed Mr Mburu Mbugua as his counsel, leaving Mr Omolo to represent the 1st, 2nd and 4th respondents.

On 12.2.04, Mr Omolo ceased acting for the 1st, 2nd and 4th respondents whereupon Mr Wekesa &

Company was appointed on 1.3.04 to represent the 2nd respondent, while Mr J Rach seems to have officially come on record for the 4th respondent on 18.2.04. 'The Notice of Change of Advocate and Notice of Appointment of Advocate is not dated apart from……..day of February, 2004' but it was stamped, at Milimani Commercial Courts, on 18.2.04. It should be noted however, that Mr Rach was not a stranger to the proceedings, having appeared with Mr Omolo, and having held brief for Omolo on 10.2.04 when he argued for interim orders under Certificate of Urgency. The matter initially came before me, as the duty judge that day, but since the contempt proceedings had been scheduled to resume on 11.2.04, I disqualified myself. However, the certificate and the orders prayed for therein were not granted by Mr Justice Azangalala, to whom the application was referred by the station (principal) judge.

The importance of the above factual statements is two fold: First, that from 12.2.04, virtually every one of the four respondents was represented by a separate counsel, unlike at the commencement of the proceedings, and more importantly, by the time some of the counsels for the respondents came on record, especially Mr Wekesa and Mr Rach, the applicant had finished with his submissions (during the period when Mr Omolo represented all the respondents with the exception of the 3rd respondent). Secondly, upon completion of the applicant's submissions, and before Mr Wekesa and Rach came on record, counsel for the 3rd respondent was naturally the right party to be heard next, not only because he was the only one on record apart from counsel for applicant, but more so because the defence for the 3rd respondent was, and still is, that he was not a director of the 1st respondent company at the time the alleged contempt was committed, and that he was therefore wrongfully joined as a party to the proceedings.

I will deal with this matter in the main ruling, at greater length. For now, suffice it to add that at that late stage of the proceedings, no preliminary objections had been raised by any party, and finally Mr Wekesa and Mr Rach came into the picture when Mr Mburu Mbugua, for the 3rd respondent, was completing his submissions in reply to the counsel for the applicant.

Of even greater importance is the fact that at the time the prayers sought by Mr Rach, on 8.7.2004, on behalf of the 4th respondent, neither Mr Wekesa [whose brief was being held by Mr Odede on 2.7.2004 and 8.7.2004] nor Mr Rach had even began on their submissions on behalf of their respective clients - that is the 2nd and the 4th respondents, herein. With the foregoing factual statements, I now turn to the application by counsel for the 4th respondent – Mr Rach – and the prayers therein. Regarding disqualification of myself on the basis of bias and prejudice against the 4th respondent, I find the arguments raised by Mr Rach very strange indeed. They stem from a small ruling I made with respect to which matter should be heard first, which I delivered on 2.7.2004. Counsel submitted that I had promised to hear his preliminary objection when the Court next resumed; and hence to proceed with the Notice of 24.2.2004 raised by the applicant, was an expression of bias. In the course of his submissions, Mr Rach used the words that "you expressed a purported opinion of the law" in deciding to hear the Notice of 24.2.2004 by the applicant, rather than the preliminary objection I wanted to raise.

Three points should suffice to dispose of the misconception by the counsel in this prayer. In the first place, this Court makes no promises to any party before it. It delivers judgments and rulings and gives orders in accordance with law. Secondly, what Mr Rach calls purported opinion of the law is, unfortunately, the law: – that when allegations of contempt of this Court are raised, the alleged contemnor must either be purged of the contempt allegations or punished for it, if approved, before he/she can continue to have audience before the said Court or tribunal. And this applies to all involved in any proceedings; parties to the dispute; witnesses; and advocates alike.

The reason for directing that the Notice of 24.2.04 be heard before the preliminary objection was simply that, before the hearing of the preliminary objection by the 4th respondents, the applicant's counsel – Mr Otyatsi; raised the issue, contained in the said Notice of 24.2.04, that through the preliminary objection, the 4th respondent had committed a further contempt of the Court, over and above the main contempt proceedings instituted on 2.10.03, and upon which he had completed his submissions.

As stated herein earlier, the law of contempt – Borrie & Lowe on *The Law of Contempt*, 3rd Edition, 1996 – requires that such an allegation of contempt be disposed off first before the alleged contemnor can have

audience before the Court or tribunal concerned.

And if I was wrong on the law, the procedure is very clear, and Mr Rach either knows or ought to know – appeal. He chose not to do that, but instead uttered the above derogatory; disrespectful words, quoted above. Still on the issue of disqualification, Mr Rach, together with Mr Odede (see more later) admitted that there was no bias, but added "there need be no actual bias, but the possibility of it" is sufficient for the judge to disqualify himself from further presiding over these proceedings.

As stated herein earlier in the statements of factual issues, I did disqualify myself, on my own volition, on 10.2.04, from hearing an application under Certificate of Urgency because the contempt proceedings were resuming before me, on 11.2.04.

Let me state clearly that when the application is intended to delay the finalization of the proceedings, and it has no merit, it would be abdication of this Court's duties to grant such prayers.

The 2nd and 4th respondents have yet to make their submissions. How can the judge be biased and prejudiced against parties yet to be heard unless such parties are denied the opportunity to be heard, which is not the case here.

In the cause of his submissions, Mr Rach undertook upon himself to run the Court; ordering the other counsels to sit down and allow him to address the Court. And all this despite repeated warning by the judge to compose himself and observe the procedures. He even refused to sit down when ordered to do so by the Court and await his turn to make his submissions. In brief, I reject the prayer to disqualify myself from proceeding with these contempt proceedings which I have presided over since their commencement in October, 2003.

I now turn to prayer No 2 by counsel for the 4th respondent – Mr J Rach - that the file be forwarded to the Chief Justice for directions as to which issue should be heard first, and how to proceed.

I find this application as ridiculous as it is contemptuous. I need not spend much time on it though. Suffice it to say that Mr Rach seems to have misconceptions on the role and place of the office of the Chief Justice in our judicial system. But whatever role and functions he might hold on that office I have no doubt that whereas there are cases which deserve placing before the Chief Justice, this is clearly not one of them.

In the day to day running and management of our Court system, the judge/ presiding officer is totally independent and free from any influence or interference from any quarters. To put it differently, this Court will not be intimidated or bow to any threats in the discharge of its judicial duties.

I am not in any way claiming to be mistake/error proof. But when and if the judge makes a mistake in the discharge of his/her duties, the remedies are all too clear in our laws.

I reject the application and the prayer therein, with the contempt that it deserves.

Turning to the application to withdraw from representing the 4th respondent in these contempt proceedings, that I grant. The Court can't force any counsel to continue representing any party.

I now turn to what in my view, constituted contempt in the face of this Court on 8.7.04 by Mr J Rach and Mr Odede, counsels for the 4th and 2nd respondents respectively.

I have already highlighted the conduct and allegations by Mr Rach. I have only one small matter to add to that.

On 8.7.04, Mr Rach not only displayed the worst disrespect of this Court but also played to the audience in much of what he said and did in the Court; refusing to sit down and behave himself; ordering the other counsels to sit down or keep quiet, and all this in total disregard of the Court's directions and clear orders

and warning. In a sentence, Mr Rach turned the Court into a circus.

Mr Odede, for the 2nd respondent - opened his submissions on the application by Mr Rach by saying: **"**I totally associate myself with the submissions by Mr Rach".

The word "associate" means either making oneself a partner; declare oneself in agreement; combine for a common purpose or connect in the mind.

Having detailed what Mr Rach said and did in the Court on the material date, I need not repeat the same for Mr Odede. He "associated" or adopted Mr Rach's submissions and sentiments.

However, he added a weird twist by saying "if it is true, what Mr Rach has said" then he continued. This was not only chicky but deliberately provocative of the Court.

Mr Odede was present during the entire proceedings on 2.7.04, even though he said nothing. So, to raise doubts as to whether it was true or not, and yet totally associate himself with it – true or false – is tantamount to retracting a lie with another one.

It is not acceptable to the Court and I hold him answerable to the same degree as Mr Rach. Mr Odede may be said to have used Mr Rach as his mouthpiece.

Before concluding, it is important to understand the role and place of the law for contempt within our judicial system. This is because in the recent past, court orders have been disobeyed and rubbished by all manner of people in this country. Open disrespect of the Courts has become the order of the day rather than the rare exceptions only attempted by persons of suspect minds.

The situation is grave when disrespect of the Court is demonstrated by officers of this Court – advocates of the High Court – who should not only know better, but who under sections 55 & 56 of the Advocates Act, Chapter 16, of the Laws of Kenya, are duty bound to maintain discipline on pain of punishment for failure to comply. Advocates are supposed to assist the Court in arriving at fair and correct decisions. They are an integral part of the dispensation of justice in our system. Section 121 of the Penal Code, Cap 63 Laws of Kenya is very clear on the powers of this Court for contempt.

Disrespect of the Court by such officers, especially in the face of the Court, sends the wrong message, and such conduct will not be condoned by this Court. May be the rest of the members of the society are taking cue from our officers of this Court – the advocates.

That must be arrested and be brought to an end, and that is why Courts have the power to punish for contempt of court, not for the sake of punishment, but to ensure respect of the authority of the Courts without which jungle rule reigns to the detriment of our society.

As Lord President Clyde said in *Johnson v Grant*, 1923 SC 789 at 790;

"…..The law does not exist to protect the personal dignity of the judiciary nor the private rights of parties or litigants. It is not the dignity of the Court which is offended. It is the fundamental supremacy of the law which is challenged."

Almost fifty years later in *Morris v Crown Office* [1970] 2 Q B 114 at 122, Lord Denning, MR, had this to add with respect to contempt in the face of the Court:

"The importance of it is: of all the places where law and order must be maintained, it is here in these Courts. The course of justice must not be deflected or interfered with. Those who strike at it, strike at the very foundation of our society. To maintain law and order, the judges have, and must have, power at once to deal with those who offend against it. It is a great power – a power instantly to imprison a person without a trial – but it is a necessary power."

I wholly adopt those words of Lord Denning and add that it is both ironic and most unfortunate that persons hired to defend others against allegations of contempt of Court become contemnors, themselves, even before their client's case is heard and determined. It is like a practical test on how the law of contempt operates.

For all the foregoing reasons, and in defence and protection of the dignity of this Court, I find both Mr Jayant Rach and Mr Odede in contempt of this Court during the proceedings in, and before, this Court on 8.7.2004 and punish them as follows:-

Mr J Rach - three weeks (21 days) prison term and Mr Odede, for his blind association with contemptuous words and conduct – two weeks (14 days) prison term. The jail terms herein above to commence with effect from today, 29th day of July, 2004.

It is so ordered.

Dated and Delivered at Nairobi, this 29th day of July, 2004.

O.K. MUTUNGI

JUDGE