



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
MISC. CASE NO. 1097 OF 2002

WACHURI FARMERS CO-OP. SOCIETY LTD.

NJURIGA FARMERS CO-OP. SOCIETY LTD..... APPLICANTS

VERSUS

MBURU MUNGAI T/A

MBURU MUNGAI & ASSOCIATES

THE REGISTRAR OF CO-OP. SOCIETIES RESPONDENTS

RULING

In a Judicial Review application filed herein for leave this court granted leave to institute the required proceedings on 23-9-2002 and ordered that leave granted do operate as a stay. The Notice of Motion was then filed on 14-10-2002 asking for certiorari and prohibition. Procedurally Order 53 rule 3 (1) of the Civil Procedure Rules would come into operation

It says:-

“When leave has been granted to apply for an order of mandamus, prohibition or certiorari the application shall be made within 21 days by NOTICE OF MOTION to the High Court; and shall Unless the Judge granting leave has Otherwise granted be at least 8 clear days between the service of Notice of Motion and the day named therein for the hearing.”

Twelve days after filing of this application the applicant now made an application by way of Notice of Motion under section 5 (1) of the Judicature Act Cap 8 and section 3A of the Civil Procedure Act Cap 29 both of the Kenya Laws for Orders That:-

- (1) ... This Hon. Court be pleased to grant leave to the applicants to institute contempt of court proceedings against the first Respondents for having breached and or Interfered with the Honourable courts Order Herein dated 23-9-02.
- (2) That the first Respondent namely Mburu Mungai be forthwith arrested and committed To Civil jail for a period of six months or any Period that the court may deem fit for having Breached and or interfered with the foresaid Court order.

The supporting affidavit by GEORGE GIKUHI NJUIRI and SIMON MUNYI MWAI sworn on 25-10-02 and on 9-9-2002 States in effect that the Notice of Motion and copy of the Order were served on 27-9-02 upon the Respondents after leave and stay were granted on 23-9-02 and notwithstanding the

Respondents on 2-10-2003 effected transfer of PLOT NO. AGUTHI/GITITU/727; having Title deed issued and charging same to the Co-operative Bank for a Loan of Ksh 3.5 million to the Respondent.

This the applicant claims was wrong since the court had stayed such transactions and moves that could be done by the Respondent and even against the caveat that was on the Title.

The Respondents oppose the application through a Replying affidavit by ROBERT MBURU MUNGAI of 08-11-2002.

He says that he does not intend to disobey court order. That the court order by the Cooperative Tribunal was a dismissal of injunction application then which had the effect of leaving matters as they were. That the charging of Transfer of the plot named started before the PROHIBITIVE Order by this court and the loan was necessary to liquidate debts incurred by the Co-operative Society that the Prohibitive Order did not stop the liquidative process so his actions were proper and that in obtaining this stay order the applicants were merely frustrating him since there was no fraud and the transaction was done with all propriety, that the Order served on him had no Penal Consequences.

The parties' learned Counsel Miss Juma for the applicant and Mr. Gatumuta for Respondent both stressed these grounds.

The order alleged to have been disobeyed was given under Order 53 rule 1 (4) of the Civil Procedure Rules Says:-

“The grant of leave under This rule to apply for an order of Prohibition or an Order of Certiorari, shall if the judge so directs operate as a stay of the proceedings in question, until the determination of the application or until the judge orders otherwise”.

In this application this court ordered a stay which is now said to have been disobeyed.

The Respondent in an outline relies on a kind of justification and seems to be saying, that the order of injunction that was prayed in the Tribunal and disallowed seems to incorporate and include the order now required by the stay order. The issue was raised but not discussed by the applicant but I believe perhaps unwittingly since it poses an important jurisprudence issue before 1975 { as to the extent of the order}

“The Term “stay of proceedings is not confined to proceedings of a judicial nature, but encompasses the process by which any decision challenged has been reached including the decision itself”.

See Ex.P. AVON COUNTY COUNCIL (1991) IQB 558

The Respondent here in his affidavit has created a dichotomy in his status between his having been appointed by Registrar as Liquidator, an administrative action and the decision by Tribunal as a judicial process and that the stay from the order Judicial Review here should not affect him as a liquidator appointed by the Registrar. At various paragraphs of his Replying affidavit the Respondent says.

Para 6. THAT the Tribunal did not “give me the mandate of liquidating the society in issue as I had been appointed by the Registrar of Co-operatives”

7. THAT the effect of the Order was to leave the situation as it was and I had not at any one time been stopped from liquidating the society

8. THAT the tra

nsfer and charging of AGUTHI/GATITU/727 was started along time before the Order was issued and the loan taken was towards setting part of debts owed by Tetu Coffee Growers Co-operative

Ltd to Co-operative Bank and not a fraudulent transfer as alleged

(11) THAT it is clear that the court order I am alleged to be in contempt of did not stop the liquidation process and my

actions have in no way contravened the court order”

I discern a serious misconception here in the understanding of the courts jurisdiction to grant stay and I can do no better to clarify the position other than quote de SMITH WOOLF & JOWELL in JUDICIAL REVIEW of ADMINISTRATIVE ACTION 5th Ed. Pp. 711 para 17.017 where Learned Authors they say:-

“Unlike an injunction it is an order directed NOT to a party to the litigation but at the decision making process of the court; tribunal, or other decision maker”. “It may not therefore be an order capable of being breached by a party to the proceedings, or anyone else and may not be enforceable by contempt proceedings”

At this point in the law there is high level conflict of approach in stay of proceedings treated by the difference between the Privy Council and the English Court of Appeal in the case of R v SECRETARY OF STATE FOR EDUCATION AND SCIENCE EXP. AVON COUNTY COUNCIL (1991) 1 QB 558, and MINISTER OF FOREIGN AFFAIRS, TRADE AND INDUSTRY Vs VEHICLES AND SUPPLIES LTD (1991) 1 WLR 550 a case from Jamaica.

Essentially the conflict is whether “Stay of Proceedings” in Order 53 rule 3 (4) is confined to judicial or quasi judicial proceedings or it has a wider application but includes any proceedings which are subject of judicial Review, the process whereby that decision is reached, and the decision itself.’

But in principle a stay of proceedings works to preserve status quo directed at suspending the operation of a particular decision. Therefore a stay like any other order of the court can have its breach punishable by contempt. I believe this breach if there is one can be punished by contempt Order

This court is empowered by the JUDICATURE ACT Cap 8 of Kenya Laws to Punish for contempt and at section 5 it says.

“The High Court and the court of appeal shall have 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 power shall extend to upholding the Authority and dignity of subordinate courts”.

Therefore the courts of Kenya apply Order 52 Rules of the Supreme Court of England and the contempt of court Act 1991 both of England.

The Order of stay was given as stated herein on 23-9- 2002. It is alleged that same was disobeyed. Both parties agree that it was given and also the Respondent agrees that it was disobeyed except for reasons that he deems offer complete defence to it.

Contempt of court is a means through which court orders are enforced. It is contempt of court to disobey orders of a court either to do a specified act within a specified time or to abstain from doing a specified act. Here the act ordered was to stay proceedings, or those actions dependent upon the orders of the Tribunal.

In this application the alleged contemnor says that the action envisaged had been started before the order and was not subject to the order of stay which was therefore Ultravies and irrelevant. But this is wrong reasoning. The order of the court whether coercive or not or perceived to be irrelevant should be obeyed unless and until the same is discharged. ROMER LJ said in HADKINSON Vs HADKINSON (1952) P 28j

“It is the plain and unqualified obligation of every person against or in respect of whom an order is made by a court of competent jurisdiction to obey it and unless and until that order is discharged. The uncompromising nature of the 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”.

The order must be obeyed whether or not it should have been granted or accepted in the first place so the argument by the Respondent runs counter to the principle.

Because the law is that the Order must be obeyed the motive for which it is obeyed does not avail any defence to the contemnor. It is therefore immaterial when the plaintiff says that the transfer was made to effect a charge used to secure money to settle part of the debt owed by Tetu Coffee Growers Co-operative Ltd to the Co-operative Bank. These arguments therefore cannot aid the contemnor. Respondent raised the issue of Penal Notice. This is crucial.

Procedurally the law requires that a contemnor be notified in clear terms of his contempt and in this case it is acknowledged that service was effected on the contemnor. A personal service is required and this is not disputed. Except however in his affidavit the purported contemnor has claimed that he was not served with a Penal Notice. What is a Penal Notice and why should it be served?

A penal Notice is required to accompany the personally served Notice of contempt to the contemnor. There was no refuting evidence whether Penal Notice was served. The question is should an Omission to serve Penal Notice Vitiates Contempt Notice and render proceedings annulity?

I do agree that Penal Notice should be served with Notice. This is Civil Contempt and its function is to protect private interest of the litigant just as it is also to protect the public interest by way of making court have authority to enforce its own orders. The penalty therefore for Civil Contempt is COERSIVE and not PUNITIVE. So that where in my view a contemnor knows exactly the nature of his breach and knows that consequences may arise from his breach Penal Notice may not so necessarily vitiate the Contempt Proceedings.

The English view which is the Law applicable is contained in the Law Text Book entitled BORRIE & LOWE The Law of Contempt 3rd Ed. Pp. 563 relying on the decision of NEILL LJ in the case of SAFRONIQU V SEGETI (1991) FCR (336) The Learned Writers said:-

“As Neill LJ. In SOFRONIQU Vs SEGE TTI pointed out before the major revision Of the Rules of the Supreme Court in 1965, There was no requirement for a Penal Notice in the case of negative or prohibitory injunction. Accordingly the Court of Appeal rejected the contention based on the wording of rule 7 (4) that it is mandatory to serve a copy of an order backed with a Penal Notice even where that order is mandatory the court can still force an order served without Penal notice”.

This opinion is in the current 1996 edition of the said Text Book I have quoted whereas contempt Act is 1991. That being the law I hold that Omission to join penal Notice did not vitiate the Notice. The court of appeal in the case of NYAMODI OCHIENG NYAMOGO & ANOTHER Vs. KENYA POSTS & TELECOMMUNICATIONS CORPORATION CA Civil Appl. No. NAI 264 of 1993 on confirming the necessity of personal service said that omitting endorsement of Penal consequences on the NOTICE rendered the application incompetent.

I must say that this ruling binds this court, but in this instance it is distinguishable as the highest court relied on the English law as indeed the law provides but that was as at 13- 1-1995 when the Judgment was read but the authority I have quoted from the Text Book Borrie and Lowe The law of Contempt is of 1996. The Rules of Procedure Relied on by the Court of Appeal are of 1982 R.S.C.Ed. where the committal Rules were under order 45 but now this has been changed to order 52 of RSC and Contempt of Court Act has been passed in England in 1991. I think the proof of contempt has been proved to the required standard. Lastly the question whether the contemnor has mens rea since the liability for breaking

a court order is strict liability must be considered but it is not necessary where an order has been disobeyed to prove intention of the contemnor not that he intends to interfere with the administration of justice like an injunctive order, prohibition becomes absolute and if not to be qualified by intent except if the order says so.

I am satisfied that the Respondent/Contemnor has committed an act of contempt and I so find He be fined Kshs 10,000/= or be jailed for 6 months in default. The transfer effected in contempt of court order is hereby rendered VOID. Costs to the applicant.

Dated this 17th Day of March 2003.

A.I. HAYANGA

JUDGE

Read to Miss Juma for Plaintiff/Applicant.

No appearance for Respondent.

A.I. HAYANGA

JUDGE