



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

**CIVIL SUIT NO. 326 OF 1999**

**ABBEYBARN LIMITED.....PLAINTIFF/DECREE HOLDER**

**VERSUS**

**INFINITY GEMSTONES LTD.....DEFENDANT/OBJECTOR**

**RULING**

The matter that was scheduled for hearing was the chamber summons taken out by the objector in this matter dated 21.3.2000. In that application the objector seeks to set aside some orders issued for attachment of some property which order, it is contended, was a nullity *ab initio*.

Learned counsel for the plaintiffs Mr Nanji who obtained the attachment orders however filed a Notice of Preliminary Objection to the hearing of the said application on the basis that the objector had failed to comply with court orders made on 4.1.2000 which action amounted to contempt of court and therefore disentitled the objector from being heard on the matter. It is the preliminary objection which was argued and is the subject matter of this ruling.

The orders that were allegedly disobeyed were given *ex parte* by the Deputy Registrar, L Achode (Mrs) and were issued on 6.1.2000. They were extracted and served on the objector with a Penal Notice on 19.1.2000 requiring the objector to deliver some items missing from an inventory of attached items for the safe custody of the court brokers. That is the same order the objector seeks to set aside before complying with its intentment, since, as submitted by learned counsel for the objector, Mr Mabeya, there is no obligation on a party to comply with an order that is a nullity *abinitio*.

On both sides of the argument are powerful legal propositions, all supported on authority. By Mr Nanji the English case of *Hadkinson vs Hadkinson* [1952] 2 All ER 567 where Romer LJ said:

"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 until that order is discharged. The uncompromising nature of this obligation is shown by the facts that it extends even to cases where the person affected by an order believes it to be irregular or even void." (underlining added)"

Romer LJ also quoted with approval Lord Cottenham LJ in *Chuck vs Cremer* [1846] 1 Copper Temp Cott 205, as follows:

"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 not be disobeyed."

Those legal propositions have been applied and followed both in our High Courts and Court of Appeal and Mr Nanji referred to examples in CA NAI 89/91 *C K Muite & 10 others vs Aaron Gitonga Ringera & 3 others* (UR) (Gachuhi/Masime/Omolo JJ A) which was an application for stay of orders for injunction granted by Mango J in HCCC 1330/91 which he also cited. The *Hadkinson* case was also followed by Simpson J (as he then was) in *Mawani vs Mawani* [1977] KLR 159.

On the other hand Mr Mabeya relied on my own recent decision which examined similar submissions and considered more recent Kenya Court of Appeal decisions. It was HC Misc Civil Suit No 264/97 (decided on 3.2.2000) *Republic vs The Chief Magistrate's Court Mombasa Exparte Abdo Bahaj & Co Ltd & anor.*

It may be reproduced on the point *inextenso*.

"Without appearing to sidetrack or minimise the importance of the procedural issues raised and particularly the issue of punishing a party for disobedience of a court order, I must at once revert to the substantive issue as to whether the lower court had the pecuniary or any jurisdiction to deal with the matter placed before it. For it matters not that a party has to be punished for alleged disobedience of an order if there was no power in the first place to make such order. It is a consequential order which would dissipate if the principal order is set aside. In saying so I do not take lightly the dangers inherent in the situation posed by counsel for the respondent, where a party would decide on his own, and without challenging a court order, that it was not a lawful order and simply decide to ignore or disobey it. The straight answer to that of course would be that the party would be liable to heavy penalties if it turns out that the orders were after all lawful. Equally dangerous would be a situation where a party, either by design or ignorance, submits a matter before a Court which has no jurisdiction in the hope that orders issued *ex parte* by that Court would serve their purpose before they are challenged.

A passage from a House of Lords decision cited with approval by our own Court of Appeal seems to lend cover to such mischief: Per Lord Diplock in *Isaacs v Robertson* [1984] 2 All ER 141 at 142.

"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 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 338 at 342, 47 ER 884 at 885) " 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 not be disobeyed." Such being the nature of this obligation, two consequences will, in general, follow from its breach. The first is that anyone who disobeys an order of the Court...is in contempt and may be punished by committal or attachment or otherwise."

See CA No 59/93 *Omega Enterprises (Kenya) Ltd v Kenya Tourist Development Corporation & 2 others*

(UR), per Gicheru JA Lord Diplock however distinguished such orders from others which attract *ex debito justitiae*, the right to have it set aside which include orders obtained in breach of the Rules or Natural Justice.

Tunoi JA, (*ibidem*) adverted to such orders, to wit:

"Mr Gautama again averred that no one, especially third parties, can be guilty of disobeying an order which is null and void. With this submission I agree. There cannot be as far as third parties are concerned interference with due administration of justice when the *ex-parte* order made is without any legal basis and is of no legal effect, and; as regards the parties to this suit, it cannot be said that there was disobedience of an order which was in the first place null and void.

In *Macfoy vs United Africa Co Ltd* [1961] 3 All ER 1169 Lord Denning delivering the opinion of the Privy Council at page 1172 (I) said:

"If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado; though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

I am of the view that orders purportedly granted by a Court that has no jurisdiction to do so attract *ex debito justitiae* the right to have them set aside and are in the category stated in the appeal case above."

It seems to me in considering both propositions of law that they beg the question: the question whether there was indeed contempt of a court order.

With respect, I cannot get the answer from the lengthy submissions made by both counsel on the basis of a preliminary point of law. A preliminary point of law can only be raised when there is no dispute on the facts. Contempt of court has always been recognised as an offence of serious gravity as it undermines the very foundations of the rule of law. A contemnor will most likely lose his liberty if not given equally weighty options of punishment. In my view proper evidence is best provided and considered in contempt of court proceedings, which have yet to be instituted in this case.

I think it is proper in this case to consider first, as contended by the objectors, whether there was any order at all that is capable of disobedience or as the Court of Appeal stated whether it is such order as would attract *ex debito justitiae* the right to have it set aside.

I dismiss the preliminary objection and order that the application shall proceed to hearing.

**Dated and Delivered at Mombasa this 27th day of June 2000.**

**P.N.WAKI**

**JUDGE**