REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 2083 OF 2000

DAVID NJOROGE KINUTHIA, JOSEPH WACHIRA MWANGI

PHILIP M. KATIA & 651 OTHERS.....PLAINTIFFS

VERSUS

GNANJIVAN SCREWS AND

FASTERNERS LIMITED.....1ST DEFENDANT

GNANJIVAN WIRE

GALVANISING MILLS LIMITED.....2ND DEFENDANT

SPECIAL STEEL MILLS LIMITED.....3RD DEFENDANT

NALIN NAIL WORKS LIMITED.....4TH DEFENDANT

(ALL KNOWN AS NALIN GROUP OF COMPANIES)

ANDREW DOUGLAS GREGORY.....5TH DEFENDANT

ABDUAL ZAHIR SHEIKH.....6TH DEFENDANT

IN THE MATTER OF ALLEGED CONTEMPT OF COURT PROCEEDINGS

BETWEEN

DAVID NJOROGE KINUTHIA

JOSEPH WACHIRA MWANGI

PHILIP M. KATIA & 651 OTHERS.....PLAINTIFFS/APPLICANTS

AND

KCB BANK LIMITED.....1ST RESPONDENT

RAVAL NAVENDRA RAMESHCHANDRA.....2ND RESPONDENT

DEVKI STEEL MILLS LIMITED.....3RD RESPONDENT

ANDREW DOUGLAS GREGORY.....4TH RESPONDENT

ABDUAL ZAHIR SHEIKH .....5TH RESPONDENT

RULING

The plaintiffs instituted a suit against the 1st to 4th defendants, all commonly known as Nalin Group of Companies, alongside the 5th defendant. By a judgment delivered on 30th January, 2004 Ibrahim J (as he then was) found in favour of the plaintiffs against the 1st, 2nd, 3rd and 4th defendants jointly and severally by way of an order for specific performance to honour the terms of the agreement dated 17th January, 1999 in respect of each plaintiff and terms of payment contained in the cited schedules.

There was also a declaration made that the plaintiffs were entitled to be paid terminal dues as provided in the said agreement, together with interest calculated from the date of the agreement until payment in full. The plaintiffs were also granted costs of the suit.

Following that Judgment, the plaintiffs moved to execute the decree which however did not materialise. The reason for the failure was that, the 3rd respondent filed a Notice of Objection followed by an application dated 14th October, 2005 seeking to lift the attachment of the objector's assets proclaimed and attached by the auctioneers. The reasons contained in the application were that the assets proclaimed and attached constituted the property of the objector in that the objector was not a judgment debtor in the suit.

There was also another objection raised by the 1st respondent, which was followed by an application dated 17th October, 2005 to the effect that the attachment levied in execution of the decree be raised, and the attached goods be realised to the objector. The reasons set out were that, the attached goods were charged to the objector under debentures over all the assets to secure advances made to the judgment debtors. The other reason was that by an agreement for sale dated 5th April, 2005, the 5th and 6th defendants and the objector sold all the assets of the judgment debtors to the 3rd respondent.

The record shows that the parties appeared before Nambuye J (as she then was) on 24th October, 2008 and a consent recorded to the effect that the properties proclaimed and attached in the process of execution of the decree be lifted. Any attached goods were ordered to be released to the objector forthwith. Each party was to bear their own costs. The consent order was signed by Mrs. Rika for the plaintiffs and Mrs. Maira for the objector.

It would appear no step was taken thereafter in the process of execution of the decree until an application dated 9th July, 2019 was filed on behalf of the plaintiffs seeking leave to institute contempt of court proceedings against the respondents, followed by another application dated 5th October, 2019 to have the matter transferred to the Employment and Labour Relations Court which application was declined in a ruling dated 14th November, 2019.

It is the application dated 9th July, 2019 which is the subject of this ruling. There are several prayers sought in the Notice of Motion which do not need exhaustive recital in view of what the respondents have advanced in answer to the Motion. Reference however may be made to some of the said prayers where need be.

Following service of the application upon the respondents, the 2nd and 3rd respondents filed a Notice of Preliminary Objection while the 1st, 4th and 5th respondents filed grounds of opposition. Subsequently, the parties were ordered to file written submissions.

The thrust of the Notice of Preliminary objection is that the 2nd and 3rd respondents are not and have never been main parties to the main suit, that is HCCC No. 2083 of 2000, in the first instance and that, any claim against the 2nd and 3rd respondents is barred by Section4 (4) of the Limitations of Actions Act, Cap 22 Laws of Kenya. Further, the 2nd and 3rd respondents have no shareholding in the 1st, 2nd, 3rd, and 4th defendants in the main suit, and are separate entities from the judgment debtors.

It is further pleaded that, the 2nd and 3rd respondents were never served with a copy of the judgment and or court order, either personally or by way of alternative service, if such alternative service was ever sought and granted. In addition, the 2nd and 3rd respondents were never warned that disobedience of the judgment and or court order would constitute contempt. Finally, the entire contempt of court proceeding is grossly incompetent, frivolous, vexatious and abuse of the court process, as it is intended at blackmailing and or extorting 2nd and 3rd respondents. It is the prayer of the 2nd and 3rd respondents that the same be struck out with costs.

The grounds of opposition filed on behalf of the 1st , 4th, and 5th respondents stated that, the interests of the applicants as judgment creditors are secondary to the interest of a debenture holder, and the application is r*es judicata* as against the 5th and 6th respondents. It is stated further that, the 5th and 6th respondents are disclosed agents of the 1st to 4th defendants and therefore cannot be held liable in their personal capacities. Finally, the application is an abuse of court process by virtue of Section 4 of the Limitation of Actions Act, Cap 22 Laws of Kenya.

I have considered the submissions by the plaintiffs dated 12th March, 2021, the 2nd and 3rd respondents dated 15th March 2021, the 1st and 4th and 5th respondents dated 26th March, 2021 and the supplementary submissions filed on behalf of the plaintiffs dated 2nd June, 2021 with leave of the court. Several authorities have also been cited which I have read, but in the event they are not specifically cited in this ruling, that should not be construed as wanting in substance. The 1st, 4th and 5th respondents support the 2nd and 3rd respondents in their submissions.

In their submissions dated 12th March, 2021 the plaintiffs have set out several issues at paragraph 8 relating to the capacity of the 2nd and 3rd respondents in these proceedings, whether they are shareholders in the 1st,2nd ,3rd and 4th defendants in the main suit or separate entities from the judgment debtors. The plaintiffs have also raised the question whether service of the judgment and/ or decree in the main suit was effected upon the 2nd and 3rd respondents. Finally, they question whether any claim against the 2nd and 3rd respondents is barred by Section 4 (4) of the Limitation of Actions Act. It is their submission that evidence is required to answer those issues and therefore the Preliminary

objection should be dismissed.

I consider the first issue to address is whether or not the 1st, 2nd and 3rd respondents were ever parties in the main suit at first instance. It is clear that the 1st, 2nd and 3rd respondents were not parties to the original suit and I believe that is why prayers 5 and 6 of the Notice of Motion seek leave of the court to join the 1st, 2nd and 3rd respondents to the proceedings. The inclusion of those prayers is a clear indicator in that regard.

In the case **Kiai Mbaki & 2 others v Gichuhi Macharia & another [2005] eKLR** the court stated as follows,

> **"The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard."**

It follows that the court cannot issue orders against a person that is not a party to the suit. Further to the foregoing, the main purpose why a party may be joined to a suit is to claim some relief from such a party. The fact that the 2nd and 3rd respondents purchased the assets of the judgment debtors does not make them shareholders or parties to the suit, neither attract any liability.

Under the Civil Procedure Rules such applications are brought under Order 1 rule 10 (2) of the Rules. This has not been cited by the applicants herein. Whatever the case, such an order may only be sought during the pendency of the suit. – see **Lillian Wairimu Ngatho and Another vs. Moki Savings Co-operative Society Limited & Another (2014) e KLR.** As at this stage there no suit pending between the plaintiffs and the defendants, judgment having been delivered on 30th January, 2004 and a decree extracted. The filing of objection proceedings did not make the respondents parties to the suit. If that were the case, prayers 5 and 6 of the application would not have proved necessary.

Where a party is not cited in the decree that is sought to be executed, the applying party must satisfy the court how liability may attach in such circumstances. A decree addresses the judgment debtor, and liability thereof must be clearly stated.

The second issue that stands out is whether the plaintiffs are barred by law from taking any action against the respondents.

Section 4(4) of the Limitation of Actions Act provides as follows,

> **"4) An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due."**

It is common ground that the judgment herein was delivered on 30th January, 2004. By 9th July, 2019 when the application dated 9th July was filed, 15 years had gone by. By virtue of the above provision the execution orders sought by the plaintiffs are out of time. This is because the orders sought have a direct reference to the main suit, the judgment of 30th January, 2004 and the decree that followed. In the case of **Adnan vs. Earl of Sandwich (1877) 2QB 485** the court addressed the object of limitation statute and stated as follows,

> **"The legitimate object of all statutes of limitation is in no doubt to quiet long continued possession, but they all rest upon the broad and intelligible principles that persons, who have at some anterior time been rightfully entitled to land or other property or money, have, by default and neglect on their part to assert their rights, slept upon them for a long time as to render it inequitable that they should be entitled to disturb a lengthened enjoyment or immunity to which they have in some sense been tacit parties."**

There is no evidence from the material presented by the plaintiffs that any application was made and allowed to extend the time beyond the 12 years set by law.

Where an application for contempt is filed against a party, it must be proved by the applying party that an order was issued against the respondents; that the said order was served, made known and or communicated to the offending party. In addition, such an order must contain a penalty notice that, in the event of disobedience, consequences shall follow. In the case of **Katsuri Limited vs. Kapurchad Deparshah (2015) e KLR** the court set out the elements that must be proved in contempt proceedings in the following terms,

> **"The High Court of South Africa in the case of *Kristen Carla Burchell vs Barry Grant Burchell*[20] held that in order to succeed in civil contempt proceedings, the applicant has to prove (i) the terms of the order, (ii) Knowledge of these terms by the Respondent, (iii). Failure by the Respondent to comply with the terms of the order. Upon proof of these requirements the presence of willfulness and bad faith on the part of the Respondent would normally be inferred, but the Respondent could rebut this inference by contrary proof on a balance of probabilities.[21] As pointed out earlier, the alleged order was not annexed, nor was it shown that it the corporate veil had been lifted in order for the directors to be held personally liable.**
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> **Writing on proving the elements of civil contempt, learned authors of the book *Contempt in Modern New Zealand*[22] have authoritatively stated as follows:-**
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> > ***"There are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases) that:-***

(a) the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;

(b) the defendant had knowledge of or proper notice of the terms of the order;

(c) the defendant has acted in breach of the terms of the order; and

(d) the defendant's conduct was deliberate.

Although the proceedings are civil in nature, it is well established that an applicant must prove the elements beyond reasonable doubt, at least higher than the standard in civil cases, The fact that the liberty of the defendant could be affected means that the standard of prove is higher than the standard in civil cases. It is incumbent on the applicant to prove that the defendant's conduct was deliberate in the sense that he or she deliberately or wilfully acted in a manner that breached the order.

The prayer sought is for committal for contempt. The power to commit for contempt is one to be exercised with great care. An order committing a person to prison for contempt is to be adopted only as a last resort.

The other important aspect to mention is that the alleged contemnor is a director of the company. He is not a party to these proceedings in his personal capacity. The company is a legal entity. The proper procedure for the applicant was first to apply to lift the corporate veil then go for the directors in their personal capacities. As matters stand now, the director is not personally liable for debts, actions or omissions of the company, hence the application before me is misdirected."

The above long citation is necessary to address the issues at the centre of this dispute.

One is bound to ask however, how a party who did not participate in the proceedings leading to the contempt proceedings, may be cited in such circumstances. That is not to say that a person interfering with the court order may not be cited. Far from it. However, there is no allegation that the respondents interfered with the court process from the outside. What the plaintiffs allege is that the respondents were active players in the whole process and that they should be cited for contempt.

It should not be forgotten that the consequences of contempt of court orders are grave. With respect to individuals, this may lead to loss of freedom by way of imprisonment or payment of fines. With respect to limited liability companies, a fine and attachment of property may follow. That is the reason the law requires proof of the order, service of the same and knowledge on the part of the party sought to be cited and condemned. Decided cases have pointed out that contempt of court is a quasi-criminal offence. Proof thereof is not on a balance of probabilities, but above that standard, yet not beyond reasonable doubt.

The consent order recorded on 24th October, 2008 appeared to absolve the respondents from any liability whatsoever. That order was not a stay of execution, but clearly stated the execution was lifted. The supplementary submission by the plaintiffs cited the case of **Koinange Investments and Development Company Limited v Ian Kahiu Ngethe & 3 Others [2015] e KLR** where judgment was forestalled by the court and therefore made Section 4 (4) of the Limitation Act inapplicable. Having observed that the consent order recorded by the parties was not a stay of execution but lifting of that process, the **Koinange case** does not aid the plaintiffs. The plaintiffs have not demonstrated that any order was issued against the respondents thereafter. There is also no proof that if any such order was issued, it was served upon the respondents either personally or by way of substituted service. There is no evidence that any notice was issued and served upon the respondents warning them of the consequences of noncompliance with the said order.

I must now return to the Notice of Preliminary Objection. In the case of **Mukisa Biscuits Manufacturing Co. Ltd –V- West End Distributors Limited (1969) Ea. 696** Law JA had the following to say,

"So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."

The Notice of Preliminary Objection raised by the 2nd and the 3rd respondents in this matter is a plea of limitation under the Limitation of Actions Act aforesaid and therefore a point of law. By upholding the objection, the matter comes to the end.

I believe I have addressed the salient issues in that demonstrate, it is an exercise in futility for the plaintiffs to pursue this matter against the respondents.

The irresistible conclusion in this matter is that, the execution proceedings are desperately out of time and cannot be saved. They are also directed at non-parties and therefore totally misplaced**.**

The only order that commends itself is that the application dated 9th July, 2019 is hereby struck out. Considering the nature of this claim however, each party shall bear their own costs.

Dated and Signed at Nairobi this …….. Day of …….. 2021

A. MBOGHOLI MSAGHA

JUDGE

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 7TH DAY OF JULY, 2021.

J. K. SERGON

JUDGE

In the presence of:

Mrs. Owano h/b for Kanjama for the plaintiff

Mwangi holding brief for Kamojo for the Plaintiff

Mrs. Abuya & Karungo for 2nd and 3rd respondents

Mrs. Muliti holding brief for Lubano for 1st, 4th & 5th respondents