REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

MILIMANI LAW COURTS

HCCC NO. E 054 OF 2019

OILFIELD MOVERS LIMITED …….…… PLAINTIFF/APPLICANT

-VERSUS-

ZAHARA OIL AND GAS LIMITED ….....….....…. DEFENDANT/RESPONDENT

RULING

1. These contempt of Court proceedings raise an important question on the place of officers of a corporation when the entity is assailed for contempt of a Court order.

2. Oilfield Movers Limited (Oilfield or the Plaintiff) moved the Court through a Notice of Motion dated 12th September 2019 for the following prayers:-

> *(2) THAT the Court makes an Order that the Contemnors - Zahara Oil & Gas Ltd, Country Manager-Zahara Oil & Gas Ltd Mr. Peter Nduru, Chief Financial Officer-Zahara Oil & Gas Ltd Mr. John Patrick Barr and Local Representative – Zahara Oil and Gas Ltd Sonal Sejpal are in contempt of Court for disobedience of the Court Order issued on 31st July 2019.*
>
> *(3) THAT the Court does impose on the Defendant and its officials – Zahara Oil & Gas Ltd, Country Manager-Zahara Oil & Gas Ltd Mr. Peter Nduru, Chief Financial Officer-Zahara Oil & Gas Ltd Mr. John Patrick Barr and Local Representative – Zahara Oil and Gas Ltd Sonal Sejpal an appropriate sanction in form of committal to civil jail for being in contempt of the orders of this Honourable Court granted on 31st July, 2019.*
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> *(4) THAT the Court makes an order that until the Contemnors purge their contempt to the satisfaction of the Court, the Contemnors, the Defendant ought not to be heard by this Court or participate in these proceedings.*
>
> *(5) THAT cost of the Application be provided.*

3. On 31st July 2019, this Court made the following orders:-

> "18. For that reason I allow prayer 6 of the Notice of Motion of 1st April, 2011 but the Bank guarantee or Deposit shall be in the sum of USD 600,705.30. The Bank Guarantee or Deposit shall be furnished or made within 45 days hereof. Costs of the Application to the Plaintiff."

4. It is common ground that at the time the current application was argued, Zahara Oil and Gas Limited (Zahara or the Defendant) had neither furnished the Bank Guarantee nor made the deposit ordered by Court. The Plaintiff takes the position that Zahara is in contempt of the Court Order and seeks that the company and three named persons said to be officials of the company to bear the responsibility of that disobedience. These are Peter Nduru, John Patrick Barr (JPB) said to be the Chief Financial Officer and Sonal Sejpal said to be the Local Representative of the company.

5. Peter Nduru answers the application on his own behalf and on behalf of the other alleged contemnors. At the onset, he states that Sonal Sejpal is not an officer of the Defendant Company and should not have been cited at all. The Applicant did not rebut this assertion and I take it that Sonal is indeed not an officer of the company and is straightaway excused from these proceedings. The application in so far as is directed at her fails with costs to her.

6. Mr. Nduru depones that he and JPB first became aware of the Court order on or about 26th November 2019 when they were informed of it by one Peter Worthington who is the Chief Executive Officer of the Respondent Company. He states that neither he nor JPB were personally served with the order within the 45 days of 14th September 2019 when the order was made or at all.

7. He makes the further point that he is aware that his company was represented by an advocate during the delivery of the Ruling which gave rise to the order and that updates in regards to the matter were sent directly by the said advocate to Mr. Worthington and not himself or JPB. That the latter duo did not receive any update from the company Advocate. To emphasize the matter, he states that he and JPB are informed of the happenings in these proceedings through their principal, Mr. Worthington who oversees all legal matters relating to the company. He avers that he and JPB are mere employees.

8. On another front, Mr. Nduru states the extracted order does not have enclosed on it a penal notice and on this failure alone the instant application should be dismissed.

9. On the merit of the application, the Respondent Company contends that it and the Applicant are, at present, party to a contract where the Applicant is providing services to the Respondent in its activity of demobilizing equipment at certain oil blocks in Lamu County.

10. This is elaborated in paragraph 18 of the affidavit Mr. Nduru in which he depones:-

> "THAT on advice received from Peter Worthington I am aware that the Respondent Company has been seeking investors to not only effect demobilization at those oil blocks referred to as L4 and L13 in Lamu County and embarking on further exploration in Lamu but also to meet its obligations in the Country and which obligations include (as we have now been advised by Peter Worthington), without prejudice to its rights to appeal the Ruling and Order of 31/07/2019, complying with the order."

11. In addition, the deponent argues the Respondent Company does not and has not had the means to deposit the said US $ 600,705.30 nor to provide a Bank Guarantee of the said sum.

12. Central to the response by the alleged contemnors is that there has been no wilful disobedience of the order of Court.

13. The law in contempt of Court proceedings is to be found in Section 5 of the Judicature Act and by dint of Section 3 thereof Part 81 of the English Civil Procedure Rules, 1998 (as amended from time to time) in the Applicable law.

14. It is common ground that when the order requiring the deposit of furnishing of the guarantee was made counsel for Respondent was present in Court. The Applicant's position is that as counsel was aware of the order then his client (the Respondent Company) is considered as being aware and service on the company was unnecessary.

15. Counsel for the Respondents refutes that to be the law and cites Rule 81.5 of the English Rules which reads:-

> "Unless the court dispenses with service under rule 81.8, a judgment or order may not be enforced under rule 81.4 unless a copy of it has been served on the person required to do or not do the act in question, and in the case of a judgment or order requiring a person to do an act–
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> (a) the copy has been served before the end of the time fixed for doing the act, together with a copy of any order fixing that time;
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> (b) where the time for doing the act has been varied by a subsequent order or agreement under rule 2.11, a copy of that subsequent order or agreement has also been served; and
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> (c) where the judgment or order was made under rule 81.4(5), or was made pursuant to an earlier judgment or order requiring the act to be done, a copy of the earlier judgment or order has also been served.
>
> (2) Where the person referred to in paragraph (1) is a company or other corporation, a copy of the judgment or order must also be served on the respondent before the end of the time fixed for doing the act.
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> (3) Copies of the judgment or order and any orders or agreements fixing or varying the time for doing an act must be served in accordance with rule 81.6 or 81.7, or in accordance with an order for alternative service made under rule 81.8(2)(b)."

16. It is submitted by counsel that the Rule is couched in mandatory terms and recognizes that the only instances when the Court may dispense with personal service are those set out under Rule 81.8 of the Rules. Those provide:-

> "(1) In the case of a judgment or order requiring a person not to do an act, the court may dispense with service of a copy of the judgment or order in accordance with rules 81.5 to 81.7 if it is satisfied that the person has had notice of it—
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> (a) by being present when the judgment or order was given or made; or
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> (b) by being notified of its terms by telephone, email or otherwise.

(2) In the case of any judgment or order the court may—

(a) dispense with service under rules 81.5 to 81.7 if the court thinks it just to do so; or

(b) make an order in respect of service by an alternative method or at an alternative place."

17. It is argued, for the Respondent, that in the instant case the Court did not dispense with the requirement for personal service of the order.

18. As I understand it, the gravamen of Oilfields argument is that as the advocate of the company was aware of the order then the company and its officials are deemed to be equally aware and personal service is unnecessary.

19. Notwithstanding the position in English Statute. Kenyan Courts have held that personal service of an order is unnecessary where a party had knowledge of it. The local mantra in knowledge is higher than service. As conceded by counsel for the Respondent, the *locus classicus* on this print is the discussion of Lenaola J. (as he then was) in Basil Criticos v Attorney General & 8 others & 4 others [2012] eKLR in which the Judge said:-

"20. The issue of knowledge of orders as being sufficient was until recently, alien in our jurisprudence. In Kariuki and Others v Minister for Gender, Sports, Culture and Social Services and Others, (2004) I KLR 588, it was held;

> "...but in our law, service is higher than knowledge and since the service here was frustrated…I shall hold in accord with the existing law that there was no service". This was made following the decision in Wangondu (supra).

However the law has changed and as it stands today knowledge supersedes personal service and for good reason. This has recently been held in Kenya Tea Growers Association vs Francis Atwoli & 5 Others, Petition No.64 of 2010 where I opined as follows;

> *"In the case before me, I am more than satisfied that even at the higher level of beyond reasonable doubt, when an individual has been served with and/or has knowledge of a court order but not only ignores it but in fact incites others to do the same, the threshold for contempt has been met. Francis Atwoli in fact went further to arrogate himself the decision to determine when the strike should end despite the fact that the Court Order had stopped it. He went further to interpret it as made without jurisdiction and that only the "Workers Court", (the Industrial Court) had jurisdiction to determine the matter. He did not do so once but on a number of occasion as he flew by helicopter from place to place on 18th October 2012. His contempt was obvious and his conduct and words can attract no other finding."*

The point above is that where a party clearly acts and shows that he had knowledge of a Court order, the strict requirement that personal service must be proved is rendered unnecessary. That should be the correct legal position and I subscribe to it.

20. This position has been endorsed repeatedly by the Court of Appeal. See for instance Shimmers Plaza Limited -vs- National Bank of Kenya [2015] eKLR.

21. It would seem that the rationale for the rule is to protect the integrity and dignity of Court orders. To excuse a contemnor who has knowledge of a Court order simply because he has not been personally served is to open up Court orders and process to contemptuous and cynical disobedience.

22. And where a party is represented by an advocate, the party is deemed to have knowledge of a Court order if the party's advocate is aware of it. The Court of Appeal in Shimmer Plaza held as follows:-

> **"The dispensation of service under rule 81.8 (1) is subject to whether the person can be said to have had notice of the terms of the judgment or order. The notice of the order is satisfied if the person or his agent can be said to either have been present when the judgment or order was given or made; or was notified of its terms by telephone, email or otherwise. In our view, *'otherwise'* would mean any other action that can be proved to have facilitated the person having come into knowledge of the terms of the judgment and/or order. This would definitely include a situation where a person is represented in court by counsel. Once the applicant has proved notice, the respondent bears an evidential burden in relation to willfulness and mala fides disobedience. This Court in the Wambora case (supra) affirmed the application of these requirements.**
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> **We now revisit the issue of service. Was there service of the order said to have been disobeyed on the respondent? There is no dispute that no formal order was extracted and personally served on the respondent and an affidavit of service filed to that effect.**
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> **In that respect, this case can be distinguished from *Justus Kariuki Mate & Another vs Hon. Martin Wambora (Wambora case)* supra cited by learned counsel for the applicant.**
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> **On the other hand however, this Court has slowly and gradually moved from the position that service of the order along with the penal notice must be personally served on a person before contempt can be proved. This is in line with the dispensations covered under 81.8 (1) (supra).**
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> **Kenya's growing jurisprudence right from the High court has reiterated that knowledge of a court order suffices to prove service and dispense with personal service for the purposes of contempt proceedings. For instance, Lenaola J in the case of**

Basil Criticos Vs Attorney General and 8 Others [2012] eKLR **pronounced himself as follows:-**

"...the law has changed and as it stands today knowledge supersedes personal service.....where a party clearly acts and shows that he had knowledge of a Court Order; the strict requirement that personal service must be proved is rendered unnecessary"

This position has been affirmed by this Court in several other cases including the *Wambora case* (supra).

It is important however that the court satisfies itself beyond any shadow of a doubt that the person alleged to be in contempt committed the act complained of with full knowledge or notice of the existence of the order of the Court forbidding it. The threshold is quite high as it involves possible deprivation of a person's liberty. This standard has not changed since the old celebrated case of *Ex parte Langley 1879, 13n Ch D. 110 (C.A),* where Thesiger L.J stated as follows. at p. 119:

"…the question in each case, and depending upon the particular circumstance of the case, must be, was there or was there not such a notice given to the person who is charged with contempt of Court that you can infer from the facts that he had notice in fact of the order which has been made? And, in a matter of this kind, bearing in mind that the liberty of the subject is to be affected, I think that those who assert that there was such a notice ought to prove it beyond reasonable doubt."

What then amounts to "notice"?

Black's Law Dictionary, 9th Ed defines notice as follows:-

"A person has notice of a fact or condition if that person-

Has actual knowledge of it;

Has received information about it; Has reason to know about it;

Knows about a related fact;

Is considered as having been able to ascertain it by checking an official filing or recording."

Would the knowledge of the judgment or order by the advocate of the alleged contemnor suffice for contempt proceedings? We hold the view that it does. This is more so in a case such as this one where the advocate was in Court representing the alleged contemnor and the orders were made in his presence. There is an assumption which is not unfounded, and which in our view is irrefutable to the effect that when an advocate appears in court on instructions of a party, then it behoves him/her to report back to the client all that transpired in court that has a bearing on the client's case.

This is the position in other jurisdictions within and outside the commonwealth."

23. In the matter before Court, counsel for Zahara became aware of the Court order on 31st July 2019 when the Ruling was delivered and Zahara is deemed to have become of the order on the same day unless it was shown that it was impossible for the advocate to immediately communicate the order to his client.

24. Now, should the position be any different in respect to the officers or members of Zahara? Mr. Muchiri for the Respondent sought to persuade the Court that in respect to the officers of Zahara, they cannot be held to be in contempt unless it can be proved that they were personally served with the order or otherwise had knowledge of it.

25. Counsel cites Rule 81.5(c) and asks Court to read it in conjunction with meaning assigned to the term "Respondent" under Rule 81.3 (c). Rules 81.5(c) reads:-

> "where the judgment or order was made under rule 81.4(5), or was made pursuant to an earlier judgment or order requiring the act to be done, a copy of the earlier judgment or order has also been served."

While Rule 81.3(c) states:-

> "respondent" means a person—
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> (i) against whom a committal application is made or is intended to be made; or
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> (ii) against whose property it is sought to issue a writ of sequestration;"

26. In lengthy arguments made to Court, the Respondent emphasizes that where a respondent is a juristic person (as in the case here), it cannot automatically be presumed that all officers and or members of the Respondent Company were aware of the order issued against the company. The proposition is developed by submissions that whereas some officers or members of a company against whom an order is

made would be liable under a committal application not all officers or members of the company would be culpable. That is, the inference of knowledge on the part of some of the officers or members of a respondent company in a committal application when the said respondent company is represented in Court by an advocate is rebuttable.

27. The Court has given anxious attention to these arguments. The law as restated in Shimmers (*supra*) is that knowledge of a Court order on the part of a litigant can be inferred from knowledge of the order by the advocate appearing for the party. This is drawn from the assumption that it behooves on every advocate a duty to report back to his client what has transpired in Court and more so where the party is required to obey a Court order. Where the litigant is a corporation, there is a duty on the Advocate to inform the officials who bear the responsibility of implementing the Court order of the existence of the order.

28. Where the advocate fails to make that important communication to his client, then it will be a failure of a duty on his part and makes the advocate liable for professional negligence. That would have to be a matter between the advocate and his client. Yet that would not exonerate the officers of the company from liability on contempt. The law infers knowledge on the part of the officers as long as the advocate of the company is aware. To hold otherwise would be to grant latitude to officers of a company who want to escape liability to raise all sorts of arguments that they were not individually informed of a Court order by the advocate of the company. Such arguments will be used to bring disrepute to Court orders.

29. I add however that while a party who proves that his advocate failed to inform him of a Court order may not be relieved of liability for contempt, the party may raise it in mitigation at sentencing.

30. Returning to the specific circumstances in the matter at hand, it bears repeating that there is uncontested evidence that counsel for Zahara was aware of Court order on 31st July 2019 when the Ruling was delivered. Both Mr. Nduru and JPB are officers of Zahara. Neither denies that it would not fall on them or be their responsibility to implement the Court order. Whilst they say that their advocate communicated the order to a Mr. Worthington who however did not make them aware of the order until 26th November 2019, Mr. Worthington did not give evidence, by way of affidavit or otherwise, to corroborate that disposition. In any event, as the Court has held, the two officers were deemed to have knowledge of the order as long as and as soon as their advocate became aware of it. Regarding the argument that the Order that was eventually served on the company did not carry a penal notice, that does not carry the Respondent's defence any further. Counsel who was present in Court had to be aware of the consequences of disobedience of a Court order, including the possibility of penal sanction. The onus was on Counsel present in Court, to not only communicate the contents of the order to the company and the responsible officials, but also to advise on the possible consequences of disobedience.

31. I now turn to consider whether the two officers and the company disobeyed the Court order. An essential for successful contempt proceedings is that the alleged contemnor must have committed a wilful or deliberate disobedience or breach of an order. A party who has genuine difficulties in implementing a Court order is not to be punished. The penal consequence of contempt proceedings are to be reserved for truly recalcitrant contemnors. This is just in the same way civil imprisonment for debtors is not for those who are unable to pay but those who simply seek to evade responsibility.

32. Reading the replying affidavit, the Court finds that the only reason proffered by the company for failing to obey the Court order is found in paragraph 17:-

"THAT even assuming that the Applicant had complied with the mandatory legal provisions relating to service of the order on the alleged contemnors and endorsement of a penal notice on said order (which it did not) I am aware, from advice received from the Respondent's Advocate on record and which advice I verily believe to be true, that this instant application would still be highly liable to be dismissed for the reason that after issuance of the order and even presently, the Respondent Company does not and has not had the means to deposit the said US$600,705.30 in Court or to provide a bank guarantee of said amount (or even a substantial part of it)."

33. What the Respondents have failed to do is to provide evidence of the lack of means or financial inability of Zahara to meet the terms of the Court order. The Respondents face a serious allegation that they are in wilful disobedience of a Court order. To escape liability, they needed to place succinct evidence that the disobedience is not intentional but because of reasons beyond their control. Little, indeed no effort has been made in this regard.

34. The upshot is that I find that Zahara Oil & Gas Limited, Peter Nduru and John Patrick Barr are in contempt of Court for disobedience of the Court order issued on 31st July 2019.

35. Yet before handing down any sanction for the said disobedience, this Court will accommodate the contemnors and give them another 14 days from today to implement the order of 31st July 2019 failing which:-

i. The Defendant will not be heard by this Court or be allowed to participate in these proceedings until the contemnors purge their act of contempt.

ii. The contemnors will be invited to offer mitigation prior to sentencing.

36. The Notice of Motion of 12th September 2019 has succeeded as against all contemnors save for Sonal Sejpal and the Applicants shall have costs thereof save that costs of the dismissed motion against Sonal Sejpal shall be in her favour as against the Applicants.

Dated, Signed and Delivered in Court at Nairobi this 5th Day of October 2020

F. TUIYOTT

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17th April 2020, this Ruling has been delivered to the parties through virtual platform.

F. TUIYOTT

JUDGE

PRESENT:

Wachira for the Applicant.

Muchiri for the Respondents.