



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
MILIMANI HIGH COURT
CIVIL CASE NO 46 OF 2015

TATU CITY LIMITED.....1ST PLAINTIFF
KOFINAF COMPANY LIMITED.....2ND PLAINTIFF
NAHASHON NGIGE NYAGAH.....3RD PLAINTIFF
VIMALKUMAR BHIMJI DEPAR SHAH.....4TH PLAINTIFF

VERSUS

STEPHEN JENNINGS.....1ST DEFENDANT
FRANCES HOLLIDAY.....2ND DEFENDANT
HANS JOCHUM HORN.....3RD DEFENDANT
PIUS MBUGUA NGUGI.....4TH DEFENDANT
FRANK MOSIER.....5TH DEFENDANT
ANTHONY NJOROGE.....6TH DEFENDANT
CHRISTOPHER BARON.....7TH DEFENDANT

RULING

1. The Court is asked to determine the Notice of Motion of 21st September 2015 which seeks the following orders:-

2. The 1st, 2nd, 3rd, 4th, 5th and 7th Defendants and Mr. Robert James Reid be and are hereby committed to civil jail for a period not exceeding 6 months for their disobedience and contempt of the Orders made herein on 6th March, 28th April and 12th June, 2015 and for ridiculing and

undermining the institution of the Court.

3. Any property of the 1st, 2nd, 3rd, 4th, 5th and 7th Defendants and Mr. Robert James Reid as may be found within the jurisdiction of this Court be and is hereby attached, to be sold and the proceeds of the sale be paid to the Plaintiffs should the said Defendants' disobedience of the Court Orders made herein continue for more than one year from the date of the making of this Order.

4. The Cost of this Application be provided for.

2. For reasons that will become apparent shortly, the Court will deal with the alleged disobedience of the orders of 6th March 2015 and 12th June 2015 in respect to the Audit that was to be undertaken by PriceWaterHouse Coopers (PWC). The order of 6th March 2015 was to the following effect:-

“d) The PriceWaterHouse Coopers (or another agreed entity) which the parties had initially agreed on to conduct independent in depth audit of the said offshore loan account shall forthwith be appointed by the appropriate organs of the Plaintiff Companies to carry out the said audit, and to report its findings to this Court within 45 (forty five) days, or within such reasonable period of time as shall be adequate to perform that audit.

e) Each party shall be responsible for their costs in this application”.

3. While on 12th June 2015 Ogola J. issued further orders as follows:-

a) Except and to the extent provided hereunder, the Notice of Motion application herein by the 3rd Defendant dated 23rd April 2015 is dismissed.

b) PriceWaterHouse Coopers (PWC), appointed auditors herein vide the Ruling of this Court delivered on 6th March 2015 shall proceed to carry out the said audit as per the decision made by the Plaintiff's Board of Directors on 28th January 2015 and with the necessary flexibility agreed upon by the 3rd Plaintiff and Mr. Robert Reid pursuant to Clause (d) of the said decision made on 28th January 2015.

c) PriceWaterHouse Coopers shall file their Report in this Court within 45 days of the commencement of the audit.

d) The cost of the audit shall be paid by the 1st Plaintiff.

e) This order shall be served upon PriceWaterHouse Coopers (PWC) who shall commence the said audit immediately upon such service.

f) The cost of this application shall be paid by the 3rd Defendant.

g) The matter will be mentioned on 28th July 2015 to receive the said audit Report.

4. This Court has taken a view that because of the manner in which the Respondents have answered the matter at hand, it cannot be involved.

5. In Support of the Notice of Motion for contempt Nahashon Ngige Nyagah (the 3rd Plaintiff) swore an Affidavit on 21st September 2015. He gives some detailed evidence as to how the Court Orders in respect to the Audit is said to have been disobeyed or disregarded by the Defendants. Let me turn to some instances.

6. In paragraph 36 of his Affidavit Mr. Nyagah depones as follows:-

“Despite the making of the Orders aforesaid, the Defendants, acting through Mr. Robert James Reid, the person mandated by the Defendants and directed by the Court to liaise with the 3rd Plaintiff in the in-depth audit, have completely frustrated and scuttled the commencement of the in-depth audit by intimidating PwC with the result that the Letter of Engagement has not been signed to date, and is unlikely to be signed on account of the said intimidation and further evidence to be adduced hereunder. The correspondence in that regard is at pages 110 to 137 of “NNN1”.

7. The correspondence attached at pages 110 to 137 to the said Affidavit reveals an attempt by the rival parties herein and PWC to agree on the modalities of the in-depth Audit that had been ordered by Court. An Email of 31st August 2015 from Mr. George Weru of PWC to Mr. Robert Reid is of concern. It reads as follows:-.

‘Dear Robert,

As indicated in the correspondence from our counsel to counsel for both the Plaintiffs and the Defendants in this matter dated 10th August 2015 (attached), we were proceeding with the engagement on the basis of the terms of reference presented to the court as Exhibit HJ 3 and this is what is reflected in the engagement letter. I think it would be helpful if you could indicate the specific areas in the engagement letter which you propose to be amended to address the concern that you raise on the accuracy and objectivity of the intended review.

Regards

George Weru’ *(my emphasis)*

8. Ms. Lipop for all the Defendants (save for 3rd and 6th Defendant) asked this Court to ignore any allegations made against Mr. Reid as he is not a party before Court. However, in the emails exchanged between PWC and Mr. Reid, the latter held himself out as having the mandate of the 1st, 2nd, 3rd, 5th & 7th Defendants to deal on their behalf. And the allegation made by the 3rd Plaintiff in his Affidavit (see paragraph 6 above) that Mr. Reid was the person mandated by the Defendants to liaise with the 3rd Plaintiff in the in-depth audit is not disputed in the Affidavit of Christopher Barron (the 7th Defendant) made in reply to the Application before Court and on behalf of the 1st, 2nd, 4th and 5th Defendants. Indeed in the Court Order of 12th June 2015 Mr. Reid is indentified as the liaison person of the Defendants. To that extent the actions or non-actions of Mr. Reid cannot be overlooked.

9. There is now evidence that has not been controverted that Mr. Reid did not respond to the concerns raised by PWC about the Letter of Engagement with the result that the Letter of Engagement was not signed and the Audit did not commence as ordered and envisaged by the Court on 6th March 2015 and 12th June 2015.

10. And the evidence that there was reluctance by Mr. Reid to cooperate with PWC is buttressed by what Mr. Stephen Jennings (the 1st Defendant) said on 16th September 2015 during the Board of Directors meeting of the 1st and 2nd Plaintiffs,

“We are happy to work with any recognized International Audit firm in the world with exception of PWC Kenyawe do not want to work with PWC Kenya”.

He then explains himself as follows,

“Because they have an audit relationship with Bidco and we are not happy with their conduct”

11. If the Defendants had no confidence in the firm of PWC Kenya then they should have sought their removal from the Audit by way of a Review of the Court Orders. Instead they stonewalled on the question of the Letter of Engagement. Eventually, on 23rd September 2015 PWC asked to be excused

from this exercise and the Court granted their request. But before deciding that the cited Defendants are guilty of contempt of Court, there would be three other issues that call for my attention.

12. In the Replying Affidavit sworn by Mr. Christopher Barron and filed on 7th March, 2017, 1st, 2nd, 3rd, 5th and 7th, the Defendants now take the position that the orders of 6th March 2015, 28th April 2015 and 12th June 2015 were made without jurisdiction. They do so by citing the Shareholders Agreement of 13th May 2010 in which it was allegedly agreed that any dispute, claim or matter arising under or in connection with the agreement was subject to the exclusive jurisdiction of the English Courts and The London Court of International Arbitration.

13. The Plaintiffs retort to this argument is that by Entering Appearance to these proceedings and filing a Statement of Defence, the Defendants waived their rights to insist on Arbitration. This may be a good answer. In any event if the Defendants were of the view that the orders were made without jurisdiction then they should have sought their review and/or setting aside. There is an uncompromising obligation of every person against whom an order is made by a Court of competent jurisdiction to obey it (until the order is discharged) even where the person affected thinks it to be irregular or void (**Hadkinson Vs. Hadkinson**[1952] ALLER 567.)

14. Order 40 Rule 6 provides:-

“(6)Where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months from the date of the grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise”.

An argument by the Defendants is that the orders lapsed on their first anniversary and could not therefore be disobeyed. The simple answer to this argument is that the order for Audit was not injunctive in nature and cannot be caught up with the timelines set out above.

15. That leads me to the next issue. As the order for Audit was not injunctive in nature, an allegation of its breach and punishment could not be brought under the aegis of Order 40 Rule 3 of the Civil Procedure Rule. At the same time, when the Application before Court was brought, the Contempt of Court Act (No.46 of 2016) had not been enacted. The Plaintiffs were therefore entitled, as they did, to find domicile in Rules 81.4, 81.16 and 81.17 of The Civil Procedure (Amendment No.2) Rules 2012 of England. Where, like here, the alleged breach relates to a judgment, Order or undertaking to do or abstain from doing an act, then leave or permission to bring an Application for Contempt is not necessary, (see the Court of Appeal in **Christine Wangari Gachege Vs. Elizabeth Wanjiru Evans & 11 others** [2014] eKLR. The procedure adopted by the Plaintiffs cannot be faulted.

16. Contempt of Court Orders are quasi-criminal in nature and require to be proved on a standard that is higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt (**Mutitika vs. Baharini Farm**[1982] I EAR 863). In the matter before Court I have found overwhelming and cogent proof that prior to recusal by PWC, the 1-5th Defendants and the 7th Defendant disobeyed and were in contempt of the Order of 12th June 2015. The threshold of proof has been met. However I make no finding against Mr. Robert Reid because at the time of making this decision, evidence that he had been served with the Application for Contempt was not readily available to me.

17. I now turn to two other aspects of the Motion before me. It had been argued by the Plaintiffs that the Court orders set out in the Motion had also been breached in other ways. That there was a Resolution of 10th September 2015 by the 1st – 5th Defendants which decided to appoint the firm of Ahmednasir Abdikadir & Co. Advocates to take over and terminate the suit. Secondly that there was a resolution to increase the quorum for actions and decisions of Directors from 2 to 3. The Plaintiffs on the other hand also informed Court that the attempt to withdraw the suit was remedied by a Court Ruling of 16th March 2016 while the attempt to compromise Representation was cured by a Court Ruling of 1st November 2016. This Court understood the Plaintiffs to be saying that the mischief of these acts of contempt had been stopped in their tracks and they would not be pressing for further remedy in that respect. It is for this

reason that this decision is on the breach to the order for Audit only and does not consider the other alleged Acts of Contempt.

18. The substantial concern for the Plaintiffs as of now, as I have just noted, is the non-compliance of the Order for Audit. This it would appear has influenced the remedy proposed by the Plaintiffs for the said breach. It was submitted by the Plaintiffs that as this is a Commercial matter the Court makes further Orders that will give effect to the Orders that were disobeyed. As would be clear from the face of the Motion, this proposed remedy is a departure from the Orders that had been sought therein. The Plaintiffs had bespoken two orders:-

i. Committal to Civil Jail

ii. Attachment and sale of the Defendants properties.

19. On the other hand, Courts do not make orders in vain. The Orders they make, unless reviewed, raised or set aside, must be obeyed. And the rationale for making an order for an in-depth Audit was well explained by Ogola J. as follows:-

“In conclusion this Court reiterates the crucial importance of the proposed audit. The disputants herein are locked into a dispute which only the said audit may unravel. The crucial business of the 1st and 2nd Plaintiffs are at a standstill due to the dispute. It is therefore important that both sides to the dispute approach the said audit in good faith, so that the business of the two Companies is not unduly compromised. I do not consider the choice of auditor as a win or a loss for either party. The audit issue was an interim measure in the resolution of the dispute, and must be dispensed with as soon as is possible. It should not be the new dispute. If this happens then there is possibility of a long drawn dispute which will no doubt dissipate the energy of the Plaintiff Companies and disorient their business. The auditor appointed will, no doubt, understand the need to approach its work with professionalism and utmost neutrality. The Applicants fears that PWC are seeking to expand the scope of the audit. This fear should not be there at all. The Company had agreed on the character and scope of the audit to be undertaken by PWC. That audit needs to be complete and should cover all the issues relating to the financial affairs of the Company, and in that regard it is logical that all the facts and figures be laid on the auditors table by all the parties to give full effect to the exercise. To do otherwise will render the audit an exercise in futility. After the proposed audit exercise is carried out, there should be no further need for another audit. Therefore, the representatives of the parties should be free to avail to the auditor all the information and materials required for the exercise, and they should be flexible enough with such information and documents to enable the said audit achieve the fullest effect under the said Terms and Reference”.

The need for an Audit may still persist. Yet it is now common ground that PWC is no longer willing to undertake it. If the Order is to be implemented then another Audit Firm must be appointed to undertake it.

20. Whilst I find that the 1st, 2nd, 3rd, 5th and 7th Defendants are guilty of Disobeying and being in contempt of the orders made in respect to the order for Audit, I direct Counsel for the parties herein to address me on which Firm should be appointed in place of PWC. This will enable Court make further Orders in regard to the order. In the meantime the Plaintiffs will have costs of the Notice of Motion of 21st September 2015.

Dated, Signed and Delivered in Court at Nairobi this 4th day of May, 2017.

F. TUIYOTT

JUDGE

PRESENT;

Wawire for Havi for Plaintiffs

Issa & Lippop for 1st, 2nd, 4th, 5th & 7th Defendants

Issa for Macharia for 3rd Defendant

Issa for Mosota for 6th Defendant

Alex - Court Clerk