



**Crown Paints (Kenya) Limited v Dry Associates Limited (Civil Appeal
181 of 2019) [2023] KECA 1383 (KLR) (24 November 2023) (Judgment)**

Neutral citation: [2023] KECA 1383 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 181 OF 2019
DK MUSINGA, HA OMONDI & GWN MACHARIA, JJA
NOVEMBER 24, 2023**

BETWEEN

CROWN PAINTS (KENYA) LIMITED APPELLANT

AND

DRY ASSOCIATES LIMITED RESPONDENT

(An Appeal from the Order and Ruling of the High Court of Kenya at Nairobi (Commercial & Admiralty Division) (Tuiyott, J.) dated 13th April 2018 in HCCC No. 289 of 2013)

JUDGMENT

1. This appeal emanates from the ruling (Tuiyott, J.) dated 13th April 2018 which ordered that the Managing Director (MD) of the appellant (hereinafter "Crown Paints") be summoned to show cause why he should not be punished for contempt of court for refusing to obey the order/ruling of 30th October, 2015. The learned Judge found that the appellant was in contempt of court.
2. The background to this appeal began when the appellant, who was in need of raising funds, issued a Commercial Paper valued at Kshs.300 Million, and the respondent was appointed as the transaction financial Adviser, Arranger, Agent and Registrar for purposes of the commercial paper. Crown Paints was in need of financing issued Commercial Paper in the value of Kshs.300 Million. The relationship between the appellant and the respondent reached a stalemate, and the appellant alleged that some investors had lost their investment under the Commercial Paper due to fraud perpetrated by the respondent's employee. Being the principal, the appellant was required by the Capital Markets Authority (CMA) to compensate investors for the loss suffered, and make payments, which included interest.
3. The respondent resisted the claim and blamed the appellant for the loss suffered by the investors, contending that the appellant failed to abide by the stipulated terms and conditions of the issue;



accepted funds secretly and in collusion with an employee of the respondent, thus endangering investors' funds.

4. The appellant filed suit against the respondent in HCCC 289 of 2013 for loss suffered as a result of fraud by the respondent's employee, seeking KShs.24,715,564.45 allegedly lost through the issue of commercial papers when the respondent acted as its investment agent. On the other hand, the respondent maintained that the appellant's claim was unlawful; and that it would be proper to have the accounts reconciled in order to assist the Court in arriving at a just determination.
5. By a Chamber Summons dated 15th June 2015, the respondent sought orders that the appellant furnishes it with certain documents to enable taking of accounts as prayed in the Defence and Counterclaim of 14th August 2013. By a ruling dated 30th October 2015, the Court allowed the respondent's application and directed the appellant to furnish the documents and information sought in the application within 30 days from the date of the ruling. The respondent complained that the appellant failed to provide all the documents and information sought in the application, thus compelling it to file the application dated 29th April 2016 seeking, inter alia, that the Managing Director of the appellant be punished for contempt of court for failing to comply with the order of 30th October 2015.
6. According to the appellant, by a letter dated 8th December 2015, it complied with the order, and provided the respondent with all the records sought that were within its possession; and also indicated the materials that it did not have. The appellant's Chief Accountant deposed that it had complied with the said order to the 'best of our ability,' explaining that the failure for full compliance that they did not have the documents in question nor did they know of their existence
7. In its ruling dated 13th April 2018, the trial court stated that the appellant was fully aware of the order of 30th October 2015; and that the court order has not been fully complied with. The court agreed with the respondent's counsel that the stance taken by the appellant could not be defended there had been no application sought to set aside vary or discharge the said order.
8. The learned Judge allowed prayer 2 of the Notice of Motion dated 29th April 2016, which sought summoning of the appellant's Managing Director, and directed that the appellant complies with the order of 30th October 2015 within 30 days, failing which the respondent would be at liberty to apply for variation of the said orders so as to include access to the respondent's records at the latter's premises. In answering the question as to whether the appellant's conduct was deliberate, the court drew the inference that since it participated in the proceedings leading to the order in issue, and did not seek to vary the orders, then the failure to comply with the orders was deliberate.
9. The court found that the order of 30th October 2015 was clear, unambiguous, and binding on the appellant, taking note that the appellant did not complain about the order being vague or hazy; that the appellant participated in the application leading to the grant of the order said to be breached; that the appellant complied with some of the orders; and was thus aware that the compliance did not fully satisfy the terms of the orders.
10. On the issue of whether the appellant's conduct was deliberate, the court having found that the appellant fully participated in the proceedings, and never stated that the production of the said documents was beyond it, and when orders were issued never sought to vary and or set them aside or appeal, then it was clear to the court that the breach was deliberate. The court held that it was proper to require the appellant to show cause, as that gave the MD of Crown Paints an opportunity to explain and exonerate himself.



11. On the last prayer with regard to allowing the respondent's agents unlimited access to the records of the appellant so as to inspect and take the documents listed in the application, the court was of the view that in the first instance the same would be intrusive, and gave the appellant one last chance to fully comply, failing which the respondent was at liberty to vary the order dated 30th October to include access.
12. Being aggrieved by the ruling of the trial court, the appellant filed its memorandum of appeal, challenging the said ruling on 9 grounds of appeal, namely, that the learned Judge erred and misdirected himself in: holding that the appellant is guilty of contempt of court; the appellant deliberately disobeyed the court orders issued on 30th April 2015; failing to consider that the appellant had demonstrated compliance with all orders issued by the Court on 30th April, 2015 except the orders that required it to provide documents that it did not have knowledge or possession of; failing to consider that the appellant was not in a position to provide the documents, and this was not deliberate; relying on technicalities rather than on the uncontested facts that the appellant was not in possession of the documents that it was ordered to provide the respondent with; ordering the appellant to perform that which it had already stated that it is impossible to do; applying himself selectively and in a biased manner when on one hand it condemned the appellant but on the other gave leave to the respondent to vary orders issued by the court to suit the respondent's circumstances without an equivalent leave to the appellant; and failing to appreciate the facts and submissions of learned Counsel for the appellant.
The appellant describes the findings of the learned Judge as "indefensible in law or on the basis of the evidence adduced".
13. The appellant submitted that the learned Judge appreciated the elements that must be proven for a finding of contempt to be made, save for one, which is -whether the alleged contemnor's conduct was deliberate. The appellant contends that the Judge erred in holding the appellant in contempt whereas the failure by the appellant was bona fide.
14. The appellant argues that it discharged the burden of demonstrating that it had complied with the order of 30th October 2015, save for order 1 (b) which required it to provide copies of the print out of all payments (including withholding taxes deducted) by banker's cheque, company cheque or electronic transfer, with regard to the following accounts:
 - i. Investment Advice Line.
 - ii. Sirius Solutions
[Imperial Bank Acc. No.74xxxxxxx].
 - iii. Meridus Capital Ltd
[Bank of Africa Acc. No. 030xxxxxxx].
 - iv. Bluecrest Holdings Ltd
[Family Bank Acc. No. 06xxxxxxx].
 - v. Diefel Investments Ltd.
 - vi. Gray Properties
[Bank of Africa Acc. No. 03xxxxxxx].
 - vii. DAL Wealth Management Ltd
[K-Rep Bank Acc. No. 003xxxxxxx].



viii. Daraja Retreat Centre

[Equity Bank Acc. No. 087xxx xxxxxx].

15. The appellant further argued that failure to comply with the said order was not deliberate or intentional but bona fide as the applicant did not have the said documents, nor had it ever seen them; that it had in an affidavit stated that it did not have the documents sought nor had it ever seen them; that the trial court was aware that it did not have the documents in question in its possession, so it gave orders in vain; and the trial court was biased when on the one hand it condemned the appellant and on the other hand gave leave to the respondent to vary the orders of 30th October 2015, without equivalent leave to the appellant.
16. The respondent condensed the appellant's grounds of appeal into one issue for determination – namely, whether the appellant is in contempt of court for failing to comply with the orders issued on 30th October 2015.
17. In arguing that the respondent properly proved that the appellant was in contempt of the court orders, the respondent points out that the appellant failed to deliver all the documents ordered, yet the terms of the order were clear and unambiguous, as the respondent had sought in prayer 1 (a) to (h) specific documents and information to be delivered by the appellant; the appellant participated in the application and filed a response without seeking a clarification of the order after the ruling was delivered, yet by a letter dated 8th December 2015 the appellant's advocate stated that some of the documents are unknown to his client and therefore the client cannot provide the same.
18. In addressing the question of contempt, the respondent made reference to the definition of Contempt as given in Black's Law Dictionary to mean:

“ the failure to obey a court order that was issued for another party's benefit. A civil contempt proceeding is coercive or remedial in nature. The usual sanction is to confine the contemnor until he or she complies with the court order”.
19. We are also invited to consider the definition in *Halsbury Laws of England* 4th Edition (9th Re-Issue), Pg. 33, para 52 which defines Contempt of Court as follows:

“ disobedience to process is a civil contempt of court to refuse or neglect to do an act required by a judge or order of the court within the time specified in the judgment order requiring a person to abstain from doing a specified act, or to act in breach of an undertaking given to the court by a person, on the faith of which the court sanctions a particular course of action or inaction... ”
20. In laying emphasis on the rationale for punishing a party for contempt of court as a safeguard to the rule of law in the administration of justice, the respondent in its submissions draws from the sentiments expressed by Ndolo, J. in the case of *Teachers Service Commission vs. Kenya National Union of Teachers & 2 others* [2013] eKLR that:

“ ... A court order is not a mere suggestion or an opinion or a point of view. It is a directive that is issued after much thought and with circumspection. It must therefore be complied with and it is in the interest of every person that this remains the case. To see it any other way is to open the door to chaos and anarchy and this Court will not be the one to open that door. If one is dissatisfied with an order of the court, the avenues for challenging it are also set out in the law. Defiance is not an option.”



21. It is the respondent's contention that the appellant had proper knowledge of the terms of the order and acted in breach of the terms despite numerous reminders as demonstrated by the letters dated 7th December 2015, which reminded the appellant's Advocate on the timeline for furnishing the documents, which had expired; the letter of 9th December 2015 which enquired as to when the respondent's representatives could make a visit to the appellant's premises to inspect and make copies of documents in line with prayers in the application which was allowed; and another letter dated 17th February; that as a matter of fact at the time the respondent made the request for the documents, all that the appellant said was that those documents were in the bundle of the pleadings; and even after the ruling, there was no attempt made to have the order reviewed.
22. This being a first appeal and as has been reiterated in several decisions of this Court, it is our primary duty to evaluate the evidence on the record in order to come to its own independent conclusion on the evidence and the law, as per rule 29(1)(a) of the Court of Appeal Rules. This duty has been reiterated in Abok James Odera t/a A.J. Odera & Associates vs. John Patrick Machira t/a Machira & Company Advocates [2013] eKLR.
23. In our considered view, the main issue in this appeal melts down to whether there was a basis for summoning the appellant's Managing Director to show cause why he should not be punished for contempt of court orders dated 30th October 2015. The Supreme Court of South Africa in Fakie NO v CCII Systems (Pty) Ltd [2006] ZASCA held that the test for disobedience of a court order is simply whether the breach was committed deliberately and malafide; that there must be an intentional disobedience or violation of the court's order.
24. In the present case, the appellant, by a letter dated 11th January 2016 informed the respondent that:

“We supplied you with all materials in our client's possession. Let us know what other specified document you need.”
25. The response to this was through a letter dated 17th February, 2016 demanding for an on the site visit, which in turn elicited a response reiterating that the appellant had no access to the documents. It then became a situation of establishing whether the appellant's conduct was a 'won't do, can't do or unable to do.' In this instance, the terms of the order were unambiguous, clearly directing the appellant to provide all the documents and information which the respondent had sought; the appellant had proper knowledge of the terms of the order, so if the orders were incapable of performance, nothing stopped the appellant from approaching the trial court, and seeking review or variation of the orders.
26. The learned Judge clearly stated in his ruling, that the show cause was a chance to give the appellant an opportunity to explain itself on account of failure to fully comply with the court order, which even the appellant concedes it has not fully complied with. The appellant contends that the learned Judge erred in finding that the alleged contemnor's conduct was deliberate. It is not in contest that the court order was not fully complied with. It is also not contested that the appellant, on the issuance of the said orders, it had difficulty in complying with

the order, but nonetheless, did not move the court as appropriate to vary, set aside, discharge or even appeal against the said orders.
27. We have read the orders of 30th October 2015 which are very clear and unambiguous, particularly with respect to the production of documents. It is apparent that the cause of conflict between the parties is the failure by the appellant to produce the documents, the subject matter of the orders of 30th October 2015, which would have been sorted out by submission of the same. It is a fact that the appellant never moved the court to address any difficulty in executing the said orders, and we have no hesitation in



making a reasonable inference that would amount to deliberate disobedience of the court's orders – enough to warrant the court which gave the orders to summon the perceived contemnor.

28. Once the order for production of the documents was given, and the appellant realized its inability to produce the same, then it behooved the appellant to move the court as appropriate and explain its difficulty in complying with the court's orders. This was not attempted by the appellant.

In *Nthabiseng Phoko vs. Ekurbeleni Metropolitan Municipality & Another* CCT 19/11 (75/2015) Nkabinde, J observed:

“the rule of law, a foundational value of *the constitution*, requires that the dignity and authority of the courts be upheld. This is crucial as the capacity of courts to carry out their functions depend on it. As *the constitution* demands, orders and decisions issued by a court bind all persons and organs of state to which they apply, and no person or organ of state may interfere in any matter, with the functioning of the courts. It follows from this that disobedience towards court orders or decisions risks rendering our courts impotent and judicial authority a mere mockery. The effectiveness of court orders or decisions is substantially determined by the assurance that they will be enforced.”

29. In the case of Canadian *Metal Co. Ltd vs. Canadian Broadcasting Corp (No. 2)*[1975] 48 D.L.R.(30) the court stated:

“To allow court orders to be disobeyed would be to tread towards anarchy. If the orders of the court can be treated with disrespect, the whole administration of justice is brought into scorn ...if the remedies that the courts grant to correct wrongs can be ignored, then there will be nothing left for each person but to take the law into his own hands. Loss of respect for the courts will quickly result into the destruction of the society.”

30. It is therefore a fundamental rule of law that court orders be obeyed and where an individual is enjoined by an order of the court to do or refrain from doing something, he has a duty to carry out that order. The court has a duty to commit that individual for contempt of its orders when he deliberately fails to carry out such orders. See *Louis Ezekiel Hart vs. Chief George 1 Ezekiel Hart* (-SC 52/2983 2nd February 1990.

In Hon. Martin Nyaga Wambora & Another vs. Justus Kariuki Marete & Another [2014] eKLR the court stated that the duty to obey the law by all individuals and institutions is cardinal in the maintenance of rule of law and administration of justice.

31. We therefore cannot fault the finding by the trial court that on the face of it, its orders were disobeyed, and requiring the appellant's official to appear before it for further engagement. We thus hold that the trial court did not err in law or fact, nor was there an error in principle as to require our interference, as it is clear from the record that the appellant was indeed aware of the orders of 30th October 2015, the appellant having partially complied with said order. The appellant should therefore appear before court and show cause why it should not be punished for failure to obey court orders. The appeal lacks merit and is dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF NOVEMBER, 2023.

D. K. MUSINGA, (P)

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JUDGE OF APPEAL



H. A. OMONDI

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JUDGE OF APPEAL

G. W. NGENYE - MACHARIA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

