



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MUSINGA, GATEMBU & MURGOR, J.J.A.)

CIVIL APPLICATION NO. 4 OF 2019

(UR.41/2019)

BETWEEN

ATTORNEY GENERAL.....1ST APPLICANT

DIRECTOR OF CRIMINAL INVESTIGATIONS.....2ND APPLICANT

AND

PHOENIX GLOBAL KENYA LIMITED.....1ST RESPONDENT

KENYA REVENUE AUTHORITY.....2ND RESPONDENT

ANTI-COUNTERFEIT AGENCY.....3RD RESPONDENT

FINANCIAL REPORTING CENTRE.....4TH RESPONDENT

KENYA BUREAU OF STANDARDS.....5TH RESPONDENT

MITCHEL COTTS (K) LIMITED.....6TH RESPONDENT

(An application for stay of proceedings and execution of the judgment of the

High Court of Kenya at Mombasa (Ogola, J.) dated 24th January, 2019

in

Constitutional Petition No. 205 of 2018)

RULING OF THE COURT

1. This ruling is in respect of an application dated 9th July, 2019 by the 1st respondent under *sections 3A and 3B* of the *Appellate Jurisdiction Act*, *section 5* of the *Judicature Act*, *section 35(1)* of the *Court of Appeal (Organization & Administration) Act*, The Contempt of Court Act 1981 and *Parts 23 and 81* of the *Civil Procedure Rules 2012 of England*.

2. The 1st respondent seeks: -

“1. ...

2. *That the Director of Criminal Investigations, the Second Applicant herein and the Managing Director of the Kenya Bureau of Standards (the Fifth Respondent herein) who have blatantly refused, neglected and /or failed to comply with orders of this*

Honourable Court made on the 2nd April, 2019 (and issued on the same day) be held in contempt of Court and appropriate sanction or penalty be levied on them for failing to and continuing to refuse to allow the downgrading exercise to continue in respect of the first Respondent's rice consignments which was premised on the above Court order."

3. The application was supported by an affidavit sworn by **Biren Jasani**, a director of the applicant. He stated that on 2nd April, 2019 the parties herein appeared before this Court and consequent upon a consent letter signed by all the parties, the Court made an order adopting the consent letter as an order of the Court.

4. The consent letter dated 2nd April, 2019, read as follows: -

2nd April, 2019

The Deputy Registrar

Court of Appeal

MOMBASA

Dear Sir,

Civil Application No. 4 of 2019

Attorney General & Anor

vs

Phoenix Global Kenya Limited & 5 Others

We shall be grateful if the court file relating to this matter can be placed before the Honourable the Judge for the purposes of recording a Consent in the following terms: -

BY CONSENT:

- 1. The Applicant's Application dated 20th February, 2019 be deferred to a date in the first week of May, 2019;***
- 2. The Record of Appeal in the appeal intended by the Applicants and first Respondent be filed within 30 days and the Appeal be heard on a priority basis;***
- 3. The first Respondent be and is hereby allowed to apply to downgrade the contentious rice under protest and without prejudice to its rights pending the determination of the Intended Appeal and such application be resolved within 14 days of the application being made;***
- 4. Each parties' rights are reserved pending determination of the Appeal and shall abide by the outcome of the Appeal;***
- 5. Parties be at liberty to apply after the first week of May, 2019."***

5. Pursuant to the consent orders aforesaid, on 8th April, 2019, the 1st respondent wrote to the Managing Director of the Kenya Bureau of Standards (**KEBS**), the 5th respondent, applying for downgrading of the rice it had imported.

6. KEBS responded vide a letter dated 26th April, 2019 granting the request for the downgrading on terms as contained in the said letter.

7. The gravamen of the contempt application is captured by paragraph 5 of the applicant's supporting affidavit which reads as follows: -

"5. That despite this, the Second applicant and the fifth Respondent, whether by themselves or through their servants, agents and/or employees, have conducted themselves maliciously, malevolently and with a complete lack of candour and have blatantly refused, neglected and or failed to comply with Orders of this Honourable Court made on 2nd April, 2019 by impeding, hindering and or refusing the downgrading exercise as approved to take place. They both continue to wrongfully and without any justification whatsoever lockup and seal the Mitchell Cotts Warehouses in Mombasa despite the foregoing Court Order thereby not only denying access to the first Respondent thereto but also interfering with their proprietary rights which they were specifically restrained from doing both in the High Court and, now, through the Consent recorded herein. In this regard, I annex hereto and mark as Exhibit 'BJ-3', true Photostat copy of this Honourable Court's Ruling in this matter delivered on 15th May, 2019 which speaks for itself.

8. The Ruling cited as Exhibit **BJ.3** ordered stay of the High Court proceedings pending hearing and determination of an appeal filed by the appellants herein.

9. The 1st respondent lamented that as a result of the contumelious conduct of the 2nd applicant and the Managing Director of the 5th respondent its business had virtually come to a standstill and its cash flow adversely affected. In addition, some of the rice has expiry dates that are fairly close. The 1st respondent is even not able to fumigate the rice to prevent it from being infested by weevils.

10. The 5th respondent urged the Court to protect its authority and dignity by granting the orders sought.

11. When the application came up for hearing on 23rd July, 2019, none of the other parties had filed a replying affidavit, but **Mrs. Owesi**, learned Counsel for the 5th respondent, told the Court that her client's replying affidavit was ready and she needed a few minutes to file it. She therefore sought a short adjournment. The appellant's application for adjournment of the hearing to some other date to enable them prepare a replying affidavit was not granted. The Court directed that the application be heard at 10.30 a.m.

12. When the hearing of the application resumed at about 11.15 a.m., **Mr. Khagram**, learned Counsel for the 1st respondent (the applicant) made his brief submissions, urging the Court to grant the orders sought.

13. **Miss Lavuna**, learned counsel for the 2nd respondent, the Kenya Revenue Authority (KRA), submitted that her client was not in contempt of any court order as it had no interest in the rice at all, the necessary taxes in respect of it having been paid. It was the Director of Criminal Investigations (**DCI**) and KEBS that had not performed their respective roles as expected, counsel added.

14. In a replying affidavit sworn by **Mr. Bernard Njiraini**, Acting Managing Director of the 5th respondent, he stated that following the consent order of 2nd April, 2019, the 1st respondent applied for downgrading of the rice and the 5th respondent by a letter dated 26th April, 2019 acceded to the request on terms as stated therein; that the 5th respondent had performed its statutory mandate and was not in contempt of the court order; that the court did not direct the 5th respondent to allow the downgrading exercise or to downgrade the rice, it merely stated that the 1st respondent "be and is hereby allowed to apply to downgrade the contentious rice", that the 5th respondent is waiting for further directions from the 1st respondent and the other necessary parties on their readiness for the downgrading exercise.

15. Mrs. Owesi submitted that before a person can be found guilty of contempt of court, it must be proved that the person had willfully and deliberately violated an order of the court; and the order of the court must be clear and precise so as to leave no doubt as to what the person was required to do or refrain from doing. She cited several authorities to buttress her submissions, among them, **Michael Sistu Mwaura Kamau v Director of Public Prosecutions & 4 Others [2016] eKLR** and **Mutitika v Baharini Farm Ltd [1985] eKLR**.

In her view, the 5th respondent's Managing Director was not in contempt of court; it is the DCI who had not provided the necessary facilitation for the downgrading of the rice

16. Mr. Wachira, learned State Counsel for the appellants, on behalf of the DCI told the Court that the consent order of 2nd April, 2019 was not clear as to what the DCI was required to do. He added that if this Court were to issue specific directives as to what ought to be done, the DCI and the multi-agency team that had sealed the 6th respondent's warehouses containing the rice in issue and to afford parties an opportunity to resolve the dispute on their own, would be ready to comply forthwith.

17. In view of the sentiments expressed by all the parties, the Court made the following interim orders: -

"1 All the parties and/or their representatives should assemble at the go-downs of the 6th respondent where the subject rice is stored on 24th July, 2019 at 9.00 a.m. to commence the downgrading exercise.

2. Each necessary party to perform its appropriate role in the downgrading exercise.

3. This application shall be listed for further hearing and/or appropriate orders on 25th July, 2019 at 9.00 a.m."

18. On 25th July, 2019, Mr. Wachira told the Court that the downgrading exercise commenced as directed by Court and the exercise was ongoing, and that the DCI had no objection to the release of the downgraded rice. That position was confirmed by Mrs. Owesi, Miss Lavuna, Ms Kerubo (learned Counsel holding brief for Mr. Mogaka for the 6th respondent) and Mr. Khagram. The Court was told that the process was likely to take 30 more days to be completed. Consequently, the Court issued further interim orders as follows: -

"1. The downgrading exercise should continue on a day to day basis during working days.

2. The applicant shall continue to provide the necessary labour force and materials and Kenya Bureau of Standards shall continue to oversee the process.

3. The downgraded rice should continuously be released to the applicant.

4. We shall make final orders in respect of the contempt application on 23/9/2019."

19. On 23rd September, 2019, the 1st respondent's counsel told the Court that the downgrading exercise took place on 24th and 25th July, 2019 only. Thereafter, the DCI gave certain directions that stalled the exercise; and that the DCI did not allow the 1st respondent to access the warehouses that contain the rice. Counsel urged the Court to finalise the hearing of the contempt application. At that juncture, Mrs. Owesi sought and was granted leave to file a further replying affidavit sworn by **Bernard Nguyo**, Acting Director, Quality Assurance and Inspection, KEBS.

20. Mr. Nyuyo stated that on 26th July, 2019 KEBS and the other parties could not access the godowns as the DCI was conducting investigations in respect of the rice and so the downgrading could not proceed; that subsequently, they were required to record statements in respect of the rice by the DCI; that the responsibility of KEBS was to supervise the downgrading exercise and nothing else, which it did until the exercise was stopped by the DCI. In the circumstances, Mrs. Owesi submitted, her client was not in contempt of court.

21. In response, Mr. Wachira told the Court that there was a wider reason for the withholding of the rice pending delivery of judgment in Civil Appeal No. 63 of 2019. He said that the DCI was conducting further investigations and if the downgrading exercise was to proceed the investigations would be prejudiced. Counsel did not tell the court the nature of the further investigations and how the downgrading was likely to prejudice the further investigations. He however, conceded that the DCI had not made any application for variation of the court orders issued on 25th July, 2019. However, the appellants were not in breach of the consent orders issued on 2nd April, 2019.

22. On behalf of the 6th respondent, Mr. Mogaka submitted that the orders issued by this Court on 25th July, 2019 directed that the downgrading exercise be done on a continuous basis but that had not been done, and he faulted the DCI for the stoppage.

23. We have carefully considered this application as well as the submissions by counsel. The 5th respondent has asked this Court to find that the DCI and the Managing Director of KEBS are in contempt of court for blatantly refusing and/or failing to comply with orders made by this Court on 2nd April, 2019. In *Robertson v Her Majesty's Advocate, 2009, HCA 63, Lord Justice Clerk* defined contempt of Court as follows: -

“Contempt of Court is constituted by conduct that denotes willful defiance of or disrespect towards the court or that willfully challenges or affronts the authority of the court or the supremacy of the law, whether in civil or criminal charges.”

24. In *A.B. & Another vs R.B. [2016] eKLR*, this Court held that to sustain committal for contempt of court the order of the Court that is alleged to have been deliberately disobeyed must be clear and precise so as to leave no doubt as to what a party was supposed to do or to refrain from doing. It is therefore imperative that we closely examine the consent letter dated 2nd April, 2019 signed by all the parties that was adopted as an order of this Court. It read as follows: -

“BY CONSENT

1. ...;

2. ...;

3. The first Respondent be and is hereby allowed to apply to downgrade the contentious rice under protest and without prejudice to its rights pending the determination of the Intended Appeal and such application be resolved within 14 days of the application being made.” (Emphasis supplied)

25. It is clear to us that clause 3 above granted the 1st respondent liberty to apply to downgrade the contentious rice whose release had been allowed by the High Court vide a judgment delivered on 24th January, 2019. Upon making the application, the application had to be determined within 14 days from the date of its submission. The making of that application and the consideration thereof was without prejudice to the parties' rights pending determination of Civil Appeal No. 63 of 2019.

26. The 5th respondent made the application on 8th April, 2019 and by a letter dated 26th April, 2019 KEBS allowed the downgrading on the following conditions:

“1. You shall be required to downgrade the rice to grade three (3) as was determined by testing.

2. The process shall be carried out at a place where it is held and shall be supervised by KEBS and any other interested party including the Multi-agency team.

3. You are required to ensure the place of activity is conducive and suitable for the intended work.

4. You shall pay to KEBS the costs associated with this activity (an invoice shall be raised).

4. You shall provide all necessary resources for the activity, which include labelling material/tools and labour.”

27. The 1st respondent made the necessary payments for the downgrading, **Kshs.558,083**, and undertook to comply with the other conditions as stipulated hereinabove. The payment was done on 26th April, 2019. The basis of the 1st respondent's application for contempt against the DCI and the Managing Director of KEBS is that they have ***“conducted themselves maliciously, malevolently and with a complete lack of candour and have blatantly refused, neglected and or failed to comply with orders of this Honourable Court made on 2nd April, 2019 by impeding, hindering and or refusing the downgrading exercise as approved to take place.”***

28. A strict interpretation of the terms of the consent letter dated 2nd April, 2019 does not reveal that the parties addressed themselves to anything else apart from allowing the 1st respondent to apply for downgrading of the rice. The terms and conditions (if any) upon which the application was to be considered were not spelt out. As a matter of fact, the consent letter was not a guarantee that upon making the application for downgrading the same would be granted. All it provided for was a limited period of 14 days for resolving the application. The application could be granted or rejected. “To resolve” an application means to determine it, one way or the other.

29. The 5th respondent, having resolved the application for downgrading (though outside the 14 days' period), complied with the terms of the consent letter and the consequent orders of the court. Whereas the physical process of conducting the downgrading exercise had not begun nearly three months after the application was allowed and the necessary payments made, under the terms of the consent letter, the DCI and the Managing Director were not in contempt. Instead of filing the contempt application, the 1st respondent should have made an application for directions and/or further orders considering that the consent letter expressly provided that "*parties be at liberty to apply after the first week of May, 2019.*"

30. In view of the foregoing, we find and hold that the DCI and the Managing Director of KEBS are not in contempt of this Court's orders issued on 2nd April, 2019.

31. It could be argued that the DCI may have violated this Court's orders issued on 25th July, 2019 but that is not the subject matter of the application before us. It would amount to a miscarriage of justice for this Court to hold a party liable for contempt in respect of orders that are not the subject of a contempt application, and which the Court has not been addressed on, except in circumstances where the court acts *suo motu*, which is not the case in this matter.

32. In the final result, we find the application dated 9th July, 2019 lacking in merit and dismiss it. Each party shall bear its own costs.

It is so ordered.

Dated and delivered at Malindi this 31st day of October, 2019.

D.K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A.K. MURGOR

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR