



IN THE COURT OF APPEAL AT NAIROBI

(CORAM: MAKHANDIA, OUKO, M'INOTI JJA)

CIVIL APPEAL NO. 198 OF 2017

BETWEEN

STEPHEN JENNINGS.....1ST APPELLANT
FRANCES HOLLIDAY.....2ND APPELLANT
PIUS MBUGUA NGUGI.....3RD APPELLANT
FRANK MOSIER.....4TH APPELLANT
CHRISTOPHER BARRON.....5TH APPELLANT

VERSUS

TATU CITY LIMITED.....1ST RESPONDENT
KOFINAF COMPANY LIMITED.....2ND RESPONDENT
NAHASHON NGIGE NYAGAH.....3RD RESPONDENT
VIMALKUMAR BHIMJI DEPAR SHAH.....4TH RESPONDENT
HANS JOCHUM HORN.....5TH RESPONDENT
ANTHONY NJOROGE.....6TH RESPONDENT

(Being an Appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Tuiyott, J.) dated 4th May, 2017

in

HCCC No. 46 of 2015)

JUDGMENT OF THE COURT

The following statement by this Court (Waki, Nambuye and Kiage, JJA) in their decision of 22nd day of September, 2017 in **Tatu City Limited & 3 others V Stephen Jennings & 6 others**, Civil Appeal No. 259 of 2015 summarizes the unfortunate situation of a project that was intended to redefine the scale of urban development in Kenya and significantly de-congest the City of Nairobi. The Court said;

“

The Tatu City project was a grand and noble investment idea. But it is now mired in the ignominy of Boardroom and Shareholder wars, mostly fought in court rooms and the airwaves. The matter before us is just one other battle front that can only lead to a temporary ceasefire as the main battle awaits the parties before the High Court....Surrounding the dispute is an intricate web of relationships between the parties stretching from Kiambu through Cyprus to Mauritius, but the kernel of it, similarly intricate, is an offshore loan transaction which appears to defy clarity”.

The suit pending in the High Court and the applications so far determined by the High Court principally relate to the affairs of two companies, Tatu City Limited, the 1st respondent and Kofinaf Company Limited, the 2nd respondent. The dispute concerns, among other things, the appointment of additional directors, the removal and replacement of the Chairman of the Board of Directors of the two companies, the operation of bank accounts of the two companies and the repayment of the loan. It is worth noting that the project has both foreign and local partners and that the controversy giving rise to this appeal arose from a dispute regarding the appointment of a firm to conduct a comprehensive audit and reconciliation of the two companies' offshore loans account.

This is how this question came to be. Through Renaissance Partners Investment Limited, a company associated with the 1st appellant (Jennings) and the 5th respondent (Horn), and with the approval of the Board of Directors of the 2nd respondent, given on 11th March, 2010, a loan of US\$ 62.5 million was secured to finance the Tatu City project. The term of the loan was 365 days from the date of drawdown, repayable at 33% per annum.

On 7th May, 2010, by a unanimous resolution of the Board of Directors of the company, the Directors agreed to sell 10 properties, in order to raise US\$ 62.5 million to settle the loan. The properties identified for this purpose were, L.R. Nos. 8749 (Wango Estate); 10083 (Mtaru Estate); 10883/2, 11486 and 11428 (Gethumbwini Estate); 10887 (Karangaita Estate) and 11285, 11287, 11288 and 11289 (Ruera Estate). According to the respondents, (except the 5th respondent) eight out of the identified properties were sold for US\$ 75.3 million and the proceeds allegedly utilized towards the repayment of the loan. They insisted that there was an overpayment in excess of US\$ 13.5 million yet there was no clear explanation from the appellants who had exclusive knowledge and control of the status of repayment of the loan. On the other hand, the lenders continued to demand the settlement of the loan.

The climax of the dispute came on 28th January, 2015 when the foreign partners outvoted the local partners in Kofinaf Board of Directors, (3 to 2) and passed a resolution pursuant to which one more property, **Ruera 1**, belonging to the 2nd respondent was sold for US\$. 48 million. The proceeds were said to have been used to make part of payment of the loan which allegedly stood at USD 94 million as at that date. Some Directors protested and called for an in-depth audit of the loan by a reputable audit firm.

Next, on 5th February, 2015 the 3rd respondent (Nyagah) was purportedly removed and replaced as the Chairman of the Board of the company by the 3rd appellant (Ngugi). Nyagah was also removed as a signatory of the bank accounts of the companies and was replaced by the 4th appellant (Mosier), the 5th appellant (Barron) and the 6th respondent (Njoroge). Some senior employees of the companies were also removed.

As a result of these developments, Nyagah and the 4th respondent (Vimal) instituted an action in the High Court in their own names and in the names of the two companies, alleging breach of fiduciary duty and fraud on the part of the three other Directors. They applied for, among other things, to have the changes passed at the meeting of Directors reversed and declared null and void, permanent injunctions restraining the appellants from making decisions without the consent of Nyagah and Vimal; Ngugi, Mosier, Njoroge and Barron from acting as directors of the 1st and 2nd respondents and from accessing and operating the 1st respondent's Bank accounts.

That suit is pending determination. But as we have noted, there have been numerous interlocutory applications.

On 23rd February 2015, the respondents amended their plaint and obtained leave to continue the suit as a derivative action. They secured the orders sought in the main suit on an interim basis pending *inter partes* hearing of the application. According to the appellants the orders in question had the effect of crippling the operations of the two companies. As a result the appellants filed a notice of motion on 26th February, 2015 seeking to discharge those orders. It was on this occasion that **Ogola, J.** granted the orders on 6th March, 2015, which are relevant to the matter under review in this judgment, but whose effect was to direct that PwC (or another agreed entity) be appointed to conduct an independent in-depth audit of the offshore loans account and to report its findings to court.

The respondents shortly returned to court with a notice of motion dated 21st September, 2015 complaining that, despite these orders, the appellants, acting through Robert James Reid (Reid), the person mandated by the appellants and who had been directed by the court to liaise with Nyagah in the conduct of the in-depth audit, had completely frustrated the commencement of the audit by intimidating PwC; that as a result of frustrations, PwC had withdrawn from conducting the audit; and that as a result, the Letter of Engagement had not been signed. They urged the court to find the appellants, the 5th respondent and Reid to be in contempt of the court orders made on 6th March, 28th April and 12th June, 2015 and to commit them to civil jail. They further prayed that any of their property as may be found within the jurisdiction of the court be attached, sold and the proceeds paid over to the respondents should the said disobedience of the court orders continue.

The appellants denied these allegations in their replying affidavit insisting that the motion dated 21st September 2015 was an abuse of the court process and that the orders made by the court on 6th March and 28th April 2015 were similarly made without jurisdiction, as such there would be no basis to commit the appellants to civil jail.

Although the respondents in their motion had complained of other instances of court orders violations by the appellants and Reid, the learned Judge was, however of the view that the respondents had abandoned those other complaints. In the result he based his decision only on the alleged disobedience of the order for audit made on 12th June, 2015. Holding that view, the learned Judge, on the basis of **Rules 81.4, 81.16 and 81.17** of the Civil Procedure (Amendment No. 2) **Rules 2012** of England and on the authority of **Christine Wangari Gachege V. Elizabeth Wanjiru Evans & 11 others** [2014] eKLR, agreed with the respondents that the appellants were in contempt of court. He

concluded that there was:-

“

■ ■ ■ ..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.....

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.....

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.”

Although the appellants were not punished, they were nonetheless aggrieved by the finding that they had violated a court order. They proffered this appeal on 12 grounds, which were, in their submissions, condensed into five.

In the first place, the appellants have argued that the application was defective on account of having been brought without leave of the court; and that the orders they are alleged to have violated were incapable of enforcement by an order of committal since they did not require them to do anything, neither did they prohibit them from doing any act. As such, they submitted that it was in error for the learned Judge to rely on **Rule 81.4** of the Civil Procedure (Amendment No. 2) **Rules 2012** of England.

Secondly, the appellants submitted that, in the absence of affidavit of service, there was no basis for finding them guilty of violating order that had not been served on them personally or one for which dispensation with service had been given.

Next, the appellants submitted that the order of 6th March, 2015 lacked endorsement of the penal notice, explaining the consequences for its disobedience.

On the fourth cluster of the grounds, it was argued that the learned Judge lacked jurisdiction to order parties to address him on the question of which firm to be appointed in place of PwC to conduct the audit since the question was not before him; and that in any case, the parties were not heard on the matter before the order was made.

Lastly, the appellants faulted the premises upon which they were found to be in contempt of court. According to them, there was no evidence upon which the learned Judge could conclude that they frustrated the appointment of an audit firm; that as a matter of fact, it was clear from the material on record before the Judge, that Reid fully cooperated with the 3rd respondent on the issue of audit; that instead of the audit firm adhering to the terms of reference presented to it, it expanded them beyond the scope of audit; that as a consequence, Reid addressed many letters to the parties with a view to reaching a consensus on the terms of reference; and as such he was not responsible for the collapse of the audit exercise.

Opposing the appeal, the respondents agreed with the learned Judge that they did not need leave of the court to bring the application for contempt; that there was no requirement for personal service if the order allegedly breached was made in the presence of the contemnor or his advocates as was the case here; that it was improper for the learned Judge to exonerate Reid from liability when contempt was established against him and the appellants individually; that the court below properly found that its orders of 12th June, 2015 were disobeyed by the appellants; and that the remedy for that disobedience was the appointment of another audit firm in place of PwC.

It is necessary at this stage to set out the orders allegedly disobeyed by the appellants. On 6th March, 2015 the High Court Ogola, J ordered, in relevant part that;

“

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”.

On 28th April, 2015 the court directed that;

“

(d) For the duration of the intended audit, and pending the filing of the said audit report in court and further directions

from this court, the Defendants shall not effect any loan repayments by the 2 Plaintiff companies. The Plaintiff companies shall, however, continue to transact any legitimate business, including buying or selling of land.”

Finally, the orders of 12th June, 2015 were, *inter alia*, that:-

“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”.

It is this last order that the appellants were found to have disobeyed.

As Lord Denning MR reminds us in the case of In re Bramblevale Ltd [1970] CH 128 at P. 137:-

“

A contempt of court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved showing that when the man was asked about it, he told lies. There must be some further evidence to incriminate him.”

A party alleging that another has committed contempt must prove it. It is now settled that the standard of proof;

“

■ ■ ■ must be higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt.” See Mutitika V. Baharini Farm (1982-88) 1 KAR, 863.

In the dispute, the learned Judge relied on the affidavit of Nyagah to prove that the appellants and Reid were in deliberate disobedience of the Court order. In paragraph 36 of that affidavit it was deposed that:-

“

36. 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”.

The burden was on the respondents to demonstrate in what way the appellants and Reid had “completely frustrated and scuttled the commencement of the in-depth audit by intimidating PwC”.

In the first place, the learned Judge was satisfied from the emails exchanged between PwC and Reid that the latter held himself out as having the mandate of the appellants to deal on their behalf. He also found supporting evidence of this conclusion in the affidavit of Nyagah to the effect that Mr. Reid was the person mandated by the appellants to liaise with the respondents in the in-depth audit exercise. In his view, the learned Judge found that “to that extent the actions or non- actions of Reid cannot be overlooked”. Although Reid was the liaison person for the appellants, he escaped contempt liability by reason only that he had not been served with the application.

But a more fundamental question is the evidence presented in proof of allegations of disobedience of the orders of 12th June, 2015. The learned Judge made reference to an email of 31st August 2015 from Mr. George Weru of PwC to Reid in which the former sought to know from the latter the specific areas in the engagement letter which he required to be amended to address the concern he had raise on the

accuracy and objectivity of the intended review.

The Judge found proof of disobedience of the orders of 12th June, 2015, first, in the fact that Reid did not respond to the concerns raised by PwC about the Letter of Engagement; and that as a result, the Letter of Engagement was not signed and the audit did not commence as ordered. Secondly, evidence of the reluctance by Reid to cooperate with PwC was buttressed by a statement attributed to the 1st appellant (Jennings) at the Board of Directors meeting to the effect that they would be happy to work with any recognized International Audit firm in the world but PwC Kenya because of its “relationship with Bidco”. While the Judge appreciated that the concern expressed by Jennings could be addressed by an application for review or setting aside of the orders appointing PwC, he found that the appellants had “stonewalled on the question of the Letter of Engagement”, which conduct was contemptuous and was the reason why PwC was forced to recuse itself from the exercise.

We, for our part, are not convinced that there was evidence to support the assertion that the appellants completely frustrated and scuttled the commencement of the in-depth audit by intimidating PwC. Indeed, the learned Judge himself expressed satisfaction from the correspondence and affidavits before him that there was an attempt by the parties and PwC to agree on the modalities of the in-depth audit. It was, therefore, in error for him to mistake a protracted negotiations for a stonewall.

The sequence of the following events confirms that an audit could not commence until parties reached a consensus on certain aspects. On 12th June, 2015, **Ogola J.** dismissed an application dated 23rd April 2015 by the 5th respondent (Horn), seeking to exclude PwC from conducting the audit as mandated by the order of 6th March 2015. But on 28th July 2015, Mr. Gachuhi, learned counsel for PwC informed **Ogola J.** in court that the audit report was not ready as parties were still negotiating the terms of reference. Consequently, counsel asked for more time to enable PwC to present the audit report. The court gave the parties 45 more days to file the report. The matter was to be mentioned on 23rd September, 2015. On 16th September 2015, before that date, the 1st and 2nd appellants held a board meeting to discuss the details of the appointment of an auditor. There was a stalemate as there was no unanimity on the question among the Directors. Following the stalemate, the respondents filed the motion in which the impugned orders were made. We do not think the parties had sufficient *consensus ad idem* on the audit. There was no evidence that the appellants deliberately disobeyed or disregarded the orders of 12th June, 2015.

As a matter of fact, PwC was to carry out the audit in accordance with the decision made by the Board of Directors on 28th January 2015. At **Clause (e) (iv)** of that decision, the 3rd respondent and Reid were “... **authorized to discuss and agree with PwC on the Terms of Reference (TORs) and the fee to be charged by PwC... that the Chairman and Mr. Robert Reid to provide required documentations to PwC for the required audit**”. Ultimately, it was also agreed that only after these were settled that PwC would commence work.

From the foregoing facts, we are of the firm view that the evidence presented to prove contempt did not reach the **Mutitika** case (supra) threshold and therefore the learned Judge committed an error in finding that the appellants had deliberately disobeyed the order of 12th June, 2015. That order was directed at PwC to conduct the audit strictly in accordance with company’s board resolution. It was envisaged by **Clause (e)** of the resolution that the 3rd respondent and Reid would have some input before the commencement of the audit exercise. There was no term in the order of 12th June, 2015 that directed Reid or the appellants to do or to abstain from doing any particular act to warrant an application of the law of contempt. It was, in our view, premature for the court to intervene by the use of coercive powers of contempt in a negotiation stalemate.

Before the court can find a person guilty of contempt, it must be satisfied that the orders allegedly violated were clear and capable of enforcement by contempt proceedings.

The Court emphasized this in **Lucy Wangui Gachara V. Minudi Okemba Lore**, C.A No. 4 of 2015, saying;

“

The rationale of the requirement that a court order must be clear; precise and easy to understand is founded on the self-evident fact that breach of a court order may result in contempt of court proceedings as well as the severe sanctions, including loss of liberty or property, that are visited upon a contemnor. Accordingly the grave consequences that attend a violation of a court order ought not be casually visited upon a person unless and until it clear what the court order required him to do or to abstain from doing. In

WANG’ONDU V. NAIROBI CITY COMMISSION, CA NO 95 OF 1988, this Court emphasized that a court will only punish as a contempt of court a breach of injunction when it is satisfied that the terms of the injunction are clear and unambiguous. (See also OCHINO & ANOTHER V. OKOMBO & 4 OTHERS [1988] KLR 165)”.

The fact that we find no evidence of willful disobedience of the orders in question or even evidence of frustration and intimidation of PwC by the appellants should determine finally this appeal, but for the questions, whether the right procedure for commencing contempt proceedings was followed; whether personal service of the order was necessary and what punishment was available.

The decision challenged in this appeal was rendered before the enactment of the Contempt of Court Act in 2016. For the procedure and punishment, the court had to resort to the Rules of the Supreme Court of England.

We draw the answer to the questions above from the decision of this Court in **Christine Wangari Gachege V. Elizabeth Wanjiru Evans & 11 others** [2014] eKLR where it was held that;

“...an application under Rule 81.4 Civil Procedure (Amendment No. 2) Rules, 2012 (breach of judgment, order or undertaking) now referred to as “application notice” (as opposed to a notice of motion) is the relevant one for the application before us. It is made in the proceedings in which the judgment or order was made or the undertaking given. The application notice must set out fully the grounds on which the committal application is made and must identify separately and numerically, each alleged act of contempt and be supported by affidavit(s) containing all the evidence relied upon.

The application notice and the affidavit or affidavits must be served personally on the respondent unless the court dispenses with service if it considers it just to do so, or the court authorizes an alternative method or place of service.

It is clear from this summary that leave, now called “permission” is not required where committal proceedings relate to a breach of a judgment, order or undertaking. That position must be contrasted with the requirement in Rules

81.12 – committal “for interference with the due administration of justice” and 81.17 – Committal “for making a false statement of truth or disclosure statement” where, in the former it is expressly provided that:-

‘The application for permission to make a committal application must be made by a part 8 claim form.....’

And in the case of the latter,

‘A committal application in relation to a false statement of truth or disclosure statement in connection with proceedings in the High Court, a Divisional Court or the Court of Appeal, may be made only;

a) with the permission of the Court dealing with the proceedings in which the false statement or disclosure statement was made.....’”

We finally conclude, from this, that no leave was required to institute contempt proceedings; that the application for contempt did not set out fully, the grounds on which it was made nor did it identify, separately and numerically, each alleged act of contempt.

By **Rule 81.5**, unless the court dispenses with service, a judgment or order may not be enforced by an order for committal unless a copy of it has been served personally on the person required to do or not do the act in question. Personal service will be dispensed with if the court is satisfied that the person has had notice of the judgment or order by being present when the judgment or order was given or made; or by being notified of its terms by telephone, email or otherwise or if the court thinks it just to dispense with personal service. The court, on the other hand, may order service to be effected by an alternative method or at an alternative place.

Regarding the requirement for penal notice, **Rule 81.9** provides that a judgment or an order to do or not do an act may not be enforced unless there is prominently displayed, on the front of the copy of the judgment or order served, a warning to the person required to do or not do the act in question, that disobedience to the order would amount to contempt of court punishable by imprisonment, a fine or sequestration of assets. From the record, we are satisfied that the order extracted and shown as having been issued on 24th June, 2015 contained a penal notice, albeit on the last page of the order.

The only known punishments for disobedience of a court order under the Rules are a writ of sequestration, imprisonment or a fine. After finding the appellants guilty of contempt of court, the learned Judge ought to have imposed any of these penalties instead of attempting to appoint another firm of auditors to replace PwC and call that punishment. Such an appointment is an internal affair of the company which only the company could do using its organs. In any case, the respondents in their motion of 21st September, 2015 specifically applied that the appellants and Reid be committed to civil jail for a period not exceeding six (6) months and that their property be attached, sold and proceeds paid to the respondents.

In the end, and for the reasons we have given, we find merit in the appeal. Accordingly, we allow it with costs.

Dated and delivered at Nairobi this 23rd Day of February, 2018.

ASIKE – MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M’INOTI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR