REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

Civil Appli 304 of 2006 (171/2006 UR)

ROSE DETHO……APPLICANT

AND

RATILAL AUTOMOBILES LTD…..…..……..1ST RESPONDENT

MAHESH TAILOR…….....…….……..2ND RESPONDENT

GEMINI TAILOR……..…….…....……3RD RESPONDENT

PRAMUKH ENTERPRIES LTD……...…..…….……4TH RESPONDENT

CHARTERHOUSE BANK LTD.……...…..…..……...…..5TH RESPONDENT

SANJAY SHAH……...…….…….6TH RESPONDENT

THE ATTORNEY GENERAL……...…….…….7TH RESPONDENT

***(Application for stay of execution of the Ruling and order of the High Court of Kenya Eldoret (Gacheche, J) dated 24th November, 2006 In* H.C.MISC. APLN. NO. 649 OF 2006)**

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RULING OF TUNOI, J.A.

1. The pending application is for stay of execution of the orders of *Gacheche J* dated 24th November, 2006 which found the applicant guilty of contempt of court and ordered her to obey the said orders by re-opening the Bank (the 5th respondent) – or face 6 months imprisonment.

2. On 24th November, 2006 the High court of Kenya at Eldoret *(Gacheche, J)* found the applicant, *ROSE DETHO*, the Statutory Manager of the 5th respondent, *CHARTERHOUSE BANK LIMITED*, to have acted in contempt of court by disobeying the orders of that court made on 15th September, 2006 and ordered:-

"*that she (the applicant) regularizes her position within the next thirty six hours otherwise she stands to suffer imprisonment for six months."*

3. However, it is common ground that the applicant has not obeyed the orders of the said superior court nor has she in any manner whatsoever purged the contempt mainly on the grounds which she advanced; firstly, that the learned Judge had made a fundamental error of law in finding the applicant guilty of contempt while there was no evidence of proper personal service; secondly, that it was an error on the part of the learned Judge to enforce a mandatory injunction which she had no jurisdiction so to grant under the provisions of Order L III of the Civil Procedure Rules; thirdly, that the order the applicant was accused of breaching did not require her to take any action; fourthly, that the learned Judge erred in finding the applicant personally liable in the absence of evidence of bad faith on her part contrary to the provisions of section 34(8) of the Banking Act which gives her complete indemnity against such liability in respect of any act or omission done in good faith; and fifthly, that the penal notice was defective and of no legal effect.

4. On 5th December, 2006 the applicant filed a Notice of Motion under rule 5(2) (b) of the Rules of this Court under a certificate of urgency seeking orders that pending the lodging, hearing and determination of the applicant's intended appeal, the execution of the order of the superior court at Eldoret be stayed. The motion came up for hearing on 11th December, 2006, but, was adjourned because the respondents' advocates were absent. It was further re-listed for hearing on 19th December, 2006 and as there was no sufficient time to hear and determine the preliminary objection which had then been intimated, this Court granted an interim stay of the orders of the superior court at Eldoret until the hearing and determination of the preliminary objection to the application for stay of execution or until further orders of the Court.

5. The respondents through their counsel, *Mr. Nyairo and Mr Odera*, have vigorously submitted that the application for stay of execution ought not be heard until the applicant has purged her contempt and complied with the superior court's orders. Thus, the only issue for us to determine at this stage is whether it is open for us in the circumstances to uphold the preliminary objection and to refuse to hear the applicant.

6. Has the contemnor a right to be heard? This is indeed an every day question in all our courts. While the general rule is that a court will not hear an application for his own benefit by a person in contempt unless and until he has first purged his contempt, there is an established exception to that general rule where the purpose of the application is to appeal against, or have set aside, on whatever ground or grounds, the very order disobedience of which has put the person concerned in contempt. See *EXITO NAVEGACION S.A. V SOUTHLAND ENTERPRISES CO. LTD, THE MESSIANIK TOLMI [1981] 2 LLOYD'S REP. 595 at page 602.* In his speech Brandon LJ said:-

"---------- *that there may be cases where an appeal by a party in contempt against the very order disobedience of which has put him in contempt, can be shown to be, for one reason or another, an abuse of the process of the Court. In such a case the exception to the general rule discussed above would not apply."*

It is worthy of note that the learned law Lord before reaching this conclusion discussed a number of authorities both in the nineteenth and twentieth centuries, including the case of *HADKINSON V. HADKINSON* [1952] 2 ALL ER 567 at page 567, at 569-570. This authority by Denning LJ contained a learned and scholarly historical account of the origins and development of the rule that a contemnor will not be heard until he has purged his contempt and it appears that the indepth analyses thereof led Denning LJ to formulate what he described as the "modern rule" which is in the following terms:

" *I am of the opinion that the fact that a party to a cause has disobeyed an order of the court is not of itself a bar to his being heard, but if his disobedience is such that, so long as it continues, it impedes the course of justice in the cause, by making it more difficult for the court to ascertain the truth or to enforce the orders which it may make, then the court may in its discretion refuse to hear him until the impediment is removed or good reason is shown why it should not be removed."*

7. The Courts in this country, both this Court and the superior court, have adopted the more flexible treatment of the jurisdiction as one of discretion to be exercised in accordance with the principle stated by Denning LJ in Hadkinson's case (supra). See *MAWANI V MAWANI* [1977] KLR 159 *and JOSEPH*

SCHILLING & 2 OTHERS V STARDUST INVESTMENTS LTD & ANOTHER Nairobi Civil Appeal No. 134 of 1997 (unreported).

8. Both *Mr Nyairo and Mr. Odera* have submitted that the orders of the superior court at Eldoret have been contemptuously and flagrantly breached and disobeyed and that there is a continuation of such a breach. They have further submitted that the respondents cannot access their accounts and this has occasioned them grave injury. Moreover, they have urged, the disobedience has impeded the course of justice since it has become impossible for the superior court at Eldoret to enforce its orders. The two counsel have referred us to the authorities of this Court and urged us to observe consistency in our jurisprudence.

9. Mr Ougo for the applicant has averred that the superior court at Eldoret had "acted contrary" to its orders and that the contemnor had a right to be heard by this Court as to why she thought she was not in contempt as alleged by the applicant. He referred us to the decision in *MACFOY V UNITED AFRICA COMPANY LTD [1961] 3 ALL ER 118.*

10. As at this time, several months after the orders were made, the applicant has not appeared before the superior court at Eldoret and her non-appearance is continuing.

11. Counsel for the respondents have urged us to uphold the authority and dignity of the court and that we should do this by making sure that court orders are obeyed. I agree with them. We reiterated in our ruling dated 17th October, 2006, that it is a fundamental tenet of the rule of law that court orders must be obeyed and that it is not open to any person or persons to choose whether or not to comply with or to ignore such orders as directed to him or them by a court of law.

12. I believe that the case at the superior court at Eldoret is of great importance to the entire banking industry in the country. However, it cannot be concluded one way or the other because the applicant, the agent of the most powerful financial entity in the country, will not obey that court's orders nor will she deign to appear before it.

13. No doubt, the disobedience so long as it continues, has the effect of impeding the course of justice in the case the subject of this application in that it has made it more difficult, if not impossible, for that court to ascertain the truth or to enforce its orders. Moreover the applicant has not shown any good reason why she should not appear before it as ordered.

14. We have been addressed at length by Mr Odera on the topic of "The Independence of the Judiciary". I have carefully considered the submissions but only so far as they are relevant to the matter now before us. I would, however, agree with him that there would be no reason for the Country to have and to maintain courts whose decisions and orders are useless and are not binding on anybody. Surely, it would be against public policy and unconstitutional to retain such courts. Moreover, it would be manifestly wrong for the courts to be seen as reluctant to jealously guard their authority or to ward off forces out to weaken their constitutional authority.

15. In the result, I would order that this application shall not be heard until the applicant has appeared before the superior court at Eldoret either to purge the contempt or to be dealt with otherwise by that court.

16. In my view, I would uphold the preliminary objection and award costs to the respondent.

17. However, as the majority does not agree the order of the Court is as proposed by them.

As to costs, I would direct that they shall be in the application as proposed by Onyango Otieno, J.A.

DATED and DELIVERED at NAIROBI this 25th day of May, 2007

P.K. TUNOI

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JUDGE OF APPEAL

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: TUNOI, GITHINJI & ONYANGO OTIENO, JJ.A)

CIVIL APPLICATION NO. NAI 304 OF 2006 (171/06 UR)

BETWEEN

ROSE DETHO …… APPLICANT

AND

RATILAL AUTOMOBILES LIMITED.……..…….. 1ST RESPONDENT

MAHESH TAILOR …….…..…….……. 2ND RESPONDENT

GEMINI TAILOR ……..…..…… 3RD RESPONDENT

PRAMUKH ENTERPRISES LIMITED …….…...……. 4TH RESPONDENT

CHARTERHOUSE BANK LIMITED ……...……. 5TH RESPONDENT

SANJAY SHAH …….....…… 6TH RESPONDENT

THE ATTORNEY GENERAL …….....……..….. 7TH RESPONDENT

(Application for stay of execution of the ruling and orders of the High Court of Kenya at Eldoret (Gacheche, J) dated 24th November, 2006

in

H.C. Misc. Civil Application No. 649 of 2006)

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RULING OF ONYANGO OTIENO, J.A

Application for stay of execution of the ruling and orders of the superior court at Eldoret (Gacheche, J) dated 24th day of November, 2006 in Miscellaneous Application No. 649 of 2006 came up for hearing before us on 15th March 2007. However, before the application could be heard, Mr. Nyairo, the learned counsel for the first, second, third and fourth respondents together with Mr. Odera, the learned counsel for the 5th respondent, raised preliminary objection to the applicant being heard on her application on grounds that the applicant, Rose Ndetho, was on 24th day of November 2006 found by the superior court to have acted in contempt of court and was ordered to regularise her position within thirty six hours

otherwise she stood to suffer imprisonment for six months and she had neither purged the contempt which she was ordered to purge nor had she availed herself to serve the imprisonment ordered in default. Those orders were, as I have stated, made by the superior court in Miscellaneous Application Number 649 of 2006. The original orders allegedly disobeyed were made on 15th day of September 2006 and are spelt out at pages 26, 27, 28, 29, 30 and 31 of the record before us. The respondents' arguments are that as the applicant's application for stay of the order has not been heard, the orders are still in effect and have not been obeyed. That being the case and the applicant being in contempt, this Court should not allow the applicant audience as to do so would mean that court's orders can be disobeyed with impunity and that, the respondents say, would create a bad precedent. She is in breach of the orders and has not allowed the first, second, third and forth respondents to access their accounts. They added that as the applicant had been found judicially guilty of contempt of court, she should not be allowed to present her application for stay of the orders of the superior court. Mr. Odera also complained that the notice of appeal in respect of the application No. 649 of 2006 has not been served upon Central Bank and Momanyi who are also parties affected. The learned counsel for the 6th respondent, Mr. Taibjee supported the sentiments of Mr. Nyairo and Mr. Odera. Several authorities were cited by the respondents' counsel.

The learned counsel for the applicant, Mr. Ougo, opposed the application arguing that whether a court order has been obeyed or not is a matter of fact for the court to investigate. There were some orders which were not subject to any obedience such as when the court ordered the applicant to take action to regularise her position yet there was no action to be taken in regularizing her position. The applicant has not made any decision on the matters which were the subject of the superior court's orders and has not taken any precipitating action departing from the court's orders. He maintained that we were not given concrete facts to demonstrate disobedience of the court's orders. Further, Mr. Ougo contended that the legality of the orders needed to be ventilated as it would be wrong to enforce the orders without first determining the legality or otherwise of the orders that were allegedly disobeyed. He submitted that where a party alleged to be in contempt seeks to show that the order he is said to be in contempt of is illegal, he should be allowed to urge his case. He also maintained that the orders allegedly disobeyed were not served upon the applicant in accordance with the requirements of the Civil Procedure Rules. He submitted that in law, where the order itself is being questioned, the applicant should be heard.

I have considered the rival submissions, the facts as are on record and the law. It is not in dispute that on 15th September 2006, in Miscellaneous Application No. 638 of 2006 at Eldoret, the superior court certified the application as urgent and allowed the applicant in that application leave to apply for fourteen orders of mandamus, seven orders of certiorari and nine orders of prohibition. It was also ordered that leave so granted would operate as a stay of the transfer of the subject funds from Charterhouse Bank Limited to Central Bank and stay of withdrawal/suspension of Charterhouse from the clearing house and/or any decision, action and report made pending or intended by any of the respondents in that application. That is the order that was allegedly disobeyed by the applicant. Mr. Ougo says the order could not by its own nature be obeyed or disobeyed. That however is not before us now because the superior court had on 24th November 2006 made a finding that the applicant was in contempt. Mr. Ougo says vide the application, which was due to be heard before the preliminary objection as raised, that the applicant is questioning the legality or otherwise of the orders issued on 15th September 2006 and that being the case, the applicant should not be driven away from the seat of justice by being denied a hearing whereas, Mr. Nyairo, Mr. Odera and Mr. Taibjee feel the applicant, being in contempt of the court orders, should not be heard until and unless she first purges that contempt. Mr. Bita agrees with Mr. Ougo, but on a different ground altogether. His stand is that as on 17th October 2006, this Court granted interim stay on another application, Civil Application No. Nai. 247 of 2006 between the same parties, the applicant should be allowed to present her application before the court. Both the applicant and the respondents agree that the decision as to whether a contemnor should be heard by the court or not is a matter within the discretion of the relevant court. In the case of Joseph Schilling and two others vs. Stardust Investments Limited and another – Civil Appeal No. 134 of 1997 to which we were referred by Mr. Nyairo, this Court stated:

"Simpson J. (as he then was) observed in Mawani vs. Mawani supra, that it was a matter of the discretion of the court whether or not to refuse to hear a party who is in defiance of a court order until such party has

purged his contempt."

However, even though the court's power when deciding whether to hear a contemnor or not is discretionary, the general rule has been not to hear a contemnor until he purges the contempt. This is because as Kwach, J.A (as he then was) stated in the case of Commercial Bank of Africa Limited vs. Isaac Kamau Ndirangu – Civil Appeal No. 157 of 1991:

"It is a fundamental tenet of the rule of law that court orders must be obeyed."

There is, however, exception to that general position and this is readily seen in the case of Hadkinson vs. Hadkinson [1952] 2 ALL ER 567 particularly at pages 569 – 570 where Denning LJ., in a well researched judgment came to what is now known as the "modern rule". He stated:

"I am of the opinion that the fact that a party to a case has disobeyed an order of the court is not of itself a bar to his being heard, but if his disobedience is such that so long as it continues, it impedes the course of justice in the cause, by making it more difficult for the court to ascertain the truth or to enforce the order which it may make, then the court may on its discretion refuse to hear him until the impediment is removed or good reason is shown why it should not be removed."

Much as I have discretion to hear or not to hear the applicant, that discretion, like any other judicial discretion, must be exercised judicially and not capriciously. It must be exercised upon reasons and not on the whims of the court or on sympathy or sentimental aspects such as that the court must show that it has teeth when faced with a case such as before us. Of course courts have teeth but must only bite in appropriate circumstances. Courts act on reason and not on emotion. In the exercise of the discretion, the legal principles I have reproduced hereinabove must guide my approach.

The main application before us is seeking stay of the orders made by the superior court at Eldoret on the 24th day of November 2006. The pertinent part of the ruling giving rise to the application states as follows:

"I do therefore find that she acted in contempt of court and do order that she regularises her position within the next thirty six hours otherwise she stands to suffer imprisonment for six months."

That is the order that the applicant is seeking to stay. As to the other order of 15th September, 2006, this Court had on 17th October 2006 made an order and it is not before us. If the applicant is ordered to purge the contempt before she is heard, the consequences are that she will have to face imprisonment or to take action on the order of 15th September 2006 which she is alleging is illegal before she is heard. In my mind, purging contempt is not composed of merely appearing in court and apologizing to the court. It means atoning for or wiping out the offence or putting right what the court had ordered to be done and which was not done. But even more important, can one say that if the alleged contempt in this matter continues, it will impede the course of justice? In other words, can the applicant's failure to take the actions that were ordered on 17th October 2006 or on 15th September 2006 impede the course of justice in the application for stay before us or make it difficult for us to ascertain the truth in respect of that application? I do not think so. We will be hearing the applicant on whether the orders should be stayed pending the hearing of the appeal and the respondents have not suggested in what way the failure to obey the orders of the superior court given on those two occasions will be an impediment to our hearing and concluding the application.

That being my view of the matter, I would decline to uphold the preliminary objection which I would dismiss with costs in the application.

Dated and delivered at Nairobi this 25th day of May, 2007.

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: TUNOI, GITHINJI, & ONYANGO OTIENO, JJ.A.)

CIVIL APPLICATION NO. NAI. 304 OF 2006 (UR. 171/2006)

BETWEEN

ROSE DETHO …… APPLICANT

AND

RATILAL AUTOMOBILES LIMITED

MAHESH TAILOR

GEMINI TAILOR

PRAMUKH ENTERPRISES LIMITED

CHARTERHOUSE BANK LIMITED

SANJAY SHAH

THE ATTORNEY GENERAL ……...…… RESPONDENTS

(Application for stay of execution pending the filing, hearing and determination of an intended appeal from the ruling and order of the High Court of Kenya at Eldoret (Gacheche J) dated 24th November, 2006

in

H.C.MISC.C. APPLI. NO. 649 OF 2006)

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RULING OF GITHINJI, J.A.

The 1st, 2nd, 3rd and 4th respondents in this application have raised a preliminary objection that *ROSE DETHO* the applicant herein should not be heard on her Notice of Motion dated 4th December, 2006 before she has purged her contempt of the order of the superior court (Gacheche J) in *Eldoret High Court Miscellaneous Civil Application No. 649 of 2006* dated 24th November, 2006.

The applicant is the statutory manager of *CHARTERHOUSE BANK LIMITED* (Bank). The four objectors are account holders in the 5th respondent's Bank.

By a letter dated 23rd June, 2006 the Central Bank of Kenya Limited (CBK) appointed the applicant a statutory manager of the Bank for a period of 12 months pursuant to *section 34 (1) (d)* of the Banking Act with effect from 23rd June, 2006.

The letter appointing the applicant authorized the applicant to exercise all the powers conferred on a statutory manager by the Banking Act and to enjoy the rights and privileges of a manager in accordance with *section 34 (2)* and *34 (6)* of the Banking Act. The appointing letter further authorized the applicant to assume the management, control and conduct of the affairs and business of the Bank to the exclusion of the Board of Directors.

By *section 34 (4)* of the Banking Act, the responsibilities of a statutory manager include:

"*(a) Tracing and preserving all property and assets of the institution;*

(b) Recovering all debts and other sums of money due to and owing to the institution.

(c) Evaluating the capital structure and management of the institution and recommending to the Central Bank any restructuring or re-organization which he considers necessary and which, subject to the provisions of any other written law may be implemented by him on behalf of the institution.

(d) Entering into contracts in the ordinary course of the business of the institution, including the raising of the funds by borrowing on such terms as he may consider reasonable; and

(e) Obtaining from any officers or employees of the institution any documents, records, accounts, statements or information relating to its business".

By *section 34 (8)* of the Banking Act the Central Bank, its officers and employees or a statutory manager is not liable in respect of any act or omission done in good faith in execution of the duties undertaken by him.

Sometime in September 2006, the four objectors filed *High Court Miscellaneous Civil Application No. 638 of 2006* at Eldoret High Court Registry seeking leave under *Order LIII* of Civil Procedure Rules to apply for judicial review orders, namely, fifteen orders of mandamus to, *inter alia*, compel the CBK, the applicant and Kenya Bankers Association to allow the objectors to access and operate their respective bank accounts at the Bank; seven orders of *certiorari* for, among other things, quashing the decision of the CBK and Minister for Finance of placing the Bank under statutory management and appointing a statutory manager and quashing the decision of the Kenya Bankers Association stopping the Bank from participating at the Clearing House; and lastly, nine orders of prohibition, *inter alia*, prohibiting the statutory manager (Rose Detho) from exercising any function or powers as statutory manager of the Bank.

The superior court granted leave on 15th September, 2006 and ordered that the grant of leave do operate as a stay in the following terms:

"*3 (a) …leave granted herein do operate as a stay of the transfer of the funds from 1st interested party (i.e. Bank) to the 1st respondent (i.e. CBK); the withdrawal, suspension of the 1st Interested Party from the Clearing House and/or any decision, action and report made pending and/or intended by any of the respondents herein and or their servants or agents which in anyway affect the rights, interest and or is adverse against the Applicants, 1st and 2nd Interested Parties pending and until the determination on this suit/Judicial Review Application.*

(b) … the leave granted do operate as a stay against any decision, action, investigation, demand, audit,

report(s) recommendations whatsoever and/ or refusal to renew the 1st Interested Party's licence or any action herein mentioned as against any of the 2nd Interested Party by any of the Respondents whatsoever until the determination of this Application".

The objectors filed a subsequent application under *section 5* of the *Judicature Act* and *Order 52* of the *Rules of the Supreme Court England – Miscellaneous Civil Application No. 649 of 2006* for committal of the Governor of CBK, the Applicant Rose Detho and Momanyi Bundi for contempt of the orders of stay granted on 15th September, 2006 by, among other things, refusing to hand over the operations of the Bank to its directors or to allow the objectors to transact their normal banking business in the Bank and by refusing to honour the objectors' respective bills of exchange properly drawn on the Bank. The applicant denied in her replying affidavit that the orders were served upon her personally, and deposed that she had not made any decision or taken any action concerning the Bank after 15th September, 2006 and that CBK had filed *Civil Application No. 247 of 2006* in the Court of Appeal challenging the jurisdiction of the superior court to issue the orders she alleged to have breached. She annexed a copy of that application. In the application the CBK and the applicant pray for an order of stay of execution of the superior court dated 15th September, 2006 and a stay of proceedings of the *Miscellaneous Civil Application No. 638 of 2006* pending the appeal. In that application, the CBK and the applicant contend that the superior court had no jurisdiction to grant leave to apply for judicial review orders nor jurisdiction to grant stay orders. The grounds of the application include grounds XV and XVI which state:

"*XV. THAT the learned judge exceeded her jurisdiction under the provisions of order LIII of the Civil Procedure Rules by issuing orders of stay in respect of matters way beyond the proceedings in question which orders grossly interferes with the performance of statutory mandates of both the applicants.*

XVI. THAT the learned judge erred in failing to appreciate that the effect of the orders of stay is that the second applicant has been restrained ex parte from executing her statutory mandate by any order which is for all practical purposes and intents an ex parte quia timet interlocutory mandatory injunction".

The superior court dismissed the application against the Governor of CBK and Momanyi Bundi but allowed the application against Rose Detho and found her guilty of contempt of court and ordered her to:

"*…… regularize her position within the next thirty six hours, otherwise she stands to suffer imprisonment for six months".*

The learned Judge however clarified that she did not grant an order for stay of placing of the Bank under statutory management and stay of the appointment of the applicant as a statutory manager while granting leave and that the statutory manager would remain in office save that she had to comply with the orders of stay.

The applicant intends to appeal against the decision of the superior court holding that she was in contempt of court and has filed a Notice of Appeal. In the meantime, by the present application, which is the subject matter of this preliminary objection, she seeks a stay of execution of the order of the superior court pending the appeal.

Mr. Nyairo for the objectors submitted that the applicant having been found guilty of the contempt of the court by the superior court cannot be heard in this interlocutory application before she has purged the contempt. The preliminary objection is supported by Mr. Odera, learned counsel for the Bank and Mr. Taibjee, learned counsel for Sanjay Shah, the 6th respondent. The preliminary objection is however opposed by Mr. Betta, learned counsel for Attorney General, the 7th respondent.

Mr. Ougo, learned counsel for the applicant relying mainly on *Gordon v Gordon* [1904 – 1907] All ER Rep. 702 and *X Ltd v Morgan – Grampian (Publishers) Ltd* [1990] 2 All ER 128 submitted, among other things, that the applicant who is challenging the legality of the order of the superior court is entitled to be heard before the order is enforced.

According to *Gordon's* case, (supra), the general rule that a party in contempt could not be heard or take proceedings in the same case until he has purged his contempt applies to proceedings voluntarily instituted by himself in which he was made some claim and not to a case where all he seeks is to be heard in respect of some matter of defence or where he has appealed against an order which he alleges to be illegal having been made without jurisdiction. In *Morgan's* case, (supra), House of Lords approved the dictum of Denning LJ. in *Hadkinson v Hadkinson* [1952] 2 All ER 567 at pages 574 – 575, and held that the court has a discretion whether to hear a contemor who has not purged his contempt and that in deciding whether to bar a litigant, the court should adopt a flexible approach. (See also *Mawani v Mawani* [1977] KLR 159, *National Hospital Insurance Fund Board of Management v Boya Rural Nursing Home Ltd*, *Kisumu Civil Appeal No. 46 of 2005* (unreported).

In the commentary to *Order 52 Rule (1) (12)* of *English RSC 1997, Supreme Court Practice Vol. 1 Part 1* the authors state, *inter alia*, at page 835:

"*A court's power to refuse to hear an alleged contemnor in support of an appeal against an order in respect of which he is said to be in contempt, should be exercised only exceptionally"*.

Thus, there is no absolute legal bar to hear a contemnor who has not purged the contempt to be heard and whether the court will hear the contemnor is a matter for the discretion of the court dependent on the circumstances of each case.

The question which arises in this case is whether it would be a proper exercise of the courts discretion to decline to hear the applicant on the application for stay of execution of the orders of the superior court pending appeal.

Firstly, the order of stay of execution sought in the application the subject matter of the preliminary objection is a discretionary order. What the applicant therefore seeks, is the exercise of judicial discretion in her favour. As Sir Charles Newbold P. said in *Mukisa Biscuits Co. Ltd v West End Distributors Ltd* [1969] EA 696 at page 701 paragraph B, a preliminary objection cannot be raised where, among other things, "…… *if what is sought is the exercise of judicial discretion"*. For that reason, the preliminary objection is not maintainable and is incompetent.

Secondly, the applicant intends to appeal against the orders of the superior court dated 15th September, 2006 granting both leave to apply for Judicial Review and stay and has filed *Civil Application No. 247 of 2006* for stay of execution of the orders of stay pending appeal. The applicant intends to challenge the jurisdiction of the superior court to grant both leave and stay on grounds which *ex facie* cannot be said to be frivolous. Thus, the applicant intends to challenge by way of appeal to this Court the very foundation and the legality of the orders she was found to have disobeyed.

Thirdly, the applicant, in addition, intends to appeal against the order of the superior court dated 24th November, 2006 finding her guilty of contempt on the grounds of both facts and law. The applicant denies that, she, as a matter of fact disobeyed the court orders.

The proposed grounds of appeal are wide ranging and raise such issues as the true construction and ambit of the orders of stay; the service of the orders on the applicant; the statutory indemnity of the applicant for personal liability; whether the stay orders were capable of implementation and, if so, whether the applicant would have implemented them without breaking the law and the issue of jurisdiction to grant the order of stay and their legality. Those are indeed weighty issues.

It is apparent therefore, that having regard to the law and circumstances of this case, the applicant would *prima facie* be entitled to be heard on appeal against the orders of committal although she has not purged the contempt. Mr. Nyairo seems to say that the applicant would be entitled to be heard during the hearing of the substantive appeal, but contends that she cannot be heard in an interlocutory application. In my view, the applicant would similarly be entitled to be heard on an interlocutory application seeking the stay of execution of the impugned orders pending appeal as otherwise the applicant would be committed to prison and thus render the appeal ineffectual.

I would for the foregoing reasons, dismiss the preliminary objection with costs to the applicant.

Dated and delivered at Nairobi this 25th day of May, 2007.

E. M. GITHINJI

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JUDGE OF APPEAL