REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT NAIROBI

(CORAM: OMOLO, O'KUBASU & DEVERELL, JJ.A.)

CIVIL APPLI NAI 162 OF 2004

BETWEEN

ALTAF ABDULRASUL DADANI …… 1ST APPLICANT

MUSIKLAND LIMITED (under receivership) …….. 2ND APPLICANT

AND

AMIN AKBERALI MANJI …….. 1ST RESPONDENT

HEMANTH KUMAR …….. 2ND RESPONDENT

MUSIKLAND MILLENIUM LIMITED …….. 3RD RESPONDENT

(Application for striking out of Civil Appeal No. 101 of 2004 from the

ruling & order of the High Court of Kenya at Nairobi (Justice Mwera)
dated 26
th
May, 2004
in
H.C.C.C. NO. 913 of 2002)
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RULING OF THE COURT

We have before us an application, by way of notice of motion, stated to have been brought under ***"Rule 1(2)*** and/or ***Rule 80*** Civil Procedure Rules". When this error as regards the correct provision under which such an application ought to be brought, was pointed out by Mr. Ochieng Oduol for the respondents in this motion, Mr. Oyatsi, for the applicants, was quick to admit the mistake and confirmed that the motion was brought under ***rules 1(2) and 80*** of the Court of Appeal Rules (the Rules). By this motion, the applicants are seeking the following orders:-

> *"1. THAT Civil Appeal No. 101 of 2004 filed herein on 26th May 2004 by the Respondents be dismissed with costs.*
>
> *2. ALTERNATIVELY, that Civil Appeal No. 101 of 2004 filed herein on 26th May, 2004 be struck out with costs.*

3. THAT the costs of this application be provided for."

The application is based on the following grounds:-

> ***(a) the Respondents have and continue deliberately to disobey the orders of the High Court made on 5th day of February, 2004 in this litigation.***
>
> ***(b) the said disobedience of orders of the Court made and issued in this litigation is an interference with the administration of justice and/or obstruction of justice.***
>
> ***(c) the said disobedience of orders of the Court belittles or is meant to lower the dignity and authority of the Court.***
>
> ***(d) the respondents are in contempt of Court and cannot be heard further in this litigation.***

In support of the application one of the applicants, **Altaf Abdulrasul Dadan**i, swore a ten paragraph affidavit.

In his submissions before us, Mr. Oyatsi stated that as the appellants *(the respondents in this application)* failed to obey the orders of the court they are in contempt of Court and hence they should not be heard until they purge the contempt. It was Mr. Oyatsi's contention that failure to comply with the injunction was failure to take a necessary step in filing their appeal. In prosecuting this application, Mr Oyatsi pegged his case on the decision of the House of Lords in ***X LTD AND ANOTHER V. MORGAN – GRAMPIAN (PUBLISHERS) LTD AND OTHERS*** [1990] 2 ALL E.R..1 and more particularly the third holding which was as follows:-

> ***"(3) The Court had a discretion whether to hear a contemnor who had not purged his contempt and in deciding whether to bar a litigant the court should adopt a flexible approach. Accordingly, where a contemnor not only failed to comply with an order of the court but, for example, made it clear that he would continue to defy the court's authority whatever the outcome of an appeal, the court was entitled to exercise its discretion to decline to entertain his appeal. However, it had been incongruous for the Court of Appeal to entertain the journalist's appeal, then dismiss it and give leave to appeal further while in the process declining to hear him in support of his appeal."***

Mr. Oyatsi took us through some portions of the speeches of Lord Bridge and Lord Oliver.

Mr. Ochieng Oduol, on his part, opened his address by stating that this was a strange application which would create a dangerous precedent if it were to be allowed. He produced a ruling of the High Court in which a stay of the orders alleged to be disobeyed, was granted. He also referred to three affidavits which, in his view, gave explanation as to why the respondents have not complied with the orders of the High Court. He went further to point out that the orders made were impossible to comply with. Mr. Ochieng Oduol submitted further that what has been argued before us was argued before the High Court culminating in the ruling of Kasango J. delivered on 16th November, 2004.

In dealing with the House of Lords decision cited by Mr. Oyatsi, it was Mr. Ochieng Oduol's submission that in that case there was a finding of contempt which was not the case in the present application. It was emphasized that the respondents have not admitted being in contempt.

The origin of this application is **High Court Civil Suit No. 913 of 2002** in which, **Altaf Abdulrasul Dadani** was the plaintiff and **Amin Akberali Manji,** the first defendant**, Hemanth Kumar** the second defendant, **Musikland Millenium Limited** the third defendant and Musikland Limited (under receivership) the fourth defendant. In the plaint filed in superior court on 22nd July, 2002, Abdulrasul Dadani, (the first respondent in this application) as the plaintiff in the superior court sought certain reliefs. The defendants to the suit filed their statements of defence in answer to that plaint and by a chamber summons application brought under Order VI rule 13(1)(b) of the Civil Procedure Rules, the plaintiff

sought striking out of certain paragraphs of the defence and judgment to be entered against first, second and third defendants on liability, certain prayers in the plaint to be granted and the suit be set down for assessment of damages. That Chamber Summons application was argued before Mwera J. who in his ruling delivered on 5th February, 2004 made certain orders. According to the order extracted pursuant to that ruling it was ordered:-

> ***"1.***
>
> ***2.***
>
> ***3.***
>
> ***4.***
>
> ***5. <u>THAT</u> a mandatory injunction be and is hereby issued compelling the first and second defendants to produce and render to the plaintiff on behalf of the fourth defendant the duly audited and certified accounts of the fourth defendant from 1995 to 2001 more complete with tax returns as was filed annually with the Registrar of Companies.***
>
> ***6. <u>THAT</u> a mandatory injunction be and is hereby issued compelling the first and second defendants to deliver up to the first defendant all the property, assets, books, records and documents of the company within sixty days.***
>
> ***7. ……***
>
> ***8. ……..***

These orders were given on 5th February, 2004 and by a notice of appeal dated 1*1th February, 2004* the first, second and third defendants filed their joint notice of appeal in the superior court on that same day (*11th February, 2004)*. These respondents became the 1st, 2nd and 3rd appellants respectively, who filed their appeal on 7th July, 2004.

By a notice of motion dated *14th July, 2004*, these three appellants filed an application which sought the following substantive prayer:-

> ***"That there be a stay of execution of the Ruling and Orders made on the 5th of February, 2004 (Honourable Justice Mwera) pending the hearing and determination of the Civil Appeal No. 101 of 2004".***

That application was argued before Kasango, J. who delivered her ruling on 16th November, 2004. In allowing the application, the learned Judge in her said ruling stated:-

> ***"I am of the view that the application ought to succeed and I am also of the view that it is not one where security can be ordered since the order is not a monetary one.***
>
> ***When this matter was heard by my brother Justice Mutungi on 14th July, 2004 an order was made in respect to the prayer of costs whereby it was ordered that the costs of the application was to await the outcome of the appeal.***
>
> ***That to my mind was a final order and I shall not disturb it. The order of this court is:-***
>
> > ***That stay of execution of the ruling and orders made on the 5th February, 2004 (Honourable Justice Mwera) is hereby granted pending the hearing and determination of Civil Appeal No. 101 of 2004 <u>AMIN AKBERALI MANJI, HEMANTH KUMAR; MUSIKLAND MILLENIUM LTD V. ALTAF ABDULRASUL DADANI, MUSIKLAND LTD</u> (under receivership)".***

In a nutshell, it can be said that the appellants (the respondents in the current motion) were ordered to produce and render to the plaintiff (1st applicant herein), duly audited and certified accounts of the fourth defendant from 1995 to 2001. They were also ordered to deliver up to the fourth defendant all the property, assets, books and records and documents of the company within sixty days of the ruling of *5th February, 2004.* The respondents' were dissatisfied with that ruling and hence preferred an appeal being Civil Appeal No. 101 of 2004. They did not comply with the orders of the superior court but instead applied for a stay which application was heard and granted by Kasango, J. in her ruling of 1*6th November, 2004*.

It was Mr. Oyatsi's contention that since the respondent herein did not comply with the injunctive orders of the superior court within the stated periods then they have no right of audience in this Court since they were in contempt of the High Court orders. They did not, in his view, take essential step as provided by rule 80 of the Rules. In our view, that is a very simplistic approach to the provision of Rule 80 of this Court's Rules which provides:-

> "A person affected by an appeal may apply to the Court to strike out the notice of appeal or the appeal, as the case may be, on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time."

Our understanding is that some essential step must relate to steps to be taken in prosecuting the appeal starting with filing of notice of appeal and then lodging of the record of appeal. The issue of mandatory injunction in the superior court does not, with due respect to Mr. Oyatsi, form part of appeal proceedings in this Court. We were being urged to find that the respondents were in contempt of the order issued by Mwera J. on 5th February, 2004. We accept it as a settled principle of law that where a party is in contempt of court it ought not be allowed to be heard unless and until it has purged the contempt. In English authority cited to us XLTD V. MORGAN – GRAMPIAN LTD (supra) at p.10 Lord Bridge stated:-

> ***"The authorities bearing on the question of hearing a contemnor who has not purged his contempt were reviewed by Brandon LJ in Astro Exit Navegacion SA v. Southland Enterprise Co. Ltd, The Messiniaki Tolmi [1981] 2 Llyod's Rep 595. He expressed his conclusions as follows (at 602):-***
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> > ***"I accept that 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."***

It is to be observed that in the English authority relied upon by Mr. Oyatsi, the Court was dealing with a party who had been found to be in contempt of court. In the present application, the respondents have not been found guilty of contempt. What happened, as we have endeavoured to show was that certain orders were given against the respondents by Mwera, J. in his ruling of *5th February, 2004*. It is true that the respondent did not comply with these orders within the prescribed period but they immediately preferred an appeal in a bid to challenge those orders. They went further. They applied and obtained an order staying those orders, vide the ruling of Kasango J. delivered on *16th November, 2004.* We were told that some of the orders were impossible to comply with. But what is important to us is that there is a valid order of stay issued by Kasango J. staying the orders of Mwera J. It cannot now be argued that the respondents are in contempt of the orders issued by Mwera, J.

We were told that to grant this application would create a dangerous precedent. Confining ourselves to the facts of this case all we can say is that when the applicants herein realized that the respondents were not complying with the orders of Mwera, J., the most sensible step for them to have taken would have been to go back to the superior court and either execute the order or cite the respondents for contempt before that Court. The respondents were lucky because the applicants did none of the above but thought of coming to this Court and tried to stop the respondent from being heard on appeal. But the respondents, although late

in doing so, applied for and obtained stay of execution. As of now there is a stay of execution hence this application to strike out this appeal is a fruitless exercise.

We must express some surprise that despite the ruling of Kasango, J. delivered on *16th November, 2004*, of which Mr. Oyatsi was aware, he could still pursue the current application when it should have been clear that there was no case for contempt. This was a gallant but misguided attempt by Mr. Oyatsi to proceed with the application when he knew very well that he and Mr. Ochieng Oduol had argued these same points before the superior court (Kasango, J.). The application to strike out or to dismiss the appeal, was in our view, futile and unfounded, i.e. there was no legal basis for it.

In view of the foregoing, we find this application to dismiss or strike out the respondents' appeal to be unmeritorious. Accordingly, we order that the notice of motion dated 7th July, 2004 seeking the dismissal or striking out of ***Civil Appeal No. 101 of 2004*** be and is hereby dismissed with costs to the respondents.

Dated and delivered at Nairobi this 8th day of July, 2005.

R.S.C. OMOLO

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APPEAL

W.S. DEVERELL

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR