Bryce Broadcast & Technologies (K) Ltd v Makotsi & another (Miscellaneous Civil Application E032 of 2023) [2024] KEHC 2152 (KLR) (27 February 2024) (Ruling)

Neutral citation: [2024] KEHC 2152 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

MISCELLANEOUS CIVIL APPLICATION E032 OF 2023

REA OUGO, J

FEBRUARY 27, 2024

BETWEEN

BRYCE BROADCAST & TECHNOLOGIES (K) LTD ..... APPLICANT

AND

HOWARD MAKOTSI ..... 1ST RESPONDENT

FLORENCE LUSABA ..... 2ND RESPONDENT

RULING

1. The Notice of Motion dated 15th May 2023 has been brought under Article 165(6) of *the Constitution*, section 5 of the *Judicature Act*, Rule 39 of the High Court Organization and Administration General Rules, 2016 as well as Rule 81.4 of the English Civil Procedure (Amendment No. 3) Rules, 2020. The applicant seeks the following orders:

    1. Spent

    2. ThatHonourable Court be pleased to give an order citing the respondents for contempt of court by their disobedience of the court's order in Bungoma CMCC E344 of 2022 Bryce Broadcast & Technologies (K) Ltd v Howard Maktsi & Another issued on 28th March 2022.

    3. That the Honourable Court be pleased to give an order citing the respondents herein for contempt of court and committing them to civil jail for a term of six (6) months and/or until he purges his contempt by restoring all of the applicant's property as the suit property in Bungoma CMCC E344 of 2022 Bryce Broadcast & Technologies (K) Ltd v Howard Maktsi & Another to the locus in quo of the proceedings thereof, and/or otherwise by disclosing the whereabouts and giving a factual and correct account of the said property thereto.

4. Thatin the alternative to prayer 3 above the Honourable Court be pleased to give an order citing the respondents for contempt of court and fining them the amount of at least Kshs. 200,000/- for such contempt.

2. The application is based on the grounds on the face of the application. The applicant further filed a supporting affidavit dated 18th May 2023. The applicant contends that it is the owner of all that property known as the suit property in Bungoma CMCC E344 of 2022 Bryce Broadcast & Technologies (K) Ltd v Howard Maktsi & Another. Through an application dated 19/10/2022 in the subordinate court, the applicant obtained conservatory orders issued on 28/10/2022. The suit property was to be left untouched in the locus in quo pending the hearing and determination of the applicant's application. On 22nd January 2023, the applicant got wind that the said suit property had been clandestinely removed from the locus in quo by the respondent to an undisclosed location. The applicant contends that the respondent's actions are in direct disobedience of the court's conservatory orders and the applicant stands to suffer loss and damage of the suit property and the court's authority of the protection of its rights.

3. The application was opposed by the respondent who filed their replying affidavit dated 10/6/2023. It was advanced that the applicant had failed to demonstrate violation and/or disobedience of a court order as alleged. The applicant alludes to the fact that they got wind that the property was removed from the locus in quo, and this raises doubt as to the certainty of the source of information as it borders on evidence that is tantamount to hearsay. The order of the subordinate court was that "...order of injunction shall be granted but only limited to stay of execution of warrant of attachment and warrant of sale pending....". It was averred that attachment of property can only be done by an auctioneer and that if indeed attachment arose, then the auctioneer who was enjoined as a defendant in the lower court ought to have been enjoined in this application. They further argue that the said property alleged to have been removed is in safe custody within the premises. It was averred that anyone accused of contempt of a court order is on trial for a misdemeanour and is entitled to a fair trial which involves and includes being tried based on material evidence and that the applicant has failed to raise material evidence before this court. An order in a civil matter ought to be served with an accompanying penal notice yet there is no evidence that in the foregoing, such notice was served. Further directing the court on the sentence to be imposed on the contemnors is tantamount to usurping the discretionary powers of the court.

4. The applicant filed a further affidavit in which she pointed out that Howard Makotsi failed to annex any authorization from the 2nd respondent authorizing him to make the affidavit on her behalf. The 1st respondent further admits to the removal of the applicant's suit property in the building to an undisclosed location. There was no inventory or proof of existence and the whereabouts of the property. The applicant explained that the order of the subordinate court was meant to preserve the status quo between the parties and had the implication of non-removal of the suit property from the locus in quo.

Submissions by the Parties

5. The applicant submits that the conservatory orders were issued to preserve the status quo which was the preservation of the applicant's property. The respondents disregarded the order and the 1st respondent by his admission admitted that status quo was interfered with. The actions of the respondents are wilful and actuated by malice. The 1st respondent failed to provide an inventory of the items held at the premises. They were aware of the intent created by the orders and were in direct breach of the terms of the orders.

6. The respondents submit that the applicant was required to demonstrate that an attachment has occurred and a sale has happened which the applicant has failed to do. The applicant also failed to demonstrate that the breach was deliberate as was captured by the court in Samuel M. N. Mweru & Others v National Land Commission & 2 Others [2020] eKLR where the court stated:

> " It is an established principle of law that in order to succeed in civil contempt proceedings, the applicant has to prove (i) The terms of the order, (ii) Knowledge of these terms by the Respondent, (iii) Failure by the Respondent to comply with the terms of the order."

7. On the issue of the 1st respondent swearing the affidavit without authorization from the 2nd respondent, they submit that the nature of the allegations made will evoke a similar response, therefore, the lack of authorization is a non-issue. It was also pointed out that the applicant failed to avail authorisation arising from the board resolution authorising the filing of affidavits.

Analysis and Determination

8. I have carefully reviewed the application, along with its supporting grounds and the affidavit filed, as well as the insightful submissions made by counsel. The crucial question at hand is whether the applicant has met the requisite threshold for the grant of the orders sought. However, before I delve into whether the applicant proved the essential elements for it to succeed in civil contempt proceedings, I must first consider whether the application is proper before the court.

9. The respondent further challenged the application on the grounds that the suit was filed without a resolution from the company. In Assia Pharmaceuticals vs. Nairobi Veterinary Centre Ltd. Nairobi (Milimani) HCCC No. 391 of 2000 the court held as follows:

> " It is settled law that where a suit is to be instituted for and on behalf of a company there should be a company resolution to that effect.....As regards litigation by an incorporated company, the directors are as a rule, the persons who have the authority to act for the company; but in the absence of any contract to the contrary in the articles of association, the majority of the members of the company are entitled to decide even to the extent of overruling the directors, whether an action in the name of the company should be commenced or allowed to proceed. The secretary of the company cannot institute proceedings in the name of the company in the absence of express authority to do so; but proceedings started without proper authority may subsequently be ratified."

10. The Court of Appeal in Spire Bank Limited v Land Registrar & 2 others [2019]eKLR commented on the essence of filing the board resolution giving the authority and the consequence of such failure.

> " It is essential to appreciate that the intention behind order 4 rule 1 (4) was to safeguard the corporate entity by ensuring that only an authorized officer could institute proceedings on its behalf. This was to address the mischief of unauthorized persons instituting proceedings on behalf of corporations, and obtaining fraudulent or unwarranted orders from the court. The company's seal that is affixed under the hand of the directors ensured that they were aware of, and had authorized such proceedings together with the persons enlisted to conduct them. And where evidence was produced to demonstrate that a person was unauthorized, the burden shifted to such officer to demonstrate that they were authorized under the company seal. With this in mind, we dare say that the provision was not intended to be

utilized as a procedural technicality to strike out suits, particularly where no evidence was produced to demonstrate that the officer was unauthorized."

11. The court inLivestock Research Organization v Okoko & another (Civil Appeal 36 A of 2021) [2022] KEHC 3302 (KLR) (29 June 2022) (Ruling) was of the view that failure to file a board resolution giving a person the authority to file suit can be cured under Article 159 of *the Constitution*. The court stated:

> " 41... The Respondents' contention that the appellant failed to attach a Resolution or authority to swear an affidavit is true. However, such omission was not fatal to the suit. This is because the deponent of the verifying affidavit stated on oath that he was authorized by the appellant and being the Director General of the appellant corporation, unless the contrary was shown that he had no such authority to swear the verifying affidavit, which evidence the Respondents did not adduce, I find that there was no basis upon which the trial court dismissed the appellant's suit, having found that the appellant had proved its case against the respondents on a balance of probabilities.
>
> 42. In my view, the dismissal of the plaintiff's suit was on a technicality which was easily curable by application of the principle in the Makupa Transit Shade Limited (supra) case, a mere procedural defect which does not go to the core of the suit which the trial court found that the appellant had proved on a balance of probabilities. That defect is and was further curable by application of Article 159(2) (d) of *the Constitution* which enjoins courts to administer justice without undue regard to procedural technicalities.
>
> 43. Moreover, the court has discretion on whether or not to strike out any pleading that is non-compliant but Article 159 of *the Constitution* of Kenya, 2010 obliges the court to deliver justice without undue regard to procedural technicalities."

12. The applicant has stated on oath that she is a director in the applicant and therefore competent to make the affidavit. I find that the appellant in this case had the authority to act for the company and the respondent having failed to produce any evidence showing thatshe had no such authority to swear the affidavit, I find that the application is competent.

13. The essence of the law on contempt is to safeguard the honour of the court and uphold the principles of the rule of law. In Gatharia K. Mutikika – vs Baharini Farm Ltd [1985] KLR 227 it was held that-

> " A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be proved satisfactorily..... it must be higher than proof on a balance of probabilities, almost but not exactly, beyond reasonable doubt. The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit criminal cases. It is not safe to extend it to offences which can be said to be quasi-criminal in nature.
>
> However, the guilt has to be proved with such strictness of proof as is consistent with the gravity of the charge... Recourse ought not to be heard to process contempt of court in aid of a civil remedy where there is any other method of doing justice. The jurisdiction of committing for contempt being practically arbitrary and unlimited, should be most jealously and carefully watched and exercised with the greatest reluctance and the greatest anxiety on the part of the judge to see whether there is no other mode which is not open

to the objection of arbitrariness and which can be brought to bear upon the subject..... applying the test that the standard of proof should be consistent with the gravity of the alleged contempt... it is competent for the court where contempt is alleged to or has been committed, and or an application to commit, to take the lenient course of granting an injunction instead of making an order for committal or sequestration, whether the offender is a party to the proceedings or not."

14. The court in Koilel & 2 others v Koilel & another (Civil Appeal E002 of 2021) [2022] KEHC 10288 (KLR) (30 June 2022) (Judgment) discussed the essential elements of contempt:

> " 32. Judicial borrowing from contemporary jurisdiction: in order to succeed in civil contempt proceedings, the Applicant has to prove; (i) the terms of the order; (ii) Knowledge of these terms by the Respondent; and (iii) Failure by the Respondent to comply with the terms of the order (Kristen Carla Burchell vs Barry Grant Burchell, Eastern Cape Division Case No. 364 of 2005).
>
> 33. ..
>
> 34. The jurisprudence now favors knowledge of the existence of Court orders as opposed to strict personal service. In the case of Shimmers Plaza Limited v National Bank of Kenya Limited [2015] eKLR the Court of Appeal posed the question as to whether knowledge of a Court order or judgment by an Advocate of the alleged contemnor would be sufficient for purpose of contempt proceedings and answered the question in the affirmative stating: -
>
> > "We hold the view that it does. This is more so in a case as this one where the Advocate was in Court representing the alleged contemnor and the orders were made in his presence. There is an assumption which is not unfounded, and which in our view is irrefutable to the effect that when an Advocate appears in Court on instructions of a party, then it behooves him to report back to the client all that transpired in Court that has a bearing on the clients' case..."

15. In this case the lower court order was issued in the presence of the respondents' legal counsel, Mr. Okaka who was holding brief for Mr. Jumba, and in the circumstances the respondents were duly informed of the court's directive. The order of the subordinate court was as follows:

> " 1. That order for injunction shall be granted but only limited to stay of execution of warrant of attachment and warrant of sale pending inter-partes hearing on the 10th November 2022. Hearing Notice to issue"

16. According toHalsbury's Laws of England 10th Edition has defined "Attachment" as follows;

> " the seizing of a person's property to secure a judgement or to be sold in satisfaction of a judgement"

17. The applicant availed two photographs showing that the goods stored in the respondent's premises had been seized. The respondent in response averred that the goods had been stored elsewhere but did not provide a picture of the same or an inventory of the goods. The respondents in the case are the landlords of the premises and the said goods could not have been moved without their knowledge or

consent. The respondents therefore allowed the seizing of the goods that were in their establishment. It was not enough for the respondents to state that the goods are within the premises without availing any evidence to support their assertion considering the duty to disapprove the evidence by the applicant.

18. Considering the circumstances of this case and the material placed before the court, I am satisfied that the application is merited. Consequently, the notice of motion dated 15th May 2023 is allowed on the following terms:

    a. The Applicant's application seeking to cite the Respondents for contempt of court dated 15th May 2023 is hereby allowed and the Respondents are found to be in contempt of Court for disobeying the Court's orders of 28th October 2022.

    b. The Respondents are hereby directed to purge their contempt within the next five (7) days by disclosing the whereabouts and giving a factual and correct account of the said property thereto.

    c. In default of compliance with order (b) above, a Notice to Show Cause will be issued against the Respondents to appear in person before the Court on 6th March 2024 to show cause why they should not be committed to civil jail for disobedience of this Court's orders of 28th October 2022.

    d. Costs in the cause.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 27TH DAY OF FEBRUARY 2024.

R. OUGO

JUDGE

In the presence of:

Miss Okwini For the Applicant

Respondents- Absent

Wilkister- C/A