IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WARSAME, SICHALE & KANTAI, JJ.A)

CIVIL APPEAL NO 247 OF 2008

BETWEEN

FREIGHT IN TIME LIMITED……..……..……APPELLANT

AND

IMAGE APPARELS LTD……RESPONDENT

(an appeal from the ruling and order of the High court of Kenya at Nairobi (Nambuye, J.) dated 3rd October 2008

in

High Court Misc. Civil Application No 1623 of

2005)

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RULING OF THE COURT

This is an appeal from the ruling and orders of Nambuye, J. (as she then was) who cited the directors of the appellants for contempt of court and ordered that each of them do pay a fine of Kshs 350,000.00, and in default, serve a term of 6 months imprisonment in jail.

The background to this order is the attachment of the respondents goods by an auctioneer, it seems, where due procedure was not followed. It emerged that some crucial documents were missing from the court file, and Omondi, CM (as she then was) ordered that the entire execution be started afresh. Attendant to this order was one for the immediate release of the respondent's goods. That order was issued on 9th March 2005.

The appellant did not release the goods as ordered, and to save itself, the respondent applied by way of an application dated 1st December 2005 to cite the officers and directors of the appellant for contempt of court. The respondent deponed that the appellant never released the goods, so it moved the court on 1st July 2005 for an order to vary the order to direct it to the auctioneers who were holding the goods. That application was allowed and it was served on the appellant on 31st October 2005.

However, the appellant still did not move to have the goods in question released to the respondent. The

respondent therefore moved to cite the directors and managers of the appellant company cited for contempt of court, claiming that they had acted in total disregard of the orders of the court, and that their actions amounted to destroying the image and dignity of the court.

Leave for that application was granted by Njagi, J. on 14th November 2008, and the application was heard and determined in the respondent's favour. Being aggrieved with those orders, the appellant has moved this Court asking that they be set aside. The first ground of appeal presented by Mr. Arum, counsel for the appellant, is that leave to file the application for contempt was never made. The law regarding contempt of court is found at section 5 of the Judicature Act which provides as follows:

> ***"Contempt of court***
>
> ***(1)The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and such power shall extend to upholding the authority and dignity of subordinate courts.***
>
> ***(2) An order of the High Court made by way of punishment for contempt of court shall be appealable as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the***
>
> ***High Court."***

Thus the High Court at that time had a duty to ascertain the applicable law of contempt in the High Court of Justice in England, at the time the application was brought. This duty was noted by H.G. Platt, J. and D.C. Porter, Ag J. (as they then were) ***In the Matter of an Application by Gurbaresh Singh & Sons Ltd Misc. Civil Case No. 50 of 1983***, where they stated that:

> ***"The second aspect concerns the words of Section 5 – "for the time being", which appear to mean that this Court should endeavour to ascertain the law in England at the time of the trial, or application being made. Sometimes it is not known, or may not be known exactly, what powers the court may have. It seems clear that the Contempt of Court Act 1981 of England is the prevailing law and that the procedure is still that set out in order 52 of the Supreme Court Rules."***

As at the time of filing of the application for contempt in December 2005, the law in England concerning contempt was found at Order 52 Rules 1 to 4 of the Rules of the Supreme Court (RSC) made under the Supreme Court of Judicature Act, 1873. This Court in

Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 others [2014] eKLR (Civil Application No. 233 of 2007 (Ur 144/2007) summarized the procedure that was to be followed in that regime as follows:

i. ***An application to the High Court of England for committal for contempt of court will not be granted unless leave to make such an application has been granted.***

ii. ***An application for leave must be made ex parte to a judge in chambers and be supported by a statement setting out the particulars of the applicant as well as those of the person sought to be committed and the grounds on which his committal is sought, and by an affidavit verifying the facts relied on.***

iii. ***The applicant must give notice of the application for leave not later than the preceding day to the Crown Office.***

iv. ***Where an application for leave is refused by a judge in chambers the applicant may apply afresh to a divisional court for leave within 8 days after the refusal by the Judge.***

v. ***When leave has been granted, the substantive application by a motion would be made to a divisional court.***

vi. ***The motion must be entered within 14 days after the granting of leave; if not, leave shall lapse.***

vii. ***The motion together with the statement and affidavit must be served personally on the person sought to be committed, unless the Court thinks otherwise."***

This then is the procedure that the respondent ought to have followed in his application. It appears that the respondent did not strictly adhere to it. It filed an application by way of motion and supporting affidavit, as opposed to one required to be supported by a statement of facts. The trial judge commented on this procedure in her ruling as follows:

> ***"Both the application for leave to apply for contempt of court orders as well as the substantive application for contempt by way of notice of motion are supported by supporting affidavits. The notice to the Registrar and the statement … are not included.***
>
> ***The question that has to be decided is whether this omission is fatal to the applicant's application. The command to the court seized of such a matter is found in the following words in Section 5 (1) namely "and that power shall extend to upholding the authority of subordinate courts." The main if not sole purpose of contempt of court proceedings is to not only "demand" but "command" obedience to court orders, in order to uphold the dignity of all courts.***
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> ***There is nothing in that section to the effect that the procedure if not followed strictly up to the minute details, the entire process is flawed. Nothing therein, takes away the courts' inherent power and jurisdiction to do all that is necessary to ensure that justice is done to both parties, ensure that the dignity of the court is upheld, ensure that there is no abuse to the due process of the court. Neither does the said section rule out local variation and adaptation of the said supreme court of England rules."***

With this finding, the application was found to be competent. On appeal, Mr. Arum submitted that because leave was not properly sought, then the application was incompetent. We do not agree. While the procedure contained in Order 52 of the Rules of the Supreme Court provided a procedure to be used in Kenya, we must remember that the purpose for the power was to be used to ***upholding the authority and dignity of the courts, the subordinate courts included. (emphasis ours) - see Section 5 of the Judicature Act.)***

We agree with the statements of the learned judge that leave was sought, albeit by way of a supporting affidavit and not a statement of facts as required in the rules of the Supreme Court, but this did not make the application fatally defective as contempt of court application arose out of a disobedience of court orders, and was intended to ensure that the dignity of the court was upheld.

The order of the court arising out of the ruling of the High Court was subsisting. That is a matter that is not in contention. Thus, there was a duty to obey that order. In ***Hadkinson V. Hadkinson [1952] 2 All ER 567*)** it was held that:

> ***"A party who knows of an order, whether null and void, regular or irregular, cannot be permitted to disobey it…it would be most dangerous to hold that the suitors or their solicitors could themselves judge whether an order was null and void, whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question, that the course of a party knowing of an order which was null and irregular and who might be affected by it was plain. He should apply to the court that it might be discharged. As long as it existed, it must not be disobeyed".***

The holding by that Court was adopted as good law by this Court in ***Mutitika v Baharini Farm Ltd***

[1985] KLR 227 where it was held that:

> ***"… Anyone who, knowing of an injunction, or an order of stay, wilfully does something, or causes others to do something, to break the injunction or interfere with the stay, is liable to be committed for contempt of court as such a person has by his conduct obstructed justice."***

We now turn to consider if the directors of the respondent had knowledge of the order. Mr. Arum submitted that the orders extracted from the magistrate's court were not served upon the directors of the appellant, but were instead left with a secretary which was contrary to procedure. Mr. Mburu in response urged the court to disregard this argument since the affidavit of service, showing that service on the contemnors was done was never controverted. In addition, counsel submitted that the contemnors each knew of the orders, but they only blamed the auctioneers without instructing them to release the goods to the respondent.

Was it necessary to have personal service on the directors? For a long time, the position was as was held by Lenaola Ag, J.(as he then was) in ***Kariuki & 2 others v Minister for Gender, Sports, Culture***

- ***2 Others [2004] 1 KLR 78,*** that personal service of the application for contempt as well as the court order said to have been disregarded on the alleged contemnor must be proved. This position was also elucidated by this Court in its previous decisions, such as in ***Refrigerator & Kitchen Utensils Ltd v Gulabchand Popotlal Shah***

- ***Others & Shanti Lal Khetshi Shah & Others LLR No. 5229 (CAK) (Civil Appeal No NAI 39/1990)*** and ***Nyamodi Ochieng Nyamogo & another v Kenya Posts & Telecommunications Corporation [1994] eKLR (Civil Application No. Nai 264 of 1993 (NAI 114/93 UR))***

In the appeal now before us, it is clear that the order requiring the release of the goods was extracted together with a penal notice. This was served on the auctioneers, who acknowledged having received it in a letter to the appellant. One Martin Mwaniki, a court process server, swore an affidavit in which he detailed his manner of service upon the alleged contemnors. He stated that on 17th March 2005, he received copies of the order and the penal notice and went to the appellant's offices at the Jomo Kenyatta International Airport. While there, he was directed to the Executive Director, Mr. Amit Shah and served the documents on him. The said Mr. Shah refused to accept service, and instead told his secretary, Catherine, to acknowledge service on his behalf. A few months later on 12th November 2005 another process server, Maurice Onyango, went to effect service of the order on the appellant. He proceeded to the appellant's office where he effected service on Mr. Amit Shah, who then instructed the said Catherine to stamp and sign the front page of the documents as acknowledgement of service. The auctioneer, Jumbo Airlink Auctioneers, were served with the court order and acknowledged the receipt of the same in a letter dated 31st November 2005 in which it asked the appellant to defray its fees and charges associated with storage of the goods.

All this is evidence that points to the fact that the appellant and its directors were fully aware of the court orders requiring them to release the goods immediately. It seems to us then that the appellant cannot now claim that its officers are protected from contempt proceedings by the mere fact that personal service was not effected of them. As stated in ***Hadkinson v Hadkinson (supra)*** court orders must be obeyed. It has been held by this Court that a person who has knowledge of a court order who wilfully does anything to subvert it is liable to be committed for contempt. ***Mutitika v Baharini Farm Ltd (supra)***.

Here we have an appellant who it was found as a matter of fact had undertaken proclamation of the respondent's goods without due regard to procedure, and was therefore ordered to release the goods in 2005. The goods were only released in full in 2007, and there is indicated on the record that the respondent had to pay some money to secure the release of its goods. From the proceedings before court, it is apparent that the goods in question were released in July 2006, September 2006, December 2006 and February 2007. Thus, it is clear that the appellant never gave any instructions, or made any steps to ensure that the goods stored by the auctioneers were released in compliance with the court orders. No

explanation was proffered as to why the appellants, or its directors, refused to take action to comply with those court orders, which smacks of contempt of court. In the words of this Court in ***Refrigerator & Kitchen Utensils Ltd v Gulabchand Popotlal Shah & Others (supra):***

> ***"It is essential for the maintenance of the rule of law and good order that the authority and dignity of our courts are upheld at all times. This Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. In relation to these respondents there are no mitigating factors. They swore no affidavits and tendered no apologies."***

Such is the situation in this appeal. The appellant never swore any affidavits to offer mitigation as to why they never complied with the court orders. In the absence of such apology or explanation, we reject the argument that the fines imposed by the trial court were excessive.

For these reasons, we decline to interfere with the ruling of the High Court. This appeal is devoid of merit, and we hereby order it dismissed with costs to the respondent.

Dated at Nairobi this 30th day of October 2015

M. WARSAME

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JUDGE OF APPEAL

F.SICHALE

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JUDGE OF APPEAL

S. Ole KANTAI

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JUDGE OF APPEAL

I certify that this is a

True copy of the original.

DEPUTY REGISTRAR