IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM

MISC. CIVIL CAUSE NO. 16 OF 2011

1. **FELIX MOSHA ..... 1ST APPLICANT**
2. **KATHKEEN ARMSTRONG ..... 2ND APPLICANT**
3. **NATIONAL INVESTMENT CO. LTD (NICOL) ..... 3RD APPLICANT**

And

1. **THE CAPITAL MARKETS AND SECURITIES..... 1ST RESPONDENT**
2. **HON. ATTORNEY GENERAL ..... 2ND RESPONDENT**

Date of last order: 31/07/2015
Date of Ruling: 11/11/2015

R U L I N G

F. Twaib, J:

By an amended chamber summons, the applicants, Felix Mosha, Kathleen Armstrong and National Investments Co. Ltd. ("NICOL"), are praying for orders to the following effect:

1. That Mrs. Nasama Massinda, the Chief Executive Officer of the 1st respondent, Capital Markets and Securities Authority ("CMSA"), should show cause why she should not be imprisoned for contempt of court, in that she failed, refused or deliberately neglected to direct the Chief Executive Officer of NMB Bank PLC ("NMB" or "the Bank") to unblock NICOL's bank account as ordered by the court.

2. That Mark Weesing, Chief Executive Officer of NMB and Ms Lillian Komwihangiro, NMB's Company Secretary and Legal Counsel, should show cause why they should not be held in contempt of court for refusing to implement the order of the court dated 5th March 2012 forwarded to the Bank on May 23, 2012 to unblock NICOL's account in the absence of any decision of the Court of Appeal setting it aside or altered by the High Court on review.

Before going any further, I feel compelled to discuss the procedure adopted by the court in determining the application because learned counsel for the applicants has expressed the view that the procedure is erroneous. For purposes of completeness, however, it is necessary to also examine the procedure the applicants have used in instituting the application.

The amended chamber summons cites section 124 of the Penal Code, Cap 16, section 68 (a) and (c) and section 95 of the Civil Procedure Code ("the CPC"). The original chamber summons also included Order XXXVII rule (1) and (2) of the CPC. In a ruling allowing the applicants to amend the chamber summons, the court noted that the chamber summons did not correctly reflect the proper application of the relevant procedure. However, the only change made by the amended chamber summons was the deletion of the citation of Order XXXVII rule (1) and (2). Subsequently, on 30th June 2015, the court ordered that the application be disposed of by way of written submissions. It fixed a schedule for the filing of the same.

On behalf of his clients, Mr. Mwezi Mhango, learned counsel for the applicants, filed his written submissions on 8th June 2015. Mr. Shuma Kissenge, learned counsel

for Mr. Mark Weesing and Ms Lillian Komwihangiro, filed his clients' submissions. However, instead of submitting on the merits of his clients' application, Mr. Mhango proceeded to argue on the procedure adopted by the court, explaining that:

> *"…once a date is set for the hearing of the application it is the people named therein who are required to appear and explain themselves in court. For they are in the same position as an accused person who is told that he has a case to answer in a criminal case, and contempt proceedings, though in a civil matter, are criminal in nature. I therefore pray that contempt proceedings be dealt with as soon as possible."*

In arriving at this conclusion, Mr. Mhango traversed what, in his opinion, is the proper procedure to follow in contempt proceedings such as the one at hand. His opinion is that, in such a case:

> *"…[T]he application is filed in court by way of chamber summons is supported [sic!] by affidavit. The affidavit sets out the facts establishing the contempt committed by the named people. They are therefore required to appear in court to say whether they admit that they committed the contempt complained of or not. If they admit the contempt the court can proceed to fine them or commit them to prison. If they deny the contempt they are entitled to defend themselves on oaths and then cross-examined by the advocate of the applicant..."*

Mr. Mhango thus holds the view that the chamber summons and its supporting affidavit, *ipso facto*, establish of a *prima facie* criminal case against the person cited, whom he considers in the same light as an accused person in a criminal proceeding, thus requiring him to answer the charges in his defence. The charges would then be drafted and the accused would be required to plead. If he denies the facts as set out in the affidavit in support of the application, the person cited will have to defend himself against the charge. If he admits the facts, he would be convicted

and a punishment meted out against him. Relying on the perceived correctness of this procedure, Mr. Mhango has taken the risk of not making any submissions whatsoever in support of the merits of his clients' application.

With all due respect, I think Mr. Mhango's strategy is flawed. His position on the applicable procedure is incorrect in many respects. My reasons for saying so are:

1. While there is no express procedure in law for civil contempt proceedings, where the same become the subject of court determination, the practice has been that an application is filed by way of chamber summons supported by an affidavit. Up to this point, Mr. Mhango is right. However, contrary to what Mr. Mhango asserts, the application and affidavit does not amount to a *prima facie* case against the person cited. Instead, the matter can be disposed of by way of an oral hearing or written submissions, as the court may determine, and depending on the nature of the issues at hand. The court will decide, after hearing the parties, whether a *prima facie* case has been made out. If yes, the court will call upon the persons cited for contempt to defend themselves. If not, the application would be dismissed.

2. Mr. Mhango has combined the civil process with criminal process. His proposed procedure is somewhat of a hybrid, which would proceed as follows:

   (a) It would be a civil process that is instituted by way of a chamber summons that relies on the law of crime (the Penal Code);

(b) It is a miscellaneous civil cause in which the alleged culprits are not the respondents but merely cited in the prayers as the culprits;

(c) It is a criminal proceeding in a civil cause which is to be disposed of after a criminal charge is drawn up and read out to the "accused";

(d) The charge is deemed to have been proved by evidence contained in an affidavit, which would, by its filing alone, constitute a finding by the court that the a *prima facie* case has been made out against the persons cited, thus requiring the alleged offender to defend himself if he pleads not guilty to the charge;

(e) If the court is not satisfied with the defence, it is supposed to proceed to convict the alleged offender and sentence him according to the penal provision under which the application is brought.

With all due respect, this procedure is alien to our jurisdiction. While contempt of court is essentially a quasi-criminal proceeding, it cannot, in my respectful view, be commenced on the basis of the law of crime. It is also inconceivable that the court would simply accept the applicants' affidavit as *prima facie* evidence of the commission of a crime under section 124 of the Penal Code, thereby requiring the court to order the attendance of the persons cited to appear and defend themselves.

3. Section 124 of the Penal Code which the applicants have cited as the enabling provision under which the application is brought is inapplicable. Before me is a

civil matter, in a civil court. Had the court's order alleged to be infringed been an order for interim or temporary injunction, an application for contempt in respect of it could have been brought under section 68 (e) and/or Order XXXVII rule 2 (2) of the Civil Procedure Code. These contain specific provisions that empower the court whose orders have been infringed to exercise contempt jurisdiction against those acting contemptuously against its orders. However, these proceedings do not relate to an interlocutory order. In some jurisdictions, such as in Kenya, a provision similar to our section 2 (2) of the Judicature and Application of Laws Act would apply: See *Awadh v Marumbu* [2004]1 KLR 454.

4. Even in *Tanzania Bundu Safaris Ltd. v Director of Wildlife & Another* [1996] TLR 246, the issue of procedure was not before the court. There is also nothing in the ruling that supports the procedure being touted by counsel for the applicants. Indeed, reading through the ruling, one gets the impression that there was an application supported by an affidavit, a counter affidavit in opposition to the application was filed by or on behalf of the person cited for contempt, a hearing on the basis of the affidavits was conducted. It is not clear whether this was done orally or by written submissions, but there is nothing in the ruling to suggest that there was any hearing by way of appearance in court to answer the charge.

5. In the other case cited by Mr. Mhango, *Kundan Singh Construction Co. Ltd. v Tanzania National Roads Agency,* Civil Case No. 1 of 2009 (unreported), the respondent's Chief Executive Officer, Mr. Ephrain Mrema, was cited and he did appear personally to answer the charges after the court ordered him to do so.

However, the issue as to what procedure was to be applied in contempt proceedings was not at issue and the court did not make any decision thereon, neither expressly nor impliedly. Furthermore, the relevant issue in that case was an interim order, not a final order such as the present, and the provisions of section 68 (a) and (c) of the CPC would apply.

6. The applicants herein have also relied upon section 68 (a) and (c) of the CPC. Unfortunately, however, these provisions, as just stated, are not applicable to the present matter for the following reasons:

   (a) Subsection (a) provides that the court may, in order to prevent the ends of justice from being defeated...issue a warrant to arrest the defendant and bring him before the court to show cause why *he should not give security for his appearance*, and if he fails to comply with any order for security commit him as a civil prisoner. This provision only applies to ensure the *appearance* the defendant in a case. This is not what is at issue herein. This case is not about the giving of security. The provision is thus not applicable.

   (b) Section 68 (c) empowers the court to "*grant a temporary injunction and in case of disobedience commit the person guilty thereof as a civil prisoner and order that his property be attached and sold*". This provision relates to disobedience of orders of *temporary injunctions*. What is engaging in this case is not a temporary injunction. It is a final, substantive order of the court, and cannot in any case call into play the provisions of section 68 (e) as the applicants have sought to do herein.

Having pointed out the serious shortcomings in the procedure adopted by the applicants, the question arises as to what would be the proper procedure that befits the circumstances of this case.

Since the orders the applicants want to be complied with are final, the court is of the considered view that the matter lies in the process of execution, which would require the filing of an Application for Execution in terms of Order XXI rules 9 and 10 (2) (j) (i) of the CPC. The relevant parts of the provisions state:

9. When the holder of a decree desires to execute it, he shall apply to the court which passed the decree or to the officer (if any) appointed in this behalf, or if the decree has been sent under the provisions hereinbefore contained to another court then to such court or to the proper officer thereof.

10. (1) Where a decree is for the payment of money the court may, on the oral application of the decree-holder at the time of the passing of the decree, order immediate execution thereof by the arrest of the judgment debtor, prior to the preparation of a warrant if he is within the precincts of the court.

(2) Save as otherwise provided by subrule (1) …, every application for the execution of a decree shall be in writing, signed and verified by the applicant or by some other person proved to the satisfaction of the court to be acquainted with the facts of the case, and shall contain in a tabular form the following particulars, namely–

(j) the mode in which the assistance of the court is required, whether–

(i) ….;
(ii) ….;
(iii) by the arrest and detention in prison of any person;

The above provisions are the proper provisions, depending on the circumstances, for a decree holder to seek to move the court to invoke its contempt jurisdiction in circumstances such as the present.

It is not correct to say that the mere filing of the chamber summons and the affidavit would amount to the establishment of a *prima facie* case, thus requiring the person accused of contempt of court to appear and enter a defence, as Mr. Mhango does.

In this regard, it is well to remind ourselves that the court's power to punish for contempt is a power that we are, as Judicial Officers, enjoined to exercise in very rare circumstances. It is, indeed, a fundamental principle of the rule of law that court orders must be obeyed. That is the rationale for the powers we possess to punish for contempt. However, its employment must be weighed against the court's duty to exercise restraint, unless there exist strong reasons for it. And the burden of proof, which lies on the applicant, should be somewhere below beyond a reasonable doubt, but certainly above a balance of probability: See the Kenyan case of *Sean Francis Jones v Cedar Rutakyamirwa Norgan & Anor*, [2004] LLR 3104 (CCK). And, as held in another Kenyan case of *Moses N.P. Njoroge & Ors v Recv. Musa Njuguna & Anor*, Nakuru High Court Civ. Case No. 247 A of 2004:

> *Recourse ought not to be to a process of contempt in aid of a civil remedy where there is any other method of doing justice, and the jurisdiction of*

committing for contempt should be most jealously and carefully watched, and exercised with greatest reluctance and great anxiety on the part of the Judges…"

The power to punish for disobedience of court orders is a great power. It is power to instantly imprison a person without a full criminal trial for disobedience of your own order. In a sense, it constitutes an exception to the principle *nemo judex in cause sua* (no one should be a judge in his own cause). But it is a necessary power: See *Morris v Crown Office* [1970] 2 QB 114 at 122. Hence, its exercise requires a careful balance. Though the jurisdiction does exist in order to ensure respect for court orders and to preserve the supremacy of the law, it should be most jealously and cautiously invoked and put into use, so as not to allow overzealous litigants abusing the process of the court. Surely, the mere filing of an application with a supporting affidavit as proof of case having been made out against the person cited would not pass this test.

As we have seen, the decisions of this court in the cases of *Bundu Safaris* and *Kunan Singh* (both *supra*), do not support that procedure. Where an oral hearing was conducted, the court did not say anything that could be an indication on what the procedure applicable should be. In fact, that question was not considered at all. The cases cannot therefore be the authorities for the procedure that counsel for the applicants has proposed herein.

If the applicants desired to proceed under section 124 of the Penal Code, they were perfectly entitled to do so, but they should have instituted or cause to be instituted, criminal proceedings under the Criminal Procedure Act, Cap 20, in a criminal court with competent jurisdiction.

The foregoing discussion would have been sufficient to dispose of this application on the grounds of wrong citation of the law and of following the wrong procedure. However, though Mr. Mhango's submissions were based on procedural issues, he did not address this particular issue, which was also not specifically raised and fully argued by the parties. And even though Mr. Kissenge deals with similar issues, maintaining that the prayers sought are inconsistent with the requirements of the law relied upon to support the application, those submissions are essentially on the merits and not technical. To be fair to the applicants and their counsel, therefore, I would not use these findings as the basis for disposing of this application. Rather, I would proceed to determine the application on the merits.

As earlier stated, Mr. Mhango chose not to make any submissions on the merits, preferring instead to complain about the procedure adopted. He even accused Mr. Kissenge, learned counsel for the persons cited, of attempting to "wear the shoes of those who are required to show cause why they should not be sent to jail for contempt of court". In other words, counsel Mhango has not done anything towards prosecuting his clients' application at all. On the other hand, Mr. Kissenge's submissions fully addressed the merits of the application. The Attorney General did not file any on behalf of Mrs. Massinda. However, the findings herein will also relate to her.

The issue at this stage, in my view, is whether a *prima facie* case has been made out to require the persons cited in the chamber summons to show cause as to why they should not be sent to prison. That necessitates a look at the facts.

The material facts can be discerned from the affidavits and annexures filed on behalf of the parties herein. Mr. Mhango swore the applicants' affidavits, while the

affidavits in opposition to the application have been sworn by Mrs. Nasama Massinda, Ms. Fatma Ayoub Simba, and Ms. Lillian Komwihangiro.

It is the applicants' contention that the persons cited, namely, Mrs. Massinda, Mr. Weesing and Ms. Komwihangiro, acted in contempt of the order of this court of 6th March 2012 that quashed CMSA's decision suspending the 2nd applicant as the Chief Executive Officer of the 3rd applicant company and the Board of Directors of the said company, and also ordered the 1st respondent to withdraw its directives freezing the 3rd applicant company's bank accounts.

Following those orders, the applicants sought to have them enforced. However, by letter dated 24th May 2012, Ms. Komwihangiro informed the applicants' advocate that the account had been unblocked, but required the company to update the company's signing mandate before it can be allowed to operate the account.

The Bank took this position after receiving a letter from CMSA to the effect that, in line with another decision of this Court in Misc. Civil Application No. 4 of 2012, Commercial Division (Bukuku, J.), NICOL shareholders had appointed an interim manager, Mr. Kinoni Wamunza, to handle NICOL's affairs in the interim. The bank was also informed that a new Interim Board had been installed under the chairmanship of Dr. Gideon Kaunda.

On 16th July 2012, Mr. Mhango wrote again to the Bank and attached the court's order of 6th March 2012, requiring the bank to obey the order "in full". In her response, dated 20th July 2012, Ms Komwihangiro informed Mr. Mhango that the bank had received a copy of the order of the Court of Appeal dated 19th June 2012 striking out NICOL's application in which it sought to have the decision of Bukuku J

revised. She also noted that while the bank had acted on my orders and unblocked the company's accounts, it required NICOL to renew its mandate before it can operate the account. Ms Komwihangiro further noted:

> *"…the dismissal of your application in the Court of Appeal reverts the matter to the status quo, as you will also recall that in Hon. Judge Twaib's judgment he also took cognizance of Hon. Bukuku's decision."*

The bank thus maintained that it will only honour NICOL's instructions upon receiving a court order clarifying which NICOL Board and Management it should recognize in the circumstances. In compliance with that requirement, the Interim Board resolved, on 23rd May 2012, to appoint other signatories to the company account, and duly notified the bank vide its letter dated 24th May 2012.

However, the 1st and 2nd applicants insisted that they were still officers of NICOL and that the bank should honour their instructions in full compliance with my orders. Hence, on 26th July 2012, the bank filed an interpleader suit (Commercial Case No. 85 of 2012) seeking, *inter alia*, the Court's determination of the proper management of the 1st defendant with the mandate to operate the company's accounts with the bank. The parties have said nothing on the fate of that suit. Those were consent orders in which Bukuku J ordered, *inter alia*, the appointment of an interim management to take over the management of NICOL pending restructuring and putting in place a new management for NICOL.

The three persons cited in this application, Ms. Massinda, Mr. Weesing and Ms Komwihangiro, have denied having acted in contempt of my orders of 6th March 2012 and insisted that NMB did in fact obey the same by unblocking NICOL's account. The applicants on the other hand, contend that since the company's

accounts were frozen on the written directives of the CMSA, the authority had the duty to communicate the Court's decision quashing its said directives so that the banks could act accordingly, which to them means allowing them to operate the company's accounts.

On Bukuku, J's decision, Mr. Mhango averred that the said order never included an order for the appointment of an Interim Manager. He further maintained that my orders are still valid as they have not been set aside, varied or discharged. With respect, I fail to understand how the applicants' counsel could argue that Bukuku J's order, which included an order "*…appointing an interim management to take over management of the 1st respondent pending restructuring and putting in place a new management acceptable to the petitioners and the 2nd respondent [meaning NICOL]*", did not include the appointment of an Interim Manager for NICOL.

The three cited persons maintain that, pursuant to the above orders by Bukuku J, NICOL held a meeting of its shareholders on 14th April 2012, at which an Interim Board of Directors was elected and Mr. Kanoni Adam Wamunza was confirmed as Interim Manager. This fact was communicated to NMB by NICOL, through its letter dated 22nd May 2012. This was done, according to Ms Komwihangiro, because the order of 6th March 2012 was subject to the order of Bukuku J. It is further the view of the persons cited that the court's orders in as far as the management of NICOL was concerned, ceased to have effect after the implementation of Bukuku J's order.

While it may not be exactly correct to say that my order of 6th March 2012 was "subject to the order of Bukuku J of 29th February", there is no doubt that my said order took cognizance of Bukuku J's order and expressly stated so by way of an *obiter dicta*. However, even if it did not, my order could not continue to apply, with

regard to the applicants' respective positions in NICOL, if, subsequent thereto, the company's shareholders resolved to elect a new Board of Directors and/or change its management.

In other words, therefore, my orders of 6th March 2012 could not have permanent effect. They could not operate to mean that the officers in whose favour the case was decided would continue in office for eternity, waving the orders around as their excuse for remaining in office, unless and until, as they wrongly perceive, they are set aside by another court order. An order of *certiorari* issued in circumstances such as those in the present case with regard to the reinstatement of company office bearers, unless the contrary appears in the order, is always subject to subsequent events which, when done in accordance with the law, have the effect of changing the office-bearers, as was the case herein.

Hence, given the shareholders' resolutions subsequent to my orders, my order of reinstatement in favour of the 1st and 2nd applicants ceased to have effect. The *obiter dicta* at the end of my ruling was not only in due cognizance of the orders of my fellow Judge which, as I said in that ruling, were not altered in any way by my decision of 6th March 2012, but also in keeping with whatever the shareholders of NICOL would lawfully decide to do with regard to the affairs of their company—a power that the law vests in them as owners of the company.

The affidavit evidence on record shows that the shareholders have done exactly that: They have exercised that power by removing the 1st and 2nd applicants from their positions in the company. From that moment on, Mr. Mosha and Ms. Armstrong must be deemed to have ceased to have any power or authority to act on behalf of NICOL.

The overall result of the foregoing findings is that, what Ms. Massinda, Mr. Weesing and Ms. Komwihangiro did, individually or collectively, which form the grounds of complaint in these proceedings, cannot be said to have been contemptuous of any of my orders of 6th March 2012. The application for contempt is therefore devoid of merit. It is dismissed with costs.

DATED AT DAR ES SALAAM this 9th day of November, 2015.

F. A. Twaib

JUDGE

DATE: 11/11/2015

CORAM:

Before: _____

For the Applicants:_____

For the 1st Respondent: _____

For the 2nd & 3rd Respondents: _____

COURT:

Ruling delivered in chambers this 11th day of November, 2015.

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REGISTRAR/DEPUTY REGISTRAR