

IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL APPLICATION NO. 14 OF 2016
(Arising from Miscellaneous Commercial Cause No. 259 of 2015 and
Commercial Case No. 119 of 2015)

GASLAMP HOLDINGS CORP APPLICANT

VERSUS

PERCY BEDA MWIDADI

VICTOR JOSEPH PETER

MAKSIM CHALDYMОВ

YURI VALENTINOVICH CHERNOMORCHENKO } RESPONDENTS

RUPHINUS ANTHONY MLORERE

GOLD TREE TANZANIA LIMITED

1st & 20th December, 2016

RULING /

MWAMBEGELE, J.:

This is a ruling in respect of an application filed by the applicant Gaslamp Holdings Corp against the six respondents – Percy Beda Mwidadi, Victor Joseph Peter, Maksim Chaldymov, Yuri Valentinovich Chernomorchenko, Ruphinus Anthony Mlorere and Gold Tree Tanzania Limited – craving for the following orders:

1. That this Honourable Court may be pleased to issue a summons to the first Respondent to appear before this Honourable Court and show cause why he should not be convicted of contempt of Court and be detained as a civil prisoner for disobedience of the lawful order of this Court made on the 14th December, 2015;
2. That this Honourable Court may upon hearing the Respondent enter a finding that the Respondent has committed contempt by disobeying the lawful Court order of 14th December, 2015 and imprison the first Respondent to a term of imprisonment as the Court sees fit;
3. That this Honourable Court may be pleased to order the first Respondent to purge his contempt by complying with the order of this Court made on the 14th December, 2015;
4. That this Honourable Court may be pleased to issue an order that the first Respondent pay the Applicant's costs; and
5. That this Honourable Court may be pleased to grant any other order as it shall deem fit and just to grant in the circumstances.

The application, which is essentially against the acts of the first respondent, has primarily been taken under section 68 (e) and Order XXXVII rule 2 (2) of the Civil Procedure Code, Cap. 33 of the Revised Edition, 2002 (hereinafter "the CPC"). It is supported by the affidavit sworn by a certain John Alphonse and resisted by a counter-affidavit of Percy Beda Mwidadi; the first respondent.

When this application was called on for hearing on 14.11.2016, Mr. Edward Chuwa, learned counsel for the first, third, fourth and sixth respondents (hereinafter referred to as the respondents) intimated to the court that he was not feeling well and was for that reason not prepared to proceed with the

hearing. He prayed that the application be disposed of by way of written submissions. As Mr. Thomas Mihayo Sipemba, learned counsel for the respondent, had no objection to Mr. Chuwa's prayer, the court granted the prayer and proceeded to slate the submissions schedule. Mr. Chuwa and Mr. Sipemba, the learned counsel who are representing the parties in this application, have complied with the submissions schedule ordered by the court.

The background to the present application is this: by a ruling of this court pronounced on 14.12.2015 in Miscellaneous Commercial Cause No: 259 of 2015 the court granted the applicant's application for stay of execution and made the following two orders, among others:

1. The 1st, 2nd, 3rd, 4th, 5th, and 6th respondents, their servants, workmen, agents and/or whosoever purporting to act on their behalf, are restrained from dealing with the assets of the 6th respondent, dealing in any manner with the shares of the 6th respondent including making any transfer and/or allotment of shares, changing the board of directors structure of the 6th respondent including but not limited to any appoint of new directors; and
2. The 1st, 2nd, 3rd, 4th, 5th, and 6th respondents, their servants, workmen, agents and/or whosoever purporting to act on their behalf are restrained from dealing with the assets of the 6th respondent, dealing in any manner with the shares of the 6th respondent including but not limited to Mining Licences Numbers ML 426/2011 and ML 468/2012 held in the name of the 6th defendant in any manner whatsoever.

The essence of the present application is that the first applicant; Percy Beda Mwidadi, has defied the foregoing orders. The applicant is therefore seeking an order of this court to summon the first applicant to appear and show cause why he should not be convicted of contempt of court and be detained as a civil prisoner for disobedience of the lawful orders of this court.

Evidence regarding the alleged contempt is found in the affidavit of John Alphonse; a person employed by Vigour Security. It should be noted at this juncture that some of the paragraphs in that affidavit; that is, paragraphs 3, 9 and 10 were expunged from the affidavit by a ruling of this court delivered on 17.10.2016 after a preliminary objection by the respondents. Thus the evidence supporting the application is, essentially, found in the following paragraphs:

4. That on 29th day of January 2016, I received a phone call from the 1st Respondent through my mobile telephone number +255 765 255874 in which the 1st Respondent told me that he was planning to come to the mine site and take some assets including BALL MILL and a MOTOR;
6. That again on 30th I received another phone call from the 1st Respondent through my mobile telephone number +255765255874 in which the 1st Respondent reiterated his intention to access the site and remove some assets to which I told him he would not be allowed to access the site;

7. That on 30th day of January, 2016 at 18.00 pm, several armed people came to the site I was at the main gate and they told me that they were under instructions from the 1st Respondent to take assets from the mine site. I informed that that I had instructions not to allow any unauthorized person to enter the site. After a lot of debate, the said people left the site only to return the next day on 31st day of January, 2016; and

8. That on 31st day of January 2016 on or about at 01 hrs, (Mid night) several armed people came to the site and told me that they were under instructions from the 1st Respondent to take assets from the mine site. I and the other guards tried to stop them but they forcefully entered the site and left with BALL MILL and a MOTOR.

In his written submissions for the applicant, Mr. Sipemba, learned counsel, basing on the foregoing paragraphs of the affidavit submits that the first respondent has defied the orders of this court. Citing ***Iris Properties Limited & another Vs the City Council of Nairobi***, JR No. 433 of t 2009 quoted in ***Econet Wireless Kenya Ltd Vs Minister for Information & Communication of Kenya & another*** [2005] 1 KLR 828 and ***Tanzania Bundu Safaris Ltd V Director of Wildlife & Another*** [1996] TLR 246, has argued that it is trite law that court orders must be respected in order to uphold the rule of law and good order. The learned counsel also cited ***Hadkinson Vs Hadkinson*** [1952] 2 All ER 567 for the proposition that it is not the duty of the parties to interpret court orders as to whether the said orders are wrong or right but to follow them until they are discharged. He also relied on ***Silent Inn Hotels Ltd Vs Interstate Office Service***

Limited, Civil Case No. 64 of 1999 (unreported) for the proposition that the prime object of proceedings of this nature is to vindicate the rule of law by a finding of contempt rather than to punish the individual.

For the respondents, Mr. Chuwa has essentially submitted that the order of this court which is alleged to have been defied was not clear; it was ambiguous. The learned counsel clarified that the order is ambiguous in a sense that item 2 of the order made reference to Mining Licences Numbers ML 426/2011 and ML 468/2012 which were referred in the plaint but not attached and therefore details on what they refer are lacking. He argues further that the order does not state which assets of the respondents are subject of the restraint order and does not make reference to any mining site which the first respondent is alleged to have interfered. The learned counsel thus relied on **Football Kenya Federation Vs Kenya Premier League Limited & 2 others** (2015) eKLR for the proposition that for any person to be liable for contempt of court the alleged order of the court must be unambiguous and the act which is forbidden by the order of the court must be clearly explained in the order. The learned counsel added that the order alleged to have been disobeyed have never been seen by the deponent of the affidavit supporting the application as the same was not appended with the said affidavit and the deponent has not deposed if he was served with it. For this reason, he contends, the deponent; Mr. John Alphonse, could not have easily understood the same.

He rebuts that all the authorities cited by the applicant are distinguishable and therefore not relevant to the present application. He contends that they would have been relevant if; firstly, the order was unambiguous, secondly, it was served on the first applicant and thirdly, there was proof of its violation.

The learned counsel for the respondents has, however, submitted that even if the court finds that the first respondent is in contempt of the order, the remedy is not necessarily conviction, for, civil contempt does not require immediate imprisonment because it is also punishable by imposition of a fine. He relied on the ***Tanzania Bundu Safaris*** case for this proposition.

Rejoining, the learned counsel for the applicant is surprised, rightly so in my view, by the learned counsel for the respondent making reference to paragraph 3 which was expunged by this court. He rejoins further that the order made by this court was not ambiguous. On the decision of ***Football Kenya Federation*** the learned counsel for the applicants states that the decision does not support the respondents' contention in that it was held in that case that the duty to obey the laws by all individuals and institutions is paramount in the maintenance of the rule of law.

I have subjected the contending arguments by the learned counsel for the parties in this application. Let me join the learned counsel for the applicant in being surprised by the counsel for the respondents' act of making reference to the paragraphs which were expunged by the court. As rightly pointed out by the learned counsel for the applicant, the learned counsel for the respondents has made reference to and submitted on paragraph 3 of the affidavit. He has also submitted on paragraph 9. Both paragraphs, together with paragraph 10, were expunged by this court in its ruling handed down on 17.10.2016 thereby making them not part of the affidavit of John Alphonse. The approach taken by the learned counsel for the respondents is by no means correct. Paragraphs 3, 9 and 10 of the affidavit of John Alphonse, having been expunged by a successful preliminary objection fronted by Mr. Chuwa himself, are no longer part of the affidavit. The learned counsel for

the respondents was therefore not legally required to submit on paragraphs 3 and 9 (which were among the expunged paragraphs) to challenge the applicant's deposition. In the premises, I accept the invitation extended to me by Mr. Sipemba, learned counsel to ignore them. I therefore expunge the submissions made by the learned counsel for the respondents regarding paragraphs 3 and 9.

The foregoing done, I should state at this stage that there is ample evidence in the affidavit supporting the application that the first respondent, indeed, defied the orders of this court made on 14.12.2015. The same has been stated at paragraphs 4, 6, 7 and 8 of the affidavit of John Alphonse supporting the application reproduced above. It is stated in those paragraphs that several armed people, under the instructions of the first respondent went to the mine site and took one Ball Mill and a Motor. Efforts by John Alphonse and his fellow guards to stop them proved futile.

I am not prepared to accept the respondents' defence to the effect that the deponent did not understand the orders. Neither am I prepared to accept the contention that the orders were not supplied to the first respondent. The fact that the learned counsel for the respondents is aware of the orders, it was incumbent upon him to make his clients aware of the same. It was not anybody's duty to see to it that the first respondent or any other respondent was supplied with the orders of this court except the learned counsel for the respondents himself. On the evidence available on record, I am satisfied that the first respondent defied the orders of this court dated 14.12.2015.

The orders of this court were not ambiguous as the learned counsel for the respondent urges this court to find. Through those orders, the 1st, 2nd, 3rd, 4th

5th, and 6th respondents, their servants, workmen, agents and/or whosoever purporting to act on their behalf, were restrained from dealing with the assets of the 6th respondent, dealing in any manner with the shares of the 6th respondent including making any transfer and/or allotment of shares, changing the board of directors structure of the 6th respondent including but not limited to any appointment of new directors. The 1st, 2nd, 3rd, 4th 5th, and 6th respondents, their servants, workmen, agents and/or whosoever purporting to act on their behalf were also restrained from dealing with the assets of the 6th respondent, dealing in any manner with the shares of the 6th respondent including but not limited to Mining Licences Numbers ML 426/2011 and ML 468/2012 held in the name of the 6th defendant in any manner whatsoever. I have read these orders more than once. I do not read anything ambiguous in them. I therefore dismiss Mr. Chuwa's contention that the orders were not unambiguous.

What was done by the first respondent; to call Mr. John Alphonse twice that he would go and collect at the mine site a Ball Mill and a Motor as stated in paragraphs 4, 5, 6, 7 and 8 of the affidavit supporting the application and effectuating what he stated in the phone by sending a several armed people who indeed collected the Ball Mill and a Motor from the mine site, was but in blatant disregard of the orders of this court given 14.12.2015.

The learned counsel for the respondents has not sufficiently submitted in the counter-affidavit as well as reply submissions to challenge the affidavit supporting the application and the submissions-in-chief of the applicant on the contempt aspect. What has come out clearly from the respondents' submission is that should the court find that the contempt of the orders has been committed, it should not convict the defaulter to a prison sentence but

to a fine as was stated in the *Tanzania Bundu Safaris* case. I should remind the learned counsel that the prayer is rather premature, for, the present application is not for commission of the first applicant to prison but, rather, it is, essentially, as seen in the Chamber Summons, an application for the court to summon the first respondent to show cause why he (the first respondent) should not be committed to prison for defying the court orders.

With the foregoing discussed, I find merit in the present application. I therefore order that summons should issue to the first applicant; Percy Beda Mwidadi, to show cause why he should not be committed to prison as a civil prisoner for defying orders of this court made on 14.12.2015 in Miscellaneous Commercial Cause No. 259 of 2015.

This application is allowed with costs.

Order accordingly.

DATED at DAR ES SALAAM this 20th day of December, 2016.

J. C. M. MWAMBEGELE
JUDGE