



**Waweru v Ngama & another; Managing Director/CEO NCBA Bank (Contemnor) (Civil Appeal 273 of 2018) [2024] KEHC 15229 (KLR) (Civ) (22 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 15229 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL 273 OF 2018**

**JM OMIDO, J**

**NOVEMBER 22, 2024**

**BETWEEN**

**JAMES NJOMO WAWERU ..... APPELLANT**

**AND**

**PAUL KIBERA NGAMA ..... 1<sup>ST</sup> RESPONDENT**

**ROBERT TANUI ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**THE MANAGING DIRECTOR/CEO NCBA BANK ..... CONTEMNOR**

**RULING**

1. The application subject to which this ruling is made is expressed to be brought under Sections 3 and 3A of the *Civil Procedure Act*, Cap 21 Laws of Kenya and Order 51 Rule 1 of the Civil Procedure Rules and seeks the following prayers:
  - a. [Spent].
  - b. [Spent].
  - c. [Spent].
  - d. That part of the orders made on 31<sup>st</sup> July, 2024 requiring the alleged Contemnor's physical attendance in open court on 19<sup>th</sup> of September, 2024 or during the hearing of the Notice of Motion dated 15<sup>th</sup> May, 2024 be set aside or varied.
  - e. That the costs of this application be borne by the 1<sup>st</sup> Respondent.



2. The application is premised on 8 grounds set out on its face which are in precis collated as follows: The suo moto order requiring the personal attendance of the alleged Contemnor during the hearing of the application dated 15<sup>th</sup> May, 2024 was made without jurisdiction and is grossly prejudicial. The NCBA Bank Kenya PLC does not have any person designated in the position of Managing Director or CEO and that it is therefore not possible for the Bank to comply with the order requiring such personal attendance. The NCBA Bank Kenya PLC has appropriately responded to the application dated 15<sup>th</sup> May, 2024 and the response suffices for the court to proceed and determine the application.
3. The application is supported by the affidavit of Christine Wahome sworn on 16<sup>th</sup> September, 2024, which expounds on the above grounds. The deponent to the affidavit describes herself as the Senior Legal Counsel NCBA Bank Kenya PLC.
4. In her affidavit, the deponent states that it is her belief that the order sought to be vacated by the application was made without jurisdiction and is grossly prejudicial to the Bank because: No party prayed for such an order or any order to like effect but the court moved to make the same on its own motion. The parties were not given an opportunity to address the court and state their positions before the order was made. The order, being substantive in nature, was made during a mention. The order presumes that there is already proven contempt, thus the contemnor must attend court.
5. The Deponent reiterates in her affidavit the position in the grounds upon which the application is premised that the position of Managing Director or CEO does not exist at NCBA Bank Kenya PLC and as such it would not be possible to comply with the order directing that the officer of the Bank in that designation attends court when the application for contempt is to be heard.
6. In winding, the Deponent restates the position that the bank has aptly responded to the Motion dated 15<sup>th</sup> May, 2024 and it is her belief that the response suffices for the court to proceed and determine the application without much ado.
7. The application is resisted by the 1<sup>st</sup> Respondent who to that end filed Grounds of Opposition and Preliminary Objection dated 19<sup>th</sup> September, 2024, to which is attached a document that the 1<sup>st</sup> Respondent relies on. I will later in this ruling address the evidentiary value of the said document.
8. In summary, the grounds and objection raised to the Motion dated 16<sup>th</sup> September, 2024 are as follows: The application is incompetent, premature, bad in law, frivolous and constitutes abuse of the due process of the court. The application seeks to manage and/or dictate the manner in which the court will handle the contempt application. The orders sought to be vacated were made in line with Section 26 of the *Civil Procedure Act* and Order 22 Rules 1, 26 and 32 of the Civil Procedure Rules. The court is within its powers to issue orders suo moto. That as per the attached document from NCBA Bank Kenya PLC's website, the bank has an officer designated as the CEO.
9. The matter was placed before me on 26<sup>th</sup> September, 2024 for the oral hearing of the application. The parties in their respective submissions reiterated the respective positions as stated in the grounds, the affidavit in support of the application and the grounds of opposition and preliminary objection.
10. The only other issue that was argued concerns the evidentiary value of the document that is attached to the 1<sup>st</sup> Respondent's grounds of opposition and preliminary objection. Mr. K'Opere learned counsel for the 1<sup>st</sup> Respondent submitted that the said document, which was extracted from the website of the Bank proved that the Bank had one John Gachora as the person in the position of CEO.
11. Learned counsel for the Bank Mr. Kongere made whether of the document and stated that the same was not admissible in evidence as it was attached to the grounds but not as an annexure to an affidavit with depositions on oath.



12. I have considered the application, the affidavit in support thereof, the document filed in opposition to the application and the record in its entirety. I deduce the issues for determination to be as follows:
  - a. Whether the order sought to be set aside, vacated or varied was made without jurisdiction.
  - b. Whether the order sought to be set aside, vacated or varied is incapable of being complied with by the Bank.
  - c. Whether the order sought to be set aside, vacated or varied is prejudicial to the Bank.
13. The Bank's submissions on the first issue for determination are four pronged: that the order was made without jurisdiction on the basis that, no party prayed for such an order or any order to like effect but the court moved to make the same on its own motion; that, the parties were not given an opportunity to state their positions before the order was made; that, the order, being substantive in nature, was made during a mention; and that, the order presumes that there is already proven contempt, thus the contemnor must attend court.
14. I will first address the grounds that the order was made suo moto and that no party sought for the same and that the same was made on a mention date yet it is a substantive order. On the position proffered that the order for the alleged Contemnor to personally attend was a substantive order made on a mention date, I am not in agreement with Mr. Kongere that an order directing a party to attend court for purposes of certain proceedings amounts to a substantive order.
15. Much as it is settled in law that substantive orders are not to be granted on the date a matter comes up for mention (see *Rahab Wanjiru Evans v Esso Kenya Limited (Civil Appeal No 13 of 1999)* and *Kenya Commercial Bank Limited v Naphtaly J.B. Hawala (Civil Application No 240 of 1997)*), an order directing a party to attend court for proceedings to be taken in that party's presence cannot be deemed to be a substantive order as the party so ordered still has the opportunity to be heard during the taking of such proceedings.
16. In our case, the substantive orders on an application for contempt are to be made after the application has been heard. The argument that the order that is subject of the ruling herein was made without the parties being given an opportunity to address the court on the same before it could be issued is therefore without merit. The further argument that the order presumes that there is already proven contempt, is without basis for the reason that the court has powers to issue directions which may include the attendance of the alleged Contemnor at the hearing of an application for contempt. It is further noteworthy that the contempt application is yet to be heard.
17. On the first issue thus, I reach the persuasion that this court had the requisite jurisdiction to order that the alleged Contemnor be present in open court during the hearing of the application for contempt.
18. I now turn to the second and third issues for determination which are whether the order sought to be set aside, vacated or varied is incapable of being complied with by the Bank and whether the said order is prejudicial to the Bank. I will proceed to determine the two issues together.
19. The two issues are grounded on the argument that the Bank does not have an officer in the designation of Managing Director or CEO and compliance with the order of the court is therefore not possible and that it would prejudice the Bank if the order remained as is.
20. This then calls upon me to address the document attached to Mr. K'Opere's Grounds of Opposition and Preliminary Objection, which counsel sought to rely on in response to the argument proffered by Mr. Kongere that the Bank has no officer designated as a Managing Director/CEO.



21. Order 51 Rule 14(1) of the Civil Procedure Rules provides that a Respondent who wishes to oppose any application may file a notice preliminary objection and/or a replying affidavit and/or a statement of grounds of opposition or a combination of any of those documents. It is trite law that a Respondent who files a notice of preliminary objection and/or grounds of opposition can only oppose and/or address the application on points of law only, the position of the court record or matters that the court may take judicial notice of.
22. It is not open for a party who files a notice of preliminary objection and/or grounds of opposition to rely on facts or adduce evidence. Such facts and evidence can only be presented through an affidavit. The document that the 1<sup>st</sup> Respondent attached to the Grounds of Opposition and Preliminary Objection is therefore of no probative evidentiary value to the application before me. The same is hereby expunged from the record.
23. With that, it then means that the position taken by the Bank that it does not have any officer in the designation of Managing Director or CEO stands unchallenged and uncontroverted. I am in the premises persuaded that it is not possible for the Bank to comply with the order of the court requiring the attendance of the Managing Director/CEO. On that sole ground, the application is merited.
24. Having said as much, the position remains that the Notice of Motion dated 15<sup>th</sup> May, 2024 is still pending. If he so wishes, the 1<sup>st</sup> Respondent shall be at liberty to seek for an order to amend the said application. He is also at liberty to seek an order that the alleged Contemnor in its application be present before the court during the hearing of the application for contempt. As we have seen above, this court also has powers to order for such presence, suo moto.
25. The upshot then is that the application dated 16<sup>th</sup> September, 2024 is allowed and the order issued on 31<sup>st</sup> July, 2024 is hereby varied to the extent that the Managing Director or CEO of the NCBA Bank Kenya PLC shall not be required to be present during the hearing of the application dated 15<sup>th</sup> May, 2024.
26. I make no order as to costs on the application.
27. Orders accordingly.

**JOE M. OMIDO**

**JUDGE.**

**DELIVERED (VIRTUALLY), DATED AND SIGNED THIS 22<sup>ND</sup> DAY OF NOVEMBER, 2024.**

For Appellant: No appearance.

For 1<sup>st</sup> Respondent: Mr. K'Opere.

For 2<sup>nd</sup> Respondent: No appearance.

For the Bank: Mr. Kongere.

**JOE M. OMIDO**

**JUDGE.**

Mr. K'Opere: I seek leave to amend the Notice of Motion dated 15<sup>th</sup> May, 2024 and to file a further affidavit. I also seek a hearing date for the application. We had a date for 19<sup>th</sup> September, 2024 which has now passed. I will amend and serve within 14 days.



Mr. Kongere: I propose that Counsel files a formal application so that I can respond to the same after getting instructions.

Mr. K'Opere: The rules allow for one to make an oral application for amendment. It is the fault of the Contemnor, who did not respond to our application, that has led to this situation.

Court: The oral application to amend the Notice of Motion dated 15<sup>th</sup> May, 2024 is hereby allowed as the same will not prejudice the Bank, who in any event will have an opportunity to respond to the same.

The amended application to be filed and served within 14 days.

Mention on 10<sup>th</sup> December, 2024 for further orders.

Mr. Kongere: We seek leave to appeal.

Mr. K'Opere: No objection.

Court: Leave to appeal is granted to the Bank.

**JOE M. OMIDO**

**JUDGE.**

**22<sup>ND</sup> NOVEMBER, 2024.**

