



REPUBLIC OF KENYA



Ace Motors Limited & another v M-Oriental Bank Ltd & another (Civil Case 12 of 2022) [2024] KEHC 16347 (KLR) (20 December 2024) (Ruling)

Neutral citation: [2024] KEHC 16347 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL CASE 12 OF 2022
JRA WANANDA, J
DECEMBER 20, 2024**

BETWEEN

ACE MOTORS LIMITED 1ST PLAINTIFF

ARUNKUMAR GORDHANDS BHATT 2ND PLAINTIFF

AND

M-ORIENTAL BANK LTD 1ST DEFENDANT

AGUNJA TRADERS AUCTIONEERS 2ND DEFENDANT

RULING

1. This Application the subject of this Ruling is an off-shoot of my earlier Ruling delivered herein on 16/06/2023 whereof I issued an interlocutory injunction restraining the exercise of a Chargee bank's exercise of its statutory power of sale until and unless it had complied with the mandatory requirements of service of proper notices under the law.
2. The instant Application is the one dated 03/10/2023, filed by the Plaintiffs, through Messrs G&A Advocates LLP, and which prays for orders as follows:
 - i. [.....] spent
 - ii. [.....] spent
 - iii. The Defendants be cited for contempt of this Honourable Court Orders emanating from the Ruling delivered on 16th June 2023 and fined Kshs. 2,000,000/.
 - iv. In the alternative, George Karanja and Josphat Kiige being the Eldoret Branch Managers of the 1st Defendant; and Julius Agunja Onyango, the proprietor of the 2nd Defendant and authors of the contempt be committed to civil jail.
 - v. Costs of this Application be borne by the Defendants.



3. The Application is premised on the grounds set out on the face thereof and the Affidavit filed by one Deepen Bhatt who described himself as a director of the 1st Plaintiff. In the Affidavit, he deponed that on 16/06/2023, this Court issued an order for injunction restraining the Defendants from advertising for sale, selling, alienating or in any way interfering with or disposing the property known as Eldoret Municipality/Block 13/201 registered in the name of the 2nd Plaintiff pending the hearing and determination of the main suit, provided that the Defendants did not issue fresh 40 days Notification to Sell pursuant to Section 96(2) of the *Land Act*, 45 days Redemption Notice pursuant to Rule 15(d) of the Auctioneers' Rules and 14 days Notification of Sale pursuant to Rule 15(e) of the Auctioneers Rules. He deponed further that the Ruling was delivered in the presence of the Defendants' Advocate.
4. He contended that afterwards, the 2nd Defendant, on instructions of the 1st Defendant, served the Plaintiff with a Notification of Sale dated 06/09/2023 indicating that the suit property shall be sold on 26/10/2023 and that the same was a Redemption Notice, and not the 40 days Notification to Sale pursuant to Section 96(2) of the *Land Act*. He deponed that pursuant thereto, the Plaintiffs' Advocates served a letter upon the Defendants' Advocates informing them that they should recall the notice as it was issued in breach of the Courts' Ruling but the Defendants refused to purge the contempt, that the letter went unanswered and that the Defendants seem hell-bent to irregularly sell the suit property even with the Court's orders in place. He therefore contended that they have established a prima facie case warranting a grant of temporary injunction since they have established that there was a Court order in place and that the Defendants were aware of the same but deliberately breached them.

Defendants' Response

5. In challenging the Application, the Defendants filed Grounds of Opposition and Replying Affidavit, both filed through Messrs Kidiavai & Co. Advocates, on 1/11/2023.
6. In the Grounds of Opposition, it is stated that the Plaintiffs have not demonstrated and/or exhibited the order with a Penal Notice duly extracted, signed, sealed and served upon the Defendants, that there is no proof of wilful or intentional disobedience or violation of any order, and that the legal requirements for citation of contempt have not been met. It was further urged that the directions of the Court as given on 16/06/2023 was that the Defendants were at liberty to issue requisite statutory notices to the Plaintiffs if default of payment of the sums due to the 1st Defendants persisted, that on 29/06/2023, the 1st Defendant issued a 40-days' notice to the Plaintiffs pursuant to the Court directions and upon expiry of the 40 days, the Plaintiffs remained in default. It was stated further that pursuant thereto, the 1st Defendant instructed the 2nd Defendant to issue the Redemption Notice under Rule 15 of the Auctioneer's Rules in accordance with the orders of the Court on 16/06/2023, that both notices were valid and proper and in accordance with the law and that therefore, the Defendants are not in contempt.
7. The Replying Affidavit is sworn by Aggrey Lucas Kidiavai, the Counsel in conduct of this matter on behalf of the Defendants. He basically reiterated the same contents of the Grounds of Opposition and for this reason, I will not recite the same.

Plaintiffs' Supplementary Affidavit

8. The Plaintiffs filed a Supplementary Affidavit on 06/11/2023 sworn by the same Deepen Bhatt. In response to the contention that the order was not extracted, signed and sealed, he deponed that the Court of Appeal has determined that knowledge of a Court order by a party's Advocate where such order is made in his/her presence suffices in contempt proceedings and that the Ruling was delivered in the presence of the Defendants' Advocate, Mr. Songole. He deponed further that the Defendant,



in its Witness Statement dated 25/10/2023, confirms knowledge of the existence of the order as it also does at paragraph 9 of its Replying Affidavit which the Defendant asserts to have been the basis upon which it issued the Statutory Notices. The deponent argued further that the Statutory Notice dated 29/06/2023 purportedly served by Registered Post was in fact never served upon either of the Plaintiffs as the Defendants have not attached any Certificates of Postage evidencing such service. He contended further that the letter dated 28/09/2023 annexed to the Defendants' Replying Affidavit was also never served upon their Advocates by email as alleged and that the Defendants have not attached the email serving such correspondence.

Hearing of the Application

9. It was then agreed and directed that the Application be canvassed by way of written Submissions. Pursuant thereto, the Plaintiffs filed their Submissions on 31/01/2024. On the part of the Defendants, up to the time of concluding this Ruling, I had not come across any Submissions filed by or on their behalf

Plaintiffs' Submissions

10. Concerning the law on contempt of Court in Kenya, Counsel for the Plaintiffs cited Section 5 of the *Judicature Act*, the case of *Katsuri Limited v Kapurchand Depor Shah* [2016] eKLR, which cited the South African case of *Kristen Carla Burchell v Barry Grant Burchell Eastern Cape Division case No 364 of 2005*, where, he submitted, it was stated that in order for an Plaintiff to succeed in civil contempt proceedings, the Plaintiff has to prove (i) clarify terms of the order, (ii) knowledge of the terms by the Defendants; and (iii) failure by the Defendants to comply with the terms of the order. On whether the terms of the Orders were clear, Counsel cited the case of *Sheila Cassatt Issenberg & another v Antony Machatha Kinyanjui* [2021] eKLR, which, he submitted, cited the Supreme Court of Canada case of *Carey v Laiken*, 2015 SCC 17 (16th April 2015) which, he submitted further, expounded the elements of contempt and in which it was held that "the order alleged to have been breached must state clearly and unequivocally what should and should not be done."
11. He then recited the Ruling of 16/06/2023 and contended that the Court was clear as to when and to whom the Order applied, did not miss any essential detail nor did any external circumstances obscure the meaning of the Orders, that the Defendants, in their Replying Affidavit, did not question the clarity of the Orders and even acted according to them and therefore cannot be justified in their disobedience. According to him, the Order was clear as per the standard explained in the case of *Carey v Laiken* (supra) and that this Court should find that the Plaintiffs satisfied this limb beyond any shadow of doubt. On whether the Plaintiffs have demonstrated that the Defendants had sufficient knowledge of the orders, he submitted that Kenya's jurisprudence has reiterated that knowledge of a Court Order is sufficient and that this therefore dispenses with the requirement of personal service. He cited the case of *Basil Criticos Vs Attorney General and & Others* [2012] eKLR which, he urged, was affirmed by the Court of Appeal in the case of *Justus Kariuki Mate & Another v Martin Nyaga Wambora & Another* [2014] eKLR which, he submitted further, adopted the view of the trial court that the law of contempt of court has changed to the extent that knowledge of an order is sufficient.
12. Regarding what amounts to knowledge/notice, Counsel cited the definition set out in *Black's Law Dictionary*, 9th Edition, that "a person has notice of a fact or condition if that person – (a) has actual knowledge of it; (b) has received information about it; (c) has reason to know about it; (d) knows about a related fact; (d) is considered as having been able to ascertain it by checking an official filing or recording. According to him therefore, the Defendants' allegation of not being in sufficient notice or knowledge of the Order is misplaced as their Advocate was in attendance when the Ruling was



delivered. On this issue of knowledge or notice of the order, Counsel also cited the Court of Appeal case of *Shimmers Plaza Limited v National Bank of Kenya Limited* [2015] eKLR. He reiterated that in any event, the Defendants' Witness Statement dated 25/10/2023 and the Replying Affidavit at paragraph 9 thereof both confirm knowledge of the Order and submitted that it is therefore disingenuous for the Defendants to claim otherwise. According to him therefore, the Court should find that the Plaintiff has discharged its burden to prove that the Defendants had sufficient knowledge of the Orders and that they should therefore be cited for contempt. On whether the Plaintiff has demonstrated that the Defendants failed to obey the Orders, Counsel submitted that it has long been established that for one to be found guilty of contempt, it must be shown that he has wilfully and intentionally disobeyed the Orders of the Court and for this, he cited the case of *Silverse Lisamula Anami vs Justus Kizito Mugali & 2 Others* (2017) eKLR.

13. He submitted that it is not in dispute that this Court ordered that if the 1st Defendant was to exercise its statutory right to sell the suit property, then it ought to have served the Plaintiffs with the 40 days' Notification to Sell, then the 45 days' Redemption Notice and then a 14 days' Notification of Sale. He contended that as has been established, the Defendants however issued the Plaintiffs with a 45 days' Redemption Notice prior to issuing the 40 days' Notice. Regarding the Defendants adducing a 40 days' notice purportedly served upon the Plaintiffs by registered post, he averred that no Certificate of postage has been adduced in evidence to prove such service. He reiterated further that despite the Plaintiffs' Advocate's best efforts to purge the contempt by notifying the Defendants' Advocates, the correspondence went unanswered, that the Defendants adduced correspondence supposedly forwarded to the Plaintiff's Advocates by email but failed to adduce an email thread evidencing service thereof and that the collective actions of the Defendants exhibits the deliberate, choreographed and wilful disregard of the Order of the Court in an attempt to unlawfully dispose the Plaintiffs' of the property. In the end, he urged the Court to find the Defendants guilty of contempt of Court, commit them to civil jail and fine them Kshs. 2,000,000/- each.

Determination

14. Evidently, the issue that arises for determination herein is “whether the notices served upon the Defendants in respect to the intention to exercise the statutory power of sale, and issued subsequent to the Court’s Ruling dated 16/06/2023, amounted to an act of contempt of Court”.
15. In this case, the Application has been brought under Order 40 of the Civil Procedure Rules, Rule 3(1) whereof provides as follows:

“In cases of disobedience, or breach of any such terms, the court granting an injunction may order the property of the person guilty of such disobedience or breach to be detained in prison for a term not exceeding six months

”
16. Contempt of Court is that conduct or action that defies or disrespects authority of Court. Black’s Law Dictionary 9th Edition defines contempt as follows:

“The act or state of despising; the conduct of being despised. Conduct that defies the authority or dignity of a court or legislature. Because such conduct interferes with the administration of justice.

”
17. Contempt of Court is in the nature of criminal proceedings and therefore, proof of a case against an alleged contemnor is higher than that of balance of probability. Due to the gravity of consequences that ordinarily flow from contempt proceedings, it must be clearly demonstrated that the person cited for contempt had personal knowledge of that order. In order to find a person guilty of contempt therefore,



there must be proof of wilful and intentional disobedience of the Court order. In *Mahinderjit Singh Bitta – vs Union of India & Others* 1A No. 10 of 2010 the Supreme Court of India stated as follows:

“In exercise of its contempt jurisdiction the courts are primarily concerned with enquiring whether the contemnor is guilty of intentional and wilful violation of the order of the court, even to constitute a civil contempt. Every party is *lis* before the court and even otherwise, is expected to obey the orders of the court in its spirit and substance. Every person is required to respect and obey the orders of the court with due dignity for the institution.

18. Knowledge is a question of fact and for a person to be found guilty of contempt, he must be aware of the terms of the order. That is, he must know what the order required him or her to do or not to do but still wilfully and deliberately disobeyed it. This principle was reiterated in the case of *Katsuri Limited v Kapurchand Depor Shah* [2016] eKLR, citing *Kristen Carla Burchell v Barry Grant Burchell* (Eastern Cape Division Case No 364 of 2005), in the following term:

“in order for an applicant to succeed in civil contempt proceedings, the applicant has to prove (i) the terms of the order, knowledge of the terms by the respondent, failure by the respondent to comply with the terms of the order.”

19. The crux of the instant Application is that the Defendants are allegedly in contempt of the orders made in the Ruling delivered herein on 16/06/2023. The orders were as a result of the Plaintiff's Application which sought the grant of an injunction restraining the Defendants from basically auctioning the suit property known as Eldoret Municipality Block 13/201 registered in the name of the 2nd Plaintiff in the exercise of a Chargee's statutory power of sale. Upon considering the Application, this Court found that the 90 days Statutory Notice issued by the 1st Defendants was proper but that the other mandatorily required subsequent notices were not. In the Ruling, the orders I made were as follows:

“49. In the premises, I order as follows:

- i. I allow the Plaintiffs-Applicants' Notice of Motion dated 23/09/2022 but only to the extent stated hereinbelow.
- ii. The Statutory Notice issued by the 1st Respondent under Section 90 of the *Land Act*, 2012 is found to proper and valid for all intents and purposes. It therefore need not be re-issued.
- iii. The Respondents are therefore at liberty to issue a proper notice of intention to sell, pursuant to Section 96(2) of the *Land Act*, 2012 and thereafter serve fresh and/or proper notices under Rule 15 of the Auctioneers Rules. That is to say, the Respondents are at liberty to issue a Notice to sell under Section 96(2) of the *Land Act* and thereafter have the property sold in accordance with the *Auctioneers Act* and Rules.
- iv. Accordingly, I grant an order of injunction restraining the Respondents, whether by themselves or through their employees, servants or agents, from advertising for sale, selling, alienating or in any way interfering with or disposing off the property known as Eldoret Municipality/Block 13/201 registered in the name of 2nd Plaintiff/Applicant pending the



hearing and determination of the main suit but only to the extent stated in (ii) and (iii) above.

v. Costs shall abide the outcome of the main suit.”

20. Both parties agree that the said orders were clear and unambiguous in what they meant. As captured in the said Ruling, there were 4 respective Notices that the Defendants were required by law to serve upon the Plaintiffs before exercising the statutory power of sale, as follows:
- a. 90 days’ Statutory Notice of default, pursuant to Section 90(1) and (2) of the [Land Act](#), 2012.
 - b. 40 days’ Notice of Intention to Sell, pursuant to Section 96(2) of the [Land Act](#), 2012.
 - c. 45 days’ Redemption Notice pursuant to Rule 15(d) of the Auctioneers’ Rules, 1997.
 - d. 14 days’ Notification of Sale, pursuant to Rule 25(e) of the Auctioneers’ Rules, 1997.
21. In the said Ruling, the Court clearly stated that service of Notice (a) was properly effected but that the requirement for service of the 3 subsequent Notices, namely, Notice (b), (c) and (d) above, was either not complied with at all or was not carried out sufficiently. The Court therefore stated that the Defendants, should they wish to make use of the statutory power of sale to recover the amount due, would have to serve fresh Notices (b), (c) and (d) above. As long as these 3 notices had not been served, the injunction would remain in force. The question now is; have the Defendants now complied by issuing the said 3 subsequent notices?
22. According to the Plaintiffs, the Defendants have not complied because they have now purported to issue the Notice (c) above without first issuing Notice (b). On their part, the Defendants insist that contrary to the Plaintiffs’ contention, they did issue Notice (b) and that it is only upon its expiry that they then proceeded to issue the Notice (c) above. In their Replying Affidavit, the Plaintiffs exhibited two respective letters dated 29/06/2023, said to be such Notices (b), one addressed to the directors of the 1st Plaintiff and the other addressed to the 2nd Plaintiff and both alluding to have been served “by post”. There is however no evidence exhibited to demonstrate that the letters were indeed sent to or received by the intended addressees since no Certificates of Postage or any other such nature of evidence has been produced.
23. On this issue of proof of service of the notices, in the case of Nyagilo Ochieng & Another vs. Kenya Commercial Bank Limited [1996] eKLR, the Court of Appeal made the following observation:
- “..... Unless the receipt of statutory notice is admitted, posting thereof must be proved and upon production of such proof the burden of proving non-receipt of such notice or notices shifts to the addressee as is contemplated by section 3(5) of the [Interpretation and General Provisions Act](#), Cap 2, Laws of Kenya.”
24. For the burden of proof to have shifted therefore, the Defendants must have first proved service. Under the above circumstances, I am unable to disagree with the Plaintiffs that the Defendants have not yet complied with the conditions set in the Ruling of 16/06/2023. Service of the “Notice of Intention to Sell” pursuant to Section 96(2) of the [Land Act](#), 2012, not having been demonstrated, the injunction granted on 16/06/2023 therefore remains in force until and unless the Defendants comply as directed.
25. Having found as such, does the Defendants above omission amount to an act of contempt of Court? In other words, does the omission amount to “an act or state of despising” or “conduct that defies the authority or dignity of a court” in the manner described in the Black’s Law Dictionary 9th Edition (supra)?



26. I do not think so. Yes, the omission can be described as indicating some level of lethargy or ineptitude to some extent, or failure to observe details or lack of caution, but by all means, I would not describe it as amounting to “intentional” and/or “wilful” violation of the order of the Court. As already aforesaid, contempt of Court is in the nature of criminal proceedings and therefore, proof of a case against an alleged contemnor is higher than that of balance of probability. For the said reasons, I decline to hold the Defendants as being in contempt of Court.

Final Orders

27. The upshot of my findings above is that the Plaintiffs’ Notice of Motion dated 3/10/2023 only partially succeeds and consequently, I rule as follows;

- i. The Defendants are not found to be in contempt of Court as alleged.
- ii. However, the orders of interlocutory injunction granted by this Court on 16/06/2023 restraining the Respondents, whether by themselves or through their employees, servants or agents, from advertising for sale, selling, alienating or in any way interfering with or disposing of the property known as Eldoret Municipality/Block 13/201 registered in the name of 2nd Plaintiff pending the hearing and determination of the main suit, remains in force until and unless the Defendants comply with the conditions stated in the orders made in the said Ruling.
- iii. The Defendants shall bear the costs of this Application.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 20TH DAY OF DECEMBER 2024.

.....

WANANDA J. R. ANURO

JUDGE

Delivered in the presence of:

Mr. Mayiga for the Plaintiffs

Mr. Songole for the Defendants

Court Assistant: Brian Kimathi

