



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 90 OF 2015

1. NGENGI MUIGAI

2. CATHERINE WANGUI NGENGI.....PLAINTIFFS

-VERSUS-

1. EAST AFRICAN BUILDING SOCIETY LTD

2. LUCY MBUGUA

3. EAST AFRICAN BUILDING SOCIETY BANK LTD

4. ECO-BANK (K).....DEFENDANTS

RULING

1. The plaintiffs filed a Notice of Motion application dated 31st August, 2020 brought under the provisions of Sections 3 and 3A of the Civil Procedure Act, Cap 21 Laws of Kenya, Sections 4, 24, 25 and 29 of the Contempt of Court Act No. 46 of 2016 and all other enabling provisions of the law. The plaintiffs seek the following orders –

(i) Spent;

(ii) That this Honourable Court be pleased to review the order granted on 16th April, 2021;

(iii) That this Honourable Court be pleased to cite the Managing Director to the 4th defendant bank Mr. Cheikh Travaly together with Mr. D.B. Mehta and Mr. Raj Pandit for the 3rd defendant for contempt of Court for disobedience of the order of Court in the ruling delivered on 4th February, 2020;

(iv) That the Honourable Court to order (sic) the said Managing Director to the 4th defendant, Mr. D.B. Mehta and Mr. Raj Pandit for the 3rd defendant to pay a fine of Kshs. 200,000/= each or be detained and imprisoned in civil jail for a period of 60 days until they purge the contempt; and

(v) Costs of this application be borne by the 4th defendant in any event.

2. The application is premised on the grounds on the face of it and the affidavit sworn on 31st August, 2020 by Catherine Wangui Muigai, the 2nd plaintiff. The defendants on 27th April, 2021 filed a replying affidavit sworn on 26th April, 2021 by Caroline Mbenge, the 4th defendant's Head of Legal and Company Secretary.

4. The application was canvassed by way of written submissions. The plaintiffs' submissions were filed on 26th July, 2021 by the law firm of Wafula Simiyu & Co. Advocates, while the defendants' submissions were filed on 28th September, 2021 by the law firm of A.B. Patel & Patel.

6. Mr. Simiyu, learned Counsel for the plaintiffs submitted that the Court order in issue was very time specific, since it was to be complied with within 30 days from the 4th February, 2020 but the same was not done. He pointed out that even though leave to appeal was sought and a Notice of Appeal was filed, an appeal was never filed.

7. It was submitted that the 4th defendant being a banking institution, is required to keep proper verifiable records of accounts of its clients' transactions and as such, the records submitted by the defendants were intended to be intentionally confusing since the entries involve third parties not related to the suit and that only 7 cheques were provided to show payments to the 1st defendant from 24th November, 2004 to 5th September, 2007.

8. He submitted that it has well been established under the Contempt of Court Act and the Civil Procedure Act that any person who is aware of an existing Court order and knowingly disobeys it, is guilty of an offence and can be punished by either imprisonment or a fine.

9. Mr. Simiyu also submitted that since the 4th defendant is a corporate entity, it can only be punished through its directors and/or senior management employees.

10. On his part, Mr. Khagram, learned Counsel for the defendants submitted that it was common ground that the defendants were ordered to furnish the plaintiffs with true accounts of all the rent collected by its agents from the suit property. He stated that the Court noted that the plaintiffs were stifling the expeditious hearing and determination of the suit by frivolous and vexatious applications, and the Court directed that the application dated 4th October, 2017 would be the last application filed so that the substantive dispute could be heard. He further stated that the plaintiffs never challenged the ruling delivered on 4th February, 2020 and as such, the integrity, dignity and authority of the Court must be jealously protected.

11. He submitted that the defendants had strictly complied with the orders of the Court by furnishing the true accounts of all rent collected by the defendants' agents from the period 8th January, 2004 to 31st January, 2020 and without exception and therefore, the instant application was made in bad faith and was made contrary to the ruling delivered on 4th February, 2020.

12. It was also submitted that it has always been the defendants' case that the auction sale was valid. It was contended that there was no valid agreement between the parties and the application for contempt was premised on an allegation of non-compliance with a gentleman's agreement and the defendants could not be held to be in contempt of Court.

13. Mr. Khagram cited the case of **EM vs KFM& NGK [2020] eKLR**, where the Court held that contempt must be proved beyond reasonable doubt and since the liberty of the alleged contemnor is threatened, then the power of the Court must be exercised with utmost care.

ANALYSIS AND DETERMINATION.

14. This Court has considered the application as well as the supporting and replying affidavits. It has also considered rival submissions including the various cases cited. The issue that arises for determination is whether the application dated 31st August, 2020 is merited.

15. In the supporting affidavit sworn by Catherene Wangui Muigai, the 2nd plaintiff, she averred that the plaintiffs remain the registered and beneficial owners of LR No. Block XVII/587 Kenyatta Road, Mombasa. She also averred that the 1st defendant advanced a loan to them and that they defaulted, prompting the 1st defendant to seek to exercise its statutory power of sale. She deposed that attempts to sell the suit property in the year 2003 were thwarted when the plaintiffs talked to the then 1st defendant's Director, Hon. Moody Awori, and it was agreed between them that the suit property would not be sold. She further deposed that the suit property was allegedly auctioned and sold to the 2nd defendant at Kshs. 19,000,000/=, and that an application seeking to stop the transfer of the suit property to the 2nd defendant was dismissed.

16. The deponent averred that at the instance of the Court, parties met on 5th September, 2018 at the defendant's (4th defendant's) office to attempt an amicable settlement. She also averred that it was agreed, and the bank undertook to provide the agreed statements within 30 days of the meeting and that the defendants were to provide two sets of statements of accounts, one from the inception of the loan, assuming that no valid auction took place for which the debt would continue accruing interest up to date, and all the rental collections would be considered as repayments into the account for the parties to consider what would be the status of the account to date; the second set of accounts would be from the inception of the loan up to the date of the auction on 7th January, 2004, factoring in the declared auction proceeds of Kshs. 19,000,000/=. That the second statement would require the defendants to declare the rental collections made since 2004 to date and the rental collections from the banks' tenants would be considered its income.

17. The deponent averred that the non-compliance with the gentleman's agreement prompted the plaintiffs to file an application which resulted in a ruling delivered on 4th February, 2020 in which the defendants were ordered to file their statement of accounts for rental collection from 7th January, 2004 to 31st January, 2020 within 30 days of the ruling, which is now past. Further, it was averred that in compliance with the order of the Court, parties appeared before the Mediator Mr. Allan Nyange but the defendants failed and/or refused to file their case summary within the 45 days' timeline.

18. It was deposed that the willful disobedience of the Court Order by the defendants was prejudicial to the plaintiffs' case as they have not been able to prepare the case for pretrial conference, and no explanation had been proffered by the defendants as to the difficulty they had encountered in availing the statements of account. The plaintiffs stated that it would be in the interest of justice if the orders sought were granted.

19. In the replying affidavit, the deponent averred that the orders issued on 4th February, 2020 were specific as they related to true accounts of all the rents collected by the defendant's (4th defendant's) agents and/or its agents from the suit property beginning 8th January, 2004 to 31st January, 2020. She deposed that it is common knowledge that during the Covid -19 pandemic, it was extremely difficult to engage their rent collecting agents on provision of accounts. She stated that the said position was appreciated by this Court and the defendants were granted 15 days to retrieve the accounts. It was averred that the defendants on 29th January, 2021 through their Advocates filed in Court the

true accounts of rent collection received from D.K. Real Estate Limited from 8th January, 2004 to 31st January, 2020. She deposed that it was unreasonable for the plaintiffs to insist on proceeding with the present application, which can only be termed as a fishing expedition, and for collateral purposes.

20. It was deposed that regardless of the Notice of Appeal filed by the defendants, they had still complied with the Court orders as directed. It was further deposed that the subject Court orders are clear, unambiguous with regard to what it required the said defendant to file in Court. The defendants reiterated that there has never been any agreement formal or gentleman's as alleged by the plaintiffs for the provision of anything. The defendants claimed that the true state of affairs is that the plaintiffs had just embarked on a fishing expedition to try to build a case where there is none.

21. The deponent averred that it has always been its position that the sale was lawful and valid and the plaintiffs accepted and acknowledged that they were indebted to the bank which could validly exercise its statutory power of sale.

22. This Court has carefully read the ruling delivered by Judge P. J. Otieno on 4th February, 2020. It is important to note the following findings by the said Judge-

“7. From the onset, I take the view that this is a file in which the court must give way forward (sic), even if appears to the parties, or any of them, that the court appears to superintend upon them in the manner of canvassing their matter. The kind of way forward I must give is that the continued concentration on interlocutory application has denied the matter the chance to be disposed off (sic) and accorded to it an underserved overstay as a pending matter.

8. For that reason I direct that this be the last interlocutory application to be entertained by the court so that the matter must now be given a hearing date for purposes of the substantive dispute being heard and determined.”

9.

10.

11...I do not fathom any prejudice that may visit the Defendant if it is ordered to avail the accounts. For that reason, I find merit in the prayer, as said before, as a facilitative relief, for use by the court if the rental yield shall become of relevance to its final determination.

12. I do grant an order that within 30 days from the date of this ruling, the defendant shall file and serve upon the plaintiff true accounts of all the rents collected by its agents from the suit property beginning the 8/01/2004 till 31/01/2020.

23. In the above ruling, Judge P.J. Otieno had expressed his resolute view that the matter be set down for hearing of the main suit as opposed to dwelling on interlocutory applications. This was not to be. The plaintiffs filed the instant application stating that there had been non-compliance with the orders made by the Court on 4th February, 2020 and as such, the defendants are in contempt of Court. It is the finding of this Court that the present application could not have been the kind of application that was contemplated when the Court forbade the filing of interlocutory applications. In my view, the present application seeks to preserve the rule of law and the dignity of the Court.

24. Contempt of Court is that conduct or action that defies or disrespects authority of Court. **Black’s Law Dictionary**, 10th Edition, defines contempt as follows:

“The act or state of despising; the quality, state or condition of being despised. Conduct that defies the authority or dignity of a court or legislature. Because such conduct interferes with the administration of justice, it is punishable, usually by fine or imprisonment.”

25. Contempt is conduct that impairs the fair and efficient administration of justice. Section 5 of the Judicature Act confers jurisdiction on the superior Courts to punish for contempt. The plaintiffs relied on provisions of the Contempt of Court Act No. 46 of 2016. The said Act was found by a Court of law to be unconstitutional and was nullified in the year 2018. See **Kenya Human Rights Commission v Attorney General & 2 others** [2018] eKLR.

26. The Court of Appeal in **Kyoga Hauliers Limited v Long Distance Truck Drivers & Allied Workers Union** [2015] eKLR held as follows-

“The power to deal with contempt of court is provided for under Section 5(1) of the Judicature Act, Section 63(c) of the Civil Procedure Act and Order 40 Rule 31 of the Civil Procedure Rules. Of importance in the determination of this issue is however Section 5(1) of the Judicature Act, since Section 63(c) of the Civil Procedure Act and Order 40 Rule 31 of the Civil Procedure Rules are concerned with disobedience of an order of temporary injunction and resultant consequences which are punishment in the form of imprisonment or attachment and sale of the contemnor’s property.” (emphasis added).

27. In **Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & another** [2005] KLR 828, Ibrahim, J (as he then was), underscored the importance of obeying Court orders. He stated as follows-

“It is essential for the maintenance of the rule of law and order that the authority and the dignity of our courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly

with proved contemnors. It is the plain and unqualified obligation of every person against whom an order is made by court of competent jurisdiction, to obey it unless and until the order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by the order believes it to be irregular or void.” (emphasis added).

28. When addressing the reasons why Courts punish for contempt, the Court in **Sheila Cassatt Issenberg & another v Antony Machatha Kinyanjui** [2021] eKLR stated thus -

“The reason why courts punish for contempt is to uphold the dignity and authority of the court, ensure compliance with directions of the court, observance and respect of due process of law, preserve an effective and impartial system of justice, and maintain public confidence in the administration of justice by courts. Without sanctions for contempt, there would be a serious threat to the rule of law and administration of justice. For a party to be cited for contempt, he must have violated and or disobeyed an order that was directed at him.”

29. Contempt of Court is in the nature of criminal proceedings and, therefore, the standard of proof of a case against a contemnor is higher than that of a balance of probability, the reason being that the liberty of the subject is usually at stake and the applicant must prove wilful and deliberate disobedience of the Court order, if he were to succeed. This was so stated in **Gatharia K. Mutikika v Baharini Farm Limited** [1985] KLR 227-

“A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be proved satisfactorily.... It must be higher than proof on a balance of probabilities, almost but not exactly, beyond reasonable doubt. The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit criminal cases. It is not safe to extend it to offences which can be said to be quasi-criminal in nature.

However, the guilt has to be proved with such strictness of proof as is consistent with the gravity of the charge... Recourse ought not to be had to process of contempt of court in aid of a civil remedy where there is any other method of doing justice. The jurisdiction of committing for contempt being practically arbitrary and unlimited, should be most jealously and carefully watched and exercised with the greatest reluctance and the greatest anxiety on the part of the judge to see whether there is no other mode which is not open to the objection of arbitrariness and which can be brought to bear upon the subject... applying the test that the standard of proof should be consistent with the gravity of the alleged contempt... it is competent for the court where contempt is alleged to or has been committed, and or an application to commit, to take the lenient course of granting an injunction instead of making an order for committal or sequestration, whether the offender is a party to the proceedings or not.”

30. The plaintiffs herein allege that there has been non-compliance of the orders issued by the Court vide the ruling delivered on 4th February, 2020. The defendants on their part allege that there has been compliance of the said Court orders. It was averred that through a letter dated 29th January, 2021, the said true accounts were forwarded to the plaintiffs.

31. It is worth noting that the order made by the Court for the provision of true accounts by the defendants, were issued as a facilitative relief, for reference by the Court in the event that the rental yield becomes of relevance in its final determination. It is therefore this Court’s view that the issue of sufficiency and/or inadequacy of the furnished accounts rests with the Court and not the plaintiffs herein and/or the defendants.

32. The **Black’s Law Dictionary** 10th Edition, defines accounts as:

“...A detailed statement of the debits and credits between parties to a contract or to a fiduciary relationship, a reckoning of monetary dealings.”

33. Having looked at the document furnished by the defendants to the Court vide the letter dated 29th January, 2021, as evidence of accounts for the period 8th January, 2004 to 31st January, 2020, the same is jumbled up, incomplete and not in a palatable state for this Court to refer to.

34. Section 1A of the Civil Procedure Act which deals with the overriding objective of the Act and the Rules aims at facilitating the just, expeditious, proportionate and affordable resolution of civil disputes. Section 1B of the said Act provides that the Court has a duty in furthering the overriding objective to handle all matters presented before it with the following aims; the just determination of proceedings, and also timely disposal of the proceedings. Section 3A of the Civil Procedure Act also gives the Court the inherent powers to make Orders that are necessary for the ends of Justice or to prevent abuse of the Court process. The Court is also guided by Article 159 of the Constitution, specifically Article 159(2)(d) which provides that in exercising judicial authority, justice shall be administered without undue regard to procedural technicalities.

35. This Court holds that the defendants defied the directive to render a true account when they deliberately filed jumbled up accounts. Consequently, since the order to be complied with was more of a facilitative order, this Court exercises its inherent powers in order to save precious judicial time, resources and meet the ends of justice and to prevent numerous applications being made on the contents of the true accounts. This Court therefore orders the parties herein to appoint an independent Auditor who will have unlimited access to the defendants’ accounts and/or their agents’ accounts, for the period specified by Judge P.J Otieno on 4th February, 2020 in order to help establish the true accounts within 60 days from the date of this ruling. Since there was willful disobedience of the Court’s directions by the defendants, they will bear the costs of the independent Auditor and the costs of the instant application.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA ON THIS 31ST DAY OF MARCH, 2022. In view of the declaration of measures restricting Court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the then Chief Justice on the 17th April, 2020 and subsequent directions, the ruling herein has been delivered through Teams Online Platform.

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Simiyu for the plaintiffs

Mr. Ondego for the defendants

Mr. Oliver Musundi – Court Assistant.