



Paragon Electronics Limited v Samsung Electronics Co Limited & 3 others (Civil Suit 171 of 2009) [2022] KEHC 3202 (KLR) (Commercial and Tax) (27 May 2022) (Ruling)

Neutral citation: [2022] KEHC 3202 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT 171 OF 2009**

A MSHILA, J

MAY 27, 2022

BETWEEN

PARAGON ELECTRONICS LIMITED DECREE HOLDER

AND

SAMSUNG ELECTRONICS CO LIMITED 1ST JUDGMENT DEBTOR

LINDA KARIMI KAAI 2ND JUDGMENT DEBTOR

KINAM KIM 3RD JUDGMENT DEBTOR

HYUN-SUK KIM 4TH JUDGMENT DEBTOR

RULING

Background

1. The Notice of Motion dated 1 August 8, 2020 was brought under article 159(2)(d) of *the Constitution*, Sections IA, 1B, and 34 of the *Civil Procedure Act* and section 5(1) of the *Judicature Act*. The Applicant sought the following orders;
 - a. Linda Karimi, Kaai, Kinam Kim, Hyun-Suk Kim be served by way of electronic email and such other electronic medium.
 - b. The Court do issue summons to Linda Karimi Kaai, Kinam Kim, Hyun-Suk Kim and any other director or manager of the Judgment Debtor served to appear in person before the Court to show cause why they and the Judgment Debtor should not be held in contempt of this Court's Order made on July 29, 2020.



- c. In default of Order (2) above or on failure to show cause the Judgment Debtor, Linda Karimi Kaai, Kinam Kim, Hyun-Suk Kim and any other Director or Manager of the Judgment Debtor served be cited for contempt of court and committed to civil jail for a term of six (6) months.
 - d. The costs of this Application be borne jointly and severally by Linda Karimi Kaai, Kinam Kim, Hyun-Suk Kim, the Judgment Debtor and any other Director or Manager of the Judgment Debtor served on full indemnity basis.
2. The Application was supported by the grounds on the face of it and by the sworn Affidavit of Clemence Wakiowho stated that the Judgment Debtor's failure and refusal to satisfy the Judgment and to comply with the order of July 29, 2020 is out of malice, impudence and bad faith and is a clear act of disregard for this Court's authority as pronounced in the Decree dated November 10, 2016 and affirmed in the orders of July 29, 2020 and by judicial notice, the Judgment Debtor is a profitable Company capable of easily satisfying the judgment herein.
 3. The Decree Holder has been diligent and has exhausted all means to execute the Decree herein and is now left with no option but to move against the Judgment Debtor as well as the managers and directors of the Judgment Debtor by way of contempt proceedings.
 4. The failure and blatant refusal by the Judgment Debtor to yield to this Court's orders amounts to an act of contempt which is a direct affront to the dignity and authority of this Court and due process of law.
 5. The Judgment Debtor filed a Replying Affidavit dated 1st September 2020 and stated that in accordance with the court orders issued by Hon. Lady Nzioka, the judge expressly stated that the Judgment Debtor was to pay the principle decretal sum and not "the decretal sum together with interest as calculated by the Deputy Registrar on 3rd December 2018 i.e. USD 125,011.99" as averred by the Decree Holder in their Supporting Affidavit.
 6. Upon receipt of the letter dated July 29, 2020, the Judgment Debtor through Samsung (EA) Ltd transferred the sum of USD 120,546.00 on July 30, 2020 being the decretal sum plus interest as from the date of judgment to April 17, 2018. The Decree Holder duly acknowledged receipt of the sum USD 120,546.00 via its letter and receipt dated 1 August 9, 2020.
 7. In response to the contempt accusations made by the Decree Holder, it is clear that from the above that the Judgment Debtor is not in contempt of any order and further they complied with the order which mandated them to pay the principle decretal sum within two days of receipt of the Judgment Debtor's bank account details which they did.

Applicant's Case

8. It was the Applicant's submission that the test to succeed in civil contempt proceedings as set out in the case of *Samuel M. N. Mweru & others v National Land Commission & 2 others* [2020] eKLR are;
 - a. Whether the terms of the court order were clear and unambiguous,
 - b. Knowledge of these terms by the Respondent,
 - c. Failure by the Respondent to comply with the terms of the order.
9. It is evident that the terms of the order given on July 29, 2020 were clear, unambiguous and binding on the Judgment Debtor. The Decree Holder fulfilled their part of the order by availing the bank account details to the Judgment Debtors for settlement of the decretal sum, while the Judgment Debtor continues to disregard the terms of the order to settle the decretal sum.



10. The Judgment Debtor is fully aware of the order of the court given on 29th July 2020. By dint of counsel for the Judgment debtor attending court on the day the order was delivered, it is clear manifestation and confirmation that the Judgment debtor had full knowledge of the court orders as was held in *Shimmers Plaza Limited v National Bank of Kenya Limited* [2015] eKLR
11. The representatives of the Judgment debtor, Linda Karimi Kaai, Kinam Kim, and Hyun-Suk Kim were also personally served with the civil contempt proceedings being the Decree Holder's contempt Application dated August 18, 2020 as evidenced by the affidavit of service sworn by Valentine Ataka on 1 September 5, 2020.
12. It was the Applicant's case that it had passed the four tests for contempt proceedings, it is just to punish the Judgment Debtor, Samsung Electronics East Africa, the hitherto Objector in the proceedings and their respective officers and directors so as to uphold the Court's Authority.
13. The Applicant submitted that the Judgment Debtor's acts of contempt are perpetuated through its managers and directors who should also be committed for contempt. The Applicant relied on the case of *Eliud Muturi Mwangi (Practising in the name and style of Muturi & Company Advocates) v LSG Luftbansa Services Europa/ Africa GMBH & another* [2015] eKLR where the court stated that the law is that any person who has committed an act of contempt of court is liable for indictment even third parties who are not parties in a suit may be committed for contempt of court.

Respondent's Case

14. The Respondents submitted that the Decree Holder has misled the court in so far as it received payment as the court ordered, it has not specified any part of the court order that was disobeyed nor has it particularized these, further the attempts to recover from the Judgment Debtor and lift the corporate veil have not been taken.
15. The Application should be dismissed with substantial costs as the applications that have been presented by the Decree Holder in these proceedings have led to considerable waste of judicial time and unnecessary costs.
16. The Judgment Debtor has complied with the court order by remitting the sums as directed and even if it breached the terms, the Decree Holder could only execute against it or apply to lift the corporate veil so as to claim satisfaction of the decree against its directors.
17. The Respondent argued that it is apparent that the contempt proceedings are intended to execute a monetary decree contrary to the position in law under section 38 of the *Civil Procedure Act* (CPA) and Order 22 of the *Civil Procedure Rules*. The Contempt proceedings are not a means of execution of a monetary decree and the Decree Holder has failed to follow the laid down procedure or exhausted all means to execute its decree.
18. It was noted by the Respondent that Clemence Wakio in his Affidavit, relied on the Decree Holder's authority dated January 24, 2019. The Respondent asked the Court to note that at this time Mr. Bulent was acting in person contrary to the provisions of Order 9 rule 8, 9, & 10 of the *Civil Procedure Rules 2010*. The Ruling of February 21, 2019 by Hon. Lady Justice Muigai effectively dismissed all applications and documents filed by or on behalf of the Decree Holder while acting in person. These documents are therefore not properly on the court's record and cannot be relied on.
19. Mr. Gulbahar resides in the United Arab Emirates (outside commonwealth) and his affidavit ought to have been taken before a Notary Public in the UAE. The affidavit in court bears no signature or seal



of attestation of any Notary Public in the UAE and as such is defective and cannot be admissible as evidence.

20. The Decree Holder's Debtors application is not founded on any law, it is defective and premature. The Decree Holder has not proven the threshold for contempt orders. The contempt application should be dismissed.

Issues For Determination

21. After considering the Application, the Response and the written submissions the following issues are for determination;
 - a. Whether leave should be granted to the Applicant to serve Linda Karimi, Kaai, Kinam Kim, Hyun-Suk Kim by way of electronic email and such other electronic medium;
 - b. Whether the Respondents are in contempt of the Court orders of 29th July 2020;

Analysis

Whether leave should be granted to the Applicant to serve Linda Karimi, Kaai, Kinam Kim, Hyun-Suk Kim by way of electronic email and such other electronic medium;

22. The law provisions on service of documents in this level of Court are provided under Order 5 of the [*Civil Procedure Rules 2010*](#) as amended in 2020, and supplemented by the Practice Directions for the Protection of Judges, Judicial Officers, Judiciary Staff, other Court Users and the General Public from the Risks Associated with the Global Corona Virus Pandemic, Gazette Notice No. 3137 of 2021.
23. Both parties herein claim to have relied on these as they carried out steps in the instant Application. The Applicant seeks leave to effect service upon the Respondents by way of electronic mail.
24. Rule 5 of Gazette 3137 provides that;

“During this period, parties are directed, whenever possible and unless otherwise directed by the court, to serve court documents and processes through electronic mail services and mobile enabled messaging applications as provided for under Order 5 Rules 22B and 22C of the Civil Procedure Rules.”
25. Therefore, Rule 5 should be read with the applicable Rule in the Civil Procedure Rules, 2020. This is Order 5 Rule 22B which provides for Electronic Mail Service. The relevant provisions of the Rule state as follows:
 - “1. Summons sent by Electronic Mail Service shall be sent to the defendant's last confirmed and used e-mail address.
 2. Service shall be deemed to have been effected when the Sender receives a delivery receipt.
 3. An officer of the court who is duly authorized to effect service shall file an Affidavit of Service attaching the Electronic Mail Service delivery receipt confirming service.”
26. In light of the foregoing, the Applicant is granted leave to serve Linda Karimi, Kaai, Kinam Kim, Hyun-Suk Kim by way of electronic email.



Whether the Respondents are in contempt of the Court orders of July 29, 2020?

27. It is an established principle of law that in order to succeed in civil contempt proceedings, the applicant has to prove
- (i) the terms of the order were clear and unambiguous;
 - (ii) Knowledge of these terms by the Respondent; and
 - (iii) Failure by the Respondent to comply with the terms of the order.
28. The Court of Appeal in the case of *Micheal Sistu Mwaura Kamau V Director of Public Prosecutions & 4 others* [2018] eKLR restated the essentials required to be established in contempt proceedings as follows: -

“The court must be satisfied that the alleged contemnor has willfully and deliberately disobeyed a court order that he was aware of. This was observed by the Supreme Court in *Republic v Ahmad Abolfathi Mohammed & another*. Secondly, as this Court emphasized in *Jihan Freighters Ltd V Hardware & General Stores Ltd and in AB & another V R B* [2016] eKLR, to sustain committal for contempt of court, the order of the court that is alleged to have been deliberately disobeyed must be clear and precise so as to leave no doubt as to what a party was supposed to do or to refrain from doing. Lastly, the standard of proof in committal proceedings is higher than proof on a balance of probabilities, though not as high as proof beyond reasonable doubt.”

29. Were the terms of the order clear and unambiguous? On July 29, 2019 ordered that within 2 days the Decree Holder to inform the Judgment Debtor of the Decree Holder’s Bank account to which the decree is to be paid and after being informed of the Decree holder’s bank account details; the judgment debtor to pay the decretal sum together with interest as calculated by the Deputy Registrar on 3rd December 2018 that is USD 125, 011.99.
30. Further, the counsel for the Judgment debtor attended court on the day the order was delivered, this is a clear confirmation that the Judgment debtor had full knowledge of the court orders.
31. Have the Respondents complied with the terms of the order? On 30th July 2020 the Judgment Debtor made a payment to the Decree Holders Account for the sum of USD 120, 546. This is evidenced by the letter dated August 19, 2021 marked “SEC 2” in which Samsung Electronics Company authorized the Judgment debtor to effect payment of USD 120, 546 pursuant to the ruling of the court issued on July 29, 2020. This was followed by the Decree Holder’s acknowledgment letter dated 1 August 9, 2020 albeit the Decree Holder taking it upon itself to state in the said letter that the amount transferred was to settle costs in the conduct of the proceedings.
32. In its supplementary submissions, the Decree Holder acknowledged the payment of the sum as follows;

“Be that as it may, we draw the courts attention to the fact that the amount owed by the Judgment debtor as calculated by the Registrar on 3rd of December 2018 is USD 125, 011.89. The alleged payments by the Judgment debtor as per the remittance advise dated 30th July is USD 120, 546.00. Technically speaking, that is less the amount directed by this Honourable Court. On that concept alone, the Judgment Debtor is still in contempt of court orders.”



33. It is this Court's view that the Judgment Debtor has partly complied with the court order by remitting the sums by paying USD 120, 546 instead of USD 125, 011.89.

34. In the case of *Sheila Cassatt Issenberg & another v Antony Machatha Kinyanjui* [2021] eKLR the court held;

“But even as courts punish for contempt to safeguard the peaceful and development of society and the rule of law, it must be borne in mind that the power to punish for contempt is a discretionary one and should be used sparingly. That is why the court observed in *Carey v Laiken* (supra), that if courts were to find contempt too easily, “a court's outrage might be treated as just so much bluster that might ultimately cheapen the role and authority of the very judicial power it seeks to protect. The court's contempt power should be used cautiously and with great restraint. It is an enforcement power of last resort rather than first resort.”

35. Taking into consideration the above mentioned case and also there being substantial payment of the decretal sum this court will exercise its discretion and not hold the Respondents in contempt at this stage.

Findings and Determination

36. For the forgoing reasons this court makes the following findings and determinations;

- (i) This court finds that the contempt of court application is partially meritorious on the stanchions of ‘terms of the order and knowledge of the court order’;
- (ii) In the absence of any orders for stay the Respondents are directed to fully comply with the orders of this court dated 29th July, 2020 by paying the remaining decretal amount in the sum of USD4,465.89 within sixty (60) days from the date hereof;
- (iii) The Applicant is hereby granted leave to serve Linda Karimi Kaai, Kinam Kim, Hyun-Suk Kim, the Judgment Debtor and any other Director or Manager of the Judgment Debtor by way of electronic email;
- (iv) Mention on 25/07/2022 for compliance and final determination of this application;
- (v) Costs shall abide the final outcome.

Orders Accordingly.

DATED, SIGNED AND DELIVERED ELECTRONIALLY AT NAIROBI THIS 27TH DAY OF MAY, 2022.

HON. A. MSHILA

JUDGE

In the presence of;

Odiembo holding brief for Ataka for the Applicant

Ouma for the Respondent

Lucy-----Court Assistant

