



**Lavington Security Limited v Commissioner For Co-operative Development & 2 others (Civil Case 61 of 2019) [2022] KEHC 10860 (KLR) (Commercial and Tax) (23 June 2022) (Ruling)**

Neutral citation: [2022] KEHC 10860 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE 61 OF 2019  
WA OKWANY, J  
JUNE 23, 2022**

**BETWEEN**

**LAVINGTON SECURITY LIMITED ..... PLAINTIFF**

**AND**

**COMMISSIONER FOR CO-OPERATIVE DEVELOPMENT ..... 1<sup>ST</sup> DEFENDANT**

**LAVINGTON UNITED SACCO SOCIETY LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**AND**

**THE CO-OPERATIVE BANK OF KENYA LIMITED . PROPOSED DEFENDANT**

**RULING**

1. This ruling is with respect to three applications, the application dated 5<sup>th</sup> November 2020 for contempt, the application dated 9<sup>th</sup> September 2020 for review and the application dated 5<sup>th</sup> March 2020 by the proposed 3<sup>rd</sup> defendant for joinder of parties.

**Application Dated 5th March 2021**

2. The proposed 3<sup>rd</sup> defendant filed the application seeking the following orders:-
  - 1) Spent.
  - 2) The Applicant, The Co-operative Bank of Kenya Limited, be Joined in these proceedings as a party and fully participate in these proceedings as such;
  - 3) That the Applicant, upon joinder, be allowed and/or be at liberty to file any such pleadings, affidavits and any documents that it may desire in propagating its case in safeguarding its



interest that stand prejudiced in absence of the applicant and to enable this Honourable Court reach a fair and just determination of the dispute in issue.

- 4) That the Applicant be awarded the costs of this application.
3. The application is supported by the affidavit of the proposed 3<sup>rd</sup> defendant's Legal Officer Elissa Otemba and is based on the following grounds:-
- 1) That the Applicant is a limited Liability Company duly incorporated in Kenya under the Companies Act Laws of Kenya and on business within the Republic of Kenya under the Banking Act and regulated by the Central Bank of Kenya;
  - 2) That the applicant serves the banking needs of small businesses, large corporations and individuals, focusing on the needs of cooperative societies in Kenya;
  - 3) That the Applicant in course of its business takes in deposit from the general public and provides credit facility to borrowers through purchase of and loans;
  - 4) That the Applicant extended some loan facility in the tune of Kshs 30,000,000 to the 2<sup>nd</sup> Defendant herein- The facility was secured by an irrevocable instruction from the Sacco, the 2<sup>nd</sup> Defendant herein to the Plaintiff to continue channeling their members monthly check off through the Proposed Party/Applicant and a letter of undertaking from the employer (the Plaintiff herein) to comply with the irrevocable instructions;
  - 5) The Plaintiff herein had a binding obligation to remit the deductions to the applicant, however the Plaintiff neglected, refused and or ignored to remit the Sacco members deductions to the Applicant, hence necessitating legal action by the 2<sup>nd</sup> Defendant
  - 6) That the proceedings herein have a direct bearing in the manner in which the Proposed party undertakes its business particularly the recovery of the outstanding facility advanced and arrears to the 2<sup>nd</sup> Defendant, which facility was premised on the Plaintiffs Undertaking to remit check-off to the applicant;
  - 7) That the Proposed 3<sup>rd</sup> Defendant has an identifiable stake in the subject matter and a legal Interest in the outcome of this suit being the unremitted deductions;
  - 8) That this is a matter of public Interest considering that the proposed Defendant is a deposit taking institution, which money belongs to the general public, payable on demand, and should therefore be protected;
  - 9) That any orders or reliefs granted that are adverse to the interest of the proposed 3<sup>rd</sup> Defendant will lead to financial loss to the business of the applicant;
  - 10) That no prejudice will be occasioned to any party howsoever if the applicant is allowed to participate in these proceedings as a party.
4. The plaintiff opposed the application through the replying affidavit of its Director Mr. Jonah Kiprotich Telo who avers that the 2<sup>nd</sup> defendant obtained a loan facility from the proposed 3<sup>rd</sup> defendant on the understanding that it would re-route its members' contribution to a bank account held with the proposed 3<sup>rd</sup> defendant. He states that the bank instructed the plaintiff to reroute its employees' contributions which instructions the plaintiff accepted through its letter dated 24<sup>th</sup> April 2019.



5. It is the plaintiff's case that it has no contractual relationship or claim against the proposed 3<sup>rd</sup> defendant so as to justify its inclusion in the case as a defendant. The plaintiff avers that the proposed 3<sup>rd</sup> defendant should have instead applied to be enjoined in the suit as an interested party as it does not have a stake in the case.
6. Parties canvassed the application by way of written submissions which I have considered. The main issue for determination is whether the proposed 3<sup>rd</sup> defendant has made out a case for its inclusion in the case.
7. Order 1 Rule 10 (2) of the Civil Procedure Rules provides for substitution and addition of parties. as follows:-

“(2) The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit be added”

8. The application is based on the fact that the applicant extended loan facility to the 2<sup>nd</sup> defendant for Kshs 30,000,000 on condition that the plaintiff would channel the monthly checkoff in an account domiciled at the proposed 3<sup>rd</sup> defendant's bank. The applicant alleges that the plaintiff did not honor its part of the bargain as it refused to remit the Sacco members deductions to the applicant as agreed. The applicant maintains that it has a stake in the subject matter and outcome of the case.
9. The plaintiff, on the other hand, argued that that there was no contractual relationship between it and the proposed defendant. The plaintiff submitted that the applicant should have instead applied to be enjoined as an interested party and not a defendant.
10. In Francis Karioko Muruatetu & Another v Republic & 5 others Petition 15 as consolidated with 16 of 2013[2016]eKLR the Supreme Court identified the following applicable conditions for joinder and held as follows: -

“One must move the Court by way of a formal application. Enjoinment is not as of right, but is at the discretion of the Court; hence, sufficient grounds must be laid before the Court, on the basis of the following elements:-

- (i) The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.
- (ii) The prejudice to be suffered by the intended interested party in case of non-joinder, must also be demonstrated to the satisfaction of the Court. It must also be clearly outlined and not something remote.
- (iii) Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the Court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the Court.”



11. In the case of Lucy Nungari Ngigi & 128 Others v National Bank of Kenya Limited & Another [2015] eKLR the Court stated as follows when considering whether to grant leave to join a party:-

“Joinder of parties is governed by Order 1 of the Civil Procedure Rules. In law, joinder should be permitted of all parties in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally; or in the alternative, where if such persons brought separate suits, any common question of law of fact would arise. See also Order 7 Rule 9 of the Civil Procedure Rules. The court may even in its own motion add a party to the suit if such party is necessary for the determination of the real matter in dispute or whose presence is necessary in order to enable the court to effectively and completely adjudicate upon and settle all questions involved in the suit. Therefore, joinder of parties is permitted by law and it can be done at any stage of the proceedings. But, joinder of parties may be refused where such joinder: will lead into practical problems of handling the existing cause of action together with the one of the party being joined; is unnecessary; or will just occasion unnecessary delay or costs on the parties in the suit. In other word, joinder of parties will be declined where the cause of action being proposed or the relief sought is incompatible to or totally different from existing cause of action or the relief. The determining factor in joinder of parties is that a common question of fact or law would arise between the existing and the intended parties.”

12. From the above cited authorities, it is clear that an applicant for joinder must demonstrate that it has a stake in the proceedings and a legal right that may be prejudiced by the proceedings.
13. A perusal of the pleadings filed herein, especially the plaintiff’s replying affidavit dated 26<sup>th</sup> April 2021, reveals an admission by the plaintiff that the 2<sup>nd</sup> defendant obtained a loan facility from the proposed 3<sup>rd</sup> defendant and that the plaintiff’s members’ contributions were to be channeled to the proposed 3<sup>rd</sup> defendant’s bank. The plaintiff also admits that it undertook to submit the remittances collected from its employees to the proposed 3<sup>rd</sup> defendant. The proposed 3<sup>rd</sup> defendant’s case is premised on the claim that the plaintiff failed to honour its part of the agreement. It is on this basis that the applicant seeks to be enjoined in the suit.
14. I note that the main contention between the parties is with respect to remittance of the plaintiff’s employees contributions to the proposed 3<sup>rd</sup> defendant. I find that the transactions in question relate to the same subject matter of the suit. I further find that it will be in order to enjoin the proposed 3<sup>rd</sup> defendant to the suit so that the merits of each party’s can be determined without any protraction of time.
15. In the upshot I find that the application is merited and I therefore allow it as prayed with orders that costs shall abide the outcome of the main suit.

#### **Application Dated 9th September 2020- (For Review)**

16. The applicant/plaintiff, Lavington Security Limited, filed the application dated 9<sup>th</sup> September 2020 seeking the following orders:-
1. Spent.
  2. Spent.
  3. That this Honourable Court be pleased to review and set aside the Ruling of Hon. Lady Justice Maureen A. Odero dated 4<sup>th</sup> September, 2020 and consequential orders from the said Ruling



and substitute it with a declaration that; “the plaintiff has duly satisfied the terms and/or its obligations pursuant to the Arrears Agreement dated 21<sup>st</sup> February 2019 adopted as the Orders of the Court on the 27<sup>th</sup> February, 2019”,

4. That the Honourable Court be pleased to issue a restraining order and/or mandatory injunction restraining the Respondents, by themselves, their agents and or servants from demanding a sum of Kshs. 48,026,779 from the Applicant and or commencing any legal recovery proceedings thereof and/or from issuing to and/or enforcing Agency Notices against the Applicant’s bankers, any institution the Applicant has customer-bank relationship with and/or the Applicant’s bank accounts hereinbelow listed;

Lavington Securit Limited Bank Accounts		
	Family Bank Kilimani Branch	04600002800
2	Family Bank Laptrust Branch	01500006094
3	Co-Operative Bank	01136006759900
4	Jamii Bora Bank - Ngong Road Ac	11516940150001
5	Kenya Women Finance Bank	1002737272
6	Middle East Bank Current Ac-997	1003028000997
7	Middle East Bank Savings Ac-930	1003028000930
8	National Bank Limited	01020200173800



	Standard Chart Bank - 02	0102009493502
	Standard Chartered 03	0102009493503
	Standard Chartered A/C 00	0102009493500
	Standard Chartered Bank -01	0102009493501
	Standard Chartered Savings A/C	015200949350
	Trans National Bank Ltd	170980008
	Transnational Bank -Salary A/C	18340001
	United Bank Of Africa (UBA)	55030160004402

5. That costs of this application be in the cause.

17. The application is supported by the affidavit of Mr. Raymond Koech and is based on the following grounds:-

- a) That the Ruling given and dated 4<sup>th</sup> September 2020 was delivered on account of an error/mistake.
- b) That the Applicant herein is dissatisfied with the finding of the Honourable lady Justice Maureen A. Odero dated 4<sup>th</sup> September 2020 wherein the Honourable Court, in respect of the Applicant's Notice of Motion dated 23<sup>rd</sup> October 2019 seeking orders among others that the Honourable Court be pleased to issue a declaration order finding that the plaintiff has duly satisfied the terms and/or its obligations pursuant to the Arrears Agreement dated 21<sup>st</sup> February 2019 adopted as the Orders of the Court on the 27<sup>th</sup> February, 2019', in error, found that the Plaintiff had not complied.
- c) That in the said Ruling, at paragraph 22, the Honourable Court found that the Plaintiff was in breach of clause of the Arrears Agreement which provides that "the Plaintiff undertakes to remain current in all future remittances as provided in the Act i.e. by the 7<sup>th</sup> day after deduction is made."
- d) That the Plaintiff had explained to the Honourable Court ( which explanation had also been offered to the 1<sup>st</sup> Respondent by Plaintiff's letter dated 1<sup>st</sup> October 2019) that indeed all required remittances had been made, save that no remittances could be made after August 2019 because all its staff had voluntarily withdrawn from the 2<sup>nd</sup> Respondent, in respect of which the Honourable Court made a finding at paragraph 26 of the Ruling that apart from the claiming that its employees had withdrawn their membership, the plaintiff/Applicant has not provided any documentary proof of such withdrawal e.g. by way of affidavit sworn by the said employees (or letters written by



the said employees withdrawing their membership in the 2<sup>nd</sup> Defendant). This remains a mere allegation not proven.

- e) That the said evidence of withdrawal indeed existed, and are now hereby attached as annexure "RK-4" in the affidavit supporting the Notice of Motion Application ('the Application').
- f) That the effect of the Honourable Court's finding is that the Plaintiff's bank accounts are exposed to and may at any time now be the subject of Agency Notices by the Defendant over claims remittances it had no lawful reason to make.
- g) That should that happen, the most affected parties shall be the same over 8700 employees of the Plaintiff whom will not be able to be paid salaries despite working and who very much depend on the said salaries paid from the said accounts to sustain their families. A proper balance of rights/obligations by this Honourable Court as contemplated by Article 159(2)(a) of *the constitution*, under such situation of hardship exalted by COVID-19, should never lead to such results.
- h) That it is for the above grounds that we urge your ladyship to have this matter placed before Honourable Court for expedited hearing and determination.
- i) That bearing in mind the time bound nature of the application and the injustice likely to be met upon the Applicant and its employees, it is therefore important that this matter be Certified Urgent and determined accordingly.
- j) That there exists sufficient reason to review the Judgement given and dated the 4<sup>th</sup> September 2020 as the same now endanger the Salaries of over 8700 employees of the Plaintiff.
- k) That Honourable Court has powers to set aside and/or vary the order thereof so that the ends of justice are met.
- l) That this application is made timeously without any undue and unnecessary delays.

18. The 2<sup>nd</sup> defendant opposed the application through the replying affidavit of its Chief Executive Officer Mr. Raphael C. Kiptui who states that the application is incompetent, fatally defective and instituted with the sole aim of delaying the realization of the fruits of the defendant's/respondents judgment. He contends that the plaintiff/applicant failed to produce the alleged withdrawal letters for consideration during the hearing of the application dated 23<sup>rd</sup> October 2019 without giving any valid reason. He further states that the court should not be faulted for the plaintiff's failure to produce the said letters and that such failure cannot constitute an error apparent on the face of record.

19. He further avers that the plaintiff's assertion that it made all the remittances is untrue as the plaintiff continues to be in default. It is the 2<sup>nd</sup> defendant's assertion that it did not receive the alleged letters of withdrawal from its members as contemplated by law.

20. The 1<sup>st</sup> defendant opposed the application through Grounds of Opposition dated 25<sup>th</sup> May 2021 wherein it states that:-

- 1) That the application a gross abuse of the court's process.
- 2) That the Applicant merely refused to put evidence before the trial judge and has not explained why the same could not be availed during the hearing of the application.



- 3) That the Applicant’s application has not met the threshold for review under Order 45 Rule 1, 2 and 3 of the Civil Procedure Rules.
  - 4) That the order for mandatory injunction restraining the Respondents from demanding the sum of Kshs. 48,026,779 from the Applicant and or commencing any legal recovery proceedings and/or from issuing to and/or enforcing Agency Notices cannot issue since it is final in nature.
21. I have carefully considered application for review, the respondents’ response and the parties’ respective submissions. The main issue for determination is whether the applicant has made out a case for the review of the ruling dated 4<sup>th</sup> September 2020.
22. Section 80 of the *Civil Procedure Act* and Order 45 rule 1 of the Civil Procedure Rules provides the framework under which the court can exercise the power to review decisions. Section 80 provides that:-  
Any person who considers himself aggrieved—
- (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
  - (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”
23. Order 45(1) of the Civil Procedure Rules sets out the requirements for an application for review as follows:-
- “ Any person considering himself aggrieved
- a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
  - b) by a decree or order from which no appeal is hereby allowed and who from the discovery of new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed, or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgment to the court which passed the decree or made the order without unreasonable delay”.
24. The applicant seeks orders to set aside the impugned ruling of 4<sup>th</sup> September 2020 on the basis that there was a mistake in the court’s finding that it breached a clause in the Arrears Agreement as it did not tender documentary proof of its employees’ withdrawal from the 2<sup>nd</sup> defendant. The applicant contends that the ruling has exposed its bank accounts to agency notices.
25. The 1<sup>st</sup> and 2<sup>nd</sup> defendants argued that the application does not meet the conditions for the granting of orders for review as the applicant has not explained why it failed to produce the documentary evidence during the hearing of the application dated 23<sup>rd</sup> October 2019. The 1<sup>st</sup> defendant observed that the plaintiff is, through this application, asking the court to consider evidence that was not adduced during the hearing of the application.



26. Justice Maureen Odero observed as follows in the impugned ruling: -

“(26) There is no evidence that in withdrawing as members of the 2<sup>nd</sup> defendant any of the plaintiff’s employees complied with the above provisions of law. Apart from claiming that its employees had withdrawn their membership, the plaintiff/applicant has not provided any documentary proof of such withdrawal e.g. by way of affidavits sworn by the said employees (of letters written by said employees withdrawing their membership in the 2<sup>nd</sup> defendant). This remains a mere allegation which is not proven. The plaintiff/applicant did not approach the court seeking to vary the arrears agreement. The same including clause 5 binds the plaintiff.”

27. In the case of *Meera Bhanja v Nirmala Kumari Choudhury*, (1995) 1 SCC 170 the learned judge observed that:-

“...The power of review may be exercised on the discovery of new and important matter or evidence which, after the exercise of due diligence was not within the knowledge of the person seeking the review or could not be produced by him at the time when the order was made; it may be exercised where some mistake or error apparent on the face of the record is found; it may also be exercised on any analogous ground. But, it may not be exercised on the ground that the decision was erroneous on merits. That would be the province of a court of appeal. A power of review is not to be confused with appellate power which may enable an appellate court to correct all manner of errors committed by the subordinate court...”

28. *Similarly, in Nyamogo & Nyamogo v Kogo [2001] EA 170* cited in *Veleo (K) Limited* the court held as follows:-

“An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of un definitiveness inherent in its very nature and it must be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was possible. Mere error or wrong view is certainly no ground for review though it may be one for appeal”

29. The principle that emerges from the foregoing cases is that an order for review may be granted when the court finds it necessary to correct an error on its part. In the impugned ruling, however, the court faulted the plaintiff for failing to adduce evidence to prove that its employees had withdrawn their membership. The plaintiff has, in this application, attached letters to show that its employees withdrew membership. The plaintiff has however, not explained why the said letters were not presented in court at the hearing of the application that resulted in the impugned ruling. I find that there was no error or mistake on the part of the court so as to warrant the granting of the review sought. My humble view is that the plaintiff’s application is aimed at granting it second bite at the cherry by introducing new evidence after the ruling. I find that the application does not meet the threshold of the conditions under which orders for review can be granted and I therefore dismiss it with costs to the defendants.



### Application Dated 5th September 2020- (Contempt)

30. The plaintiff filed the application dated 5<sup>th</sup> September 2020 seeking the following orders:-

1. Spent.
2. Spent.
3. ■ THAT pending the hearing and determination of this Motion, there be a stay of prosecution of the proceedings in this case.
4. Leave be granted to the Plaintiff to have;
  - a. Standard Chartered Bank (kenya) Limited (hereinafter also "SCB"), by itself and/or accountable officers not cited herein, be enjoined in these proceedings as the 1<sup>st</sup> Interested Party/contemnor;
  - b. Dr. Davidson Mwaisaka (head, Legal Department, Scb) be enjoined in these proceedings as the 2<sup>nd</sup> Interested Party [contemnor];
  - c. Evelyn Wanjiru Gachanjah, (legal Counsel, SCB) be enjoined in these proceedings as the 3<sup>rd</sup> Interested Party/ Contemnor;
  - d. Charles Macharia, (relationship Manager, Scb) be enjoined in these proceedings as the 4<sup>th</sup> Interested Party/contemnor;
  - b) Geoffrey Njan'gombe, Ag Commissioner for Co-operative Development (the accountable officer of the 1<sup>st</sup> Defendant) as the 5<sup>th</sup> Interested Party/ Contemnor.
5. That upon admission as Interested Parties, each one of them, together with the 2<sup>nd</sup> Defendant/ 6<sup>th</sup> cited person, do show cause why they should not be committed to a civil jail for a period not exceeding six months or having their properties attached for having disobeyed and contemned the orders herein issued on the 23<sup>rd</sup> September 2020 and 30<sup>th</sup> September 2020 and duly served on them and duly served on them
6. That in default of compliance to the terms of prayer 5 herein being met, the interested Parties and each one of them be committed to a civil jail for a period not exceeding six months and/or have their properties attached for having disobeyed and contemned the orders herein issued on the 23<sup>rd</sup> September 2020 and 30<sup>th</sup> September 2020 and duly served on them
7. That the 1<sup>st</sup> and 2<sup>nd</sup> Defendant Contemnors/cited persons be ordered to purge their contempt by withdrawing and/or ceasing to send any letters of demand of remittances to the Plaintiff itself and/or threats of execution and/or issuing and/or enforcing Agency Notices against the Plaintiff bankers, or any institution the Applicant has customer-bank relationship pending the determination of the Notice of Motion Application dated 9<sup>th</sup> September 2020.
8. That the 1<sup>st</sup> Contemnor be ordered to purge the contempt by allowing the Plaintiff unlimited access to bank accounts operated by the Plaintiff on various branches of the 1<sup>st</sup> Contemnor and that the time count for the thirty (30) days compliance period for the Order No. 1 of the Orders of this Honourable Court issued on the 1<sup>st</sup> October 2020 only resume running after the 1<sup>st</sup> Contemnor purges its contempt. (Bearing in mind that fulfillment of the said condition is extrinsically depended on the Plaintiff's ability to access its bank accounts held at the 1<sup>st</sup> Contemnor).



9. That 1<sup>st</sup> and 2<sup>nd</sup> Defendants and all the Interest Parties be denied audience before this Honourable Court until they shall have purged the contempt.
  10. That the 2<sup>nd</sup> to 5<sup>th</sup> Contemnors, be personally in court on all dates appointed for the hearing of this Application Notice.
  11. That the OCS Central Police Station do assist in the arrest of, and the enforcement of all Orders herein issued upon the interested parties.
  12. That this Honourable Court be pleased to grant any relief it deems fit and just in the circumstance •
  13. The costs of this application be saddled upon the 1<sup>st</sup> Contemnor.
31. The application is supported by the affidavit of Mr. Jonah Kiprotich Telo and is based on the following grounds:-
1. The cited Interested parties and the persons sought to be enjoined in the proceedings for the purposes of the Contempt of Court proceedings have declined to obey the Orders secured in this matter issued on the 23<sup>rd</sup> September 2020 and 1<sup>st</sup> October 2020 yet the said Orders of this Honourable Court were granted in the presence of the intended 5<sup>th</sup> Interested party/Contemnor and were duly served upon the 1<sup>st</sup> to 4<sup>th</sup> Intended interested party/contemnor, thus they are fully aware of the said Orders.
  2. The said interested parties/cited persons have denigrated the authority and dignity of this Honourable Court, acting with contemptuous and contumacious impunity rendering the proceedings now before the Honourable Court an exercise in futility. Such must be brought to heel.
  3. The contumacious acts of the Intended Interested Parties/cited persons constitute a blatant violation and unmitigated breach of the Principle of the Rule of Law and good governance espoused in Article 10(2)(b) of *the Constitution* of Kenya.
  4. The cited contemnors herein sought to be enjoined as parties to the proceedings, acted in express violations of this Honourable Court's Orders made and issued on the 23<sup>rd</sup> September 2012 in the following terms;
    - 4.1. Whereas there were agency notices issued against the plaintiff's bank accounts held in the 1<sup>st</sup> contemnor pursuant to section 35 of the *co-operative Societies Act*, CAP 490 Laws of Kenya by the time of filing the Notice of Motion Application dated 9<sup>th</sup> September 2020, an application to review the ruling of Honourable Court delivered on the 4<sup>th</sup> September 2020 (attached as annexure 'LS-1' in the supporting affidavit herewith), on the 23<sup>rd</sup> September 2020 the Honourable Court Ordered that "the Agency Notices be and are hereby stayed until 30<sup>th</sup> September 2020". The understanding was that it was adverse for the Plaintiff to be prevented from operating its accounts held with the 1<sup>st</sup> Contemnor (for which the agency notices had placed in lien), failing to pay its over 3000 security men employees (during the hard times of COVID-19) as the Honourable Court determined a meritorious application for review.
    - 4.2. The said Court Orders was delivered in presence of the 5<sup>th</sup> Contemnor and was duly served upon the 1<sup>st</sup> Contemnor through its officers, the 2<sup>nd</sup> to 5<sup>th</sup> Contemnors, and despite the clear terms of the said Court Orders, the general consensus of the



1<sup>st</sup> to 5<sup>th</sup> Contemnors, through their replying email of 25<sup>th</sup> September 2020, from Commissioner Cooperatives cooperativecommissioner@gmail.com' was that, I wish to state that it is important to preserve the funds of the society until the matter in court is dispensed with. Under the circumstances, the Agency Notice is still in force until advised otherwise.//

- 4.3. The 1<sup>st</sup> Contemnor, whom in all expectation must be a neutral party in the matter, in ignorance of the Said Court order and under poor guidance from the 2<sup>nd</sup> to 5<sup>th</sup> Contemnors disobeyed the Court Orders by failing to allow the Plaintiff access its accounts. So now, the employees of the Plaintiff, poor askaris, bear the heaviest brunt of this violation by the 1<sup>st</sup> Contemnor, a big rogue multinational organization.
5. The cited contemnors herein sought to be enjoined as parties to the proceedings, acted in express violations of this Honourable Court's Orders made and issued on the 30<sup>th</sup> September 2012 in the following terms;
  - “5.1. Despite a clear court order that "an order of temporary injunction be and is hereby issued restraining the Respondents, by themselves, their agents and or servants from demanding a sum of Kshs. 48,026,779 from the Applicant and/or commencing any legal recovery proceedings thereof and/or from issuing to and/or enforcing Agency Notices against the Applicant's bankers, any institution the Applicant has customer-bank relationship with and/or the Applicant's bank accounts hereinbelow listed, the 1<sup>st</sup> Contemnor has still, under advisement of the 2<sup>nd</sup> to the 5<sup>th</sup> Contemnors, maintained the position that "it is important to preserve the funds of the society until the matter in court is dispensed with. Under the circumstances, the Agency Notice is still in force until advised otherwise.”
  - 5.2. The 1<sup>st</sup> Contemnor has still placed the Plaintiff's accounts under suspension for reasons only known to them.
6. In essence the Contemnors do not recognize that application and interpretation of the law in any given context is no longer left to the peculiar liking, dislike or whimsical interpretation of a party, and Article 10 of *the Constitution* of Kenya compels any person who interpret and apply any law must appraise him(it)self of the national values and ethos which include the rule of law social justice, integrity, transparency ■ among others.
7. The Contemnors, having been fully aware of this Court's Orders ought to be denied any audience before the Court until they have purged their contempt.
8. The act of Contempt cannot be tolerated in a Kenya Governed by *the Constitution* and pursuant to the Principles of Rule of law enshrined in Article 10(2) of *the Constitution*. They must be punished as by law envisaged, thus necessitating this Application.
9. The gravamen of the acts of contempt is escalated by the fact that the said order of 30<sup>th</sup> September 2020 was "subject to the Plaintiff/Applicant depositing the amount of Kshs.48,026Z79.00/- into a joint interest earning account held in the names of all ■ three (3) Advocates within thirty (30) days of the date of the ruling" for which "in the event of failure to comply with the above orders, the interim orders would



elapse automatically... This suggestion for the deposit of security for the application for review, as was here ordered, was made by the Plaintiff to court to show good will, now with the acts of contempt, the Plaintiff will not be in a position to satisfy the conditions of the orders made on the 30<sup>th</sup> September, at all the time in the cause, the record shows it, the 5<sup>th</sup> Contemnor has always sided with the 2<sup>nd</sup> Defendant even though it is also expected to be a neutral participant, and it is the same 5<sup>th</sup> Contemnor advising the 1<sup>st</sup> Contemnor to continue holding the Plaintiff's money illegally, are they working in cohort?

10. The gravity of contempt is so heavy that imposition of a custodial sentence and attachment of property is necessary for public protection, on the following bases;

10.1. The acts of the contemnors have fundamentally denigrated *the Constitution*;

The breach of the Orders herein issued by this Honourable Court stated has been deliberate, calculated and expressly intentional;

1.1. The degree of culpability on each of the Contemnors is heavy and clearly established;

10.4 The contemnors deliberately set to disobey the Court Orders of 23<sup>rd</sup> September 2020 and 1<sup>st</sup> October 2020 respectively, even after acknowledging its existence, being fully aware of its scope and import, and hence they were never dragged into the unlawful act or placed into breach of the said orders by reasons of the conduct of others;

11.

10.5. The contemnors fully appreciate the seriousness of breach at all time, the 1<sup>st</sup> Contemnor being a multinational organization, it could get all the good counsels available, the rest of the Contemnors, save for the 4<sup>th</sup> Contemnor, are officers of this Honourable Court who should lead in advancing the rule of law. The 2<sup>nd</sup> Defendant, 6<sup>th</sup> cited person, continue to issue notices of demand and threats of execution despite the clear terms of injunction orders, issued in presence of their counsel.

12. The Contemptuous acts of these contemnors, in particular constitute a serious interference with the administration of justice and is demonstrative of a flagrant disregard for the rule of law.

13. It is necessary that the interested parties purge the contempt or otherwise be committed to civil jail for this express disobedience.

14. The Orders contemned have been personally served on the interested parties and hence the contents of the Orders are known to them.

15. The Interested parties have been notified of such contempt but have been adamant in their contempt.

16. The jurisdiction conferred upon this Honourable Court is exclusive, and properly invoked and the Applicant seeks to have the ends of justice met as opposed to seeking any vendetta or "settling any scores" with the interested parties.



32. The 2<sup>nd</sup> respondent opposed the application through the replying affidavit sworn by its Chief Executive Officer Mr. Raphael C. Kiptui who avers that the orders of 23<sup>rd</sup> September 2020 staying the agency notices lapsed on 30<sup>th</sup> September 2020 and that the applicant had attempted to access the subject accounts without satisfying the condition on the order dated 1<sup>st</sup> October 2020. It was the 2<sup>nd</sup> respondent's case that all the parties had complied with the court orders.
33. I have considered the contempt application, the response thereto and submissions. I find that the issue for determination is whether the applicant has made out a case for the granting of the orders to enjoin the interested parties to the case and to cite them for contempt. This court had granted orders to restrain the respondents from demanding the sum of Kshs 48,026,776 and from issuing agency notices.
34. The elements of civil contempt as were laid out in Contempt in Modern New Zealand that was cited in North Tetu Farmers Co. Ltd v Joseph Nderitu Wanjohi [2016] eKLR as follows: -
- “There are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases) that:-
- (a) the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;
  - (b) the defendant had knowledge of or proper notice of the terms of the order;
  - (c) the defendant has acted in breach of the terms of the order; and
  - (d) the defendant's conduct was deliberate.”
35. In the instant case, it was not disputed that the court granted the restraining orders on 23<sup>rd</sup> September 2020 and 1<sup>st</sup> October 2020. The burden was therefore on the applicant to prove, beyond reasonable doubt, that the contemnors willfully disobeyed the said court orders.
36. I note that the parties herein eventually complied with the court orders for the opening a joint interest earning account and that the alleged acts of contempt occurred before compliance with the order. Considering that the orders have been complied with, I find no reason to hold the contemnors in contempt. I am guided by the decision in Directline Assurance Co Ltd vs Jamii Bora Bank Ltd & 5 Others (2015) eKLR where it was held that: -
- “ 13. Now, to the second issue, what is the role of contempt proceedings in civil litigation? To my mind contempt proceedings are quasi – criminal in nature, and is a tool employed by a civil court to ensure obedience to the civil court's orders and directions. A civil court has no interest in punishing a litigant, unless a litigant leaves the court with no option but to resort to quasi- criminal proceedings to punish a litigant. When a court orders are being disobeyed, or are about to be disobeyed, and the contemnor comes down and purges the contempt, either out of his own freewill or at the prompt of the court, the court will accept the purge of the contempt unless circumstances exist to suggest that the coming down, or the alleged purging of the contempt, is not genuine, or is done in bad faith, or is in itself a continuation of the original contempt. In accepting the coming down of the contemnor, the court will assess the reasons given for the disobedience, the time taken to come down, and the cost incurred in the process”.



37. In the circumstances of this case, I find that the orders issued on 23<sup>rd</sup> September 2020 and 1<sup>st</sup> October 2020 have been implemented and there no is therefore nothing to hold against the contemnors. The application is therefore dismissed with no orders as to costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 23RD DAY OF JUNE 2022.**

**W. A. OKWANY**

**JUDGE**

**In the presence of: -**

**Mr. Ochieng for Okone for the Applicant.**

**Mr. Fraser for 1<sup>st</sup>-4<sup>th</sup> Respondents.**

**Mr. Abudullah for the proposed 3<sup>rd</sup> Defendant.**

**Ms Nthiga for 1<sup>st</sup> Respondent.**

**Ms Maina for Ms Wangwe for 2<sup>nd</sup> Respondent.**

**Court Assistant- Sylvia**

