



New Age Associates v Mantic Africa Limited; Ecobank Kenya Limited (Garnishee) (Commercial Case 004 of 2021) [2022] KEHC 12661 (KLR) (Commercial and Tax) (28 July 2022) (Ruling)

Neutral citation: [2022] KEHC 12661 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 004 OF 2021
DAS MAJANJA, J
JULY 28, 2022**

BETWEEN

NEW AGE ASSOCIATES PLAINTIFF

AND

MANTIC AFRICA LIMITED DEFENDANT

AND

ECOBANK KENYA LIMITED GARNISHEE

RULING

1. This suit relates to a loan agreement between the plaintiff and the defendant for a sum of USD 150,000.00 which the defendant was to repay USD 225,000.00 over a period of 6 months. After the defendant defaulted, the plaintiff filed suit in Milimani Magistrates Court Civil Case no E5987 of 2020. The plaintiff then moved this court by an application dated January 4, 2021 in HC ML Misc Civil Application no E003 OF 2021 seeking orders, *inter alia*, to transfer the suit before the subordinate court to this court and to freeze the defendant's account at Ecobank to the extent of USD 225,000.00. On January 19 2021 made granted the following orders:
 - a. Application dated January 04, 2021 is allowed and CMCC no 5891 OF 2020 is hereby transferred to the High Court, Commercial and Tax Division.
 - b. Pending the hearing of the suit prayer 5 of the application dated January 04, 2021 is granted for a period of 30 days unless otherwise extended by this court.
 - c. Mention on February 19, 2021 for directions. Notice to issue.



2. The plaintiff filed an application dated November 8, 2021 for judgment on admission for USD 134,000.00. On November 25, 2021, the court entered judgment on admission for USD 134,000.00 and ordered the balance owing to proceed for trial. Thereafter, the plaintiff filed another application dated December 20, 2021 where it sought to garnishee the defendant's account no xxxx held at Ecobank to wholly or partially satisfy the judgment. On December 24, 2021, the court issued a garnishee order nisi, "pending the hearing and determination of the application or further orders of the court."
3. The plaintiff filed another application dated January 19, 2022 which is now the subject of this ruling, under section 5(1) of the Judicature Act seeking orders, *inter alia*, that the garnishee's Managing Director and Executive Central, Eastern and Southern Africa (CESA) Mr Cheik Travaly and the defendant's director Mr Sameer Joshi be cited for contempt for disobedience of court orders issued on January 20, 2021 in Misc Civil Application no E003 of 2021 and that they be committed to civil jail for period of six (6) months for contempt for disobedience of the order. The plaintiff also seeks an order for Ecobank to retrieve money in Account no xxxxx amounting to USD 389,933.02 being the difference of the money that was in the account on January 21, 2021 and what is currently in the account and also provide an updated bank statements for the same account.
4. This application is supported by the affidavit of Dimple Manakiwala sworn on January 19, 2022. The plaintiff contends that the court order issued on January 20, 2021 freezing the defendant's account to the extent of USD 225,000.00 was served upon the Ecobank as garnishee on January 21, 2021. That it wrote to the garnishee on September 7, 2021 to confirm whether the court order was still in force, the account had sufficient funds to satisfy the court order and that no transaction has taken place in the account between January 21, 2021 to September 7, 2021. The plaintiff states that it discovered that the defendant has been transacting with the account and Ecobank allowed the transactions contrary to the court order.
5. The plaintiff requests the court to compel the defendant and Ecobank to retrieve the money in the account being USD 389,933.02 being the difference of the money that was in the account as at January 21, 2021 and as at the time of filing the application on January 19, 2022. The plaintiff is concerned that it may not be able to recover the money and enjoy the fruits of its judgment and urges the court to hold the defendant and Ecobank in contempt for disobeying the court order.
6. The defendant filed Grounds of Opposition dated June 9, 2022 stating that the application is misconceived and an abuse of court process. It states that the court order on which the application is based was not served hence it is not liable.
7. Ecobank filed its replying affidavit sworn by Edmund Moga, its branch operations manager of Ecobank Towers Branch, sworn on January 24, 2022. He confirms that account no xxxxx belongs to the defendant. He depones that the court order issued by the court on January 19, 2021 freezing the account to the extent of USD 225,000.00 was for a period of 30 days unless extended by court. He confirms service of the court order on January 21, 2021 and the available funds as at the date of service was USD 407,316.84 and it froze the account in compliance with the court order. Ecobank states that upon lapse of the 30 days, it was not notified of any extension of the order and subsequently it lifted the hold on the account as the order had lapsed and that it did not therefore act in bad faith as alleged. It prays that the application be dismissed.
8. In response, the plaintiff filed a further affidavit sworn by Dimple Manakiwala on January 26, 2022 denying that the court order was to lapse after thirty days, it states the court order was issued pending the hearing and determination of the suit. It states that it wrote to Ecobank on September 7, 2021 which letter was received and stamped, for confirmation whether the court order was still in force, whether the account had sufficient funds to satisfy the court order and that no transaction had



occurred on the account since October 9, 2020. The plaintiff further confirmed that on the same date of September 7, 2021, the account had a total sum of USD 379,707.51 vis-a-vis the decretal amount of USD 225,000.00. That on the same date, the defendant made a transaction of USD 140,000.00. The plaintiff therefore maintains that the actions by the defendant and Ecobank are malicious and the application ought to be allowed.

9. The application was canvassed by way of written submissions which I have considered. The issues for determination are whether the defendant and Ecobank committed contempt of court by disobeying the court order of January 19, 2021 and if so, whether the orders sought in the application should be granted.
10. The court order in question is that which was issued on January 20, 2021 in HC ML Misc Civil Application no E003 OF 2021 whereby the garnishee, Ecobank, was ordered to close or freeze the bank account for a period of thirty days unless extended by the court. The applicant has provided proof through statement of account of the respondent in the garnishee bank of several transactions of the account particularly that of September 7, 2021 which it holds amount to contempt of the court order.
11. In order to establish contempt, the applicant bears the burden of proving that the subject order was clear, unambiguous and binding, that the respondents had knowledge of the order and that they intentionally, willfully and deliberately disobeyed the order (see *Kenya National Union of Teachers (KNUT) v Teachers Service Commission and Another* NRB ELRC Pet No 158 of 2019 [2010] eKLR and *Silverse Lisamula Anami v Justus Kizito Mugali and 2 Others* KKG Misc EP Appl No 3 of 2021 [2017] eKLR). The standard of proof in cases of contempt of court was explained in *Mutitika v Baharini Farm Limited* [1985] KLR 229, 234 where the Court of Appeal held as follows:

In our view, the standard of proof in contempt proceedings must be higher than proof on the 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, in criminal cases. It is not safe to extend it to an offence which can be said to be quasi-criminal in nature.
12. In this case, the burden of proof lies on the plaintiff to show that the court order was clear, unambiguous and binding. It states that the court order was valid pending the hearing and the determination of the suit. The plaintiff further states that the order has been extended from time to time, however there is no proof provided as to the dates which this court or any other court extended the court order. The court order was clear and unambiguous that it was only valid for a period of thirty days. Ecobank is therefore correct to state that once the thirty days' period was over the court order automatically lapsed. The burden was upon the plaintiff to inform Ecobank of any extension so that as the garnishee it could continue to hold the defendant's account. The only service upon Ecobank is that of January 21, 2021 order which Ecobank does not dispute. What is disputed is whether the court order was extended and whether Ecobank was informed of it. Since proof of this is not furnished, I find that the plaintiff did not discharge burden of proof.
13. Based on the material before the court, I find and hold that the plaintiff has not demonstrated that the defendant and Ecobank have intentionally, willfully and deliberately disobey the court order. The subject order lapsed after thirty days and further order was served on them. An analysis of the statement of account shows that no transactions were done in the months of January – February 2021 when the court order was operational. Since there is no proof of service of the extended order, it lapsed and was no longer binding to the parties. Had the plaintiff provided evidence of service of such extension then the court would have found Ecobank and the defendant in contempt.



14. For the reasons I have set out above, I dismiss the application dated January 19,2022 with costs to the Ecobank and the defendant. The costs for each respondent is assessed at Kes 30,000.00 to be paid within 14 days.

SIGNED AT NAIROBI

D S MAJANJA

JUDGE

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF JULY 2022.

D CHEPKWONY

JUDGE

Court assistant: Mr M Onyango

Wachira Gachoka and Company Advocates for the plaintiff

Taibjee and Bhalla Advocates LLP for the defendant

Nyaanga and Mugisha Advocates for the garnishee

