



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUSIA**

**CIVIL SUIT NO.3 OF 2021**

**LWERO COMPANY LIMITED.....PLAINTIFF/APPLICANT**

**VERSUS**

**THE REGISTRAR OF COMPANIES....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**SAFARICOM LIMITED.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**ABUBAKAR MAULANA OMAR.....DEFENDANT/RESPONDENT**

**RULING**

[1] **Lwero Company Ltd**, is a limited liability company and the plaintiff in this suit. The Registrar General of Companies is the first defendant and **Safaricom Ltd**, a public limited company, the second defendant. The third defendant **Abubakar Maulana Omar**, is a male adult said to be the sole director of the plaintiff.

The suit is based on allegations of breach of trust on the part of the first defendant and negligence on the part of the second defendant as well as fraud on the part of the third defendant.

[2] The plaintiff therefore prays for a permanent injunction against the second defendant restraining it from transacting with the third defendant in the plaintiff's name and an order directing the first defendant to rectify the register in respect of the shareholding and directorship of the plaintiff.

The plaintiff also prays for general damages for mental and psychological torture and costs of the suit.

[3] At the time of filing the plaint on the 15<sup>th</sup> March 2021, the plaintiff also filed the Notice of motion dated 11<sup>th</sup> March 2021 seeking temporary injunction against the respondent to restrain him from dealing and transacting with the third defendant on its behalf and an order that the respondent do deliver transaction documents to the applicant's directors in relation to the transactions and dealings with the third defendant on behalf of the applicant. The motion was amended on 22<sup>nd</sup> June 2021.

[4] The grounds on which the application was based were that in the month of January 2021, a director of the plaintiff by name **Emmanuel Ouma Nderema**, with a view to filing tax returns with the Kenya Revenue Authority (**KRA**) discovered that the plaintiff's Email address had been opened by unknown persons and was blocked. This was however, opened when the plaintiff's Email address and PIN were availed by the aforementioned director. Several messages pertaining to withholding tax were found in the Email prompting further enquiries at the Huduma Centre in Busia to ascertain the plaintiff's directorship. This revealed that Form CR 12 had been altered to show that the third plaintiff was the sole director of the company. Consequently, the matter was reported to the police and more details were sought on the nature of transactions conducted by the third defendant.

[5] These grounds were fortified by the averments contained in the supporting affidavit deponed by the said Emmanuel Ouma Nderema dated 12<sup>th</sup> March 2021. The application did not proceed to hearing and was on the 13<sup>th</sup> July 2021, compromised by a consent in the following terms:-

[i] Application be allowed in terms of prayer (2) and (3)

[ii] Prayer (3) do issue to the 2<sup>nd</sup> respondent only.

[iii] The applicant granted leave to amend its plaint with corresponding leave to the respondents to amend defence.

[6] About two months thereafter, the plaintiff/applicant filed the present application dated 13<sup>th</sup> September 2021, seeking the main order that

the second respondent do show cause why it should not be punished for disobeying or breaching the court order granted on 4<sup>th</sup> October 2017 and served on the defendant on 27<sup>th</sup> July 2021. The application is based on the grounds set out in the supporting affidavit of Emmanuel Ouma Nderema and is essentially brought under order **Sections 5 and 10** of the **Judicature Act** and **Rule 3** of **The High Court (Practice and Procedure) Rules**.

[7] In canvassing the application, the applicant filed the written submissions dated 27<sup>th</sup> October 2021, through **Calistus & Co. Advocates**, while the written submissions by the second defendant/respondent dated 15<sup>th</sup> November 2021 were filed by **Meritad Law Africa LLP**.

The first and third defendants did not file any submissions and did not participate in the application which actually pitted the plaintiff and the second defendant only.

[8] After due consideration of the application on the basis of the supporting grounds and the rival submissions, it became apparent to this court that the plaintiff seeks to have the second defendant as the only person suitable for punishment for disobedience of an order issued by this court on account of the consent entered herein on 13<sup>th</sup> July 2021 and extracted as an order of the court on 27<sup>th</sup> July 2021. The issues arising for determination are **firstly**, whether the application is proper and competent before the court and if so, **secondly**, whether the applicant has shown sufficient cause to hold the second defendant guilty of contempt of court.

[9] With regard to the first issue, it is notable that the main prayer (**i.e prayer 3**) alludes to a breach of an order granted by the court on 4<sup>th</sup> October 2017 and served upon the defendant on 27<sup>th</sup> July 2021. However, the record does not show existence of such order which cannot obviously be related to this suit which was instituted or filed in court on 15<sup>th</sup> March 2021. Also, there was no order served upon the defendant on 27<sup>th</sup> July 2021, which was the date when the actual subject order was issued. Further, prayer three (**3**) refers to the affected party as the second respondent and again as the defendant yet the notice of motion refers to three defendants and/or respondents. There is no clarity with regard to which of the three defendants was or is to be affected by the order sought in the application.

[10] All the foregoing points to errors on the identity of the order alleged to have been breached and on the description of the party or parties said to have breached the order. The resultant effect would be a finding by this court that the application as presented is not only improper and incompetent before this court but also defective. However, the errors may be treated as mere technicalities or typographical errors which do not touch on the substance of the matter as there is no dispute that the subject order was indeed issued on 27<sup>th</sup> July 2021 pursuant to the consent entered in court between the plaintiff/applicant and the second defendant/respondent on the 13<sup>th</sup> July 2021.

[11] Be that as it may, with regard to the second issue for determination, the application by the plaintiff/applicant dated 11<sup>th</sup> March 2021 and amended on 22<sup>nd</sup> June 2021, was the foundation of the subject court order issued on 27<sup>th</sup> July 2021. The propriety and competence of that application was therefore crucial in determining the competence and indeed the validity of the subject court order. A fatal defect in that regard would impact negatively on the impugned court order.

[12] Indeed, no party can be found guilty of contempt of court on the basis of a fatally defective or invalid court order. The validity or otherwise of the subject court order is a factor for consideration in this second issue for determination.

As a prelude, it would be prudent to consider the salient features of the applicable law and legal principles in contempt of court proceedings. In that regard, a mere disregard of a court order would not amount to contempt unless there is a deliberate and intentional violation of the court's dignity, repute or authority.

[13] The Constitutional Court of South Africa in the case of **Burchell Vs. Burchell Case No.364 of 2005**, underpinned the importance to the Rule of Law of compliance with court orders in the following terms:-

**“Compliance with court orders is an issue of fundamental concern for a society that seeks to base itself on the rule of law. The Constitution states that the Rule of Law and supremacy of the constitution are foundational values of our society. It vests the judicial authority of the State in the courts and requires other organs of the State to assist and protect the courts. It gives everyone the right to have legal disputes resolved in the court or other independent and impartial tribunals.**

**Failure to enforce court orders effectively has the potential to undermine confidence in recourse to law as an instrument to resolve civil disputes and may thus impact negatively on the rule of law.”**

[14] The Court of Appeal in the case of **Christine Wangari Gachege Vs. Elizabeth Wanjiru Evans & 11 others Civil Application No.233 of 2007**, stated that the statutory basis of contempt of court in so far as the Court of Appeal and the High Court are concerned is **S.5 (1)** of the **Judicature Act** and **Section 63 ( c )** of the **Civil Procedure Act** s.5 (1) of the **Judicature Act** provides that:-

**“The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England and that power shall extend to upholding the authority and dignity of subordinate courts.”**

S.5 (2) provides that:-

**“An order of the High Court made by way of punishment for contempt of court shall be appealable as if it were a conviction and sentence made in exercise of the original criminal jurisdiction of the High Court.”**

[15] s.63 ( c ) of the **Civil Procedure Act** falls under the heading of supplemental proceedings, in order to prevent the ends of justice from being defeated. It provides that the court may if it so prescribed, grant a temporary injunction and in case of disobedience commit the person guilty thereof to prison and order that his property be attached and sold.

In **Simmers Plaza Vs. National Bank of Kenya Ltd (2015) eKLR**, it was stated that:

**“We reiterate herein that court orders must be obeyed. Parties against whom such orders are made cannot be allowed to trash them with impunity. Obedience of court orders is not optional, rather, it is mandatory and a person does not choose whether to obey a court order or not. The courts should not hold their hands in helplessness and watch as their orders are disobeyed with impunity left right and centre. This would amount to abdication of our sacrosanct duty bestowed on us by the Constitution. The dignity and authority of the court must be protected, and that is why those who flagrantly disobey them must be punished lest they lead us all to a state of anarchy”.**

[16] It is an established principle of law that in order to succeed in civil contempt proceedings, the applicant has to prove **firstly**, the terms of the order, **secondly**, knowledge of these terms by the respondent and **thirdly**, the failure by the respondent to comply with the terms of the order. On proof of these factors, willfulness and bad faith on the part of the respondent would be inferred.

In the book **“contempt in Modern Newzealand”**, it is stated that:-

**“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 acted in breach of the terms of the orders and**
- (d) The defendants’ conduct was deliberate.”**

[17] In contempt of court proceedings, as was held in **Simmers Plaza Ltd Vs. National Bank of Kenya (supra)**, personal service of an order is not necessary where it is made in the presence of the respondent’s advocate or where the respondent is aware of the order.

In **Basil Cricos Vs. Attorney General & others (2012) eKLR**, it was stated that:-

**“...the Law has changed and as it stands today knowledge supersedes personal service....where a party clearly acts and shows that he had knowledge of a court order, the strict requirement that personal service must be proved is rendered unnecessary.”**

[18] As noted hereinabove, the application dated 11<sup>th</sup> March 2021 as amended on the 22<sup>nd</sup> June 2021, was the bedrock of the impugned court order issued on 27<sup>th</sup> July 2021, in the following terms:-

- (1) That a temporary injunction be and is hereby issued to restrain, the 2<sup>nd</sup> respondents, whether acting by its directors, officers, servants or agents or any otherwise whatever (sic) from dealing transacting with Abubakar Maulana Omar on behalf of the applicant pending the hearing and determination of this suit.**
- (2) That the 2<sup>nd</sup> respondent (Safaricom Ltd) be and is hereby ordered to deliver transaction documents to the directors of the applicant in relation to the transactions/dealings with Abubakar Maulana Omar. ....on behalf of the applicant pending the hearing and determination of the suit herein.**

These terms were germinated by the consent entered herein on 13<sup>th</sup> July 2021 between the plaintiff/applicant and the second defendant/respondent in compromising the application vide the amended Notice of Motion dated 22<sup>nd</sup> June 2021, which in the manner of framing actually sought temporary injunction orders against all the defendants/respondents or any one of the three defendants pending the hearing and determination of this suit.

[19] In as much as there was failure by the applicant to state with accuracy and certainty or to specify the actual defendant being targetted by the order, it would follow that the resultant consent order and its extracted format were unclear and ambiguous. In the circumstances, none of the defendants or respondents could be held guilty of contempt on the basis of terms of injunction which are ambiguous, unclear and indeed, grossly unstructured.

To add salt to the wound, prayers (2) and (3) of the material notice of motion were so generalized and non-specific with regard to the said transaction documents and the nature of the business dealings alluded to.

[20] Even if the terms of injunction were clear and unambiguous, grounds five, seven and eight of the application implied that the terms did not apply to one of the defendants but at least two of them i.e. the first and second defendants/respondents. Further, prayer (3) alluded to the

delivery of transaction documents to the directors of the applicant and not the applicant itself, yet the directors and a company are separate and distinct legal entities. The directors could not therefore seek transaction documents from any party in their personal capacity unless they are personally joined in the suit as parties thereto.

[21] It may also be noted that the terms of the injunction order did not specify the period of compliance. This meant that compliance with the subject order could be affected any time before the determination of the suit. The party required to comply with the order could do so any time as long as the suit was at the hearing stage. Therefore, any intended application for contempt of court could not be effected within the hearing stages as that would be premature.

[22] From all the foregoing, it is plain that the applicant failed to establish the most essential elements to make a case for civil contempt of court against the defendant/respondent's and in particular, the second respondent. It was not proved that the terms of the subject court order were clear and unambiguous, neither was it proved that the second respondent or any other respondent acted in breach of the terms of the order as to infer bad faith and willful disobedience on their part.

In any event, the second respondent did provide adequate defence against contempt of court by showing through its replying affidavit and annexures that the terms of the injunction order were ambiguous and that they did not violate the order as they had already delivered some of the transaction documents and were in the process of delivering additional documents but for this application and the applicant's failure to reply correspondence in that regard.

[23] It would therefore follow that the applicant acted prematurely and has herein failed to show sufficient cause to hold the second defendant or even any other defendant guilty of contempt of court.

In sum, the present application is devoid of merit and is hereby dismissed with costs to the second defendant/respondent.

Ordered accordingly.

**J.R. KARANJAH**

**J U D G E**

**[DELIVERED & SIGNED THIS 25<sup>TH</sup> DAY OF NOVEMBER 2021]**