



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

COMMERCIAL SUIT NO. 69 OF 2017

**JUJA COFFEE EXPORTERS LTD.....PLAINTIFF**

**VERSUS**

**NATIONAL BANK OF KENYA LTD.....DEFENDANT**

**R U L I N G**

1. Before me for determination is a **Notice of Motion** application dated **24<sup>th</sup> March 2021**. By the said application, the Defendant prays for orders that:-

**1. Spent;**

**2. Spent;**

**3. That the Honourable Court be pleased to order that the Directors and shareholders of the Plaintiff namely; Tauhida Tahir Sheikh Said, and Nurein Tahir Sheikh Said be summoned to attend court on the next hearing date of this application to show cause why they should not be committed to a civil jail for a term not exceeding Six (6) months for being in contempt of the Orders issued by this court on 22<sup>nd</sup> January,2021;**

**4. That the Honourable Court be pleased to order that the Directors and shareholders of the Plaintiff namely; Tauhida Tahir Sheikh Said, and Nurein Tahir Sheikh Said be committed to a civil jail for a term not exceeding Six (6) months for being in contempt of the Orders issued by this court on 22<sup>nd</sup> January,2021**

**5. That the costs of this Application be awarded to the Defendant.**

2. The application is premised on the grounds on the face of it and the affidavits sworn on **24<sup>th</sup> March, 2021** by **Eustace Nyaga**, the Defendant's **Head of Credit, and Recovery Department**. The deponent avers that the Plaintiff vide **Notice of Motion** application dated **19<sup>th</sup> April, 2017** approached the court seeking orders for injunction against the bank that intended to sell the suit properties. The court issued an interim order of injunction restraining the bank from realizing its securities by way of sale of the suit properties. The said interim orders were extended severally. However, on **13<sup>th</sup> July, 2017**, the court extended the existing interim orders of injunction on condition that the Plaintiff pays to the Defendant a sum of Kshs.100,000,000/= towards reduction of the debt within 30 days from **13<sup>th</sup> July, 2017**.

3. The deponent avers that the conditional order was not abided with and on **19<sup>th</sup> September, 2017**, the court discharged the conditional interim orders, and as a result, the bank was at liberty to realize its securities by way of sale of the suit properties. Consequently, the bank advertised the suit properties for sale by public auction, which was scheduled to take place on **16<sup>th</sup> October, 2017**. However, the Plaintiff withdrew its pending application for injunction dated **19<sup>th</sup> April, 2017** and in its place filed a fresh application for injunction dated **9<sup>th</sup> October, 2017** seeking similar orders. Nevertheless, the said application was dismissed with costs vide a Ruling delivered on **11<sup>th</sup> April, 2019**.

4. In response to the said application, the Plaintiff through **Nurein Tahir Sheikh Said** depones in a **Replying Affidavit** filed herein on **2<sup>nd</sup> June, 2021** that indeed the Plaintiff was ordered to provide a bank guarantee for Kshs.3 Billion. That however, this was not a stand-alone order but a condition attached to an injunction pending appeal, which the Plaintiff had sought. Nevertheless, the condition was equally time bound with the effect that it, as well as the injunction would lapse, unless otherwise extended, on the thirtieth (30<sup>th</sup>) day after it was made. Consequently, when the Plaintiff was unable to comply with the onerous condition attached to the injunction, thus, the default clause took effect and the orders lapsed. Therefore, there is no order to be complied with and the Plaintiff cannot be accused of being in contempt of court. In fact, the Defendant appreciated the fact when it advertised the suit properties for auction on **12<sup>th</sup> April 2021**.

## DETERMINATION

5. I have considered the application and the responses thereto. I have equally considered the submissions and authorities placed before me by the **Firm of M/S Munyao Muthama & Kashindi Advocates** for the Defendant, as well as **Mr. Gikandi**, Learned Counsel for the Plaintiff.

6. The Court of Appeal in the case of **Kyoga Hauliers Limited –vs- 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]

7. In the case of **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 thus stating:

**“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)

8. Dealing with the reasons to punish for contempt, in the case of **Sheila Cassatt Issenberg & Another –vs- Antony Machatha Kinyanjui [2021]eKLR**, the Court held:

**“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.”**

9. The power to punish for contempt is an important and necessary power of protecting the cause of justice and the rule of law, and for protecting the authority of the court and the supremacy of the law. In the case of **Board of Governors, Moi High School Kabarak –vs- Malcom Bell & Another (Supreme Court Petition No.6 and 7 of 2013)**, the Supreme Court described the power to punish for contempt as a power of the Court to safeguard itself against contemptuous or disruptive intrusion from elsewhere and identified that power as one of the indisputable attributes of the Court’s inherent powers. Without that power, the Supreme Court observed, protection of citizen’s rights and freedoms would be virtually impossible. Courts of law would be reduced to futile institutions spewing forth Orders in vain.

10. Contempt of Court is in the nature of criminal proceedings and, therefore, proof of a case against a contemnor is higher than that of balance of probability. This is because, 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 aptly stated in the case of **Gatharia K. Mutikika –vs- Baharini Farm Limited [1985] KLR 227**, that:

**“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 party 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.”**

11. Where court has issued injunctive orders as it did on 22<sup>nd</sup> January 2021, it has subsequent powers to punish those who violate them, as provided for by **Order 40, Rule 3(1)** of the **Civil Procedure Rules**:-

**“In cases of disobedience, or of breach of any such terms, the court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the court directs his release.”**

12. Disobedience of court orders amounts to contempt of court. **Section 5** of the **Judicature Act** still applies in determination of contempt of

court proceedings in Kenya as it was stated in the case of Samuel M. N. Mweru & Others –vs- National Land Commission & 2 others [2020] eKLR where it was held:-

**“That since the act that repealed section 5 of the Judicature Act has been declared unconstitutional, the effect is that section 5 of the Judicature Act still stands. Having concluded as aforesaid, I find it fit to examine the procedure for instituting contempt of court proceedings under section 5 of the Judicature Act.”**

13. **Mativo J.** in the case of Samuel M. N. Mweru & Others v National Land Commission & 2 others [2020] eKLR relied on the High Court of South Africa case of Kristen Carla Burchell vs Barry Grant Burchell, Eastern Cape Division Case No. 364 of 2005 where it was held that: -

**“...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, (ii) Knowledge of these terms by the Respondent, (iii) Failure by the Respondent to comply with the terms of the order.**

Further, the Learned Judge stated that:-

**“Perhaps the most comprehensive of the elements of civil contempt was stated by the learned authors of the book *Contempt in Modern New Zealand* who succinctly stated:-**

**“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.”**

14. It follows from the above decisions that there must be observance and obedience of an order issued by a court. The question then becomes, can the Plaintiffs/Respondent be cited for contempt of a **Court Order of 22<sup>nd</sup> January, 2021** that they assert had lapsed on **22<sup>nd</sup> February, 2021** when they failed to meet the condition of depositing an insurance bond or a Bank Guarantee?

15. On the part of the Defendant, it has not been controverted that the Order issued on **22<sup>nd</sup> January, 2021** was that the Plaintiff was required to furnish security in the form of an Insurance Bond or a Bank Guarantee within 30 days and that the orders of injunction lapsed when the Plaintiff failed to furnish the security as ordered on **22<sup>nd</sup> February, 2021**, and that the Defendant even proceeded to advertise the suit property for auction on **12<sup>th</sup> April, 2021**.

16. I agree with Plaintiff's averments that the orders of Justice P.J. Otieno lapsed upon failure by the Plaintiff to furnish security as ordered by the court. Therefore, going forward the conditional injunction had lapsed and there was nothing for the Plaintiff to obey, since the Defendant had the liberty to exercise its statutory power of sale and indeed, it is not controverted that on **12<sup>th</sup> April, 2021**, the suit properties were advertised for auction. Consequently, the averments and arguments adduced by the Applicant/Defendant cannot lead the court to make a finding that the Plaintiff's Directors and Shareholders are in contempt of the orders issued on **29<sup>th</sup> March, 2021** vide a Ruling delivered on **22<sup>nd</sup> January, 2021**.

17. In the resultant, I find the **Notice of Motion** application dated **24<sup>th</sup> March, 2021** lacks merit. The same is dismissed with costs.

It so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 20<sup>TH</sup> DAY OF DECEMBER, 2021**

**D. O. CHEPKWONY**

**JUDGE**

In the presence of:-

Mr. Gikandi counsel for the Plaintiff

No appearance for Defendant

