



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT GARISSA**

**CIVIL CASE NO. 4 OF 2017**

**MARTIN MWANGI NDIRANGU.....PLAINTIFF**

**VERSUS**

**INVESCO ASSURANCE CO. LTD.....DEFENDANT**

**AND**

**CO-OPERATIVE BANK OF KENYA.....1<sup>ST</sup> GARNISHEE**

**KCB BANK OF KENYA LIMITED.....2<sup>ND</sup> GARNISHEE**

**FAMILY BANK LIMITED.....3<sup>RD</sup> GARNISHEE**

**RULING**

1. By notice of motion dated 25/8/2020 the Applicant/Plaintiff seeks orders; principally that Court do find that the 3<sup>rd</sup> Garnishee's failure to remit the sum of Kshs. 5,150,404/- in satisfaction of a Garnishee Absolute order, as per the ruling of 29<sup>th</sup> July, 2020 issued by this court, is an act in contempt of court.
2. Upon granting of prayer 2 above, this Court do impose a fine/penalty of Kenya Shillings Five Million (Kshs. 5,000,000/-) against the 3<sup>rd</sup> Garnishee (contemnor) to satisfy the penalty for contempt. Upon grant of prayer No. 2 and 3 above, this Court do issue an order that the 3<sup>rd</sup> Garnishee's Managing Director and Chief Executive Officer, Ms. Rebecca Mbithi, be committed to civil jail for a period of six (6) months.
3. **In alternative**, court is urged to issue an order compelling the 3<sup>rd</sup> Garnishee to fully comply with the orders issued on the 29<sup>th</sup> July, 2020 within the next 7 days of the application being filed.
4. **The applicant also seek** Costs of this application be borne by the 3<sup>rd</sup> Garnishee. It is brought under section 5(1) of Judicature Act Cap 8 Laws of Kenya and section 3A of the Civil Procedure Act.
5. The application is supported by the grounds on the face of the instant motion. The applicant case is that The Plaintiff herein obtained judgment against the Defendant and subsequently moved this court for Garnishee orders as against several financial institutions, the 3<sup>rd</sup> Garnishee included. The latter was initially served with a Garnishee Order Nisi in April, 2019, which order was ignored by the 3<sup>rd</sup> Garnishee. A subsequent Garnishee Order Absolute was also ignored.
6. The 3<sup>rd</sup> Garnishee thereafter filed an application seeking to set aside the Garnishee Orders Absolute issued against it. The said application was canvassed via submissions by both parties and a ruling issued by this court on the 29<sup>th</sup> July, 2020.
7. The ruling directed the 3<sup>rd</sup> Garnishee to immediately honour the Garnishee Orders by remitting the sum of Kshs. 5,150,404/- to the Plaintiff, failure of which the latter was entitled to move this court for appropriate contempt orders.
8. The 3<sup>rd</sup> Garnishee, in clear breach of these orders, has now proceeded to only remit the paltry sum of Kshs.400,000/- out of the sum of Kshs.5,150,404/- and alleges that the amount is the lumpsum amount collected from the Defendant's account.
9. This is despite filing the Defendant's bank statements in court showing positive bank balances sufficient to cater for the full judgement

sum. The 3<sup>rd</sup> Garnishee's acts are not only in a blatant breach of the court's orders but also an act of contempt aimed in aiding the Defendant from paying the Plaintiff his well-deserved, unchallenged and long-awaited fruits of judgment.

10. Despite repeated requests and demands to the 3<sup>rd</sup> Garnishee to honour the orders of court issued on 29<sup>th</sup> July, 2020, the 3<sup>rd</sup> Garnishee has declined to fully honour the same. The application is supported also by the affidavit of David N. Njoroge sworn on 25/8/2020 which reiterates the content of the aforesaid grounds.

11. The same effect reiterates, that, subsequent to hearing of the 3<sup>rd</sup> Garnishee's application seeking to set aside Garnishee Orders Absolute served upon it in February 2020, this Court delivered its ruling on the 29<sup>th</sup> July 2020 directing the 3<sup>rd</sup> Garnishee to immediately honour the Garnishee Orders by remitting the sum of Kshs.5,150,404/- to the Plaintiff, failure of which the latter was entitled to move this court for appropriate contempt orders.

12. The said ruling delivered on 29<sup>th</sup> July 2020 was immediately extracted and served upon the 3<sup>rd</sup> Garnishee, seeking their compliance on a timely basis as directed by the court.

13. The 3<sup>rd</sup> Garnishee, in clear breach of these orders, only remitted the sum of Kshs.400,000/- out of the sum of Kshs.5,150,404/- and alleged that the amount is the lumpsom amount collected from the Defendant's account. This is despite filing the Defendant's bank statements in court showing positive bank balances sufficient to cater for the full judgment sum.

14. The 3<sup>rd</sup> Garnishee's acts are not only in a blatant breach of the court's orders but also an act of contempt aimed in aiding the Defendant from paying the Plaintiff his well-deserved, unchallenged and long-awaited fruits of judgment.

15. Despite repeated requests and demands to the 3<sup>rd</sup> Garnishee to honour the orders of court issued on 29<sup>th</sup> July, 2020, the 3<sup>rd</sup> Garnishee has declined to fully honour the same.

16. That is therefore in the interests of fairness and justice that the orders herein be granted to ensure that the 3<sup>rd</sup> Garnishee abides by the orders of this court. Unless the said orders are issued, the 3<sup>rd</sup> Garnishee's actions shall render a mockery of this court's judicial authority.

17. That it is rather evident that the 3<sup>rd</sup> Garnishee's actions are illegal and in contempt of the orders issued by this Honourable Court and as such, the 3<sup>rd</sup> Garnishee's Managing Director and Chief Executive Officer, Ms. Rebecca Mbithi should be cited forthwith; and annexures thereto.

18. The respondent rejoinder via the Respondent/Garnishee No. 3 replying affidavit sworn by Keziah Rutto on 8/10/2020 which is summary states that, the 3<sup>rd</sup> Garnishee intends to appeal against the ruling delivered by the court on 29<sup>th</sup> July, 2020 and to that end, a Notice of Appeal has been filed and served upon the Plaintiff.

19. That the 3<sup>rd</sup> Garnishee has filed an application before the Court of Appeal being Civil Application No. E270 of 2020, seeking stay of execution pending the hearing and determination of the intended appeal. Direction have been given on the application and the same is pending hearing and determination.

20. It is conceded that a copy of the ruling was served upon the 3<sup>rd</sup> Garnishee and that, the sum of Kshs.400,000/- was remitted to the Plaintiff from the Defendant's bank accounts. The respondent contends that, sum of Kshs.400,000/- was the only amount that was available for attachment as at 3<sup>rd</sup> August, 2020 when the amount was paid to the Plaintiff.

21. The 3<sup>rd</sup> Garnishee depones that it could not fully comply with the Garnishee Order Absolute issued on 29<sup>th</sup> July, 2020 as there are no funds available to satisfy the said order.

22. The respondent states that, the 2<sup>nd</sup> Respondent's bank accounts with the Applicant currently have no funds save from account No. 102000010148 which has a balance of Kshs.343,351.50 which is allegedly frozen.

23. It is also deponed that, upon remittance of the sum of Kshs.400,000/- to the Plaintiff, the 3<sup>rd</sup> Garnishee complied with the Garnishee Absolute Order to the best of its capacities and it cannot therefore be said to be in breach of the order given by the court.

24. It is denied, that the 3<sup>rd</sup> Garnishee blatantly breached this court's orders. The 3<sup>rd</sup> Garnishee complied with the orders as best as it could and it could not pay more than was available in the Defendant's bank accounts.

25. Without prejudice, the deponent has purported to swear an alternative facts, that she is aware that in cases of contempt, fines are imposed by the court in exercise of its discretion and are not dictated by the parties.

26. That it is established law that no order requiring a person to do abstain from doing an act may be enforced by contempt unless a copy of the order has been personally served on the alleged contemnor and endorsed with a notice of penal consequences.

27. That the Plaintiff has not demonstrated that the 3<sup>rd</sup> Garnishee's Chief Executive Officer Ms. Rebecca Mbithi was personally served with the order herein or that she was aware of the same.

28. That the Plaintiff has not annexed an affidavit as proof of service upon the 3<sup>rd</sup> Garnishee's Chief Executive Officer Ms. Rebecca Mbithi. That Prayer 4 seeking the committal to civil jail of the 3<sup>rd</sup> Garnishee's Chief Executive Officer cannot issue as personal service of the order was not effected upon her.

29. That the Garnishee Order Nisi and the Garnishee Order Absolute were not endorsed with a penal notice. In addition, the Plaintiff did not serve the 3<sup>rd</sup> Garnishee with an order arising from the ruling of 29<sup>th</sup> July 2020 upon which he seeks to have the 3<sup>rd</sup> Garnishee cited for contempt.

30. That the omissions highlighted in (f) above is a fatal to the Plaintiff's application for contempt and the said application must fail. That in light of the application for stay referred to in paragraph 7 above, prayer 5 cannot issue at this stage as the same would render the said application useless.

31. The Respondent proceeds to state that she is aware that a court of law will not grant an order for contempt if the order upon which an application for contempt is brought to court cannot be complied with.

32. That for the reasons given above, the 3<sup>rd</sup> Garnishee cannot fully comply with this court's orders vide the ruling of 29<sup>th</sup> July, 2020. The orders sought by the Plaintiff should therefore not issue.

33. The parties canvassed same via oral submissions namely:

#### **PLAINTIFF /APPLICANT'S SUBMISSIONS:**

34. The orders of the court are still not honoured. The order was served on 3<sup>rd</sup> Garnishee's Advocate and the Garnishee itself. Only Kshs.400,000/- paid but the Respondent has refused to honour court order. The court has to act to force the Respondent to release the balance.

#### **RESPONDENT /RESPONDENT'S SUBMISSIONS:**

35. They lodged an appeal and stay application which are still pending hearing. They rely on **Double Clean Ltd & 4 Others vs Jambo Holdings Ltd & Others [2016] eKLR**. The case relying on another case – **Campel & another vs Cadanian Hunger Foundation NAI 28/940 (UR)**.

36. The impugned order if enforced and contemnors are jailed, intended appeal will be rendered nugatory. After paying the Kshs. 400,000/- there was no sufficient amount to pay fully for Defendant's debt.

37. The 3<sup>rd</sup> Garnishee has no Defendant's money to pay fully decretal amount. There is no deliberate refusal to pay decretal amount; unless it pays from its pocket. Court should also note that penal consequences was not served. See **Nyamondi Ochieng vs K.P.T. Corporation [1994] eKLR** holding: On the mandatory requirement of service of penal consequences.

38. The Garnishee order was not endorsed with penal consequences. 3<sup>rd</sup> Garnishee C.E.O was not served thus no proper service. See **Nyamondi case (supra)**. Court emphasized need of personal service. It is not enough to say legal department was served. **Kasturi Ltd vs SHAH (2016) e KLR** which emphasized on personal service.

39. No personal service was effected on C.E.O thus can't be cited for contempt. The penalties are determined by court not party. No willful disobedience of court order. The Application is fatally defective for not complying with mandatory provisions.

#### **PLAINTIFF/APPLICANT REJOINDER**

40. The applicant submitted that the filing of an appeal is not a stay by itself. The stay of application in Court of Appeal is not a stay. On service of order and penal notice, the Respondent are relying on old law.

41. In New law; the personal service of order and penal notice is not necessary If contemnor is aware of order. See the case of **Shillers Plaza vs NBK; [2015] e KLR where the Court of Appeal held; "Knowledge of court order services to prove service and dispenses with personal service."**

42. If advocate of a party was in court when order was given, the contemnor is deemed to know of court order. There is prove they were aware of the order of the court thus respondent paid Kshs. 400,000/-vide paragraph 5 of replying affidavit – thus acknowledges service of ruling /order.

#### **ISSUES, ANALYSIS AND DETERMINATION**

43. After going through the pleadings, affidavits and rivalling submissions, I find the issues are; **whether the absolute order was served upon the respondent? if above in affirmative, has the respondent breached the absolute order in issue? If above in affirmative, what is the appropriate order thereof and who bears the costs of the application?**

44. On the first issue, the respondent on its own words conceded that a copy of the ruling was served upon the 3<sup>rd</sup> Garnishee and that, a sum of Kshs.400,000/- was remitted to the Plaintiff from the Defendant's bank accounts. The respondent contends that, sum of Kshs. 400,000/- was the only amount that was available for attachment as at 3<sup>rd</sup> August, 2020 when the amount was paid to the Plaintiff.

45. The 3rd Garnishee depones further that it could not fully comply with the Garnishee Order Absolute issued on 29th July, 2020 as there are no funds available to satisfy the said order. It is not deponed that the failure to comply was due to absence of service of the order in issue. Thus court need not say any more.

46. On whether the respondent is in breach of the court orders in issue, the court observes that, subsequent to hearing of the 3rd Garnishee's application seeking to set aside Garnishee Orders Absolute served upon it in February 2020, this Court delivered its ruling on the 29th July 2020 directing the 3rd Garnishee to immediately honour the Garnishee Orders by remitting the sum of Kshs.5,150,404/- to the Plaintiff, failure of which the latter was entitled to move this court for appropriate contempt orders.

47. That after the said ruling was delivered on 29th July 2020, an order was extracted and served upon the 3rd Garnishee, seeking their compliance of the same as directed by the court.

48. That the 3rd Garnishee, in clear breach of these orders, only remitted the sum of Kshs. 400,000/- out of the sum of Kshs. 5,150,404/- and alleged that the amount is the lumps sum collected from the Defendant's account. This was despite the filing of the Defendant's bank statements in court showing positive bank balances sufficient to cater for the full judgment sum.

49. That the 3rd Garnishee's acts were not only in a blatant breach of the court's orders but also an act of contempt aimed in aiding the Defendant from paying the Plaintiff his well-deserved, unchallenged and long-awaited fruits of judgment.

50. In the case of **Kenya Human Rights Commission vs Attorney General & Another** [2018] eKLR noted that the Court has inherent powers to enforce its orders under Article 159 of the Constitution as follows:

**a. " Article 159 of the constitution recognizes the judicial authority of courts and tribunals established under the constitution. Courts and tribunals exercise this authority on behalf of the people. The decisions courts make are for and on behalf of the people and for that reason, they must not only be respected and obeyed but must also be complied with in order to enhance public confidence in the judiciary which is vital for the preservation of our constitutional democracy. The judiciary acts only in accordance with the constitution and the law (Article 160) and exercises its judicial authority through its judgments decrees orders and or directions to check government power, keep it within its constitutional stretch hold the legislature and executive to account thereby secure the rule of law, administration of justice and protection of human rights. For that reason, the authority of the courts and dignity of their processes are maintained when their court orders are obeyed and respected thus courts become effective in the discharge of their constitutional mandate.**

51. In **Nthabiseng Pheko v Ekurhuleni Metropolitan Municipality & another CCT 19/11(75/2015)**. Nkabinde, j observed that:-

**a. "The rule of law, a foundational value of the constitution, requires that the dignity and authority of the courts be upheld. This is crucial, as the capacity of courts to carry out their functions depends upon it. As the constitution commands, orders and decisions issued by a court bind all persons to whom and organs of state to which they apply, and no person or organ of state may interfere in any matter, with the functioning of the courts. It follows from this that disobedience towards courts orders or decisions risks rendering our courts impotent and judicial authority a mere mockery. The effectiveness of court orders or decisions is substantially determined by the assurance that they will be enforced."**

52. In the case of **Canadian Metal Co. Ltd v Canadian Broadcasting Corp(N0.2) [1975] 48 D.LR(30)**, the court stated that;

**a. "To allow court orders to be disobeyed would be to tread the road toward anarchy. If orders of the court can be treated with disrespect, the whole administration of justice is brought into scorn... if the remedies that the courts grant to correct... wrongs can be ignored, then there will be nothing left for each person but to take the law into his own hands. Loss of respect for the courts will quickly result into the destruction of our society."**

53. Courts therefore punish for contempt to insulate its processes for purposes of compliance so that the rule of law and administration of justice are not undermined. Without this power or where it is limited or diminished, the court is left helpless and its decisions would mean nothing. This ultimately erodes public confidence in the courts; endangers the rule of law, administration of justice and more importantly, development of society.

54. That is why the court stated in **Carey v Laiken [2015] SCC17** that;

**a. "Contempt of court rests on the power of the court to uphold its dignity and process. The rule of law is directly dependent on the ability of the courts to enforce their process and maintain their dignity and respect"**

55. It is therefore a fundamental rule of law that court orders be obeyed and where an individual is enjoined by an order of the court to do or to refrain from doing a particular act; he has a duty to carry out that order. The court has a duty to commit that individual for contempt of its orders where he deliberately fails to carry out such orders. See (**Louis Ezekiel Hart v Chief George 1 Ezekiel Hart (-SC 52/2983 2nd February 1990)**).

56. And in Hon. **Martin Nyaga Wambora and Another v Justus Kariuki Mate & Another [2014] eKLR**, the Court stated ;

**"the duty to obey the law by all individuals and institutions is cardinal in the maintenance of rule law and administration of justice. It is therefore clear that the importance of the judiciary in the maintenance of constitutional democracy cannot be overemphasized. In order to achieve this constitutional mandate, the judiciary requires the power to enforce its decisions and punish those who disobey, disrespect or violate its processes otherwise courts will have no other means of ensuring that the**

public benefit from the judgments they hand down and the orders and or directions made on their behalf. When stripped of this power courts will be unable to guarantee compliance with their processes and will certainly become ineffective in the discharge of their duties and performance of their functions with the ultimate result that the public, as trustees of the rule of law, will be the major victim.”

57. In **Eliud Muturi Mwangi (Practising) in the name and style of Muturi & Company Advocates) vs. LSG Lufthansa Services Europa/Africa GMBH & another [2015] eKLR**, it was held thus:

a. “ The law is that any person who has committed an act of contempt of court is liable for indictment. Therefore, even third parties who are not parties in a suit may be committed for contempt of court and classic examples are contempt on the face of the court, contempt by officers of a company or corporation, contempt by persons who are claiming under the title of a party in a suit or as assigns or successors in title.”

58. Since the court of appeal has not stayed this court orders, this court finds the respondent in contempt of court orders in issue and makes the following orders;

i. This court issues hereby an order compelling the 3rd Garnishee to fully comply with the orders issued on the 29th July, 2020 within the next 7 days from the dates herein and in default the plaintiff to execute against respondent to recover the amount in issue.

ii. The respondent is fined ksh 200,000 to be paid within the next 7 days from the date of the ruling and in default the Respondents Managing Director and Chief Executive Officer, Ms. Rebecca Mbithi, to be committed to civil jail for a period of one (1) month.

iii. Costs to the applicant.

DATED, DELIVERED AND SIGNED AT GARISSA THIS 28<sup>TH</sup> DAY OF OCTOBER, 2020.

.....

C. KARIUKI

JUDGE