



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 194 OF 2008

PROF. MAURI ONYALO YAMBO.....1<sup>ST</sup> PLAINTIFF

MRS. JOAN AKINYI YAMBO.....2<sup>ND</sup> PLAINTIFF

-VERSUS-

HOUSING FINANCE COMPANY (K) LIMITED....1<sup>ST</sup> DEFENDANT

OTINDI INVESTMENTS LIMITED.....2<sup>ND</sup> DEFENDANT

**RULING**

[1] The Application before the Court is the Plaintiffs' Notice of Motion dated **2 June, 2016** and filed on **3 June 2016**. The same was brought pursuant to the provisions of **Section 3A** of the **Civil Procedure Act** and **Order 40 Rule 3 (1)** of the Civil Procedure Rules. The application seeks for the following orders:

[a] THAT this Honourable Court be pleased to order the committal to prison of the 1<sup>st</sup> Defendant's directors for such period of time as this Court may deem fit and just in that the 1<sup>st</sup> Defendant has disobeyed the Court Order made on **24 March 2009** *inter alia*, restraining the Defendants herein either by itself, its servants or agents by means of temporary injunction from interfering with the Plaintiff's possession of the suit property **L.R No. 3734/904/M4, LAVINGTON NAIROBI**, issued herein

[b] THAT this Court be pleased to order the withdrawal of the Plaintiffs' names from the **Metropol Credit Reference Bureau**.

[c] THAT the costs hereof be assessed by the Court and paid by the 1<sup>st</sup> Defendant.

[2] The Plaintiffs' application is supported by the affidavit of **Prof. Mauri Onyalo Yambo**, the 1<sup>st</sup> Plaintiff herein and sworn on **2 June, 2016**. The background to the application is that on **24 March 2009**, the Court granted the Plaintiffs interim orders herein restraining the 2<sup>nd</sup> Defendant either by themselves or through their agents from interfering with the Plaintiffs' possession of **L.R No. 3734/904, Lavington Nairobi (herein "the suit property")**. The Plaintiff avers that the said order was duly extracted and served upon the 1<sup>st</sup> Defendant through its Advocates on record.

[3] It is the Plaintiffs' case that despite being served with the said order, the 1<sup>st</sup> Defendant has failed and/or refused to comply and persists in such refusal. The Plaintiffs aver that, in blatant refusal to obey the valid court order, the 1<sup>st</sup> Defendant has advertently published the names of the Plaintiffs with **Metropol Credit Reference Bureau** and **Transunion Credit Reference Bureau** as delinquent debtors, while well knowing of the existence of the injunctive order.

[4] In response to the application, the 1<sup>st</sup> Defendant filed a Replying affidavit sworn by the 1<sup>st</sup> Defendant's Legal Manager, **Martin Machira**, sworn on **17 June 2016**. The 1<sup>st</sup> Defendant avers that the order made on **24 March 2009** was only against the 2<sup>nd</sup> Defendant restraining them from transferring the suit property to third parties or in any way interfering with the Plaintiffs' possession of the said property. According to the 1<sup>st</sup> Defendant, the Plaintiffs never sought any order against them in the Notice of Motion Application filed on **25 June 2008**. The 1<sup>st</sup> Defendant further avers that the said order had no penal notice endorsed

on it and had never been served on them or its Directors.

[5] It was further the contention of the 1<sup>st</sup> Defendant's that **Regulation 50** of the **Credit Reference Bureau Regulations, 2013** mandates banking institutions to notify their customers, within one month before a loan becomes non-performing, that it shall submit to the bureau the information pertaining to the loan immediately it becomes non-performing; and that in the absence of an order restraining them from referring the Plaintiffs for listing at the Credit Reference Bureau, the 1<sup>st</sup> Defendant was under obligation to comply; whereupon it was notified by **Metropol Credit Reference Bureau Ltd** on the **24 February 2016**, that the Plaintiffs had disputed the listing. In response thereto, the 1<sup>st</sup> Defendant wrote the letter dated **7 March 2016** (marked '**MM-9**') affirming that the Plaintiff's mortgage account was still in arrears. Accordingly, the 1<sup>st</sup> Defendant averred that the present application seeking to commit its Directors to civil jail is not only defective but is also an abuse of the Court process and should therefore be dismissed with costs.

[6] The application was disposed by way of written submissions. Thus, the Plaintiff filed its written submissions dated **18 July, 2016** on **19 July 2016** while the 1<sup>st</sup> Defendant filed its submissions dated **29 May, 2017** on **30 May 2017**. Having considered the application, the affidavits aforementioned and the written submissions filed herein, the key question to resolve is whether the 1<sup>st</sup> Defendant is in contempt of the orders granted by this Court on **24 March 2009**.

[7] The parties are in agreement that upon the filing of this suit, the Plaintiffs put in an application for an interlocutory injunction seeking to have the 2<sup>nd</sup> Defendant restrained from interfering with their possession of the suit property, pending the hearing and determination of the suit. A copy of the application was exhibited as an annexure to the Replying Affidavit of **Martin Machira** and marked **MM-2**. That application was heard and allowed by **Kimaru, J.** on **24 March 2009**. An order was extracted in terms thereof which was duly served on the 2<sup>nd</sup> Defendant. A copy thereof is annexed to the Replying Affidavit of **Mr. Machira** and marked **MM-1**. The Plaintiff has, vide the instant application dated **2 June 2016**, moved the Court to have the 1<sup>st</sup> Defendant cited for contempt for having caused their names to be listed with the **Metropol Credit Reference Bureau Ltd**, contending that the publishing of their names as delinquent debtors by the 1<sup>st</sup> Defendant plainly goes against the order.

[8] First and foremost, there is a manifest disconnect between the Plaintiffs' prayer in their Chamber Summons, the Ruling of the Court dated **24 March 2009** and the Order that was extracted therefrom on the one hand and the contempt application on the other. The initial application was in respect of the 2<sup>nd</sup> Defendant; the Ruling dated **24 March 2009** was in respect of the 2<sup>nd</sup> Defendant and the order that was extracted was directed at the 2<sup>nd</sup> Defendant. That Order reads:

**"IT IS HEREBY ORDERED:-**

1. **That the 2<sup>nd</sup> Defendants either by itself, its servants or agents is constrained by means of a temporary injunction from transferring to 3<sup>rd</sup> parties, alienating or otherwise howsoever interfering with the plaintiffs possession of the suit property LR No. 3734/904 Lavington, Nairobi pending the hearing and determination of the suit.**
2. **That the Plaintiffs shall have the costs of the application."**

[9] It is plain from the Order aforesaid that it was not directed at the 1<sup>st</sup> Defendant and therefore the 1<sup>st</sup> Defendant is in order in questioning why it has been cited for contempt. Secondly, the Order was specific to the Plaintiffs' possession of the suit property, and had absolutely nothing to do with the listing of the Plaintiffs as delinquent borrowers; which is what the instant application is all about. It would accordingly be futile to inquire into whether or not the 1<sup>st</sup> Defendant was served with the Order or a penal notice when clearly it was not the target or object of the Order. In the same vein, the question of whether or not the 1<sup>st</sup> Defendant complied with the Order or not would not arise, there being no suggestion that the Plaintiffs' possession of the suit property, which was protected by the injunctive order, has been interfered with or threatened with interference. In any event, **Order 40 Rule 6** of the **Civil Procedure Act** is explicit that:

**"Where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months from the date of the grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise."**

And there is no such order on the court file.

[10] More importantly, the 1<sup>st</sup> Defendant was under obligation to make the report complained about by dint of **Regulation 18** of the **Credit Reference Regulations 2013**, which state that:

**"(1) Customer information which shall be exchanged pursuant to these Regulations is any customer information concerning a customer's non-performing loan and any other negative information and may include details specified in sub- regulation (4)."**

Sub-regulation (4) provides a list of information to do, not only with the customer's identity, but also a customer's credit status including the nature and amount of loans or advances and other credit facilities granted, amounts outstanding thereof, credit applications and related matters. Besides the regulations have an elaborate redress mechanism under **Regulation 35** for aggrieved ones to pursue for purposes of redress.

**[11]** In the result, I have no hesitation in holding that the Plaintiffs' application dated **2 June 2016** is not only misconceived but is also totally lacking in merit. The same is hereby dismissed with costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13<sup>TH</sup> DAY OF OCTOBER, 2017**

**OLGA SEWE**

**JUDGE**