



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 9 OF 2015
FAST TRACK

RAIN DROPS LIMITED.....PLAINTIFF

VERSUS

COUNTY GOVERNMENT OF KILIFI.....DEFENDANT

RULING

The application dated 26th April, 2016 seeks two main prayers: -

1. Spent

2. THAT to ensure that this honourable court is not made to act in vain, and to ensure that the court's Orders made on the 25th February, 2016 and issued on the 29th of February 2016, are enforced both in their letter and spirit, the 1st, 2nd and 3rd respondents be directed to immediately ensure full compliance with the said Orders.

3. THAT the 1st, 2nd and 3rd respondents and each of them be cited for contempt of this honourable court and be committed to civil jail for 6 months for defying and being in flagrant and contemptuous breach of the honourable court's Orders made on the 25th February, 2016 and issued on the 29th of February, 2016.

The application is supported by the affidavit of **Joseph Munyoki Nzioka** sworn on 28th April, 2016. The respondents filed two replying affidavits. One sworn by **Owen Yaa Baya** on 13th May, 2016 and the second affidavit by **Amazon J. Kingi** on 20th May, 2016.

Mr. Taib, counsel for the applicant, filed written submissions on the matter. Counsel reinforced his written submissions with further oral arguments. The totality of the applicant's submissions is that this court made a ruling on 25th February, 2016. The two alledged contemnors were supposed to comply with the ruling but to date have failed to do so. The contemnors were served with the orders by two court process servers on two different occasions. They were aware of the court orders yet they have not complied with the same.

It is further submitted that the decision not to comply with the court order is willful and *mala fide*. The two alleged contemnors are the senior most officers in Kilifi County and the orders required them to file a report on revenue collection and transfer the revenue to the escrow accounts as per the agreement between the parties. The responsibility to effect the orders fell on the two alleged contemnors. Mr. Taib further contends that all members of the executive committee are appointed by the Governor. He can hire and fire them. The order directed the defendant to file a report indicating how much revenue was collected from 17th September, 2015 to end of February, 2016.

Counsel reiterates that the two alleged contemnors were aware of the court orders. Counsel relies on the case of **SHIMMERS PLAZA LTD V NBK [2015] eKLR**. The respondents are not seeking interpretation or clarification of the orders meaning that the orders were clear to them. The decision not to comply is deliberate. Time limits were set by the orders but there has been no compliance. No report on revenue collection has been filed and no funds were transferred to the escrow accounts.

Mr. Kithi, counsel for the defendant and the two alleged contemnors opposed the application. Counsel submit that the two alleged contemnors are not parties to the suit. They have been targeted in view of their positions in the County Government of Kilifi. One is the Governor while the second one is the County Secretary. No reasons have been given as to why these two were picked. The court orders involve public finances and the department dealing with money is under the County Treasurer. The County Treasury is established under section 103 of the Public finance Management Act and it is a statutory body. All revenue collections are being administered by the County Treasury. The person to have been cited would have been the County Executive member of Finance.

It is further submitted for the respondents that the right to bring up contempt proceedings had not crystallised. The order requiring the filing of the report has been complied with. There is a bank statement from Kenya Commercial Bank accounts showing that the collected revenue was deposited in those accounts. Further, Chase Bank went into receivership and the respondents could not have transferred the money to that bank. The plaintiff's counsel sent to the defendant Bank opening forms for a different bank but the defendant had to comply with normal procedures. Banks are service providers who have to compete and the defendant could not have just picked a bank and open an account. It is further contended that the applicant is not banking the money in the escrow account but in their own account. The alleged contemnors did not have knowledge of the court orders. Correspondence from the plaintiff's counsel was received after the respondents had complied with the orders. Mr. Kithi was only appearing for the defendant and correspondence received from the plaintiff involved the defendant only and not the other two alleged contemnors. Mr. Kithi relies on the case of **OCHINO & ANOTHER V OKOMBO & 4 OTHERS (1989) eKLR** and the South African case of **FAKIE V CC11 SYSTEMS (PTY) LTD [2006] S.CA. 54**.

The application herein is brought under section 5 of the Judicature Act which section provides as follows:

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“Contempt of court

1. 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 such power shall extend to upholding the authority and dignity of subordinate courts.

2. 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 the exercise of the ordinary original criminal jurisdiction of the High court.”

It is well established that contempt of court proceedings are quasi criminal in nature. That is why under section 5 (2) of the judicature Act, any conviction is appealable just like a criminal conviction. This calls for patience and great care on the part of the court before reaching the conclusion that a party has disobeyed a court order and is therefore in contempt of court. It should not be lost to judicial officers that in most cases litigants would be quite happy to see their opponents getting punished by the court at the

slightest degree of non-compliance with court orders.

The orders of this court of 25th February, 2016 states as follows: -

A. THAT the plaintiff's application dated 27th November, 2015 be and is hereby granted in the following terms: -

i. That the defendant to file a report showing how much revenue was collected from 17th September, 2015 to date.

ii. That the interested party Chase Bank Limited Malindi Branch to release to the plaintiff a sum of Kenya shillings thirty Five Million (Kshs.35,000,000.00) being the plaintiff's 30% share for the period from September 2015 to February, 2016 at an estimated monthly share of Kenya shillings Five Million (Kshs.5,000,000.00) also noting that the plaintiff may not receive another payment in due course.

iii. The revenue collected from September, 2015 to date to be transferred to the two escrow accounts as per the parties agreement within thirty (30) days hereof.

iv. Pending compliance with orders (a) and (c) hereinabove, I do review my orders of 17th September, 2015 and do allow the plaintiff to be the one collecting the revenue forthwith and the collected revenue to be banked in the escrow account daily. This order shall take effect from 1st march, 2016.

v. Upon filing the revenue collection report as per order (a) and upon transferring the revenue collected from 7th September, 2014 to 25th February, 2016 each party be at liberty to apply.

The first order involved the filing of a report showing how much money was collected from 17th September, 2015 to the date of the ruling, that is 25th February, 2016. That order was granted because the plaintiff informed the court that the revenue that was being collected by the plaintiff was not being deposited in the escrow accounts. The defendant has now filed a bank statement indicating that the funds were deposited at the Kenya Commercial Bank accounts. I have seen the bank statements. One account No. 1175862436 has a credit balance of Kshs.9,302,160/= as at 26th February, 2016. No withdrawals were made from that account. The second account No. 1175862053 had a credit balance of Kshs.72,955,125.40 as at 26th February, 2016. Similarly, no withdrawals were made. There is the position that Chase Bank had problems and the money was deposited in the defendant's bank accounts. That satisfies the requirements of the court order. Although the statements were to start from 17th September, 2015, the deposit starts from 22nd October, 2015. The defendants maintain that the plaintiff continued to collect the revenue in September. I will not deal with the time difference. I am satisfied that the court order in relation to the filing of a report has been satisfied. There will be no difference between a report and the exact bank statement showing the bankings.

The second order was for Chase Bank to release a sum of Kshs.35 million to the applicant. There is no complaint on this issue. The supporting affidavit of Mr. Joseph Munyoki Nzioka does not mention this issue. I believe the order was complied with. Mr. Taib did not raise any issue on this order.

The 3rd order was to have the collected revenue to be transferred to the two escrow accounts. It is common knowledge that during the intervening period Chase bank was put under receivership. Counsel for the applicant did send fresh bank account opening forms to the defendant. The plaintiff is quite aware that Chase bank where the two escrow accounts are being held was under receivership. The explanation is legally correct as the defendant could not transfer the money to a bank that had been placed under receivership. I am satisfied with the explanation and I do not find any disobedience of the court order.

The fourth order allowed the plaintiff to continue collecting the revenue. There is no complaint on that

order. I presume the plaintiffs are collecting the revenue. This application was filed on 29th April, 2016. Mr. Taib filed another application on 29th June, 2016 when this ruling was still pending. It is clear from the subsequent application that the plaintiff is collecting the revenue.

The above four specific orders are what is contained in the court ruling of 25th February, 2016. The application for contempt was filed on 29th April, 2016, a period of two months later. Counsel for the applicant could have listed the matter for mention and explain to the court the status of compliance with the court orders. The orders are issued by the courts and it is the courts which normally observe any deliberate non-compliance with the orders. Even when there is non-compliance, the court has to give the contemnor an opportunity to explain the reasons for non-compliance. The court cannot simply make a hasty decision that its orders have been disobeyed and proceed to punish someone. Ideally it is the court that is the silent complainant in civil contempt proceedings. The court is being informed that its own orders are being ignored or that a party is deliberately not complying with its orders. The court has to examine the allegations cautiously before reaching a conclusion that its orders have been disobeyed.

Given the history of the dispute herein, I do find that there is no disobedience with the court orders issued on 29th February, 2016. The money was to be deposited in the two escrow accounts at Chase Bank as per the parties agreement of 20th February, 2014. Chase Bank was put under receivership. The collected revenue is available and is subject to subsequent litigation. I find that the defendant did comply with the court orders.

The upshot is that the application dated 26th April, 2016 lacks merit and is hereby dismissed. Costs shall follow the outcome of the main suit.

Dated and delivered in Malindi this 21st day of September, 2016.

S.J. CHITEMBWE

JUDGE