



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 143 OF 2014

In the matter of: Section 5 of the Judicature Act, as well as Section 63 (c) of the
Civil Procedure Rules

In the matter of: Order 40 Rule 3 of the Civil Procedure Rules as well as Part 81.4 of the Civil
Procedure Rules of England and Wales

In the matter of: Disobedience of the Court Orders made by this Honourable Court on 14th
April 2014 and 26th September 2014

In the matter of: An application by Directline Assurance Company Limited for an Order for
**Committal for Contempt of Court against Jamii Bora Bank Limited and its officers, Samuel
Kimani (The Chief Executive Officer), Timothy Kabiru (The Chief Commercial Officer), Virginia
Ndunge (The Company Secretary), Rufus Macharia (The Debt Recovery Manager) and Fred
Chumo (The Legal Manager)**

WITH

DIRECTLINE ASSURANCE COMPANY LIMITED.....APPLICANT

-VERSUS-

JAMII BORA BANK LIMITED 1ST RESPONDENT

SAMUEL KIMANI 2ND RESPONDENT

TIMOTHY KABIRU 3RD RESPONDENT

VIRGINIA NDUNGE 4TH RESPONDENT

RUFUS MACHARIA 5TH RESPONDENT

FRED CHUMO 6TH RESPONDENT

R U L I N G

1. There are two Notice of Motion applications before the court. The first one is dated 16th December 2014 and is filed by the Plaintiff (hereinafter referred to as the '**1st Application**'), while the second one is dated 8th May 2015 filed by the Defendants (hereinafter called the '**2nd Application**').

2. The first application seeks to secure the following orders:-

1. *That the 1st Defendant/Respondent be denied audience before the Honourable Court until such time as the 1st Defendant has purged its Contempt.*
2. *That the Honourable Court be pleased to issue the following Orders against the 1st Defendant and/or its Directors and/or officers for deliberately defying and disobeying the Court Orders issued by the Honourable Court on 14th April 2014 and 26th September 2014:*
 - a. *The 1st Defendant as well as the 1st Defendant's Chief Executive Officer (Mr. Samuel Kimani), Chief Commercial Officer (Mr. Timothy Kabiru), Company Secretary (Ms. Virginia Ndunge), Debt Recovery Manager (Mr. Rufus Macharia) and Legal Manager (Mr. Fred Chumo) be fined such sums of money as this Honourable Court may direct and that the same be paid into court forthwith;*
 - b. *Property belonging to the 1st Defendant as well as the 1st Defendant's Chief Executive Officer (Mr. Samuel Kimani), Chief Commercial Officer (Mr. Timothy Kabiru), Company Secretary (Ms. Virginia Ndunge), Debt Recovery Manager (Mr. Rufus Macharia) and Legal Manager (Mr. Fred Chumo) be attached to the extent of such value as this Honourable Court may direct; and*
 - c. *The 1st Defendant's Chief Executive Officer (Mr. Samuel Kimani), Chief Commercial Officer (Mr. Timothy Kabiru), Company Secretary (Ms. Virginia Ndunge), Debt Recovery Manager (Mr. Rufus Macharia) and Legal Manager (Mr. Fred Chumo) be committed to and/or detained in prison for a term of six (6) months.*
3. *That there be liberty to apply.*
4. *THAT the cost of this Application be borne by the 1st Defendant.*

3. The application is premised on the following grounds:-

- a) *On 14th April 2014, the Honourable Court issued an injunctive Order restraining the 1st Defendant, its agents and/or servants from setting off, handling and/or dealing with the Plaintiff's deposit of Ksh. 24,847,315/= that had been held by the 1st Defendant under FDR Receipt No. 0292062788 pending the inter partes hearing and determination of the Plaintiff's Notice of Motion dated 11th April 2014.*
- b) *The said Order was extracted on 15th April 2014 and was served on the 1st Defendant on the same date, at approximately 11:05am.*
- c) *Upon receipt of the Court's Order, the 1st Defendant withheld acknowledging its receipt until 1:10pm, a period of over 2 hours.*
- d) *In the intervening period, and as the process server awaited receipt of the duly acknowledged copy of the Court Order, the 1st Defendant proceeded to effect a debit of Ksh. 20,960,000/= from the aforesaid deposit in purported exercise of its right of set-off, despite the same being expressly barred by the Court Order.*

e) After effecting the said debit from the Plaintiff's account, the 1st Defendant then furnished the process-server with a received copy of the Court Order wherein the 1st Defendant had engrossed thereon as follows: "Received under protest. Order overtaken by events".

f) In the circumstances, it is clear that the 1st Defendant effected the debit of Ksh. 20,960,000/= from the Plaintiff's account in a bid to defeat the Court Order issued on 14th April 2014 restraining the same, and the delay in acknowledging receipt of the Order was deliberately done so as to facilitate the debiting of the Plaintiff's account in contravention of the Court Order that had just been served upon the 1st Defendant.

g) The above actions by the 1st Defendant - which were done on 15th April 2014 - clearly indicate that the 1st Defendant willfully violated the express orders of the court and thereby denigrated the authority of the court, with the 1st Defendant's acts of contempt being particularized below:

i) Refusing to immediately acknowledge receipt of a valid court order;

ii) Refusing to immediately act upon a valid court order;

iii) Setting off the sum of Ksh. 20,960,000/= from the Plaintiff's account in violation of a court order in its possession expressly barring it from doing so;

iv) Setting off the sum of Ksh. 20,960,000/= from the Plaintiff's account so as to defeat the express terms of the court's order made on 14th April 2014 barring the 1st Defendant from effecting the same;

v) Withholding its acknowledgement of receipt of the Court's order until after it had willfully disobeyed the same; and

vi) Falsely alleging that the Court Order had been overtaken by events when the same was served.

h) In fact, in a considered ruling dated 26th September 2014, the Honourable Court held that the above debit effected by the 1st Defendant on the Plaintiff's account with the 1st Defendant was highly irregular. It therefore ordered that the proceeds of the said debit, namely the sum of Ksh. 20,960,000/=, be placed in a Special interest earning Account established in favour of the Plaintiff pending the hearing and determination of this suit.

i) The above order was extracted and served not only on the 1st Defendant's Advocates on record but also on the 1st Defendant itself on 6th November 2014.

j) However, yet again, the 1st Defendant has failed, refused and/or neglected to comply with the Court Order issued on 26th September 2014. Particulars of the 1st Defendant's Contempt of Court in this particular instance can be surmised as follows:

- i. Failure to comply with the Court Order issued on 26th September 2014, extracted on 4th November 2014 and served upon the 1st Defendant itself on 6th November 2014; and
- ii. Failure to set up a special account for Ksh. 20,960,000/= in the Plaintiff's favour whose proceeds are to be held as security pending the hearing and determination of this suit.

k) The deliberate contravention of the Court's aforesaid Orders by the 1st Defendant is directly attributable to the following officers of the 1st Defendant who are personally

familiar with the dispute at hand and on whose instructions the aforesaid actions have taken place: the Chief Executive Officer (Mr. Samuel Kimani), the Chief Commercial Officer (Mr. Timothy Kabiru), the Company Secretary (Ms. Virginia Ndunge), the Debt Recovery Manager (Mr. Rufus Macharia) and the Legal Manager (Mr. Fred Chumo).

l) The 1st Defendant's willful disobedience of the Court's aforesaid Orders has brought the Honourable Court into ridicule, odium and disrepute and has painted the Court as weak, powerless and ineffective;

j) The Honourable Court ought to move with speed to uphold its dignity and assert its authority so as to enforce obedience of its Orders

k) Parties who willfully disobey Court Orders must be punished;

l) It is in the interest of justice that the Orders sought herein be granted;

m) Other grounds and reasons to be adduced at the hearing hereof.

4. The application is supported by affidavit sworn by Sandra Nyakweba on 16th December 2014. The said affidavit expounds on the aforesaid grounds. In further support of the application Sandra Nyakweba swore a Supplementary Affidavit on 27th February 2015. In further support thereof there is a 2nd Supplementary Affidavit sworn by Donald Okonda on 27th February 2015. These affidavits emphasize the alleged disobedience of this court's orders by the alleged contemnors.

5. The application is opposed by the Respondents vide a Replying Affidavit of **Fred Chumo** on **22nd December 2014**.

6. The application was heard inter-partes on 5th March 2015 and a Ruling reserved for 30th April 2015 which was subsequently pushed to 15th May 2015.

7. Before the said Ruling could be delivered the Respondents filed the 2nd application herein seeking the following orders:-

- 1. That this application be certified urgent and service be dispensed with in the first instance.*
- 2. That pending the hearing and determination of this application, the Honourable Court be pleased to Order a Stay of any further proceedings and ruling in respect to the Plaintiff's application dated 16th December 2014 seeking punishment of the 1st Defendant and the Respondents for alleged violation of the court orders made by this Honourable Court on 14th April 2014 and 26th September 2014.*
- 3. That this Honourable Court be pleased to find and hold that the aforesaid orders made on 14th April 2014 and 26th September 2014 have been complied with to the fullest possible extent.*
- 4. That this Honourable Court be pleased to discharge the Respondents, Jamii Bora Bank Limited, Samuel Kimani, Timothy Kabiru, Virginia Ndunge, Rufus Macharia and Fred Chumo for any or any alleged contempt of court and that the Honourable Court be pleased to declare that the proceedings in respect of the application dated 16th December 2014 be terminated and marked as closed and or settled.*
- 5. That the costs of this application be in the cause.*

8. The application was premised on the following grounds:-

a. THAT the 1st Respondent, Jamii Bora Bank Limited, has issued 2 new Fixed Deposit Receipt

Nos. 0292065245 dated 21st January 2015 for the sum of Kshs. 20,960,000/= with interest accruing at the rate of 12% per annum from 14th April 2014 to 14th April 2015 (now matured) and FDR No. 02920652452 dated 7th May 2015 for the sum of Kshs. 23,475,200/= with interest accruing from 14th April 2015 to 14th April 2016 at the rate of 12% per annum in full compliance with the Court Orders made on 26th September 2014 as read together with the court order issued on 14th April 2014;

b. THAT the new Fixed Deposit Receipt Nos. 0292065245 and 02920652452 have been issued in place of Fixed Deposit Receipt No. 0292065245 dated 21st January 2015 already issued also in compliance with the court order made on 26th September 2014 as read with court orders made on 14th April 2014;

c. THAT the issuance of the 2 Fixed Deposit Receipts Nos. 0292065245 and 02920652452 have been issued in place of Fixed Deposit Receipt No. 0292065245 dated 21st January 2015 has been undertaken in deference and obedience to the court to obviate any lingering doubt as to the 1st Defendant's and the Respondents' respect to the court;

d. THAT prior to the issuance of the 2 new Fixed Deposit Receipts Nos. 0292065245 and 02920652452 have been issued in place of Fixed Deposit Receipt No. 0292065245 dated 21st January 2015, the Respondents have made a without prejudice offer to the Plaintiff/Applicant but the Respondents' offer for peace and tranquility, has not been responded to and appears to have been spurned thus necessitating the filing of this application;

e. THAT the liberty, reputation and constitutional rights of the Respondents is at stake as is the reputation and authority of the court hence the application herein is necessary to enhance the court's authority;

f. THAT the real and true purpose of the Plaintiff's application dated 16th December 2014 is to ensure compliance with the court orders made on 14th April 2014 and 26th September 2014 and therefore, the 1st Defendant's and the Respondents' application herein enhances rather than undermines the dignity and authority of the court;

g. THAT is in interests of justice that the Respondents' application herein be heard and determined prior to the Ruling on the Plaintiff's application dated 16th December 2014;

h. THAT it in the wider interests of justice that the Plaintiff's application and the proceedings thereon be stayed pending the hearing and determination of the Respondents' application herein;

i. THAT the offer made to the Plaintiff by the 1st Defendant and the Respondents was made in good faith and in the honest and reasonable belief that all that the Plaintiff seeks in its application dated 16th December 2014 is the compliance with the court orders made on 26th September 2014;

j. THAT the Respondents are ready and willing to abide by any other directions and orders that shall be made by this court including depositing any reasonable security for the due compliance with the court orders made on 26th September 2014 as read together with the orders made on 14th April 2014;

k. THAT the liberty of the 2nd to 6th Respondent and the reputation of the 1st Respondent, one of the fastest growing banks in Kenya, is at stake and therefore, it in the wider and larger interests of justice that the application herein be allowed a chance to clear any possible and lingering

doubts as to the compliance with the court orders made on 26th September 2014 as read together with the orders issued on 14th April 2014.

9. The application is supported by affidavit of **Velma Okoth** sworn on **8th May 2015**. The affidavit mainly expounds on the above grounds.

10. The Respondent to the 2nd application opposed the same through Grounds of Opposition filed in court on 11th May 2015 stating that:-

- i. ***The Respondents' application is premature and speculative as it presupposes the outcome of the Ruling on the Plaintiff's Notice of Motion dated 16th December 2014 (hereinafter referred to as 'the Plaintiff's') yet the said Ruling is still pending.***
- ii. ***The Respondents' application lacks merit as it seeks to stay the determination of the Plaintiff's application despite the fact that the order to discharge the 1st to 6th Respondents to the Plaintiff's application sought in prayers 3 and 4 of the Respondent's application can only be issued after a Ruling is delivered on the Plaintiff's application.***
- iii. ***The Respondents' application is a gross abuse of court process as it seeks to re-litigate the issue of contempt of court by the 1st to 6th Respondent/Applicants yet the culpability or otherwise of the 1st to 6th Respondents for contempt of court is an issue that has already been canvassed before the Hon. Court during the hearing of the Plaintiff's application on the 5th of March 2015 and can therefore not be re-opened for litigation.***
- iv. ***The Respondent's application is also a gross abuse of court process as it seeks to steal a march on the Plaintiff by delaying delivery of the Ruling on the Plaintiff's application, which Ruling is scheduled for delivery on 15th May 2015.***
- v. ***The Respondent's application has been made in bad faith.***
- vi. ***Such and other grounds and/or reasons to be adduced at the hearing hereof.***

11. I have carefully considered the two applications. The second application was filed before I could deliver the Ruling on the first application. In order to determine the applications, I will raise only two issues:-

1. ***Whether the alleged contemnors have indeed purged the alleged contempt.***
2. ***The role of contempt proceedings in civil litigation.***
3. ***Costs, if any.***

12. To address the first issue, I have noted the Supporting Affidavit of Velma Okoth in which she states the alleged contemnors have by the time of filing the 2nd application, fully complied with the orders of this court and issued a new Fix Deposit Receipt Numbers 0292065245 and 0292065245 in deference in obedience to the court. This position was confirmed by Mr. Kuria, the Plaintiff's counsel. It is therefore true that the alleged contemnors have purged the contempt, and have pleaded with this court to allow them to comply with this court's order made on 26th September 2014. Indeed, in its grounds of objection the Plaintiff does not deny that the contempt has been purged, but urges that the alleged contemnors be punished the said purging of the contempt notwithstanding. It is therefore the finding of this court that the contemnors have purged the contempt, and that the respective orders of this court have been fully complied with.

13. Now, to the second issue, what is the role of contempt proceedings in civil litigation? To my mind contempt proceedings are quasi – criminal in nature, and is a tool employed by a civil court to ensure obedience to the civil court's orders and directions. A civil court has no interest in punishing a litigant, unless a litigant leaves the court with no option but to resort to quasi- criminal proceedings to punish a litigant. When a court orders are being disobeyed, or are about to be disobeyed, and the contemnor comes down and purges the contempt, either out of his own freewill or at the prompt of the court, the court will accept the purge of the contempt unless circumstances exist to suggest that the coming down, or the alleged purging of the contempt, is not genuine, or is done in bad faith, or is in itself a continuation of the original contempt. In accepting the coming down of the contemnor, the court will assess the reasons given for the disobedience, the time taken to come down, and the cost incurred in the process.

14. In the particular instance, this court notes that the contemnors have come down in a span of a few months. As they did that they credited the interest due on the fixed deposit receipts to the account of the Plaintiff, and they have pleaded obedience to this court and are remorseful. This court accepts the act of purging the contempt and the remorsefulness of the contemnors, and notes that in the entire process the Plaintiff has not suffered any loss, except the anxiety and anger which comes with one party refusing to honour court orders.

15. I must note however, that it is not the interest of this court to meet criminal punishment upon any litigants, unless there is no option. Where a party accepts culpability and amends his waywardness, I think he deserves another chance.

16. In light of the foregoing the only remedy for the Plaintiff would be in terms of costs of those proceedings.

17. In the upshot, this court makes the following orders:-

- a. ***This court finds and holds that the aforesaid orders made on 14th April 2014 and 26th September 2014 have been complied with fully.***
- b. ***This court herewith discharges the Respondents, Jamii Bora Bank Limited, Samuel Kimani, Timothy Kabiru, Virginia Ndunge, Rufus Macharia and Fred Chumo from alleged contempt of court and that the proceedings in respect of the application dated 16th December 2014 be and are hereby terminated and closed.***
- c. ***The costs for the two applications shall be for the Plaintiff***

Orders accordingly.

READ, DELIVERED AND DATED AT NAIROBI THIS 30TH DAY OF SEPTEMBER 2015

E. K. O. OGOLA

JUDGE

PRESENT:

Mr. Kuria for the Applicant

Mr. Mwangi for the 1st Respondents

Teresia – Court Clerk