



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO.221OF 2015

1. CLEAN ANALYTICAL SYSTEM AB

2. CAS KENYA LIMITED.....PLAINTIFFS

VERSUS

FAITH KAGWIRIADEFENDANT/CONTEMNOR

AND

LUCY WAITHAKA.....3RD PARTY/CONTEMNOR

RULING ON SENTENCE

1. On 8th December, 2015 this court found the defendant and the 3rd party to be in contempt of court orders made by Honourable Onyancha J on 16th June 2015. The contemnors' advocates mitigated and urged the court to exercise leniency and pardon. The contemnors. On behalf of the defendant it was submitted by Mr Okatch advocate that the defendant was remorseful. That she had withdrawn money for purchases of a piece of land although she had not annexed to her affidavits any such evidence but that she was willing to avail such evidence before sentence is pronounced. Further, that the dispute herein is basically between the defendant and her husband who had employed her through the plaintiff companies but that the relationship soured giving rise to the claims against her. Further, that she has already filed an application seeking to vacate the exparte orders which were not deserved. The defendant further pleaded that she regrets being in contempt of court. She has a sickly child who needs her constant care and fees in secondary school, while having regular appointments with the doctor. That the freezing order had affected her greatly since she was a victim of circumstances. Further, that she had always attended court, following the proceedings and being a single mother, her child will suffer if she is incarcerated.

2. On behalf of the 3rd party, her advocate Miss Mwathane submitted that the third party appreciates the finding of the court and that the third party was only carrying out her duties as a bank manager in light of the bank/customer relationship but that she later ensured the order of the court was obeyed. The third party was also said to have regularly attended court and submitted herself to the court. That her employment would suffer and or be interrupted if she is incarcerated as she depends on it solely for the livelihood. She prayed for leniency of the court.

3. I have considered the mitigating factors as submitted on behalf of the defendant and the 3rd party contemnors. From the onset, this court must send a strong signal to all parties and non parties to suits

before any court of law that they are obliged by law to obey or assist the court in the enforcement of any such court orders whenever they are directed to do so. Contempt of court is a crime against the authority of the court and fair administration of justice. It is not an offence against any party to the dispute. It is a serious affront to the rule of law which is one of the pillars of good governance as well as a principle and value espoused in Article 10 of our Constitution.

4. Judicial power in Kenya it must be borne in mind is vested in the courts and tribunals by Article 159 of the Constitution and that power is a fundamental tenet of the rule of law that court orders must of necessity and not by choice be obeyed to the letter. It is therefore not open to any person or class of persons to choose whether and when to obey or not to comply with court orders or even ignore or assist or aid any other person in disobeying the court orders. It also matters not the status of the person expected to so obey the court orders.

5. Citing and punishing one for contempt of court is one way of ensuring that lawful court orders whether made *ex parte* in the first instance or *inter partes* are obeyed by all and sundry. *Ex parte* orders are not meant to be final or to determine the dispute between the parties. In this case the *ex parte* order was meant to preserve the subject matter of the claim and the defendant was in any event going to have at the earliest opportunity to come to court and challenge that order as that is an unimpeded right and she has already filed such an application which is pending on record. There was therefore absolutely no reason why, upon being alerted by the 3rd party representing Equity Bank that there was a freezing order by the court, the defendant rushed to the bank to withdraw the money Kshs 2,000,000/- and when she was responding to the application for contempt she did not attempt to indicate the urgent purpose for which the money was quickly withdrawn since just a few days earlier the bank statement shows that she had withdrawn huge sums of money from the said account. The attempted mitigation through provision of a purchase/sale of land agreement is irrelevant since none of the withdrawals from the account between 3rd June, 2015 and 18TH June 2015 show any relation to the sale agreement and moreover, the defendant only attempted to explain the withdrawals in mitigation and after the parties had mitigated is when she filed supporting documents which included a sale agreement and some report made to the police to show that there was a person named Bengt Inge Brode threatening her. Those in my view are documents that are irrelevant at this stage of mitigation as the plaintiff did not have an opportunity to respond to them and it would be unfair and unjust to allow and rely on such afterthought documents as mitigators.

6. This court nonetheless does appreciate that the dispute is between individuals who are known to one another and that they have had an intimate relationship as shown by the correspondence on record which relationship has soured hence there is likelihood that some trust which existed between them was lost hence the dispute. But that is still no excuse for disobeying lawful court orders. Contemnors undermine the dignity and authority of the courts and must be dealt with firmly so that the judicial authority of the courts is not brought into disrepute it is not for the courts to allow parties to steal a march on it and obtain undeserved forensic advantage by willfully and flagrantly disobeying court orders.

7. The 3rd party is before this court representing the Equity Bank which was served with the order of this court to facilitate its enforcement. The order was served on the third party personally as the operations manager of the bank. Equity Bank of Harambee Avenue Branch, Nairobi, admittedly, holds more than one account with the defendant and upon the court order being served on the 3rd party, instead of concentrating on obeying it, she alerted the defendant who, before being served with the said order, but with full knowledge of the temporary freezing order, rushed to the bank and withdrew the money. It is important for parties to know that courts do not fish for evidence to prove facts that are alleged. In the circumstances of this case, the 3rd party was trying to be too clever with the court by saying there were over 120 accounts that can be opened and that names of account holders could be similar so the court order was ambiguous. This court is empowered under the provisions of Section 119 of the Evidence Act to presume the existence of any fact which it thinks likely to have happened, regard being had to the common cause of natural events, human conduct and public and private business, in their relation to the fact of the particular case. It is on that basis that the court did presume that indeed,

if what the 3rd party was attempting to explain was plausible, nothing prevented her from availing those documentation to court. Furthermore, that customers with more than one account, in a bank, there is always a link between one account and another account for the same person or persons for ease of tracking the customer's transactions with the bank hence it could not have taken the defendant to withdraw money from the same branch of the bank before the 3rd party noticed, if she had acted on the orders of the court to freeze all the defendant's accounts in the branch and not inform the defendant. This court also takes note that had the 3rd party not notified the defendant, the money would most likely not have been withdrawn at that lightning speed.

8. It is an unqualified obligation of every person against whom a court order has been made or directed at to obey it instant unless and until that order is varied or discharged. It matters not that the order was obtained ex parte or without disclosing material facts or even without jurisdiction. As long as such order has not been reviewed, varied or set aside, (see Order 40 Rule 4 (1), it is the duty of the person against whom it is issued to comply and complain later by putting in place mechanisms to have it set aside or varied. The consequences of failure to obey a court order are that any action taken in breach of that order is a nullity and of no consequence. In this case, the interim orders granted against the defendant and directed at the Bank was not meant to finally determine this dispute between the parties whether they are related or not as stated by the defendant. Equally, the obedience of court orders supersedes the Bank/customer relationship between the defendant and the 3rd party's employer Equity Bank. The interim order was only meant to give interim protection of the subject matter in order not to expose the disposable asset to preventable peril.

9. The 3rd party chose to willfully disobey the said court order. She is the one who dragged the defendant to the bank with a notification then sat back and watched the defendant who had not been formally served with the said court order withdraw the funds from the account. The third party then pretended that the court order was vague and ambiguous. The 3rd party must therefore, together, jointly and severally with the defendant be ready to face and bear the consequences of such disobedience however undesirable.

10. Therefore, having considered all the circumstances of this case and the touchy mitigation and pleas made by the contemnors through their respective advocates, I make the following pronouncements.

- a. That the defendant **FAITH KAGWIRIA** and the third party **LUCY WAITHAKA** (contemnors) shall jointly and severally within seven days from the date hereof purge the contempt committed by restoring/restituting the whole sum of kshs 2,000,000 two million Kenya shillings back into the Equity Bank Harambee Avenue Branch account No.0240261946083 from which it has unlawfully withdrawn in flagrant disobedience of this court's order.
- b. That the defendant and the third party contemnors are hereby ordered to pay into court a fine of Kenya shillings two hundred and fifty thousand (kshs 250,000) each, by end of today.
- c. In default of purging the contempt within 7 days or unless the period is reviewed by this court, the contemnors shall be arrested and detained in prison for a period of three(3) months.
- d. In default of payment of the fine herein as imposed, the contemnors shall be detained in prison for a term of three months or until the said fine is paid, whichever is the earlier.

Dated, signed and delivered in open court at Nairobi this 10th day of December, 2015.

R.E. ABURILI

JUDGE

10/12/2015

Coram R.E. Aburili J

C.A. Adline

Mr Masse for the applicant

Mr Akhulia for third party (3rd party present)

No appearance for defendant (defendant in person present)

COURT- Ruling on sentence read and pronounced in open court as scheduled.

R.E. ABURILI

JUDGE

Mr Akhulia- I seek stay of execution.

Mr Odhiambo now appearing for the defendant in court and states - We ask for 2 weeks stay to enable us file an appeal.

COURT- The court did on 8th December 2015 find the defendant and third party in contempt of court orders and today the contemnors have been ordered to purge the contempt within 7 days and also pay a fine of shs 250,000 each in default to be detained in prison.

The third party and defendants have applied for stay of execution of the sentence pending appeal. I have considered the applications for stay of execution of the sentence. The court has ordered for purging of the contempt which the contemnors appear determined to defeat accordingly I decline to grant any stay orders as prayed.

Orders accordingly.

R.E. ABURILI

JUDGE

10/12/2015