



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 221 OF 2015

1. CLEAN ANALYTICAL SYSTEM AB

2. CAS KENYA LIMITED.....PLAINTIFFS

VERSUS

FAITH KAGWIRIA.....DEFENDANT

AND

LUCY WAITHAKA.....3RD PARTY

RULING

1. Before this court is the Plaintiffs/applicants' notice of motion dated 7th July, 2015 seeking the following orders:-

a. That Equity Bank Limited be ordered to deposit the sum of KShs. 2,000,000/= paid to the Defendant on 18th June, 2015 in court within seven (7) days of the date of this order.

d. That the Branch Manager of Equity Bank, Harambee Avenue Branch, Lucy Waitthaka be committed to civil jail for a period not exceeding six (6) months.

c. That this court be pleased to order the attachment of the property of Equity Bank Limited and that the attached property be sold and the proceeds be paid to the Plaintiffs as compensation.

d. That the Defendant be committed to civil jail for a period not exceeding six (6) months.

e. That this court be pleased to order attachment of the property of the Defendant and that the attached property be sold and proceeds be paid to the Plaintiffs as compensation for breach of a court order.

2. The application is premised on the grounds set out on the face of the application, the supporting affidavit of Raphael Okere who is the Accounting Manager of the 2nd Plaintiff and Country Representative of the Plaintiffs sworn on 7th July, 2015 and a supplementary affidavit sworn on 10th September, 2015 by Peter Mburu Waitthaka who is a licensed court process server. In response to the motion, the Defendant Faith Kagwiria and Lucy Waitthaka the 3rd party swore their replying affidavits on

5th August, 2015 and 10th September, 2015 respectively.

3. The Plaintiffs' case was that on 16th June, 2015, Justice Onyancha granted an interlocutory injunction restraining the Defendant, her servants, employees or agents from withdrawing, assigning, alienating, paying out or transferring monies from current account number 0240101448255 or any other account held by the Defendant at Equity Bank Limited, Harambee Avenue Branch Nairobi until 26th June, 2015; an injunction restraining the Defendant by herself, her employees, agents or whomsoever from registering any transfers, charge, lease, disposal or alienation in respect of any interest or dealing in motor vehicle registration No. KBZ O99G and that the orders be served upon the Manager Equity Bank Limited, Harambee Avenue Branch to be cooperative and to assist in the obedience of the orders by the Defendant in compliance of the order to prayer 3.

4. It is contended that the said order was served upon the Branch Manager, Equity Bank Limited Harambee Avenue on 17th June, 2015 and that the Defendant was made aware of the orders by Lucy Waithaka on 17th June, 2015 but frustrated and attempted to evade service of the court order until 18th June, 2015 when she was served at Muthangari Police Station. The plaintiffs lament that despite the said service, the Branch Manager, Equity Bank, Harambee Avenue Branch, Nairobi connived with the Defendant and in contempt of the said order effected payment of KShs. 2,000,000/= in cash from the Defendant's account number 0240261946083 from the said Harambee Avenue Branch on 18th June, 2015.

5. The Defendant denied that she was made aware of the court order by Lucy Waithaka as alleged. She further contended that the said allegation is not contained in the affidavit of service ('R 02') of Peter Mburu Waithaka sworn on 22nd June, 2015. That the averments of Raphael Okere that she frustrated service are baseless since the 'R 02' elaborate how service was effected and how cooperative she was. She stated that it is clear in 'R 02' that service was effected upon her at 4.50 pm way after the bank had closed. She contended that service was effected upon her at Muthangari Police Station which is miles from Equity Bank, Harambee Avenue Branch. She contended further that the allegations that she and the Bank Manager connived had not been particularised or supported by evidence.

6. Lucy Waithaka the Operations Manager of the Equity Bank Harambee Avenue Branch and who was personally served with the subject and material court order on her part admitted receiving the said court order but denied having connived with the Defendant to act in contravention of the court order. She explained that she was served with the court order on the afternoon of 17th June, 2015. That the contents of the order that were relevant to her were that she was to co-operate and assist the court in enforcing an order barring the Defendant from account number 0240101448255 or any other account held by the defendant at Equity Bank, Harambee Avenue Branch. That she then proceeded to restrict transactions in the said account until the orders are set aside or until 24th June, 2015. That she also advised the Branch Manager to inform the Defendant of her freezing of the account. She contended that the said order was ambiguous since there are several types of accounts which an individual can open amongst them, current accounts, ordinary accounts, school fees accounts, tailor made accounts etc. That due to the ambiguity and the fact that various departments were involved, it was not possible for the process to be completed on 17th June, 2015 to enable the narrowing down of the type of accounts sought to be restricted. That on 18th June, 2015, the search and compilation process elicited around 120 different accounts with variations of the Defendant's names. That the said accounts needed to be verified that they belonged to the Defendant to ensure that account holders with names similar to those of the Defendant were not denied access to their accounts.

7. That on the same day, account number 0240261946083 was debited with KShs. 2,000,000/=. The Bank then conducted investigations and linked it to the Defendant and restricted further transactions thereon together with all identified accounts belonging to the Defendant. She re-affirmed that the orders were strange, vague and ambiguous as opposed to being clear and precise and enforceable as required by law. It was also contended that it was the Plaintiffs' duty to disclose the particulars of the Defendant's other accounts for clarity.

8. The application was canvassed orally by the alleged contemnor's advocates who reiterated the depositions in their respective clients' sworn affidavits and which this court has carefully considered.

The applicable Law

9. Section 5 of the Judicature Act, which is the substantive law on contempt of court, provides that:

a. 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.

b. 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."

10. The applicable procedural law governing contempt of court is Section 63 of the Civil Procedure Act which provides:-

"63. In order to prevent the ends of justice from being defeated the court may, if it is so prescribed –

a. ...

b. ...

c. Grant a temporary injunction and in case of disobedience commit the person guilty thereof to prison and order that his property to be attached and sold.

11. Under Order 40 rule (3) of the Civil Procedure Act, *in case of disobedience, or of breach of any such terms, the court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the court directs his release."*

12. I have carefully considered the application before court, the oppositions thereto and the able rival submission by all counsels for the respective parties to this application and the relevant authorities cited before me. I have also considered the applicable law as it is in Kenyan statutes and the imported Law namely, the Supreme Court of England Rules by dint of Section 5 of the Judicature Act which empowers this court to cite and commit a person for contempt of court if such a person brazenly disobeys its lawful orders.

13. Contempt of court is meant to protect the integrity of the court process and respect for the rule of law. It has nothing to do with respect for orders of an individual judge. The general rule governing the obligation of persons to obey court orders was enunciated in the case of Hadkinson v. Hadkinson [1952] ALL ER 567, in which Romer LJ stated at page 569 stated as follows:-

"It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made against by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void." (emphasis added).

14. Further, Lord Donaldson MR said in Johnson –v- Walton (1990) 1 FLR350 at 352 stated that:-

"It cannot be too clearly stated that, when an injunctive order is made or when an undertaking is given, it operates until it is revoked on appeal or by the court itself, and it has to be obeyed whether or not it should have been granted in the first place." (Emphasis added).

15. The standard of proof in contempt proceedings is much higher than proof on a balance of probabilities. It is almost but not exactly beyond reasonable doubt. This is because the charge of contempt of court is akin to a criminal offence and a party is likely to lose his liberty. This position is fortified by the Court of Appeal decision in the case of **Mutitika v. Baharini Farm Ltd [1985] KLR 227** where it was held that the guilt of a contemnor must be proved strictly as is consistent with the gravity of the charge. Where service of the order is disputed, knowledge of such court order is necessary before one can be cited for its disobedience.

16. **Lenaola J** in the case of **Basil Criticos Vs Attorney General and 8 Others [2012] eKLR** stated that :-

“...the law has changed and as it stands today knowledge supersedes personal service.....where a party clearly acts and shows that he had knowledge of a Court Order; the strict requirement that personal service must be proved is rendered unnecessary.”

17. It is therefore for this court to determine whether or not the impugned order was served upon the defendant and her bankers represented by the third party or whether the alleged contemnors had knowledge of the court order and brazenly disobeyed it.

18. In the instant case, the order was obtained ex parte hence the need to serve it upon the defendant and her bankers. Further the said order bore the title of the case which includes the case number and the names of the parties herein. It was also properly sealed and contained the penal notice. It is therefore a proper court order.

19. The court must however determine certain essentials for it to find that there was contempt of court and these essentials are as set out In the **Law of Contempt 3rd Edition, Butterworth’s 1996 at page 560**, where the learned authors observed that:-***“Thus although persons are under a duty to comply strictly with the terms of an injunction, the courts will only punish a person for contempt upon adequate proof of the following points. First, it must be established that the terms of the injunction are clear and unambiguous; secondly, it must be shown that the Defendant has had proper notice of such terms; and thirdly, there must be clear proof that the terms have been broken by the Defendant. There is also a fourth issue, namely, the mens rea required in such cases. We will also refer, fifthly, to the question of who is responsible for the breach.” (Emphasis supplied).***

20. The affidavit of service of Peter Mburu Waithaka, 'R 02' reveals that the Defendant was served with the court order on 18th June, 2015 at 4.50 pm at Muthangari Police Station. From the averments and tone of the said affidavit of service, it cannot be inferred that the Defendant frustrated the process server's efforts to serve her rather, for security reasons she opted to be served at the police station.

21. On whether the order was clear and unambiguous. The relevant parts of the order are:

" ...

3. That an interlocutory injunction be and is hereby issued restraining the Defendant by herself, her servants, employees or agents from withdrawing, assigning, alienating, paying out or transferring monies from current account number 0240101448255 or any other account held by the Defendant at Equity Bank Limited Harambee Avenue Branch Nairobi until 24th June, 2015....

5. That these orders be served upon the Manager Equity Bank Limited, Harambee Avenue Branch to be cooperative and to assist in the obedience of the orders by the Defendant in compliance of the order to prayer 3... " (Emphasis mine)

22. To my mind the bit of the "any other account held by the Defendant at Equity Bank Limited Harambee Avenue Branch Nairobi" is not any ambiguous as it clearly meant any other account held by the Defendant at that particular branch of that bank and the allegation that that aspect of the order is

ambiguous does not stand. A reading of the order reveals that the branch manager was to restrict any transaction by the Defendant not only with regard to account number 0240101448255 but also any other account held by the Defendant in that branch of the bank. Secondly, it is worth noting that while it is contended by the third party that there was difficulty in verifying the exact accounts held by the Defendant, there has been no attempt by Lucy Waithaka to provide documentary evidence to the alleged difficulty. It was expected of her to annex documentation of the alleged 120 or so bank accounts she alleged were found to be in similar names with the defendant. None was provided, which leaves this court with doubt as to the truth of that allegation. The court is blind to that fact and it was incumbent upon Lucy Waithaka to provide such evidence that truly, there were 120 accounts held by people with names similar to those of the Defendant. I find the explanation as to the difficulty in ascertaining the Defendant's other accounts including the account where the sums of money were withdrawn on 18th June, 2015 wanting of sufficient evidence. I am further of the opinion that having received a court order before at 13.47 pm which fact is not denied, the bank ought to have acted as a matter of urgency and if there was any alleged ambiguity, they should have sought clarification as soon as possible and not to alert the defendant to take the opportunity to withdraw the money from one of the accounts held at the Bank's Branch. This court invokes the provisions of section 119 of the Evidence Act, Cap 80 laws of Kenya and presumes the existence of a fact that where a person opens more than one bank account with the same Bank and branch, there is always a link between those accounts and tracing one other account for the same person with the same names and same particulars would not be difficult for the bank manager.

23. Finally, the fact that Lucy Waithaka has conceded the allegation that she informed the Branch Manager to notify the defendant customer of the existence of the order on 17th June, 2015 and the fact that money was withdrawn on 18th June, 2015, before service of the order was effected upon the defendant who could not be traced the whole morning until later in the afternoon of 18th June, 2015 coupled with the absence of evidence as to difficulty in identifying the Defendant's accounts raises eye brows. In my humble view, the defendant was alerted by the bank of the order on 17th June, 2015 and smartly avoided service until the convenient time. It does not appear to me that the withdrawal of shs 2 million on 18th June, 2015 was a coincidence since the said account shows that the defendant had not less than two days earlier made very substantial withdrawals from the same account. She did not make any attempt to explain the urgency for which the huge withdrawals were being made from the bank account. In addition, the defendant has not explained to this court her real or perceived fears that compelled her to send the process server to Muthangari Police Station where she could receive a court order.

24. The process server had gone to the defendant's home in broad daylight and had spoken to her security to alert her of his intention and purpose of visiting her residence. There was no evidence of an ambush or any threat to her life necessitating a report to the police station at that hour of the day and if that was the case that indeed she was under any form of fear, she could have called the police to come to her residence and not send the process server to the police station and for her to follow him there. This court finds the defendant's conduct consistent with knowledge that there was a court order which she had been notified of by the Bank and which she had cleverly avoided and disobeyed by rushing to withdraw the money and hence used the police as a cover up.

25. Even if I am to be found wrong on my latter inference, the fact that there is no evidence of difficulty in identifying the Defendant's account leaves me with no option but to find that the Bank Operations Manager deliberately failed to comply with the order of this court. It must also be noted that even if the Branch Manager found the order to be invalid, the bank ought to have applied to challenge it rather than disobey it. It is further noteworthy that the 3rd party and defendant have not made any attempt to purge the contempt.

26. In the premise, I find that the applicant has proved, to the required standard that the defendant had knowledge of a clear and unambiguous court order and that the third party was served with the said court order but that the said third party Lucy Waithaka notified or caused to be notified to the defendant the contents of the said court order and that they both smartly schemed a plan to brazenly disobey the court order issued by this court. I am further similarly satisfied that failure to obey and to comply with the orders by the alleged contemnors was deliberate, wilful and without lawful or reasonable excuse, taking

into account the facts and circumstances surrounding such disobedience and this case and accordingly I find them to be in contempt of court and convict them for the offence of contempt of court.

27. Sentence shall be pronounced after mitigation.

Dated, signed and delivered in open court at Nairobi this 8th day of December, 2015.

R.E.ABURILI

JUDGE