



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL CASE NO. 66 OF 2008

ORIENTAL COMMERCIAL BANK LTD.....PLAINTIFF

VERSUS

RAJNI K. SOMAIA.....DEFENDANT

R U L I N G

1). The notice of motion by the applicant dated 3-7-2013 seeks to have the respondent committed to civil jail for disobeying the court orders delivered on 22-10-2010 which:

- a. **Compelled the advocate to deliver a cash account to the client in respect of monies received from the client and on behalf of the client.**
- b. **Compelled the advocate to deliver an account to the client for monies received including the sum of Kshs. 8,100,000/= including interest earned from the date of receipt of the said sums to date.**
- c. **Compelled the advocate to compile a list of all bills taxed so far both paid and unpaid.**

The applicant sought leave on 3rd July 2013 under the provisions of Order 52 Rule 2 (3) of the Rules of the Supreme Court of England which was granted.

2). From the pleadings herein, it is evident that the respondent was formally retained by the bank to collect monies on its behalf. Due to their differences the applicant bank filed one suit No. 66 of 2008 (OS) where it sought orders to compel the respondent to furnish full accounts for monies received on its behalf and for bills of costs filed against it by the respondent.

The applicant equally applied to stay taxation of the bills of costs filed by the respondent. By her ruling dated 22-10-2010 Justice Ali Aroni ordered the respondent to furnish accounts as outlined above within 21 days of the date of ruling.

3). On 9-11-2010 Mr. Gichaba in a letter copied to the Deputy Registrar presented account statements to the applicant where he wrote:

“Kindly herein enclosed find cash account statements as ordered by the court kindly acknowledge receipt”.

On 8-12-2010 the applicant replied to the respondent expressing dissatisfaction with the furnished

accounts. Subsequently, the parties had this matter mentioned severally culminating in the filing of this motion.

4). Counsel for the applicant urge the court to cite the respondent for contempt as he had disobeyed the orders. She argued that the respondent received monies which he failed to account for despite the court requiring him to do so. She heavily relied on the case of **Kenya Tea Growers Association -VS- Francis Atwoli & 5 Others [2012] eKLR** where the court observed that the court orders ought to be complied with.

5). The respondent's counsel submitted that the application ought to fail as it never complied with Rule 52 (3) (3) of the Supreme Court of England Rules which makes it mandatory to serve the application upon the respondent in person. Mr. Menezes as well as Mr. Gichaba observed that no penal notice was served upon the respondent personally. Mr. Menezes further submitted that the notice of motion was not proper as it ought to be supported by one or more affidavits and a statement of the facts. He further argued that the applicant had not annexed the order which the respondent was in contempt of. The respondent's counsel argued that their client had in any event complied with the court orders and in fact the court did acknowledge so.

6). Having read the lengthy affidavits as well as heard the parties oral submissions and the attached authorities, the issues that emerge for determination are three namely:

- a. **What is the right procedure for instituting contempt proceedings and whether the applicant followed the same?**
- b. **Whether there was service of the impugned order upon the respondent.**
- c. **Whether the respondent is in contempt of the order?**

7). In answering the first issue Mr. Menezes confirmed that it is section 5 of the Judicature Act that is applicable in this regard. Section 63 (c) of the Civil Procedure Act provides that a disobedience of an order of injunction will attract punishment in the form of imprisonment or attachment and sale of the contemnors property.

Section 5 (1) of the Judicature Act provides that:

“5 (1) The High Court and the Court of Appeal shall have the same power to punish for contempt as is for the time being possessed by the High Court of Justice in England and that 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 applicable as if it were a conviction and sentence made in the exercise of the original criminal jurisdiction of the High Court”.

8). Prior to the year 2012, the procedure for instituting contempt proceedings was provided for by orders 52 Rule 1 and 4 of the Rules of the Supreme Court hereafter referred to as (RSC). The procedure under Order 52 of RSC was well summarised by the Court of Appeal in **Christine Wangari Gachege - VS- Elizabeth Wanjiru Evans & 11 Others [2014] eKLR** as follows:

“Order 52 RSC until 2012 as alluded to earlier provided the procedure of commencing contempt of court proceedings.

The procedure may be summarised as follows, in so far as it relates to the High Court of Justice:

- i. **An application to the High Court of England for committal for contempt of court will not be granted unless leave to make such an application has been granted.**
- ii. **An application for leave must be made ex parte to a judge in chambers and be supported by a statement setting out the particulars of the applicant as well as those of the person sought**

- to be committed and the grounds on which his committal is sought and by an affidavit verifying the facts relied upon.
- iii. **The applicant must give notice of the application for leave not later than the preceding day to the crown office.**
 - iv. **Where an application for leave is refused by a judge in chambers the applicant may apply afresh to a divisional court for leave within 8 days after the refusal by the judge.**
 - v. **When leave has been granted, the substantive application by a motion would be made to a divisional court.**
 - vi. **The motion must be entered within 14 days after the granting of leave; if not leave shall lapse.**
 - vii. **The motion together with the statement and affidavit must be served personally on the person sought to be committed, unless the court thinks otherwise”.**

9). The coming into operation of the Civil Procedure (Amendment No. 2) Rule 2012 of the England has substantially changed the mode of instituting contempt proceedings. Part 81 now provides for different procedures depending on the type of contempt. Section 2 of part 81 provides for the procedure to be followed when instituting and prosecuting contempt in enforcement of a judgment, order or undertaking to do or abstain from doing an act.

Part 81:10 provides the procedure as follows:

“81:10 – (1) A committal application is made by an application notice under part 23 in the proceedings in which the judgment or order was made or the undertaking was given”.

(2) Where the committal application is made against a person who is not an existing party to the proceedings, it is made against that person by an application notice under part 23.

(3) The application notice must:-

a) set out in full the grounds on which the committal application is made and must identify, separately and numerically each alleged act of contempt including, if known, the date of each of the alleged acts; and

b) be supported by one or more affidavits containing all the evidence relied upon.

(4) Subject to paragraph (5) the application notice and the evidence in support must be served personally on the respondent.

(5) The court may:

a) dispense with service under paragraph (4) if it considers it just to do so; or

b) make an order in respect of service by an alternative method or at an alternative place”.

10). It appears from the above amendment that a person filing for contempt is only required to file an application notice setting out the grounds on which the application is premised and supported by an affidavit containing all the relevant evidence. It follows that leave nor notice to the crown is require. The application ought to be served upon the respondent personally”.

Both parties in this application seemed to have been unaware about the obtaining position. The authorities relied upon by the parties are respectfully bad in law as they dealt with the repealed procedure.

11). However, even in the repealed procedure service was still a requirement. I am not satisfied that the order was served upon the respondent herein. What I find is correspondences between the counsels only.

Knowledge alone was insufficient. The respondent in any event did not dispute that he knew that there was need to comply with the order and indeed he complied by sending the accounts to the applicants though it found them insufficient.

12). The next question that follows the above observation is whether there was contempt on the part of the respondent. The applicant has argued that the failure to file proper accounts was contemptuous. Mr. Gichaba however said that they had complied with the court's requirements. As stated earlier on I am satisfied that the accounts were submitted by the respondent. The letter was copied to the Deputy Registrar of this court. The only problem is that the applicant was not satisfied with the same. Should the respondent be punished for failing to provide accounts that satisfied the applicant? Was the court order specific on which accounts to be supplied and under what format?

13). The court ordered the respondent to furnish accounts of Kshs. 8,100,000/= and the taxed and untaxed bills. It never specified the format in which the accounts was to be delivered. The court in its wisdom expected the parties to supply the accounts to each other and thus the reason for setting a date for confirmation.

14). The applicant further appears to be asking for a figure of Kshs.11,000,000/= from the respondent yet the court's ruling talks of Kshs. 8,100,000/=. This is another claim which materially differs from that brought before court.

15). I have also perused the further affidavit of Wilfred Macharia sworn on 20-2-2014 and it appears that there are deeper issues between the parties herein. What I find interesting is that the issues raised therein especially the history behind the relationship between the respondent and the bank seem to blur the issues raised in the contempt application.

16). Borrie & Lowe in The Law of Contempt 3rd edition at 558, states:

“Even if the contempt powers are sought to be invoked the courts will be reluctant to exercise their powers and will do so only in the clearest cases, namely, where an offender, having had proper notice of the order, has been shown beyond reasonable doubt to have committed the contempt. In most cases this will mean that the offender will have been shown to have deliberately or willfully disobeyed the court order”.

17). I do not find sufficient reasons regardless of the applicant's application format to suggest that the respondent breached the court order. The accounts though unsatisfactory in the eyes of the applicant were supplied as demanded by the court. Consequently, I shall dismiss the application with costs to the respondent.

Dated, signed and delivered at Kisumu this 30th day of July, 2014.

**H.K.
JUDGE**

CHEMITEI