



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**MISC. APPLICATION NO. 50 OF 2013**

**IN THE MATTER OF: AN APPLICATION BY SIMON NJUMWA MAGHANGA**

**FOR LEAVE TO APPLY FOR CONTEMPT PROCEEDINGS  
AGAINST JOYCE JEPTARUS KAGONGO**

**IN THE MATTER OF: HCCC MISC. APPLICATION NO. 58 OF 2012 SIMEON**

**WILLIAM NJUMWA MAGHANGA –VS- JOYCE JEPTARUS  
KAGONGO T/A J. J. CHESARO & CO. ADVOCATES**

**SIMON NJUMWA MAGHANGA ..... PLAINTIFF/APPLICANT**

**V E R S U S**

**JOYCE JEPTARUS KAGONGO**

**T/A J. J. CHESARO & CO. ADVOCATES ..... DEFENDANT/RESPONDENT**

**RULING**

1. Notice of Motion dated 29th April 2013 is filed by **SIMON NJUMWA MAGHANGA** (Simon). By that application he seeks for the arrest and committal to Civil Jail of **JOYCE JEPTARUS KAGONGO**.

**BACKGROUND**

2. In the year 2001 Simon filed the case before the Chief Magistrate's Court, Mombasa being **CMCC No. 5114 of 2004** through the firm of Advocates Joyce Jeptarus Kagongo trading as J. J. Chesaro & Co. Advocates. That lower Court matter was a subject of an appeal before the High Court. That matter was settled on 28th September 2010. That firm of Advocates received on behalf of Simon Kshs. 1.5 million. That money was received on 30th August 2010. Since that receipt of that money that firm of Advocates has failed to release that payment to Simon. Simon accordingly filed an Originating Summons on 2nd March 2012 in **High Court Mombasa Civil Case No. 58 of 2012 (OS)**. He sought the following prayers-

1. **THAT all the monies which the Respondent has received from CRATER AUTOMOBILES (NBI) LTD in respect of HCCC No. 86 of 2001 be deposited with Court.**
2. **THAT the Respondent do deliver a cash account of all monies received by them on behalf of the Applicant in HCCC No. 86 of 2001 SIMEON WILLIAM NJUMWA MAGHANGA –VS- CRATER AUTOMOBILES (NBI) LTD.**
3. **THAT the Respondent do declare the amount retained by her to cover her professional fees, in respect of HCCC No. 86 of 2001.**
4. **THAT the Respondent do deliver to Counsel for the Applicant all the sums received less the retained legal fees.**

The Originating Summons came up for hearing on 6th November 2012. On that day the Court made the following orders-

**“REPUBLIC OF KENYA**

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**MISC. APPLICATION NO. 58 OF 2012**

**IN THE MATTER OF: AN APPLICATION BY SIMEON**

**NJUMWA MAGHANGA FOR ADVOCATE ACCOUNTS**

**AND**

**IN THE MATTER OF: THE CIVIL PROCEDURE ACT CAP**

**21 THE ADVOCATES ACT (CAP 16) THE LAW  
SOCIETY OF KENYA ACT**

**BETWEEN**

**SIMEON WILLIAM NJUMWA MAGHANGA ..... APPLICANT**

**AND**

**JOYCE JEPTARUS KAGONGO**

**T/A J. J. CHESARO & CO. ADVOCATES..... RESPONDENT**

**ORDER**

**(In Court before Hon. Justice R. M. Mwongo on 6<sup>th</sup> November, 2012)**

**UPON READING the application by way of Notice of Preliminary Objection dated 15<sup>th</sup> May, 2012 brought under Order 20 Rule 1 and Order 52 rule 3 of the Civil Procedure Act 2010 and all enabling provisions of the laws of Kenya UPON READING the Replying Affidavit sworn by JOYCE JEPTARUS KAGONGO and UPON HEARING Mr. Tindi Counsel for Applicant and Ms Chesaro for Respondent;**

**IT IS HEREBY ORDERED:-**

1. ***THAT the amount of Kshs. 1,500,000/- be deposited in Court less the Advocates fee of Chesaro & Co. to be ascertained between the parties within one (1) week from today's date.***
2. ***THAT the amount to be paid within two (2) weeks from today's date by Chesaro.***
3. ***THAT mention on 23<sup>rd</sup> November, 2012."***

Since the Law firm did not make payment as ordered by the Court on 19th December 2012 the following order was made by the Court-

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***AND***

***JOYCE JEPTARUS KAGONGO***

***(T/A J. J. CHESARO & CO. ADVOCATES) .....RESPONDENT***

**ORDER**

***(IN COURT BEFORE HON. JUSTICE R. M. MWONGO ON 19<sup>TH</sup> DECEMBER, 2012)***

***UPON HEARING Counsels Mrs. J. J. Chesaro and Mr. Martin Tindi for both parties,***

**IT IS HEREBY ORDERED:-**

1. ***THAT the consent arrangement leading to the court order of 6<sup>th</sup> November, 2012 has failed and is therefore spent. Accordingly it is now directed that the Respondent do deposit the full amount of Kshs. 1,500,000/- in court pending further directions. The deposit to be paid in court not later than close of business on 21<sup>st</sup> December, 2012.***

***GIVEN under my hand and the seal of this Court this 19<sup>th</sup> day of December, 2012."***

That order has not been obeyed to date. As a consequence the present application is now before Court.

3. It is on that basis that Simon seeks the Court to commit Mrs. Chesaro to Civil Jail for being in disobedience to the Court order of 19th December 2012.
4. Joyce Chesaro while accepting that the Court ordered her to make payment of Kshs. 1.5 million by the 21st December 2012 she opposed the application before Court on the ground that she has filed a Notice of Appeal against the order of 19th December 2012. She also opposed the application on the basis that that order did not take into account her costs which had not been taxed. In a further affidavit sworn by Mrs. Chesaro there was intimation that she was willing to make payment of the amount of Kshs. 1.5 million to Simon within sixty (60) days. In that regard I wish to make reference to the case **GER -VS- MARMANET FOREST CO-OPERATIVE & CREDIT SOCIETY LTD (2002)KLR1** where the Court stated-

*“Client’s money is defined under the Advocates (Accounts) Rules as money held or received by an advocate on account of a person for whom he is acting in relation to the holding or receipt of such money either as an advocate or, in connection with his practice as an advocate as agent, bailee, trustee, stakeholder or in any other capacity.”*

5. The Court in the case **REPUBLIC -VS- JUDICIAL COMMISSION OF INQUIRY INTO THE GOLDENBERG AFFAIR & ANOTHER [2003]KLR 601** expressed itself as follows in regard to the application for contempt-

*“The Court will not hesitate, in appropriate case, to punish for contempt where an application is properly brought and proved. The power to punish for contempt is exercised for the benefit of the institution of the Judiciary and the public.”*

6. As it would be seen from the extracted order of 19th December 2012 Mrs. Chesaro was present in Court when the order was made. She was therefore aware of that order but upto date she has failed to obey it. As stated in the book **A PRACTICAL APPROACH TO CIVIL PROCEDURE** by **Stuart Sime** contempt to Court can take many forms, one such form is *“disobedience by the contemner of an order requiring him or her to take or refrain from taking specific action.”*
7. This Court finds Mrs. Chesaro to be in contempt of the Court in that she has disobeyed the order of 19th December 2012. It is for that reason the Court make the following orders-
  - a. **The Court makes a finding that Mrs. Joyce Jeptarus Chesaro Advocate is in contempt of the Court by disobeying the order of 19th December 2012.**
  - b. **The Court does hereby order Mrs. Joyce Jeptarus Chesaro Advocate to pay Simon Njumwa Maghanga Kshs. 1.5 million within fourteen (14) days from the date hereof failing which an order is hereby issued for the arrest of Mrs. Joyce Jeptarus Chesaro Advocate and to be committed to serve Civil jail for six (6) months. Parties are granted liberty to apply for further orders.**
  - c. **The costs of the Notice of Motion dated 29th April 2013 are awarded to the Applicant.**

**Dated and delivered at Mombasa this 28<sup>th</sup> day of November, 2013.**

**MARY KASANGO**

**JUDGE**