



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
(MILIMANI LAW COURTS)

Civil Suit 240 of 2001

SETH NYAWARE OMAMO.....1ST
PLAINTIFF

VERSUS

KITALE ELGON CO-OPERATIVE UNION
LIMITED.....DEFENDANT

RULING

The application before the Court brought by the Plaintiff/Applicant by way of Chamber Summons dated 21st July 2011 is seeking the following orders:

1. That this Honourable Court be pleased to grant the Plaintiff/Applicant leave to commence Contempt of Court Proceedings against (a) The Managing Director, Agricultural Finance Corporation (b) Ms Rose A Ochanda – The Corporation Secretary, Agricultural Finance Corporation and (c) The Agricultural Finance Corporation herein for failure to comply with the Court order of the 27th February 2001.
2. That this Honourable court do grant leave to the Applicant to apply for the personal arrest and detention in civil jail for a period not exceeding six (6) months the said Managing Director and Corporation Secretary of the Agricultural Finance Corporation herein for contempt of the Court order of the 27th February 2001.
3. That this Honourable Court be pleased to grant leave to the Applicant to apply for the attachment and/or sequestration of the property of the Agricultural Finance Corporation for contempt of the Court orders of the 27th February 2001.

The grounds for the application are that the said Managing Director and Corporation Secretary of the Agricultural Finance Corporation have declined to implement and enforce the Order of this Court of the 27th February 2001, and have in contempt of Court paid out monies preserved by the said Order.

The detailed facts are leading to the application are provided in the Replying Affidavit sworn by the Applicant on 21st July 2011. The Applicant states that upon an application he made on the 26th February 2001, this Court did issue an order against Agricultural Finance Corporation ordering that all the monies held then by the said Corporation, and belonging to Kitale Elgon Co-operation Union Limited be attached pending the determination of this suit. The Applicant further states that on the 27th February 2001 the said Court order was duly served endorsed with a Penal Notice upon the Agricultural Finance Corporation,

and duly received by the then Corporation Secretary/Legal Officer, Mr. Mumo Matemo for and on behalf of the Agricultural Finance Corporation.

The Applicant avers that this Honourable Court awarded him final judgment in the suit filed herein for Kshs.13,068,000/= together with Costs on the 12th July 2007. Upon the delivery of judgment, he was informed that Agricultural Finance Corporation had, without reference to either the Court or his lawyers, released the money attached by the Court's order of the 27th February 2001 to the Defendant herein on the 31st July 2002 in complete contempt of the Court. The Applicant further avers that the said Agricultural Finance Corporation has admitted being served with the subject Court order but insists that they paid out the said money because the Court order was only interim and lapsed after the delivery of the judgment herein.

The Applicant annexed as exhibits a copy of the Court order given on the 26th February 2001 and issued on the 27th February 2001, and a copy of the Judgment Decree in the suit filed herein.

The Advocate for the Agricultural Finance Corporation filed a Preliminary Objection dated 9th November 2011 on the grounds that the application was materially defective and did not warrant the orders sought, that the Applicant had failed to comply with the mandatory requirements of the law with regard to service of orders, that the suit herein has been determined and that the application was an abuse of the process of court. At the hearing of the application the Advocate for Agricultural Finance Corporation, Mr. Mainga, submitted that his preliminary objection is based on three points of law.

The first point of law raised by the Advocate was that the Agricultural Finance Corporation is not a party to the suit filed herein and no effort had been made to join it as a party. Secondly, that this application is defective in the sense that the order said to have been served on the Agricultural Finance Corporation does not have a penal notice and that this makes an order defective in contempt proceedings. The Advocate relied on the authorities of **Kariuki & 2 others –vs- Minister of Gender Sports, Culture & Social Services (2004) 1KLR 588**, and **Leon Insurance Brokers –vs- K Rep Bank Ltd & Another, HCCC No. 413 of 2009(Nairobi)** which hold that for one to be committed to jail for contempt of court, the order served must have a penal notice. The third point of law raised was that there was no personal service on the Managing Director of Agricultural Finance Corporation, and there was no return of service filed. The Advocate again relied on **Kariuki & 2 others –v- Minister of Gender Sports, Culture & Social Services (2004) 1KLR 588** where it was held that personal service in and contempt is paramount because a person may be sent to person.

Mr. Esuchi, The Plaintiff's Advocate, in reply to the Preliminary Objection raised, submitted that the Agricultural Finance Corporation were aware of the said orders by the court and should have set aside or appealed against the orders on ground that they were not parties thereto.

I have carefully considered the pleadings, evidence and submissions made with regard to the preliminary objection and application before this Court. Order 1 Rule 3 and Order 7 Rule 8 of the Civil Procedure Rules are clear that if you are seeking relief or a remedy against a person you must join him or her as a Defendant to the pleadings, whether in a Plaintiff or Counterclaim. Under Order 1 Rule 15 of the Rules a Defendant can also issue a third party notice if seeking to claim from a third party. There is no evidence on the court record of the joinder of Agricultural Finance Corporation as a Defendant or Third Party, and on this point alone I find that the entire application must fail as the Agricultural Finance Corporation or its officers against whom the orders are sought are not party to the suit filed herein.

Even if the court were to exercise its discretion to join the Agricultural Finance Corporation as a party, I note that the Plaintiff's application is brought under section 5 of the Judicature Act and section 3A of the Civil Procedure Act. The procedure for contempt of court proceedings under section 5 of the Judicature Act was elaborated upon by Ouko J in **Godfrey Kilatya Kituku & 6 Others v Malindi Municipal Council HCCC (Malindi) No 45 of 2005** and it is clear from that decision and that of Lenaola J. in **Kariuki & 2 others –vs- Minister of Gender Sports, Culture & Social Services (2004) 1KLR 588** that there must be personal service of a court order that contains a penal notice. The reason for these

requirements is that since the liberty of the alleged contemnor is at stake, courts must ensure that the contemnor has adequate notice and information of the charges made and an adequate opportunity to show cause why he or she should not be held in contempt.

It is true as submitted by the advocate for the Agricultural Finance Corporation that an Affidavit of service should be sworn and annexed to summons that have been served on parties. This requirement is found in section 20 of the Civil Procedure Act and Order 5 Rule 15 of the Civil Procedure Rules. Upon perusal of the court record, I found no affidavit of service filed by the Applicants attesting to service of the court orders on the 1st Respondent. I am however not inclined to find this default fatal to the proceedings before the court. Indeed Order 51 Rule 10(2) of the Civil Procedure Rules, following the provisions of Article 159(2) of the Constitution is clear that no application shall be defeated on a technicality or want of form that does not affect the substance of the application.

In the present case, although the Applicant has shown that he served the Corporation Secretary of the Agricultural Finance Corporation with a court order containing a handwritten penal notice, the Corporation Secretary that was served Mr. Mumo Matemu, is different from the corporation sought to be committed to civil jail, a Mrs Rose A. Ochanda. There is also no evidence produced on personal service of any court order on the Managing Director of the Agricultural Finance Corporation.

For the reasons given in the foregoing, the Preliminary Objection raised by the Advocate of the Agricultural Finance Corporation is upheld, and the application dated 21st July 2011 is hereby dismissed.

The Plaintiff shall bear the costs of the application.

Dated, signed and delivered in open court at Nairobi this 26th day of January, 2012.

P. NYAMWEYA

JUDGE