REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL CASE NO. 23 OF 2008

RINYA HOSPITAL LIMITED……..…….... PLAINTIFF

-VERSUS-

CO-OPERATIVE BANK OF KENYA LTD…….....…… 1st DEFENDANT

SPORTLIGHT INTERCEPTS KENYA LTD …….....….2nd DEFENDANT

RULING

On or about 25th August 1997, the plaintiff obtained a loan facility to the tune of Kshs. 2,700,000/= from the 1st defendant and secured the same by a legal charge over its parcel of land known as **South Sakwa/Wawere/647**. The plaintiff failed to repay the loan and the 1st defendant in the exercise of its statutory power of sale instructed the 2nd defendant to sell the said parcel of land through public auction. But that could not be done as, the plaintiff filed this suit praying for injunctive orders against the defendants amongst other prayers. The plaintiff alleged that the intended sale was fraudulent because it had not been given the requisite statutory notice by the 1st defendant. Contempreneously with the filing of the suit, he took out a chamber summons application under Order XXXIX rules 1 and 2A of the **Civil Procedure Rules** seeking an interim order of injunction to restrain the defendants from selling the suit premises pending the hearing and determination of the suit. The court heard the application interpartes and allowed the same on 26th September, 2008 holding that although it had been established that the plaintiff had defaulted in the repayment of the loan, nonetheless the 1st defendant could not through the 2nd defendant exercise its statutory power of sale as the Statutory Notice issued by the 1st defendant was defective and bad in law. **Musinga J.** delivered himself thus on the issue ***"…… An invalid statutory notice cannot legitimize the exercise of a chargees Statutory power of sale, even where a chargor is openly in default of payment of a loan, as in this case. In the circumstance, I believe the only option at the 1st defendant's disposal is to issue a fresh compliant statutory notice before it can proceed to realize its security …".*** The significance of these observations by the Judge shall become apparent later in this ruling.

Notwithstanding, the orders of Temporary injunction aforesaid, the 1st defendant has since issued and served a fresh statutory notice dated 8th June, 2010 and received by the plaintiff on 20th August, 2010. To the plaintiff the issuance of the statutory notice as aforesaid and the intended sale vide public auction, contradicts and contravenes the terms or the order of injunction issued by this court as aforesaid. As a result of the actions of the 1st defendant complained of, the plaintiff mounted the application dated 31st August, 2010 seeking in the main to cite and punish the 1st defendant through its

Company Secretary together with one, **Samwel M. Kibugi**, a legal officer of the 1st defendant for contempt of court for disobeying, ignoring and or disregarding the lawful court orders issued or granted on 20th September, 2008. In the alternative the plaintiff prayed for an order of sequestration to attach the properties of the 1st defendant to be sold to defray the damages occasioned by the breach and or disobedience of the said orders of injunction. Finally, the plaintiff prayed that this court recalls, rescinds and annuls the statutory notice dated 8th June, 2010.

The response of the 1st defendant to the application is that acting on the ruling of **Musinga J**. aforesaid, it issued a fresh statutory notice to the plaintiff on 8th June, 2010. Thus the plaintiff's application is not maintainable in law, was vexatious, scandalous, frivolous, and an afterthought. He had not come to court with clean hands. As a parting shot, the 1st defendant stated that on 14th November, 2008, the plaintiff had made an application for summary judgment which application was dismissed with costs on 22nd April, 2010.

The principles upon which a court will act and punish a party for contempt of court are well settled:-

- The order allegedly breached and which invites contempt sanctions must have been personally served on the person required to do or abstain from doing the act in question.
- Such order must be endorsed with a penal notice informing the person on whom the copy is served that if he disobeys it, he is liable to the process of execution to compel him to obey.
- The applicant must demonstrate that the contemnor has been served with the court order and has willfully disobeyed it.
- The standard of proof is usually higher than in normal civil case but not to the threshold of criminal cases, that is, beyond reasonable doubt.
- The act of disobedience must be intentional.

See generally order 53 rule 3(1) **Supreme Court Practice Rules**, Halisburys laws of England volume 9, 4th Edition, **Bramble Ltd (1970) CH 128 and Achieng & Achieng Communication Ltd –vs- Safaricom Ltd (2009) eKLR**.

Applying all the foregoing to the circumstances of this case, I am unable to hold that the plaintiff has satisfied any of them. I have no doubt at all in my mind that the plaintiff extracted the order with a penal notice endorsed thereon. I also entertain no doubt at all that the same was served on the defendants. However it was not personally served on the persons now sought to be cited and punished. It is apparent from the affidavit of service sworn by one, **Patrick O. Miruka**, a process server that he served the order upon a lady simply going by the name, **Anne** and whom the process server described as a legal officer. Yet those sought to be cited and punished for contempt is the Company Secretary and one, **Samwel M. Kibugi**. There is absolutely no evidence of service if at all upon the Company Secretary nor the said **Samwel M. Kibugi** or even any averments that there were attempts to serve them which they resisted. As stated by **Nyamu J**. (as he then was) in the case of **Duncan Manuel Murigi –vs- Kenya Railways Corporation (2008) eKLR** in an application which bears strong resemblance with the instant application ***"… in proceedings of this nature the applicant must prove personal service upon the contemnor in order to succeed. Where personal service is not possible due to deliberate evasion by the contemnor, the applicant can after several attempts apply to the court for substituted service. The applicant herein has not in any of the pleadings stated that there were attempts to serve the Managing Director which failed for any reason. Although, the contemnor is aware of the orders allegedly disobeyed, going by the evidence on record, he has not been personally served and the applicant cannot succeed in this application. The orders still stand and it is upon the applicant to start afresh and effect personal service upon the Managing Director of the respondent before commencing a similar application …".*** The same situation obtains here. The above reasoning answers the plaintiff's submissions that it is trite law that a party who is aware of the orders of court, whether or not served has a plain and unqualified obligation to obey and respect them until and unless set aside. Much as the 1st defendant is a corporation and can only act through its authorized officers as correctly submitted by the plaintiff, it can only be punished through its Managing Director if there is one or through any other person

in senior management. These are the officers who ought to have been served personally. It is not stated that **Anne** who was served was such an officer. She could as well have been a junior officer, worse of all, may be not even an employee. In any event why has the applicant not cited the said **Anne** in these contempt proceedings.

The injunction issued by **Musinga J.** was interms that ***"…. There be and is hereby granted an interim order of injunction restraining the defendants/respondents by themselves, agents, servants, employees and or any other person acting under the defendants/respondents instructions from alienating, selling, transferring, clogging further transferring and or in any other manner dealing with LR No. South Sakwa/Wawere/647, pending the hearing and determination of the instant suit …".*** The order is clear and unambiguous. It did not bar the 1st defendant from issuing a fresh statutory notice. Had that been the intention of the plaintiff in making the application, he could have specifically provided such eventuality in the application. I do not therefore agree with the submissions of the plaintiff that the issuance of the fresh statutory notice and the intended sale by public auction contradicts and contravenes the terms of the orders of injunction and in particular, that the action is meant to alienate, sell, transfer, clog the title of the suit premises. Indeed the 1st defendant's action had prior blessing of this court when it commented thus when granting the plaintiff the initial injunction ***"… it is hoped that the 1st defendant would issue a fresh compliant statutory notice to realize its security if the plaintiff fails to repay the loan together with all the accrued interest …".*** At the time the applicant did not see anything ominous with this observation by the judge and took action about it. I would imagine, he was afterall in the comfort zone.

In any event, and going by the plaint, the plaintiff is not denying owing the 1st defendant the amount claimed of Kshs. 17,503,410/88. There is no evidence that since the issuance of the earlier statutory notice and the subsequent injunction, the plaintiff has made any efforts to redeem the loan. In the meantime the loan still continues to accrue interest. It is instructive that the amount in the earlier impugned statutory notice is different from the amount in the current statutory notice. Whereas the earlier notice was demanding Kshs. 3,971,446/50 in the instant notice the amount has escalated to Kshs. 17,503,410/88. One may then argue that this is an entirely new claim.

I am not oblivious to the fact that this is the 3rd application being filed by the plaintiff without as much as causing the substantive suit to be set down for hearing, or repaying the loan. The only assumption open to me on the facts of this case so far is that the plaintiff is using the court process to deny the 1st defendant its right to recover the colossal sum of money owed to it by the plaintiff. It is a principle of equity that he who comes to equity must come with clean hands. The hands of the plaintiff as correctly submitted by the 1st defendant are dirty and stained, undeserving of the orders sought.

In the end I hold that the application cannot be sustained because:-

- There was no personal service of the order on the intended contemnors.
- There is no evidence of willful or intentional disobedience of the said order by those sought to be cited.
- The application was not made in good faith.

- And as stated by **Musinga J.** in **Kisii HCCC No. 18 of 2009 Marwa Distributors Ltd & Anor – vs- Kenya Commercial Bank Limited (UR)** ***"…. I believe courts should not be used as a haven for defaulters when banks are pursuing recovery of public money loaned to borrowers. He who comes to equity must come with clean hands and, in my view, the plaintiffs hands are stained ….".***

The application is dismissed with costs to the 1st defendant.

Ruling dated, signed and **delivered** at Kisii this 17th day of January, 2011.

ASIKE-MAKHANDIA
JUDGE