

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 424 of 2007

JOHN MWANGI NDIRANGU T/A QUICK ACTION SERVERS...PLAINTIFF/APPLICANT

VERSUS

CHAKAMA RANCHING CO. LTD.....DEFENDANT

AND

1. MESSRS JOSEPH KASENA YERI

2. EZEKIEL KARISA KITSAO

3. HARITH ALI EL-BUSAIDY

4. MR. WILFRED NYAMU MATI t/a Nyamu & Nyamu Advocates.....RESPONDENTS

R U L I N G

On 27th August, 2007 Warsame J made the following order:

“I direct/order the defendant to deposit the sum of KShs.8 million in the joint account of both advocates within the next 7 days. And in the meantime M/s Nyamu & Nyamu Advocates not to release that sum to the defendant before the deposit is effected.”

Apparently the defendant did not comply with this order. The defendant did not deposit the said sum of KShs.8 million in a joint account in the names of counsel for the plaintiff and counsel for the defendant within the stipulated period. On 21st February, 2008, the plaintiff filed an application under **Order XXXIX Rule 2(1) & (2), 3 and 9** of the **Civil Procedure Rules, Sections 3, 3A & 63 (c) & (e)** of the **Civil Procedure Act** seeking orders of this court to commit the directors of the defendant and their advocate to civil jail for contempt of court. The plaintiff further sought an order of the court for the defendant by itself or through its agents or associates to be denied the right of audience before this court until the defendant purges its contempt. The plaintiff specifically sought for the committal to civil jail for contempt of court of Joseph Kasena Yeri, Ezekiel Karisa Kitsao, Harith Ali El-Busaidy and Wilfred Nyamu Mati t/a Nyamu & Nyamu Advocates. The grounds in support of the application are on the face of the application. The application is supported by the annexed affidavit of John Ndirangu Mwangi. The said directors of the defendant were duly served with the application. Although Wilfred Nyamu Mati – Advocate was not served with application, the said advocate became aware of the application and duly filed a replying affidavit to the application. Similarly, this court allowed on record the replying affidavit which was filed out of time by Joseph Kasena Yeri.

The replying affidavits sworn by Joseph Kasena Yeri and Wilfred Nyamu Mati are remarkably similar in content. They swore that they were not in contempt of the order of this court. They further deponed that the sale transaction in respect of the suit properties was not concluded and therefore it was premature for the plaintiff to seek to be paid his commission. Wilfred Nyamu Mati swore that although he had received part payment of the purchase consideration from the Settlement Fund Trustees, he had applied the said sum to settle a debt which was owed by the defendant to the Kenya Commercial Bank. He

further deponed that the defendant still owed the County Council of Malindi and the Government of Kenya land rates and land rent. He deponed that the said sale transaction would not be concluded unless the said land rates and land rent were paid. He further swore that a firm of advocates, F. M. Mulwa Advocates, had obtained an order of the court in **Nairobi HC Misc. Civil Application No. 595 of 2007** directing the Director of Land Adjudication & Settlement not to release to the defendant the sum of Kshs.15,152,000/=. The two respondents swore that they had no funds in their hands to enable them to comply with the said court order.

At the hearing of the application, I heard the submissions made by Mrs. Njaywe for the plaintiff and Mr. Mutinda for the defendant. Mr. Nyamu appeared on his own behalf. I have carefully considered the rival arguments made in respect of the matter in dispute in this application. The issue for determination by this court is whether the plaintiff established a case to enable this court cite the said respondents for contempt of court. Certain facts are not in dispute in this application. It is not disputed that Warsame J issued an order compelling the defendant to deposit a sum of KShs.8 million in a joint account in the names of the counsel of the parties to this suit. Nyamu Advocate was directed by the court not to release any money to the defendant before the said sum of KShs.8 million was deposited in the said joint account. The said order was made in the presence of Nyamu Advocate. It is not disputed that the said order together with a notice of penal consequences was served on the respondents. The said order of Warsame J has not been challenged by way of appeal. No application is pending before court either to review or set aside the said order. The said order therefore is still valid and must be complied with.

The respondents clearly understood what they were required to do by the said order. They were required to comply with the said order within seven (7) days of the issuance of the said order by the court. To-date, they have not complied with the said order. Instead, if the replying affidavits filed in court and the submissions made on behalf of the respondents is anything to go by, the respondents have attempted either to wish or explain away their failure to comply with the said order. Mr. Mutinda for the defendant sought to explain the defendant's failure to comply with the said court order by claiming that the suit filed by the plaintiff was incompetent. Mr. Nyamu advocate explained his failure for not complying with the said order by claiming that the defendant had other obligations which will be settled first before he could comply with the said order of the court.

It was clear to me that the respondents, particularly Nyamu Advocate, who is an officer of the court, have treated the issue of non-compliance with the said order issued by Warsame J with total lack of seriousness. Mr. Nyamu conceded in his submission before court that he was issued with a cheque of KShs.10.8 million to hold on behalf of the defendant. He told the court that he now had in his custody the sum of KShs.6 million which he is holding as a stake holder pending the conclusion of a sale transaction between the defendant and the Settlement Fund Trustees. Orders of this court must be obeyed. It is not within the province of any person who has been served with an order of this court to creatively interpret the said order with a view to frustrating it from being complied with. Prevarication and procrastination will not do. It was clear to this court that the respondents, despite being aware of the import and the true meaning of the said order, chose to disobey it. This court has a duty to uphold the law. If the respondents were of the opinion that they could not comply with the said court order, there was nothing which prevented them from filing an appropriate application in court to give an explanation of their difficulty in complying with the said order of the court.

In the circumstances therefore, I will allow the application. Joseph Kasena Yeri, Ezekiel Karisa Kitsao and Harith Ali El-Busaidy, the directors of the defendant are hereby cited for contempt of this court. Similarly, Wilfred Nyamu Mati t/a Nyamu & Nyamu Advocate is hereby held in contempt of the order of this court issued on the 27th August, 2007. This court will however give the directors of the defendant and their counsel an opportunity to purge their contempt. Wilfred Nyamu Mati t/a Nyamu & Nyamu Advocates is hereby ordered to immediately deposit the sum of KShs.8 million in a joint interest earning account in a reputable bank to be opened in the name of Messrs Wanyonyi & Muhia Advocates and Alfonse Mutinda & Co. Advocates. The said amount shall be deposited at the latest at 3.00p.m. on 7th March, 2008. The respondents are hereby ordered to appear in person before this court on the 10th March, 2008 to confirm compliance with the order of the court.

The plaintiff shall have the costs of this application.

DATED at **NAIROBI** this **5th** day of **MARCH, 2008**.

L. KIMARU

JUDGE