



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Misc. Appli. 264 of 2007**

KANGIRI FARMERS CO-OPERATIVE SOCIETY LTD.....APPLICANT

Versus

COMMISSIONER FOR CO-OPERATIVE DEVELOPMENT.....RESPONDENT

RULING

The Notice of Motion dated 13th April 2007 is brought pursuant to Section 5 of the Judicature Act and Order 52 rule 3 of the supreme Court Practice Rules of England. It is brought by the ex parte Applicant Kagiri Farmers Co-operative Society Ltd. seeking an order that this court be pleased to order that James Mureithi, James Murage and Dan Musungu, the Respondents be committed to civil jail for 6 months. The Application is based on grounds found on the face of the Application and is supported by a statutory statement and verifying affidavit dated 14th April 2007 sworn by Absolom Kamau Mwangi. The Applicant filed skeleton arguments on 24th April 2007. The Respondents and Interested Parties opposed the Notice of Motion. The Respondents have filed 4 affidavits, by Regina Anyika, James Mureithi, Dan Musungu and James Murage all dated 3rd May 2007 and skeleton arguments were filed on 30th April 2007 and further submissions on 22nd May 2007. The Interested Party filed skeleton arguments on 9th June 2007. Parties to the main Judicial Review Application are Kagiri Farmers who are the Applicant, in this application, the Respondent is Commissioner for Co-operative Development while the Interested Parties are Mumathi Staff Sacco and the Co-operative Bank of Kenya (1st and 2nd Interested Parties respectively).

The Applicant filed a Judicial Review Application challenging an agency notice dated 27th January 2007. The Commissioner of Co-operative Development appointed the 2nd Interested Party, the Co-operative Bank Murang'a Branch as an agent for purposes of collecting about Kshs.3.7 from the ex parte Applicant's Bank Account and paying it into the account of the 1st Interested Party being monies owed by the Applicant to the 1st Interested Party as staff contributions. On 20th February 2007, the Branch Manager of the 2nd Interested Party informed the Applicant of the agency notice which he intended to act upon within 30 days time. By that time the Applicant had just over Kshs.2.2 million in its account. The Applicant therefore filed the Judicial Review Application challenging the agency notice.

The court granted leave to the Applicant to commence Judicial Review proceedings for an order of certiorari and prohibition and the same was to operate as stay of the agency notice. My brother Justice Nyamu granted the prayer. The order was served on the Respondent on 17th March 2007 and on 5th April 2007 the Applicant tried to cash a cheque but the 2nd Interested Party declined to pay it on grounds that the agency notice was in force. The 2nd Interested Party's refusal to comply with the court's order prompted the filing of the contempt proceedings. Dr. Kuria in his submissions addressed 4 issues that arose.

The first one was whether officers of a company can be liable for contempt and whether the officers of the 2nd Interested Party can be liable for committal to civil jail for disobeying a court's order. He urged that Directors of a corporation are liable for the Company's Acts or servants and officers of a company upon whom an order is served are liable. He relied on **Snells Principles of Equity 28th Edition Page 13-14**.

The 2nd issue is the effect of wrong or incompetent legal advice given to a contemnor by his Counsel. On that point Counsel submitted that ignorance of an order is not a defence. That Advocates have the responsibility of ensuring that orders are obeyed and if orders are disobeyed the parties can still be committed. That it did not matter what Mr. Sichangi Counsel for the 2nd Interested Party advised its officers. They are liable. He relied on the case of **REFRIGERATOR & KICHEN UTENCILS LTD V G.B. SHAH CA 39/1990**. It was Counsel's further submission that it was upto the parties to obey and not give their own interpretation that the order was meant to maintain the status quo. That if they did not understand the order they, should have sought clarification from the court. To the contrary, the Applicant contends that the language of the court was plain, clear and unambiguous and the Interested Party's interpretation of the order was uncalled for. The 3rd issue considered is the relevance of the Court's order of stay. Counsel referred to Black's Law Dictionary and Jowitts Dictionary of English Law and urged that stay means holding or suspending of proceedings and that the courts order did not mean preventing any transaction from being done on the account.

Counsel also addressed the Respondents defence that Justice Nyamu had interpreted a similar order made by him in another case, HMisc 62/07 and that its effect was to freeze or suspend the transactions on the account. Counsel urged that these are different proceedings which cannot be compared with the ones in which the judge gave a different interpretation of his order.

In opposing the application, Mr. Ojiambo for the 2nd Interested Party addressed three issues (1) The effect of the order of stay (2) the effectiveness of the order to enable the committal of the Respondents as sought by the Applicants and (3) whether the court's discretion would be exercised to grant the orders sought.

Counsel sought to explain what transpired before the committal proceedings were commenced. That when Sichangi & Co. Advocates were served with the Application seeking to commit the Respondent Officers for contempt, he wrote the letter dated 2nd April 2007 (RA 7) seeking to have the order of the court on stay interpreted by Justice Nyamu. That similar agency notices as the one issued against the Applicant had been issued by the 1st Respondent and the society had come to court and sought stay. The order was placed before the court for interpretation in HMisc 62/07 (RA 6) and the court said that it meant that the Bank holds the money and that the same interpretation should apply in this matter. Counsel also urged that the orders were never directed at the 2nd Interested Party Bank but at the 1st Respondent and that if the money were released then that would be determining the Judicial Review application that is yet to be heard by this court. That by seeking to have money released it is a way of getting an order of mandamus compelling the Bank to release the monies yet the Judicial Review application is yet to be determined.

Counsel observed that an order of stay cannot mean paying out of money. That an order that requires one to pay money or do a specific act must be specific and there is no such specific order made by the court. Counsel made reliance on **Halsbury's Laws of England Vol 9.1/4/06** for that proposition. That the order granted is an interim order not a final one and if money were to be paid over to the applicant, it would be determining the Judicial Review application. Counsel disagreed with the Applicant's contention that an order of stay is like an injunction. In the case of **REP ex parte ECONET WIRELESS KENYA LTD HMISC 1640/04** Ibrahim J held that the court had no jurisdiction to grant an injunction under Judicial Review jurisdiction.

It is also the Interested Party's submission that the stay order was not directed at the Bank but at the Commissioner for Co-operatives. That in any case the order cannot have been directed at the Bank which is a private body, Judicial Review being a public law remedy.

Counsel submitted further that for there to be committal for contempt, the order must be clear and unambiguous as held in the cases of **GORDON V GORDON (1946) 1 ALL ER 247**, **MUTITIKA V BAHARIN FARM LTD (1985) EA 227** and **OCHINO V OKOMBO (1989) KLR 165**. That the order was made on 16th February 2007, the Notice of Motion filed on 19th March 2007 and by the time the application of contempt was filed, the stay order had lapsed. That whatever the case this order should have been taken back to Justice Nyamu to interpret instead of filing these proceedings.

Mr. Muriuki Counsel for the Respondent agreed with the submissions made on behalf of the Interested Party. Counsel said that the order of stay was meant to maintain the status quo so that the agency notice was not implemented.

To appreciate the controversy before me, I think it proper to set out the whole of the court's order issued by Justice Nyamu dated 16th March 2007. It reads:

“(In Chamber on the 16th day of March, 2007. Before the Hon. Mr. Justice Nyamu)

UPON READING the application presented to this Hon. Court on 16th March 2007 by the Counsel for the Applicant under Order LIII rules 1 and 2 of the Civil Procedure Rules, AND UPON READING the statutory statement and the affidavit of Mr. Julius Macharia M'dugire sworn on 15th March 2007 and the annexures thereto, AND UPON HEARING Counsel for the Applicant; IT IS ORDERED:-

- 1. That the Applicant be and is hereby granted leave to apply for an order of certiorari to remove and bring into the High Court for the purpose of quashing the Respondent's agency notice dated 22nd January 2007 appointing the branch manager, Co-operative Bank of Kenya Ltd., Murang'a Branch, an agent of Mumathi Sacco Society Ltd. for purposes of collecting from the Applicant Kshs.3,764,568.70;**
- 2. That the Applicant be and is hereby granted leave to apply for an order of prohibition directed against the Respondents and or prohibiting him/her from proceeding with the intended implementation of the said agency notice dated 22nd January 2007;**
- 3. That the grant of leave to apply for orders of certiorari and prohibition do operate as a stay of the agency notice dated 22nd January 2007;**
- 4. That the orders are granted on condition that the application is filed within 21 days and served within 8 days failing which the order automatically lapses;**
- 5. That the costs be in the cause.**

GIVEN under my hand and the seal of the court at Nairobi this 16th day of February, 2007. Issued at Nairobi this 16th day of March 2007.

Signed

Deputy Registrar

High Court of Kenya, Nairobi

PENAL NOTICE

TAKE NOTICE THAT IF YOU, THE WITHIN NAMED RESPONDENTS OR YOUR AGENTS DISOBEY THIS ORDER, YOU WILL BE LIABLE TO BE CITED FOR CONTEMPT OF COURT AND SHALL BE LIABLE FOR IMPRISONMENT FOR A PERIOD OF NOT LESS

THAN SIX MONTHS.”

The issue of service of the order on the Respondent and Interested Parties seem not to be disputed. The order was served on 19th March 2007 on the Respondents and 1st Interested Party and on 20/2007 on the 2nd Interested Party. What is in dispute is the interpretation of the order especially prayer 3 relating to stay and whether the order is clear and unambiguous.

Once the court granted leave to file a Judicial Review application on 16th February 2008 the, Notice of Motion was filed 3 days later on 19th March 2007. Once the Applicant complied with the direction to file the Notice of Motion within 21 days, the order of stay would remain in force till the Judicial Review application is heard and determined. The 2nd Interested Party's submission that the order of stay had lapsed by the time the contempt proceedings were filed on 12th April 2007 (leave) and 13th April 2007 (Notice of Motion) is not correct.

A reading of the order of the court in dispute clearly shows that the courts order is directed at the Respondent i.e. **“ in quashing the Respondent’s agency notice dated 22nd January 2007.....”** and **“.....prohibition directed against the Respondent and prohibiting him from**” The agency notice could not have been directed at the Interested Parties because they are private entities and Judicial Review orders can only issue against public bodies. However being named as Interested Parties the order in my view was supposed to put them on notice – being parties that would be directly affected by the said court’s orders.

On the question of whether or not Directors of a company or officers can be committed to jail for disobedience of the court’s orders, the Applicants counsel cited **Shell’s Principles of Equity 28th Ed Pg 650-651** which states:

“The court may commit to prison any person who disobeys The act of disobedience need not be contumacious; provided the act is clearly a breach, it suffices if it is intentional and not merely casual or accidental. The court may commit not only the parties enjoined but also directors and officers (though not, it seems, individual members) of any cooperate party enjoined and also any person who knowingly a bet the parties in the breach of the injunction on the ground that they are obstructing the courts of justice.” I think this observation represents the correct position. The Town Clerk or Town Engineer of Councils have been committed for contempt as officers of the Councils – eg in **REP V MUNICIPAL COUNCIL OF NAKURU ex parte KWANZA ESTATES LTD HMISC 1539/05**, this court found the Town Clerk and Town Engineer guilty of contempt of court.

The Directors or Chief Officers of the Bank if served with the order could be cited for contempt if they wilfully disobey the court’s order.

Black’s Law Dictionary 8th ED defines stay as **“postponement or halting of a proceedings, judgment, or the like (2) an order to suspend all or part of a judicial proceedings or a judgment resulting from that proceedings.”**

Jowitt’s Dictionary of English Law Vol 2 defines stay as a suspension of proceedings in an action or sometimes it means a total discontinuance of the action. In the instant case, the order of the court stayed the agency notice issued by the Respondent directed at the Applicant’s accounts held by the 2nd Interested Party. The applicants have interpreted the order to mean that the money held by the Bank could be released to them upon the agency notice being stayed. I do not believe that is a correct interpretation of that order. If the money were to be released to the Applicants it means the very substratum of the agency notice would have been destroyed. It would defeat the whole purpose of the agency notice and it would mean that the Judicial Review application is determined even before it is heard interpartes. This is because the Applicant would withdraw the money held by the 2nd Interested Party in which the 1st Interested Party has an interest as they wish and may deplete the account before the time the Judicial Review Application is heard interpartes and if any orders are given in favour of the Respondent, they

would have been overtaken by events or defeated. That would be condemning one party unheard or offending the cardinal principles of natural justice that one should not be condemned unheard. Harlbury's Laws of England Vol. 9.1 465 states that for one to be punished for disobedience of a court's order the order must be clear and unambiguous.

In this case it seems the two sides interpreted the order of the court differently. In my considered view however, the order is clear and unambiguous that the Respondent was supposed to halt or stop any action towards the enforcement of the agency notice issued by the Respondent. When the Applicant's Counsel wrote to the Interested Parties and the Respondent alleging disobedience because the Bank had declined to pay out money and the Interested Parties indicated how they understood the order, the matter should have been referred to the court for interpretation. Normally the party against whom the order is made against will be expected to obey the order till the court directs otherwise. In the case of **CHUCK V CREMER 1(COOP temp Cott 342)** Lord Cottenham said **"A party who knows of an order whether, null or valid, regular or irregular cannot be permitted to disobey it.... It would be most dangerous to hold that the suitors; or their solicitors, could themselves judge whether an order was null or valid whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question. That the course of a party knowing of an order, which was null or irregular, and who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it existed, it must not be disobeyed."** This decision was adopted **HADKINSON V HADKINSON (1952) ALL LR 567**; The case here is different however. This is not a case where the Interested Party and Respondent would be expected to obey even if the order is null or irregular because had the Interested Parties gone ahead to pay the sums demanded by the Applicant the Judicial Review application would have been compromised. This was excess of different interpretations and the best recourse would have been to call on Justice Nyamu to interpret the order.

Contempt of court proceedings affect the liberty of a person and the standard of proof is higher than an a balance of probabilities and almost but not exactly beyond any reasonable doubt and therefore the contemnors guilt has to be proved strictly and the jurisdiction has to be exercised with utmost care. (See **MUTITIKA CASE supra**). In the instant case. I find that the order of the court was directed at the Respondents, to halt acting on the agency notice and they complied. The order gave notice to the Bank (2nd Interested Party) and the Bank, did not release any money to the 1st Interested Party or the Respondent. They obeyed the order. I find there to have been no willful disobedience of the court's order to warrant the committal of the Respondents and Interested Parties for contempt. If anything it is the applicants who have misinterpreted the order. I find no merit in this application and it is hereby dismissed with costs going to the Respondent and Interested Parties.

Dated and delivered this 19th day of September 2008.

R.P.V. WENDOH

JUDGE

Present:

Dr. Kuria for the Applicant

Ms Were holding brief for Mr. Muriuki for the 1st Interested Party

Mr. Ojiambo for the 2nd Interested Party

Elizabeth: Court Clerk