



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU
CIVIL SUIT NO. 122 OF 2003

NORA STELLA SANDHU.....PLAINTIFF

VERSUS

**NATIONAL BANK OF KENYA LTD.....1ST
DEFENDANT**

BENJAMIN KISOI SILA (T/A Legacy Auctioneering Services).....2ND DEFENDANT

RULING

The Plaintiff, by way of chamber summons dated 16th December, 2003 applied for orders that the status quo in the matter be maintained in terms of the court order of 7th August, 2003. She also prayed that the property of the first Defendant and that of Mrs. D.W. Gitonga, Manager Legal Services of the first Defendant be attached and in the alternative, the court to order the detention in prison for a term of six months of the persons named in prayer 3(b) of its application.

The application was made on the grounds that the named persons had disobeyed court orders of the 7th August, 2003 by issuing a notice to the applicant herein. It was further stated that the applicant's representation of the estate was only limited to filing this suit.

It would appear that the reason why Mrs. D.W. Gitonga is being dragged into the matter is because the Defendant in issuing the notice alleged to have been issued in disobedience of a court order, acted on the advice of the said Mrs.0 Gitonga.

The affidavit in support of the application was sworn by the Plaintiff on 15th December, 2003 and she deponed that she obtained a limited grant for the purpose of filing this suit. She further deponed that on 7th August, 2003 this court issued an order of injunction against the Defendant in the presence of both advocates for the parties herein and the orders were served upon the defendants on 9th August, 2003 and they received the same and acknowledged service by stamping and dating the reverse side of the order. Notwithstanding the said service, the first Defendant issued the plaintiff with a notice dated 8th September, 2003, the Plaintiff so deponed.

According to the plaintiff, that was an act of contempt of court and urged the court to punish the first Defendant and its manager of legal affairs as prayed in the application.

In his submissions, the learned counsel for the applicant, Mr. Ogola stated that the applicant had satisfied the required conditions which he summarised as follows:-

(a) An order has to be served upon the contemnor (b) The order has to be endorsed with notice of penal consequences.

(c) There has to be clear disobedience to the order.

He cited several authorities in support of his submissions. As far as the grounds of opposition and the replying affidavit were concerned, he submitted that the respondents had admitted that they wrote the letter of 8th September, 2003. He also took issue with the replying affidavit, saying that it did not disclose the true abode of the deponent but he did not urge the court to strike it out. However, the provisions of order XVIII Rule 7 would be applicable to cure that minor defect in the said affidavit.

The respondents opposed the said application through their learned counsel Mr. Kiburi. They filed grounds of opposition dated 8th January, 2004 and a replying affidavit sworn by Damaris Wanjiku Gitonga on 9th January, 2004. In the replying affidavit, Mrs Gitonga deponed that on 7th August, 2003 the court held that the bank could not exercise its statutory powers of sale without issuing a fresh statutory notice as the previous ones were spent and as the bank was keen to recover some Kshs.40 million owed by the estate represented by the applicant, she issued a statutory notice dated 8th September, 2003. She further deponed that no disrespect was intended by the said notice and she believed that the same did not in any way prejudice the applicant or lower the dignity of the court. She therefore said that there was no basis of seeking the prayers made by the applicant. She also said that the applicant had not disclosed what she was doing to administer the estate of Sital Singh Sandhu and Kapoor Singh Sandhu.

Mr. Kiburi pointed out that the application was filed by a stranger by the name Kiplenge, Ogola & Mugambi Advocates where as the advocates who were on record were Juma Kiplenge & Associates. There was no notice of change of advocates for the plaintiffs which had been filed but since Mr. Kiburi did not urge the court to strike out the application for that reason, I hold that failure to file the notice of change of advocates is not fatal to the Plaintiff's application. Mr. Kiburi admitted that the said statutory notice was issued and it even made reference to the court ruling but the issuance of the said notice was not in contempt of court at all because the bank was obliged to issue a notice to the legal representative of the said estate as the earlier notices were spent. He submitted that an intimation of intention to exercise statutory power of sale was not synonymous to disobedience of a court order restraining the bank from exercising its statutory power of sale of the suit property.

I have carefully perused the order that was granted on 7th August and issued on 8th August, 2003. The relevant part thereof stated as follows:-

1. "That pending the hearing of this suit this honourable court be and is hereby pleased to stay and or restrain the defendants either by themselves, their servants, agents or otherwise howsoever from exercising its statutory power of sale or selling the suit property on the 4th August, 2003 or alienating interfering or in any way dealing with Nakuru Municipality Block 4/131.
2. Costs of this application be in the cause."

The order contained the usual Penal Notice at the foot thereof.

I have also carefully perused the letter dated 8th September, 2003 signed by Mrs. D.W. Gitonga for the Manager Legal Services of the National Bank of Kenya.

To understand the basis of the aforesaid order, it is necessary to look at the plaint which was filed by the Plaintiff on 25th July, 2003 as well as the application which the Plaintiff filed on the same day.

In paragraph one of the plaint, the Plaintiff was described as the legal representative of the estate of Sital Singh Sandhu. The plaint further alleged that the first Defendant purported to have served a statutory notice upon Sital Singh Sandhu & Kapoor Singh Sandhu (hereinafter referred to as "chargors") when the first Defendant knew or ought to have known that the chargors were deceased. It was said that the notice so issued was invalid and could not amount to a proper statutory notice as would entitle a bank to exercise its statutory power of sale upon its expiry.

The ruling delivered by Justice Lesiit on 7th August, 2003 clearly stated the notices that the first

Defendant had served upon the deceased chargors were spent and the chargee could not therefore sell the charged property without issuing a fresh notice. I believe that is why the first Defendant issued the notice of 8th September, 2003 to the Plaintiff. The first sentence of that letter had the following opening words.

“Following the ruling of Justice Lesiit delivered on 7th August, 2003, in respect of Nakuru HCCC No. 122 of 2003, whose particulars are well within your knowledge, we hereby give you NOTICE that”

Did the issuance of the above notice amount to contempt of court? I am not persuaded to believe so. The court order restrained the defendants from exercising the first defendant’s statutory power of sale pending the hearing and determination of the suit. The question is: did the defendants sell the property or interfere with it in any way? The simple answer is no!

Whether the bank was right or wrong in issuing a statutory notice to the plaintiff when she was holding only a limited grant of letters of administration and colligenda bona is not the issue for determination. The issue is whether the first Defendant has committed the offence of contempt of court. Mr. Ogola submitted that by issuing the statutory notice to the plaintiff, the bank commenced the process of exercising its statutory power of sale and that, according to him, was contemptuous. If the court were to accept Mr. Ogola’s submissions, it would be tantamount to punishing the respondents for attempted contempt of court which is something totally unknown in our laws. In the case of Re BRAMBLEVALE LTD [1969] 3 ALL ER 1062 Lord Denning Mr. (as he then was) at Pg. 1063 stated as follows:-

“A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be satisfactorily proved. To use the time honoured phrase, it must be proved beyond reasonable doubt.”

However, our Court of Appeal stated in MUTITIKA VS BAHARINI FARM (1982 – 88) 1 KAR that that degree of proof was too high for an offence “of a criminal character” and, ipso facto, not a criminal offence properly so defined. The court stated that “*the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt*”.

Mr. Kiburi submitted that the authorities cited by the plaintiff’s counsel could only apply where there was actual contempt. I agree with him. I hold that no contempt of court has been proved against the defendants and consequently I dismiss prayer No.3 of the Plaintiff’s application. The Plaintiff has also prayed that the defendants be ordered to maintain the status quo in terms of the court order of the 7th August, 2003.

The defendants opposed this prayer as well, arguing that the Plaintiff was not making any effort to repay the huge outstanding sum due from the estate of the deceased chargors to the bank, almost Kshs.40 million. Mr. Kiburi submitted that since the plaintiff wanted to benefit from equity, she must also do equity and cited the case of SIMIYU VS HOUSING FINANCE CO. OF KENYA Milimani Commercial Court, Case NO. 937 of 2001.

I agree with him to a certain extent but I cannot order the Plaintiff to pay any money as was the case in the above cited matter.

The first Defendant has now applied that the orders of the court issued on 7th August, 2003 be varied and/or set aside but this is not the application which I am considering now. I cannot say much at this juncture before the first Defendant’s application is heard and determined as it may be prejudicial to either of the parties in the matter.

In the book “OSWALD ON CONTEMPT” 3rd Edition at Pg. 16 it is stated as follows:-

“The court, however, has power to restrain by injunction threatened contempts. It is competent for the court where a contempt is threatened or has been committed, and on an application to commit, to take the lenient course of granting an injunction instead of making an order for committal or sequestration, whether the offender is a party to the proceedings or not.”

In my view, there is already an order of injunction in force and it would be superfluous to issue another one. The status quo as obtained on 7th August, 2003 should be maintained until the suit is heard and determined or until such other orders as may be issued upon the hearing and determination of the first defendant's application dated 21st January, 2004 are made. On costs, given the nature of the application and the findings that I have arrived at, the order that commends itself to me is costs should be in the cause and

it is so ordered.

DATED, SIGNED & DELIVERED at Nakuru this 5th day of February, 2004.

DANIEL K. MUSINGA

AG. JUDGE

5/2/2004

Ruling delivered in the presence of Mr. Ogola for the applicant and Mr. Oumo holding brief for Mr. Kiburi for the respondent.

DANIEL K. MUSINGA

AG. JUDGE

5/2/2004