



REPUBLIC OF KENYA



**Mogi v Diamond Trust Bank Kenya Ltd & 2 others (Civil Case E941 of 2021)
[2024] KEHC 102 (KLR) (Commercial and Tax) (17 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 102 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E941 OF 2021
A MABEYA, J
JANUARY 17, 2024**

BETWEEN

CHARLES MAKORI MOGI PLAINTIFF

AND

DIAMOND TRUST BANK KENYA LTD 1ST DEFENDANT

DALALI TRADERS AUCTIONEERS 2ND DEFENDANT

ALFRED THIGIRI JACOB & LYDIA KINYA MWITHIMNU .. 3RD DEFENDANT

RULING

1. This is an application dated 08/06/2023. It is brought inter alia, under sections 1A, 3B, 3A & 63(e) of the *Civil Procedure Act*. It seeks that a factual finding be made that the 1st and 2nd Defendant are in contempt of this court's order of 31/05/2023. That the directors of the said Defendants be cited for the said contempt and be imprisoned for a period not exceeding 6 months.
2. The motion was supported by the affidavit of Lydia Kihya Mwathimbu sworn on the same date. It was contended that the Applicant had applied vide a notice dated 23/03/2023 seeking to retrain the Defendants from alienating or dealing with the property known as Elegens Gardens, Maisonette No. 7 erected on L.R. No. 209/10206 (PART) South C, Nairobi ("the suit property").
3. That on 31/05/2023, this court ordered the status quo be maintained till 22/06/2023. That in defiance thereof, the said Defendants proceeded to transfer the title to the suit property which they had sold through an unlawful public the subsisting orders. That their actions were against the administration of justice.
4. The application was opposed vide the replying affidavit of Maryanne Mbugua sworn on 15/06/2023. She is a debt recovery officer of the 1st Defendant ("the bank"). She is aware of the status quo order



of 31/05/2023 which was issued suo motto by the court. That the court had not been addressed on the matter and therefore did not specify what status quo entailed. That the property had been sold on 07/12/2021 but because of the orders made on the same date, the bank had withheld action until after the ruling of the court of 05/05/2023 which dismissed the injunction application.

5. That after the dismissal of the injunction application the bank was under pressure to complete the sale. That the purchaser's advocates collected the completion documents from the bank's advocates on 26/05/2023 which put the transaction beyond the control of the bank. That after the issuance of the status quo order, the bank contacted the purchaser's advocates but confirmed that the transfer documents were lodged on 31/05/2023. That the transfer has since been effected. The in the premises, there was no disobedience on the part of the bank and the 2nd Defendant.
6. The parties filed their respective submissions dated 16th and 26th June, 2023 for the Respondent and the Applicant, respectively. I have considered them. The Respondent's submissions were directed against the Applicants application dated 23/05/2023 which has not been heard. They are therefore irrelevant as far as the application for contempt is concerned.
7. A court order is not a suggestion. A court proceeding which concludes with an order is a solemn act that must be revered, respected and obeyed by all. This is because, at the heart of a democratic system, rule of law and civilized society is obedience and reverence to court orders. That is why once disobedience of a court order is alleged, the court will down its tools on all matters and first investigate the allegation. Once it establishes the allegation to be true, the court metes out appropriate punishment for the contempt.
8. In *Econet Wireless Kenya Limited vs Minister for information & Communication* [2005]KLR 828 the court held:

“it is essential for the maintenance of the rule of law and order that the authority and the dignity of our courts are upheld at all times. The court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. ... The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by the order believes it to be irregular and void.”

9. The importance of safeguarding the authority of courts by ensuring that court orders are strictly obeyed is well captured by the decision of the Indian Supreme Court cited by the Applicant in here submissions. in *T. N. Gadavarman Thiru Mulpad vs Ashok Khot and Another* [2006] 5 SCC, the Indian Supreme court held:-

“Disobedience of this court's order strikes at the very root of the rule of law on which the judicial system rests. The rule of law is the foundation of a democratic society. Judiciary is the guardian of the rule of law. Hence, it is not only the third pillar but also the central pillar of the democratic state. If the judiciary is to perform its duties and functions effectively and remain true to the spirit with which they are sacredly entrusted to it, the dignity and authority of the courts have to be respected and protected at all costs. Otherwise the very cornerstone of our constitutional scheme will give way and with it will disappear the rule of law and the civilized life in the society. That is why it is imperative and invariable that courts orders are to be followed and complied with.”



10. In view of the foregoing, it is with a view to avoid chaos and anarchy in society that the rule of law is to be maintained. The rule of law ensures predictability, equality before the law rather than might being right. The institution to guarantee that is the judiciary through its courts.
11. In the present case, it is not in dispute that this court made an order of status quo on 31/05/2023. That meant that the position at which the subject matter of the litigation had reached be frozen there. It did not require any interpretation. It meant no party was to proceed to take any steps to upset the position as it was then which would have led to the Applicant's application dated 23/05/2023 being an academic exercise or exercise in futility.
12. The court notes that the suit property had been sold on 07/12/2023 but the process was frozen by the order of the same date. that order was however, discharged vide the ruling of this court delivered on 05/05/2023. It is then that the Applicant came to court vide the application dated 23/05/2023 and sought restraining orders. Pending challenging the sale of the suit property of 07/12/2023.
13. From the replying affidavit of Maryanne Mbugua of 15/06/2023, it is clear that the completion documents for the said transfer were released by the bank's advocates on 26/05/2023 to the purchaser's advocates. After that date, the bank had no control on what happened to those completion documents. It is also clear that the transfer was effected on the same day the court made the status quo order, viz 31/05/2023.
14. The question therefore is whether in the circumstances, the 1st and 2nd Defendants can be held to have disobeyed the order of 31/05/2023. I do not think so. Having released possession of the completion documents on 26/05/2023, the said Defendants no longer had control of what happened to those documents.
15. Further it should be recalled that the bank had held onto these documents all the way from 07/12/2021 to 26/05/2023. The bank did not act on them showing its deference to the then order in force. It cannot therefore be argued that the bank woke up on 31/05/2023 to disobey the order of that date.
16. In view of the foregoing, I find that there is no evidence to show that the 1st and 2nd Defendant disobeyed the court order of 31/05/2023. In the premises the application dated 08/06/2023 is without merit and is hereby dismissed with costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF JANUARY, 2024.

A. MABEYA, FCI Arb, EBS

JUDGE

