



REPUBLIC OF KENYA



**Nyagudi & another v NIC Bank Limited & another (Commercial Case 419 of 2017)
[2024] KEHC 3461 (KLR) (Commercial and Tax) (1 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 3461 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 419 OF 2017
DO CHEPKWONY, J
MARCH 1, 2024**

BETWEEN

KENNEDY ODHIAMBO NYAGUDI 1ST PLAINTIFF

LIONS HEART SELF HELP GROUP 2ND PLAINTIFF

AND

NIC BANK LIMITED 1ST DEFENDANT

AMAYA GAMING GROUP K LIMITED 2ND DEFENDANT

RULING

1. This Ruling is in respect to the Notice of Motion Application dated 24th October, 2018 which seeks the following orders:
 - a. Spent.
 - b. Spent.
 - c. The court do make necessary arrangements for the viewing of the media publication titled ‘Betting bait: Kenya’s Mega Money Laundering Scam’ published by KTN News on 15th October, 2018 “hereinafter the publication” during the hearing hereof.
 - d. The 1st Plaintiff, Kennedy Odhiambo Nyagudi, be ordered to appear before court to show cause as to why he should not be found guilty of contempt and punished in accordance with Section 29 of the *Contempt of Court Act*.
 - e. The 1st Plaintiff’s advocate, Eddy Nicholas Orinda be ordered to appear before court to show cause as to why he should not be found guilty of contempt and punished in accordance with Section 29 of the *Contempt of Court Act*.



- f. An Order for committal to civil jail for a period not exceeding 6 months for contempt of court do issue against the 1st Plaintiff.
 - g. An Order for committal to civil jail for a period not exceeding 6 months for contempt of court do issue against Eddy Nicholas Orinda Advocate.
 - h. The 1st Plaintiff and Eddy Nicholas Orinda bear the costs of this application personally, jointly and severally on a full indemnity basis.
 - i. Any other orders the court may deem fit in the circumstances and to protect the dignity and authority.
2. The Application is based on the grounds set out on its face and in the Supporting Affidavit of Waweru Mathenge sworn on 24th October, 2018. According to the Applicant, on 13th July, 2018, Hon. Lady Justice Ngetich delivered a ruling dismissing the 1st Defendant's application dated 3rd November, 2017 and allowing the Plaintiffs' application dated 10th October, 2017 wherein they were granted orders compelling the 1st Defendant to provide certain documents and information in respect of the 2nd Defendant's accounts with the 1st Defendant as well as a mandatory injunction compelling the 1st Defendant to pay the sum of Kshs.150,000/= to the Plaintiffs. The Applicant also states that by an application dated 13th August, 2018, Lady Justice Ngetich issued a stay of execution of orders dated 13th July 2018 on 16th August, 2018, which orders were extended on 17th October, 2018 to 17th January, 2019.
 3. The Applicant goes on to state that notwithstanding the said court orders and the pendency of the suit as well as Civil Appeal No. 278 of 2018, NIC Bank Limited v Kennedy Odhiambo & 2 others, the 1st Plaintiff and his Advocate went ahead and caused to be published and the airing of the publication in the Kenya Television Network, a piece entitled "Betting Bait: Kenya's Mega Money Laundering Scam" alleging money laundering and fraud within the 1st Defendant, the Bank, which issues are pending determination herein.
 4. It is the Applicant's argument that the publication was meant to malign its image and to interfere with the course of justice in the pending proceedings and as such the publication was made in contempt of court which amounts to litigating a matter in the media as opposed to the court which is prejudicial to the pending litigation. The Applicant has therefore urged the court to allow the application so as it can protect the dignity and authority of the court and the parties herein.
 5. In response to the application, the Plaintiffs filed Notice of Preliminary Objection dated 25th February, 2018 on the basis that the application is founded on the *Contempt of Court Act* which was declared unconstitutional but the said Preliminary Objection was dismissed in a court ruling of 22nd October, 2019.
 6. The court directed the Application to be disposed off by way of written submissions. The Applicant filed its Submissions dated 4th June, 2019 and the Respondent and the 1st Plaintiff filed his dated 30th May, 2021 all which the court has considered in its determination.

Analysis and Determination

7. I have considered the prayers being sought in the application dated 24th October, 2018, I have read through the grounds upon which they are premised both on its fact and supporting Affidavit alongside the written submissions filed by both parties. I find the main issue for consideration is whether there is contempt of court orders to warrant the orders that have been sought herein.



8. The law on Contempt of court is enshrined under Section 5 of the *Judicature Act* Cap 8 Laws of Kenya which provides:-
- (1) The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate courts.
 - (2) An order of the High Court made by way of punishment for contempt of court shall be appealable as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the High Court.
9. It is trite law that there are elements that must be satisfied to prove contempt of court as was stated in the case of *Katsuri Limited –v- Kapurchand Depor Shah* [2016] eKLR which cited *Kristen Carla Burchell –v- Barry Grant Burchell* (Eastern Cape Division case No 364 of 2005), where it was stated that:-
- “In order for an applicant to succeed in civil contempt proceedings, the applicant has to prove (i) the terms of the order, (ii) knowledge of the terms by the respondent, and (iii) failure by the respondent to comply with the terms of the order.”
10. In this case, the Applicant holds that the 1st Plaintiff defied the court orders of 13th July, 2018 and caused the publication to be aired. According to the 1st Plaintiff there are no express orders against any publication for it to be in contempt of.
11. To determine the terms of the order alleged to have been defied by the Plaintiffs, it is important to evaluate the court orders issued to understand the terms of the same. On 13th July, 2018, the court made an Order in respect to An Application dated 10th October, 2017 and another dated 3rd November, 2017 wherein it was ordered as follows:-
- a. “That an order be and is hereby granted compelling the Defendants/ Respondents forthwith to provide to the Plaintiffs/ Applicants the following documents to enable the necessary preparations for the trial at a date to be set by the Honourable Court.
 - I. A copy of the minutes and resolutions from the 2nd Defendant appointing the 1st Defendant as their Banker and instructing them to open each of the accounts opened by the 1st Defendant.
The accounts not being only limited to the following accounts:
 - i. CA 212 XXXXXX XXXX
 - ii. CA 212 XXXXXX XXXX
 - iii. CA 212 XXXX XXX
 - iv. FD 232 XXXX XXXX
 - II. A copy of the minutes and resolutions appointing the signatories and mandates on how to operate the accounts to each of the accounts opened by the 1st Defendant



- III. A certified copy of the particulars of Directors of the 2nd Defendant from the Registrar of Companies at the time of opening the accounts.
 - IV. Proof of payment of charges to the Registrar of Companies for the particulars and details of the Directors of the 2nd Defendant while conducting due diligence on the 2nd Defendant.
 - V. A certified copy of the Memorandum and Articles of Association from the Registrar of Companies of the 2nd Defendant as requested by the 1st Defendant during the account opening of the accounts.
 - VI. Copies of PIN Certificates for the Directors of the 2nd Defendant that were provided during account opening.
 - VII. Name and address of the person or institution that introduced the 2nd Defendant to the 1st Defendant before opening the accounts.
 - VIII. A copy of the letter of introduction for the 2nd Defendant to the 1st Defendant or the duly executed introduction form by the introducer.
 - IX. Names of persons mandated to operate the accounts and where the name changed, the minutes and resolutions changing the signatories,
 - X. Copies of Residence and work permits for the foreign individuals that operated the accounts.
 - XI. Copies of Certified Bank Statements for all the accounts of the Defendant from the date they were opened to date.
- b. That an order of mandatory injunction be and is hereby granted compelling the Defendant/Respondent to return/refund/reimburse the amount of Kshs. 150,000 paid to Ochanda Onguru & Company Advocates while pursuing the documents before the filing of this suit.
 - c. That the 1st Defendant's Notice of Motion dated 3rd November, 2017 be and is hereby dismissed
 - d. That costs and incidental to this application in the cause.
- Further Orders:
- e. That stay of execution be and is hereby issued for 30 days.
 - f. That the 1st Defendant be supplied with copy of ruling and proceedings.

12. A reading of the above-cited court orders clearly shows that there is no particular order barring any publication by the Plaintiff or any party that would demonstrate that the Plaintiff was in contempt of any court orders. The court orders were meant to compel the Plaintiffs to produce documents and particulars of persons involved in the operations and running the Defendant's, to be used in



preparation of the trial and mandatory injunction orders for the Defendant's to reimburse the amount of Kshs 150,000/=.

13. There being no specific order barring the Plaintiff from making or airing any publication or otherwise, the Plaintiffs cannot be said to be in contempt of any court orders to warrant the orders sought. With this findings there is no need of dealing with the other elements required to prove contempt of court.
14. In the circumstances, the court finds that the Notice of Motion application dated 24th October, 2018 lacks merit and is hereby dismissed with costs to the Plaintiffs.

It is so ordered.

RULING DATED AND SIGNED AT KIAMBU THIS 15TH DAY OF FEBRUARY, 2024.

D. O. CHEPKWONY

JUDGE

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 1ST DAY OF MARCH, 2024.

ALFRED MABEYA

JUDGE

