



**Kebenei v African Grain Care Equipment Limited & 2 others; Kibenei (Applicant); Maindio (Contemnor) (Miscellaneous Civil Application E183 of 2022) [2023] KEHC 812 (KLR) (14 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 812 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
MISCELLANEOUS CIVIL APPLICATION E183 OF 2022  
RN NYAKUNDI, J  
FEBRUARY 14, 2023**

**BETWEEN**

**MICHAEL KIBET KEBENEI ..... APPLICANT**

**AND**

**AFRICAN GRAIN CARE EQUIPMENT LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**WILLIE KIBET MAINDIO ..... 2<sup>ND</sup> RESPONDENT**

**THE REGISTRAR OF COMPANIES ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**MICHAEL KIBET KIBENEI ..... APPLICANT**

**AND**

**WILLIE KIBET MAINDIO ..... CONTEMNOR**

**RULING**

1. By a Notice of Motion dated 16th January, 2023, the Applicant seeks the following orders:-
  1. That this Honourable Court do issue upon the 1<sup>st</sup> and 2<sup>nd</sup> Contemnors to attend to this Court and show Cause why they should not be cited for contempt of this Court’s ruling and orders issued on 22<sup>nd</sup> December, 2022.
  2. That this Honourable Court do cite the Contemnor for contempt of Court orders and directions issued on 22<sup>nd</sup> December, 2022 and commit him to civil jail or as the Court may deem fit.



3. That this Honourable Court to authorize the Applicant to process payments singly all in all of the 1<sup>st</sup> Respondent's bank accounts subject to rendering an account to court until the status conference slated before Court on 14<sup>th</sup> February, 2023.
4. That this Honourable Court do issue any other order it deems fit for the tenets of justice to be achieved and or met.
5. That costs of this application be provided for.

The application is premised of the grounds adduced therein and it is further supported by the affidavit sworn by Michael Kibet Kebenei, dated 16<sup>th</sup> January, 2023.

### **The Applicant's Case**

2. The Applicant's case is that as per the records that are held by the 3<sup>rd</sup> Respondent, he is aware that the Contemnor is a director/shareholder of the 1<sup>st</sup> Respondent. That as per the directions that were given by this Court on 22<sup>nd</sup> December, 2022, it was ordered that the Applicant put into effect minutes No. SGM/4/2022 of 19<sup>th</sup> August, 2022. Further that the Applicant was directed to serve the 2<sup>nd</sup> Respondent with all due expenses/finances of the 1<sup>st</sup> Respondent which require payment. The Applicant maintains that the Contemnor's advocate on record concurred that on behalf of his client the same shall be approved unconditionally.
3. The Applicant maintains that the said orders are still in force and have not been set-aside and or vacated by this Court.
4. The Applicant further deposed that on 4<sup>th</sup> January, 2023, the Contemnor unfortunately and in blatant disrespect of this Court's ruling and orders of 22<sup>nd</sup> December, 2022, refused to process payment requested submitted by the Applicant's Advocates on 28<sup>th</sup> December, 2021 on behalf of the 1<sup>st</sup> Respondent.
5. The Applicant contends that the contemnor has consistently disobeyed the Court's directions and or orders by his continuous refusal to process payments on behalf of the 1<sup>st</sup> Respondent to its detriment. The Applicant maintains that unless the orders sought therein are issued, the Contemnor herein will continue to disobey the orders of this Court to the detriment of the 1<sup>st</sup> Respondent rendering these instant proceedings and the subsequent judgment an academic exercise.
6. The Applicant contends that the 1<sup>st</sup> Respondent has numerous obligations to deliver which continue to be at risk and unpaid for instance supplier payment, taxes, statutory payments, staff loans and bank facilities. Further that the 1<sup>st</sup> Respondent has ongoing contracts and is signing up additional contracts which shall necessitate processing of letters of credit and bank guarantees which stand risk of non-performance due to the intentional disobedience of the Court orders that were issued on 22<sup>nd</sup> December, 2022, by the Contemnor for instance the delivery of Kyoga I & II projects in Uganda which require immediate purchase of electrical panels.

### **The 2<sup>nd</sup> Respondent's Case**

7. The application is opposed vide the Replying affidavit dated 2<sup>nd</sup> February, 2023, sworn by Willie Kibet Maindio.



8. The 2<sup>nd</sup> Respondent deposed that this instant application is defective, bad in law and abuse of Court process. The 2<sup>nd</sup> Respondent wants this Court duly consider his preliminary objection dated 21<sup>st</sup> December, 2022 as the same would likely dispose of this matter.
9. The 2<sup>nd</sup> Respondent maintains that pursuant to this court's directions that were issued on 22<sup>nd</sup> December, 2022, he approved all payments in terms of Min. SGM 4/2022 on 26<sup>th</sup> December, 2022, save for payments to the firm of Ngethe & Co. Advocates.
10. The 2<sup>nd</sup> Respondent further deposed that on 31<sup>st</sup> December, 2022, he made a complaint at Eldoret Police station and was issued with OB No.28/31/12/2022 in respect of the fraudulent transaction on Equity Bank Account No. 164xxxxxxx amounting to Kshs.23,894,602.42. Further that the said bank account is currently under investigations and that no withdrawals and or transaction can be undertaken on the said account. The 2<sup>nd</sup> Respondent maintains that he communicated the said position to the Applicant herein on 4<sup>th</sup> & 10<sup>th</sup> January, 2023, all of which was in vain.
11. The 2<sup>nd</sup> Respondent maintains that the subject account has since been frozen on account of fraud by both the bank and the Applicant and thus no transaction can be undertaken.
12. The 2<sup>nd</sup> Respondent contends that he has severally called for the meeting of directors of the company so as to address the urgent issues regarding the smooth operations of the Company but the Applicant completely declined.
13. According to the 2<sup>nd</sup> Respondent, the Applicant continues to frustrate the separation process by declining to comply with Clause 6 of terms of reference on full disclosure of assets of the company. The 2<sup>nd</sup> Respondent maintains that valuation cannot be complete unless the Applicant complies with Clause 6 of the terms of reference. That various letters have been written to the Applicant to comply to no avail.
14. According to the 2<sup>nd</sup> Respondent, the Applicant continues to violate and frustrate compliance with the orders of 22<sup>nd</sup> December, 2022, with impunity.
15. The 2<sup>nd</sup> Respondent further deposed that the Applicant in further frustration of the smooth operations of the company declined to issue properly drawn cheque leaves from credible bank accounts despite continued reminder. The 2<sup>nd</sup> Respondent contends that a communique was made to the Applicant vide a letter dated 4<sup>th</sup> January, 2022 in vain.
16. The 2<sup>nd</sup> Respondent contends that the contents of paragraph (9) of the Applicant's supporting affidavit have never been sent to him for purposes of scrutiny and approval.
17. The 2<sup>nd</sup> Respondent further deposed that the letters of credit were taken at Co-operative bank of Kenya. That payment in satisfaction of the said loan facility was to be paid through proceeds of a project in Uganda in the name Kyoga. The 2<sup>nd</sup> Respondent contends that the Applicant in blatant violation of the letters of credit and the agreement between the company and Co-operative Bank fraudulently diverted all the payments from Kyoga to Equity Bank and proceeded to fraudulently withdraw the said monies in cohort with Equity Bank staff without his approval. That the bank facility at Co-operative bank is now overdue and that the Kshs.23,000,000/= taken by the Applicant herein was meant repay the bank loans at Co-operative.



## Determination

18. From onset, I must point out that this instant application has been brought under the wrong provisions of the law. It is noteworthy to mention that on 9<sup>th</sup> November 2018, Mwita J, in [Kenya Human Rights Commission v Attorney General & Another](#) [2018] eKLR, declared that the entire [Contempt of Court Act](#) No. 46 of 2016 as invalid for lack of public participation as required by Articles 10 and 118(b) of the [Constitution](#) and found that the said Act as enacted encroached upon the independence of the Judiciary.
19. Be as it may however, before the enactment of the since deleted Contempt of Act, Section 5 of the [Judicature Act](#) Cap 8 Laws of Kenya, was the only statutory basis with respect to the procedure for institution contempt of Court proceedings. That Section 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.
20. As it is there is no law that governs contempt of Court and hence the application was brought under incorrect provisions of the law. A party seeking recourse for contempt of Court proceeding would then have to rely on the provisions of Section 3 of the [Judicature Act](#) that provides that;

The jurisdiction of the Supreme Court, the Court of Appeal, the High Court, the Environment and Land Court, the Employment and Labour Relations Court and of all subordinate courts shall be exercised in conformity with—

  - a) The [Constitution](#)
  - b) subject thereto, all other written laws, including the Acts of Parliament of the United Kingdom cited in Part I of the Schedule to this Act, modified in accordance with Part II of that Schedule
  - c) subject thereto and so far as those written laws do not extend or apply, the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12<sup>th</sup> August, 1897, and the procedure and practice observed in courts of justice in England at that date
21. Provided that the said common law, doctrines of equity and statutes of general application shall apply so far only as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary.”
22. Therefore, in Kenya the law that governs contempt of Court proceedings is the English law applicable in England at the time the alleged contempt is committed. Section 5 of the [Judicature Act](#) imposes a duty on the High Court, the Court of Appeal and law practitioners to ascertain the applicable law of contempt in the High Court of Justice in England, at the time the application is brought.



23. The application before Court seeks to have the 2<sup>nd</sup> Respondent cited contempt of this Court's orders of 22<sup>nd</sup> December, 2021 and or to be committed him to civil jail.
24. Contempt of Court is in the nature of criminal proceedings and, therefore, proof of a case against a Contemnor is higher than that of balance of probability. Due to the gravity of consequences that ordinarily flow from contempt proceedings, it is proper that the order be served and the person cited for contempt should have had personal knowledge of that order. This was aptly stated in *Gatharia K. Mutikika v Baharini Farm Limited* [1985] KLR 227, that:

A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be proved satisfactorily.... It must be higher than proof on a balance of probabilities, almost but not exactly, beyond reasonable doubt. The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit criminal cases. It is not safe to extend it to offences which can be said to be quasi-criminal in nature.

However, the guilt has to be proved with such strictness of proof as is consistent with the gravity of the charge... Recourse ought not to be had to process of contempt of court in aid of a civil remedy where there is any other method of doing justice. The jurisdiction of committing for contempt being practically arbitrary and unlimited, should be most jealously and carefully watched and exercised with the greatest reluctance and the greatest anxiety on the party of the judge to see whether there is no other mode which is not open to the objection of arbitrariness and which can be brought to bear upon the subject... applying the test that the standard of proof should be consistent with the gravity of the alleged contempt... it is competent for the court where contempt is alleged to or has been committed, and or 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.

24. In the instant case, it not in dispute that the 2<sup>nd</sup> Respondent was aware of this Court's orders that were issued on 22<sup>nd</sup> December, 2022. However, from the chronology of events elucidated by the respective parties herein, it seems like status quo in this matter shifted upon the said orders being issued. There are accusations and counter-accusations from the parties herein that cannot in my view be determined conclusively at this interim stage. The issues being raised by the both the Applicant and the 2<sup>nd</sup> Respondent are weighty issues that cannot be wished away as such. They may require calling of witnesses and evidence to that effect.
25. The Applicant has faulted the 2<sup>nd</sup> Respondent for disobeying this Court's orders that were issued on 22<sup>nd</sup> December, 2022. The Applicant maintains that this has been to the detriment of the 1<sup>st</sup> Respondent herein. The 2<sup>nd</sup> Respondent on the other hand has also blamed the Applicant for frustrating the compliance process. The 2<sup>nd</sup> Respondent has in fact levelled an allegation of fraud against the Applicant herein. To my mind issues of fraud are criminal in nature and if the same were to be true then compliance with the orders of 22<sup>nd</sup> December, 2022 cannot proceed.



26. As was again stated by the Supreme Court of India in *Mahinderjit Singh Bitta v Union of India & Others* 1 A NO. 10 of 2010 (13<sup>th</sup> October, 2011):

In exercise of its contempt jurisdiction, the courts are primarily concerned with enquiring whether the contemnor is guilty of intentional and willful violation of the order of the court, even to constitute a civil contempt. Every party is lis before the court and even otherwise, is expected to obey the orders of the court in its spirit and substance. Every person is required to respect and obey the orders of the court with due dignity for the institution. (Emphasis).

27. While appreciating that Court orders ought to be complied with. I must mention that with the foregoing in mind I cannot hold that the 2<sup>nd</sup> Respondent is in contempt of the orders of 22<sup>nd</sup> December, 2022. In order to do so the Applicant must demonstrate that there was wilful disobedience of the said orders by 2<sup>nd</sup> Respondent which at this particular juncture I cannot conclusively answer in the affirmative. It is clear however that the averments having been made in the claim on financial obligations of the company to other third parties there is still a lacuna as to the liquidity of the account susceptible to withdrawals for cheques drawn by the applicant in the Motion dated 16<sup>th</sup> January 2023. It is therefore not open to the applicant to complain before this court particular payments have not been honoured to his satisfaction against the suppliers of goods and services or employees of the company. There is also a question arising as to whether the state of mind of the directors at the time when this whole legal saga began rearing the directors acted bona fide as well as in the interest of the company or in their power and for improper motive. It is correct to say that an inference can be drawn from the affidavit that there may be some grain of self-interest of some of the directors involved but probative evidence is far from being presented from this court. What is more important is for a party to establish that a fiduciary power has been exercised for the purpose which it was not conferred by the articles and Memorandum of Association of the Company. In that case I have heard arguments and counter distinction arguments from the skeleton submissions from both counsels seized on this matter. The extreme argument on one side is that the 1<sup>st</sup> and 2<sup>nd</sup> Respondent are required to exercise bona fide of the power in the interest of the company but they seem to have abdicated that role and are found to be motivated by self-interest. In the circumstances there is no evidence at this stage from the applicant that the 1<sup>st</sup> and 2<sup>nd</sup> Respondent do serve the purpose of personal interest and not that of the company. It is usually the case here that a resolution was passed to undertake the doctrine of separation of the existing corporate entities upon principles substantially equitable. In the interim yes, the company must honour its obligations to the shareholders and other 3<sup>rd</sup> parties who trade or are in contract of employment. This may be an important weighty factor but the truth is the affidavit evidence viewed in the context of the interpretative exercise that the courts has engaged in it has not yielded that the primary positive duty of the directors has to be midwived by this court. The issue at hand on contempt from a matter of detail in which parties themselves through their legal counsels had agreed to some proposals on a scheme of payments being made in the interim period as they answer in so far as they can on severance of the legal entities. If then this is the question on which the applicants peg their arguments on contempt that premise has not ripened.
28. The company as a separate entity was firmly established in the landmark case of *Salomon v Salomon & Co. Ltd* (1897) AC 22 in that case the House of Lords held inter alia as follows: that the debts of the corporation were not the debts of Mr. Solomon because they were two



separate legal entities, and that once the artificial person has been created, it must be treated like any other independent person with its rights and liabilities appropriate to itself”

As Lord Macnaghten observed:

The company is at law a different person altogether from the subscribers to the memorandum, and though it may be that after incorporation the business is precisely the same as it was before, and the same person are managers, and the same hands received the profit, the company is not in law the agent of the subscribers or trustee for them”

29. It is not crystal clear whether the respondents wants to use the corporate to evade a contractual or legal obligations. So is the timing of the court to use its discretion device of mandamus for the directors to perform their duties provided in the Articles and Memorandum of Association? In all respects to this litigation I don’t think such a jurisdiction has arisen. Piercing the corporate Veil as a remedy is not a question to be answered before this forum.
30. In view of my above analysis and findings, the conclusion becomes irresistible that the Applicant’s application dated 16<sup>th</sup> January, 2023, does not satisfy the prerequisites for the Court to grant the orders sought. Accordingly, I dismiss the Applicant’s application dated 16<sup>th</sup> January, 2023 with no orders as to costs.

It is so ordered.

**DATED AND DELIVERED AT ELDORET THIS 14<sup>TH</sup> DAY OF FEBRUARY, 2023.**

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**R. NYAKUNDI**

**JUDGE**

