



**Njuguna v Kamanga & 8 others (Commercial Case 152 of 2018)
[2023] KEHC 19213 (KLR) (Commercial and Tax) (23 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 19213 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 152 OF 2018
DO CHEPKWONY, J
MAY 23, 2023**

BETWEEN

PETER MWANGI NJUGUNA APPLICANT

AND

SIMON KAMANGA 1ST DEFENDANT

CHARLES NDEGWA 2ND DEFENDANT

GEORGE NDERITU 3RD DEFENDANT

ISAAC MWANIKI 4TH DEFENDANT

JAMES MAINA 5TH DEFENDANT

SOLOMON NDUNGU 6TH DEFENDANT

JOHN KAMAU 7TH DEFENDANT

PETER KIMANI 8TH DEFENDANT

EVAN KAIRU 9TH DEFENDANT

RULING

1. What is before this Court for determination is the Notice of Motion application dated 25th October, 2019. By way of background the Plaintiff filed this suit vide Plaintiff dated 16th April, 2018. Through a Court Order issued on 4th May, 2018, this Court was referred to the Court Annexed Mediation. This culminated into a Mediation Settlement Agreement dated 20th November, 2018 which was adopted as an Order of the court by Lady Justice M. Odero on 6th March, 2019 and a Court Order was issued dated 11th June, 2019.



2. The Defendants filed an Application dated 10th September, 2019 seeking leave to institute Contempt of Court proceedings against the Plaintiff which leave was granted on 26th September, 2019 leading to filing of the Notice of Motion application dated 25th October, 2019 in which the Applicant seeks:-
 - a) That a finding be made that the Plaintiff herein is in contempt of the consent order adopted by court on 6th March, 2019.
 - b. That an order be issued to commit the Plaintiff to prison for such period as the court may deem fit for contempt of court.
 - c) That an order do issue compelling the Plaintiff to give an account on his compliance with Order 5 of the Consent Order and, in the event that the lorry KCF 324F was repossessed by Tshusho Capital Limited, the Plaintiff to pay the value of the said lorry to the account of Gtwenty Holdings Limited failure to which execution is to issue against him.
 - d) That the Plaintiff /Respondent to meet the costs of this application.
3. In the Notice of Motion application dated 25th October, 2019, the Applicant seeks the following orders:-
 - a) That a finding be made that the Plaintiff herein is in contempt of the Consent Order adopted by court on 6th March, 2019.
 - b) That an order be issued be committed the Plaintiff to prison for such period as the court may deem fit for contempt of court.
 - c) That an order do issue compelling the Plaintiff to give an account on his compliance with Order No.(5 of the Consent Order and in the event that the lorry KCF 324F was repossessed by Tshusho Capital Limited, the Plaintiff to pay the value of the said lorry to the account of Gtwenty Holdings Limited failure to which execution is to issue against him.
 - d) That the Plaintiff /Respondent to meet the costs of this application.
4. The Application is based on the grounds on its face and in the Supporting Affidavit of Charles Ndegwa, the 2nd Defendant on his own behalf and on behalf of the other Defendants sworn on 25th October, 2019.
5. The Defendants state that they are all members of Gtwenty Holdings Limited {"the Company"} whose sole asset is Motor Vehicle Registration Number KCF 324E which was acquired by way of financing through Tshusho Capital Limited.
6. The Defendants hold that when the Plaintiff filed the suit, they all entered into a Mediation Settlement Agreement which was adopted as an order of the court, whereby the Plaintiff was required under to settle the outstanding amount owed to Tshusho Capital Limited which was to be deposited into the Company's KCB Account. It is the Defendants' averment that the Plaintiff failed to pay the outstanding amount and they are fearful that the Motor Vehicle may have been repossessed by the Tshusho Capital Limited leading to their loss of investment.
7. The Defendants' contention is that in the event the Plaintiff has already paid the amounts owed, then he should disclose the evidence of such payments and if the Motor Vehicle has been repossessed, then



the Plaintiff should be compelled to pay the value of the Motor Vehicle in default, execution should issue.

8. According to the Defendants, the Plaintiff's actions amount to disobedience of Court Orders which should not be condoned so as to preserve the respect and dignity of the court and rule of law.
9. The Plaintiff opposed the application through a Replying Affidavit sworn on 13th April, 2022. The Plaintiff holds that the Consent Order which was entered by both parties and adopted as an order of the court on 6th March, 2019 had clear procedures on what ought to have been done in order to implement it. He goes on to state that it was an order that two auditors be appointed by consensus or by a majority, but the Defendants being the majority did not appoint the auditors as was required. The Plaintiff contends that the Defendants did not also open a Bank Account at KCB Bank where members were to deposit any assets they held on behalf of the Company. The Plaintiff states that the auditor's report was to be done on the petrol station and the Motor Vehicle for the period between August, 2015 to September, 2018 and so was the audit on the members of the Company which was also not done.
10. The Plaintiff also states that he was not aware of the Consent Order No.(5) where he agreed to pay the outstanding amount since his Advocate only gave him the second page of the Mediation Settlement Agreement to sign, hence his signature does not appear on the first page of the Agreement which shows the information therein was deliberately withheld from him.
11. The Plaintiff then depones that the outstanding amounts were not included in the consent order and it is therefore unenforceable. The Plaintiff also argues that the subject Motor Vehicle belongs to Orion Ventures Limited and not Gtwenty Capital Limited, thus the Consent Order was erroneous. He argues that the advocate who represented him in the mediation process had previously been employed in the Defendants' Advocate firm Guandaru Thuita & Co Advocates and there could have been collusion in the mediation process.
12. The Plaintiff argues that without the audit being done it is not possible to determine the outstanding amount due to Tshusho Capital or the extent of his indebtedness to the Company. The Plaintiff acknowledges owing a sum of Kshs.1,182,000.00 to the Company which he transferred from his personal Equity Account No.032xxxxx244 to the Company's Account.
13. The Plaintiff goes on to argue that the Company is not a party to the suit and it should not benefit from the orders made in the suit. He holds that the members of the Company were against the audit being done due to impropriety of its properties. It is the Plaintiff's view that he should not be punished yet the other Consent Orders were not also complied with and therefore it was unenforceable. The Plaintiff also states that he is heavily indebted and currently owes over Kshs.20,000,000.00 to different financial institutions.
14. In the Supplementary Affidavit, the Applicants hold that the Mediation Settlement Agreement bestowed different obligations to the parties. They averred that they opened the Bank Account No.125XXXXXX543 on 20th February, 2019, and Audit Report was to be done after the Plaintiff paying the full loan since the subject Motor Vehicle was still on loan.
15. The Applicants have disputed the claim that the Plaintiff was not aware of the Court Order and go on to hold that mediation was a voluntary process which he attended to without coercion and was therefore aware of the proceedings.
16. On the issue of conflict of interest or collusion of his advocate being an employee in their counsel's firm, it is the Applicant's contention that this was an afterthought since it has been raised more than



five years later after the conclusion of the mediation as he ought to have complained to the relevant bodies such as the court or the Law society of Kenya.

17. The Applicants state that the Mediation Settlement was accomplished through the parties deliberations and the issue of ownership of the motor vehicle ought to have been raised there. They hold that the Plaintiff is only required to comply with the terms of the consent order otherwise the application dated 25th October, 2019 should be allowed.
18. The parties were directed to dispose of the Application by way of written submissions. The Defendants/Applicants filed their submissions dated 8th November, 2022 in which they raised two issues for determination:
 - a) Whether the Plaintiff is in contempt of order 5 of the Consent order adopted on 6th March, 2019.
 - b) whether the Plaintiff should be committed to prison for contempt of Order 5 of the Consent Order adopted on 6th March, 2019.

The Respondent/Plaintiff on his part filed submissions and raised several issues including:-

- a) Whether Mr. Charles Ndegwa had the authority of the co Defendants to swear any affidavits.
- b) Whether an audit was a prerequisite to the performance of any of the terms set out in the mediation settlement agreement.
- c) Whether a KCB Bank Account was opened as per the mediation settlement agreement and if so whether the information was communicated to the Plaintiff.
- d) Whether motor vehicle registration number KCF 324E belongs to twenty Holdings Limited and if not whether the same could have been subject of the mediation settlement agreement.
- e) Whether the Plaintiff properly executed the mediation settlement agreement.
- f) Whether Mr. Isaac Ochieng was conflicted in acting for the Plaintiff having previously worked for Guandaru Thuita advocates.
- g) Whether Gtwenty Holdings Limited could benefit from the mediation process despite not being a party to the suit.
- h) Whether the Defendants have honoured the terms of the mediation settlement agreement.
- i) Whether the plaintiff is in contempt of court.
- j) Who should bears the costs of the subject application.

Analysis and Determination

19. To determine the application filed herein, this Court has read and analysed the submissions by respective parties, in line with the relevant provisions of the law and from the two sets of submissions, the issues raised therein can be summarised as follows:-
 - a) Whether the Consent Order of 6th March, 2019 is valid and enforceable.



b) Whether there was contempt of the Consent Order of 6th March, 2019.

a) Whether the Consent Order of 6th March, 2019 is valid and enforceable.

20. It is trite law that a court order is binding and enforceable and unless it has been set aside, it ought to be complied with. In the case of *Trusted Society of Human Rights Alliance –vs- Cabinet Secretary for Devolution and Planning & 3 Others* [2017] eKLR, the Court held that:-

“A Court order is binding on the party against whom it is addressed and until set aside remains valid and is to be complied with. I shudder to think of the place of our judicial system if parties are left to freely decide what court orders to obey and which ones to ignore. Parties must realize that once they are brought to court they are subject to the jurisdiction of the Court.”

21. The only instance where courts are allowed to interfere with consent orders is where it can be established that there is mistake, misrepresentation, duress and or undue influence. The Court of Appeal in the case of *Kenya Commercial Bank Ltd v Specialized Engineering Co. Ltd* [1982] KLR P. 485 held that:

“A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or by an agreement contrary to the Policy of the Court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the Court to set aside an agreement.”

22. In the instant case, there is no court order setting aside the consent order of 6th March, 2019 and neither has the Applicant demonstrated any mistake, mis-representation, duress or undue influence in the said consent between the parties. In any event, It is this Court’s humble view that the Plaintiff ought to have filed an application seeking to set aside the Consent Order immediately it was issued, wherein the issues that have been raised in respect of his advocate’s conflict of interest, ownership of the subject Motor Vehicle, the Company not being a party to the suit and his failure to execute the Mediation Settlement Agreement as alleged would have been raised for consideration on merit. It is late in the day to raise such issues without an application to set aside the consent order, this court cannot consider these issues. The court therefore finds that since the Consent Order of 6th March, 2019 has not been set aside, the same remarks valid and enforceable, thus binding upon all the parties and should be complied with.

b) Whether there was contempt of the Consent Order of 6th March, 2019.

23. It is common ground that the court issued express orders on 6th March, 2019 as per the Mediation Settlement Agreement. These orders were not issued in vain and they must be obeyed. In discussing contempt proceedings, the Court of Appeal in the case of *Shimmers Plaza Limited v National Bank of Kenya Limited* [2015]eKLR, held as follows;

“We reiterate here that court orders must be obeyed. Parties against whom such orders are made cannot be allowed to trash them with impunity. Obedience of Court orders is not optional, rather, it is mandatory and a person does not choose whether to obey a court order or not..

The courts should not fold their hands in helplessness and watch as their orders are disobeyed with impunity left, right and centre. This would amount to abdication of our



sacrosanct duty bestowed on us by the *Constitution*. The dignity, and authority of the Court must be protected, and that is why those who flagrantly disobey them must be punished, lest they lead us all to a state of anarchy.”

24. In order to determine whether or not the Consent Orders issued herein were complied with, there is need to reproduce the terms of the said consent which were as follows:-

It Is Hereby Ordered Dy Consent:

- i. That two independent auditors shall be proposed by consent by the advocates on record for the parties within two weeks from 13/9/2018 to conduct an audit report on the Gtwenty Holdings Limited's assets and one among them shall be appointed by the members of Gtwenty Holdings Limited within two weeks from 27/9/2018 by a majority vote. The appointed auditor's fees shall be settled by Gtwenty Holdings Limited.
- ii. That the auditor shall prepare an audit report with reference to the old audit report and all the books of accounts, bank statements and all other materials that are relevant to the audit which materials shall be handed over by all persons in custody of the same on or by 1st October, 2018 to the appointed auditor.
- iii. That an interest earning account shall be opened at KCB Bank whose signatories shall be Simon Wambuqu, David Githinii, Peter Ndungu and David Kiiru which account details shall be given to all the members of Gtwenty Holdings Limited to deposit all the assets that each party holds in their personal accounts if any, that belong to Gtwenty Holdings Limited and all arrears that the members are yet to settle with Gtwenty Holdings Limited up until 3rd March, 2018 on or by 15th October, 2018.
- iv. That the Auditors report shall be with regard to the petrol station and lorry owned by Gtwenty Holdings Limited from August, 2015 when it was formed to end of September, 2018 and shall also audit each members' contributions to the Company.
- v. That Peter Mwangi Njuguna do settle the outstanding amount payable to Shusho Capital Limited with regard to the lorry; KCF 324E and the balance which he holds which is owed to Gtwenty Holdings Limited upon settlement to be deposited in the KCB Account.
- vi. That the Audit report shall be presented before all the members on 3rd November, 2018.
- vii. That the Mediation be deferred to a date agreeable to all parties.

Further Order:

- viii. That the file to be placed before Justice M. A. Odero to deal with the outstanding matters arising from the Settlement Agreement.

25. A reading of the terms of the Consent Order reproduced above, evidently confirms that there were obligations placed on both parties. However, there is no evidence of performance of these obligations by either party. The Applicants argue that they could not carry out the audit since the Respondent had not paid up the loan. But an appreciation of the Consent Orders shows the auditing was not dependent



on payment of the loan. The only condition under order 5 was the opening of the KCB Bank account, for which there is no evidence of such an account being opened.

26. It is evident that there is non-compliance of the court orders by both parties. It would thus be unfair to condemn the Plaintiff alone where none of the parties have complied with the orders.
27. It therefore follows that in view of the above –stated reasons, the application dated 25th October, 2022 lacks merit and it is hereby dismissed with costs to the Plaintiff.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 23RD DAY OF MAY, 2023.

D. O. CHEPKWONY

JUDGE

In the presence of:

M/S Kiiru counsel holding brief for Mr. Thuita

Mr. Nyorsok holding brief for Mr. Elkington for Respondent

Court Assistant - Martin

