



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

MISCELLANEOUS APPLICATION NO. 115 OF 2019

JOHN WARUNGU WANJERU.....APPLICANT

VERSUS

FAMILY BANK LIMITED.....1ST RESPONDENT

TITUS K.MUYA.....2ND RESPONDENT

ARCH FRANCIS GITAU MUNGAI.....3RD RESPONDENT

LERIONKA S.TIMPATI.....4TH RESPONDENT

LAZARUS MUEMA.....5TH RESPONDENT

GEORGE MBAGU KINUTHIA T/A IMMEDIATE AUCTIONEERS.....6TH RESPONDENT

RULING

1. The application has been brought under the provisions of Section 5 of the Judicature Act and the Companies Act and is seeking for the following orders;

(i) Spent.

(ii) The 1st respondent Family Bank Ltd be found in contempt of the court order issued on 16/04/2019;

(iii) Lifting of the corporate veil over the 1st respondent and order the Directors of the said Family Bank, Titus Muya, Arch. Francis Gitau Mungai, Lerionika Tiampati and Lazarus Muema be held personally liable for the contemptuous acts committed by the 1st respondent;

(iv) An order for committal to prison be made against Titus Muya, Arch. Francis Gitau Mungai, Lerionika Tiampati and Lazarus Muema the directors of the 1st respondent for a period of six months;

(v) An order for committal to prison be made against the 6th respondent GEORGE MBAGU KINUTHIA T/A IMMEDIATE AUCTIONEERS for a period of six months;

(vi) The respondents be condemned to pay costs of the application.

2. The Applicant relied on the grounds on the face of the Application and the Supporting Affidavit made by the applicant and dated 19th August, 2016.

3. At the hearing hereof learned counsel Mr Muhoho appeared for the applicant and Mr. Isinta appeared for the respondent; the parties were directed to canvass the application by filing and exchanging written submissions; hereunder are the parties rival submissions;

APPLICANT'S SUBMISSIONS

4. The ruling of the Honorable Court was read out in court in the presence of both counsel for the parties herein; thereafter the 1st respondent proceeded to instruct the 6th respondent to attach motor vehicle registration number KCE 583M on 16/09/2019;

5. The applicant's contention is that even though the law insists on personal service of court orders the practice has changed and as long as the respondent had knowledge of the court order this is considered as effective service; having knowledge of the court order proceeded to issue instructions to the auctioneers to proceed with the execution that was willful and a deliberate disobedience of the court order and thus the respondent should be found to be in contempt of the court order;

6. The applicant points out that in its response to the application the respondent did not deny service of the order on themselves; and requests the court to lift the veil of incorporation and find the directors being the 2nd to 5th respondents liable for disobedience of the court and be committed to civil jail for a period of six (6) months; case law relied on... **Basil Criticos Vs Attorney General and 8 others (2012) Eklr and court of Appeal Civil No. 24 of 2014 Justus Kariuki Mate and Another vs Hon. Martin Nyaga Wabora and Another which authorities have been quoted in Court of Appeal Civil No.33 of 2012 Shimmers Plaza Limited vs National Bank of Kenya Limited, and high Court of Kenya at Nyeri Civil case No. 25 of 2013 Katsuri Ltd vs Kapurechand Debar Shah.**

7. RESPONDENTS SUBMISSIONS

8. In response the respondents submitted and insisted that they were not personally served with the court order and emphasized that there ought to have been personal service before they were deemed to be in contempt of court order;

9. Further the directors of the company were not involved in the day to day operations of the company hence could not be held personally liable and be committed to civil jail for six (6) months; and prayed for the dismissal of the application with costs.

ISSUES FOR DETERMINATION

10. After reading the parties respective written submissions this court has framed two issues for determination which are;

- (i) Whether the respondents were personally served with the order or had knowledge of it;
- (ii) Whether the corporate veil should be lifted and the directors be held personally liable for disobeying court orders;

ANALYSIS

Whether the respondents were personally served with the order or had knowledge of it:

11. The Chief Magistrate's Court in CMCC No.348 of 2018 granted injunctive orders on the 16/04/2019 pending the hearing and determination of the suit; on 16/08/2019 in total disregard of the court order the 1st respondent directed the seizure of the applicant's motor vehicle and a notification for sale was issued. This action prompted the filing the instance application which was brought under the provisions of Section 5 of the Judicature Act seeking orders to protect the dignity and authority of the court.

12. What is contention is that at the time of the seizure of the motor vehicle the respondents had not been served with the impugned court order, counsel reiterated that there must be personal service supported by proof otherwise the respondents cannot be said to be in disobedience of the court order and be held to be in contempt; whereas the applicant's position was that the respondents had legal representation and their advocate was present in court when the order was delivered; therefore knowledge supersedes personal service;

13. The applicable law would have been the Contempt of Court Act No.46 of 2016 but the Act was declared unconstitutional in the case of **Kenya Human Rights Commission vs The Attorney General & Anor [2018] eKLR**; therefore the applicable law on punishment for contempt of court for the time being is found at Section 5 of the Judicature Act which reads as follows:-

5(1) The High Court and the court of Appeal shall have the same power to punish for contempt of court as if for the time being possessed by the High Court of Justice in England, and such power shall extend to upholding the authority and dignity of subordinate courts.

14. The Practice Directions where the person is a company or corporation is that a copy of the judgment or order not to do an act must be personally served on the party or in accordance with an order for alternative service; indeed where a party is likely to be deprived of his liberty, the law then envisages a strict requirement of personal service and proof of service but there is rider that the court may dispense with service if it is satisfied that the person/party had notice or knowledge of the terms of the order or judgment;

15. A situation that depicts notice or knowledge is where a party or its legal representative or agent was present in court when the judgment or order was read; therefore, either personal service or knowledge of a court order are pre-conditions to liability in such proceedings and the former must be proved whereas the latter can be inferred;

16. In this instance the court record is devoid of any Return of Service made by any process server which would have been sufficient proof to demonstrate personal service of the order; but upon perusal of the court proceedings of 16/04/2019 the court record reflects that the ruling was delivered in open court in the **'presence of Counsel Gichuki holding brief for Mr.Isinta for the 1st respondent, Bosire for the 2nd defendant and there was no appearance for the applicant and for the 3rd and 4th respondent'**; from these facts it is apparent that there was a legal representative of the 1st respondent present in court when the order was delivered; the counsel having been duly informed is presumed

to have notified the 1st respondent and from this presumption an inference can be drawn that the 1st respondent had knowledge of the order;

17. For the forgoing reasons this court finds that the 1st respondent had notice and knowledge of the court order made on the 16/04/2019 and finds that strict proof of personal service is unnecessary and service is hereby dispensed with; having been aware of the order it chose not to abide with it and proceeded to issue instructions to the 6th respondent to attach the motor vehicle for sale in total disobedience of the court orders and contempt of the court that issued the orders.

18. This court is satisfied that the respondents had notice and knowledge of the order;

Whether the corporate veil should be lifted and the directors be held personally liable for disobeying court orders;

19. The 1st respondent is a separate legal entity from its directors in the eyes of the law; but this court notes that there are some circumstances when the court can lift the veil and hold directors personally liable; and these instances are when there is fraud or improper conduct;

20. In the 1st respondent's Replying Affidavit, the deponent contends that the directors of the company did not run the daily affairs of the company and therefore should not be held liable;

21. In answer to the forgoing contention this court is guided by the case **Jones vs Lipman & Anor [1962]** where it was held that;

'A company may in many ways be likened to a human body. They may have a brain and a nerve centre which controls what they do; They also have hands which hold tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company (emphasis mine) and control what they do. The state of mind of these managers is the state of mind of the company and is treated by the law as such.'

22. The 2nd to 5th respondents are the mind and will of the 1st respondent; in this instance the order was read out in the presence of counsel for the 1st respondent and as earlier stated must be presumed to have informed the 1st respondent of the same; the 1st respondent having knowledge of the order issued instructions to the 6th respondent to proceed to attach the applicant's motor vehicle registration number KCE 583M; this action by the 1st respondent is found to be willful and a deliberate disobedience of the court order which action constitutes improper conduct, which cannot be taken lightly, and those who disobey court orders must be punished;

23. This court reiterates that court orders are meant to be obeyed and **'obedience is not optional, rather it is mandatory and a person does not choose whether to obey a court order or not.'**; in circumstances where any party is in doubt and does not understand the Orders they ought to seek clarification or interpretation from the court;

24. It has been repeated time and time again that the courts should not fold their hands and watch helplessly as their orders are disobeyed with impunity; as this would be an abdication of its sacrosanct duty of protecting the dignity and authority of the court which duty is bestowed upon it by the Constitution; the courts should not fold their hands and watch helplessly as their orders are disobeyed with impunity; in the circumstances, this court is satisfied that the ends of justice will only be served if the corporate veil is lifted and the 2nd to 5th respondents as directors be held personally liable for disobeying court orders.

25. This court hereby lifts the veil of incorporation and finds the directors of the company being the 2nd to 5th respondents guilty of contempt of court and they shall be punished accordingly;

26. The 6th respondent is not found guilty of contempt of court as they only acted under instructions of the 1st respondent.

FINDINGS AND DETERMINATION

27. For the foregoing reasons this court makes the following findings and determination;

- (i) The application is found to have merit and it is hereby allowed;
- (ii) This court finds that the respondents had notice and knowledge of the court order;
- (iii) The corporate veil shall be lifted and the 2nd to 5th respondents/directors are found guilty of contempt of court and they shall be punished accordingly;
- (iv) Mention on 22/06/2021 for mitigation before sentencing.
- (v) The 1st respondent shall bear the costs of the application;

It is so Ordered.

Dated, Signed and Delivered Electronically at Nyeri this 13th day of May 2021.

HON.A.MSHILA

JUDGE