



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CIVIL CASE NO. 8 OF 2019

PETERSON IRUNGU MUNYE.....PLAINTIFF/APPLICANT

VERSUS

BENSON MUGUA.....1ST DEFENDANT/RESPONDENT

EQUITY BANK LIMITED.....2ND DEFENDANT/RESPONDENT

RULING

1. On 4th June 2019, the lower court issued an order requiring the 2nd defendant to remove the plaintiff's name from the *Credit Reference Bureau*.
2. By a plaint filed at the High Court on 23rd August 2019, the plaintiff sought to compel the defendants to comply with the order at the peril of punishment for contempt.
3. The plaintiff has now presented a notice of motion dated 29th January 2019 to compel the respondents "to obey the lawful court order dated 4th June 2019 in *Chief Magistrates Court at Murang'a Civil Case 1 of 2019* requiring them to withdraw the name of the plaintiff from the *Credit Reference Bureau*".
4. The motion is supported by deposition sworn on even date. A copy of the order by the lower court is annexed.
5. The application is contested through the replying affidavit of the 1st respondent sworn on 9th June 2020.
6. On 12th October 2021, learned counsel for the disputants informed me that they would rely entirely on their written submissions. Those by the plaintiff were filed on 9th March 2021. There are further submissions filed on 4th August 2021 in reply to those by the respondent. The respondents' submissions were lodged on 14th July 2021.
7. I take the following view of the matter. The main suit is still pending. I will as much as possible avoid making conclusive findings. Leave to bring proceedings for contempt was granted by the High Court on 24th July 2019. It is also common ground that the lower court issued the order dated 4th June 2019.
8. However, a close scrutiny shows that *none* of the defendants here were principal parties to the suit in lower court. The heading of the annexed order shows that the parties were: *Peterson Irungu Munye* (the plaintiff here) versus *Joseph Chege Kuria* as 1st defendant and *Equity Bank (K) Limited* (as proposed 2nd Defendant).
9. Secondly, a further reading of the order reveals that it was a conditional order. It read:

That the bank be and is hereby directed to withdraw the name of the plaintiff from the credit reference bureau and consequently be restrained from enlisting him as long as he has cleared the amount he was directed by this court to pay. [Underlining added]
10. The evidence of payment of such sums or the satisfaction of the conditions does not appear in the supporting affidavit or materials supplied by the applicant at this stage. I say that very carefully and without making a finding.
11. The issue for determination is whether the respondent's conduct is in *contempt* of the order; or, whether they should be *punished* for it. I agree with the general exposition on the law on contempt in *Samuel M. N. Mweru & others v National Land Commission & 2 others*, High Court, Nairobi, JR 443 of 2017 [2020] eKLR cited by learned counsel for the applicants.

12. The standard of proof in a matter of this nature is *slightly above* balance of probabilities. The reason is that the *personal liberty* of the subject would be at stake. I have stated that neither the 1st defendant nor the 2nd defendant were parties or *principal parties* in the lower court. It would be gain said that the resultant order could only bind the parties before that court or any other named party duly served. The applicant also required to prove *personal service* of the order and that the respondents flagrantly breached it. ***Shimmers Plaza Limited v National Bank of Kenya Limited***, Nairobi Court of Appeal, Civil Appeal No. 33 of 2012, [2015] eKLR); ***James H. Gitau Mwara v Attorney General & another***, Nairobi HCCC 2892 of 1993 [2018] eKLR.

13. I have also stated that the order of the lower court was, on the face of it, *conditional* and that the plaintiff's name was to be withdrawn from the bureau "*as long as he has cleared the amount he was directed by this court to pay*". The applicant has not provided that crucial evidence at this juncture. I cannot then say, as urged by the applicant's learned counsel, *Mr. Kiriba*, that the terms of the order were clear and binding on the respondents; or, that the failure to comply was deliberate.

14. It must follow as a corollary that the plaintiff has not proved contempt of the order of the lower court to the required standard.

15. For all those reasons, the plaintiff's notice of motion dated 29th January 2019 is hereby *dismissed* with costs to the defendants.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MURANG'A THIS 2ND DAY OF NOVEMBER 2021.

KANYI KIMONDO

JUDGE

RULING READ IN OPEN COURT IN THE PRESENCE OF:

NO APPEARANCE BY COUNSEL FOR THE PLAINTIFF AND THE DEFENDANTS.

MS. SUSAN WAIGANJO, COURT ASSISTANT.