



**Nyambariga v Kipngetch & another; Imap International Limited
& another (Interested Party) (Commercial Civil Case 133 of 2020)
[2021] KEHC 331 (KLR) (Commercial and Tax) (3 December 2021) (Ruling)**

Neutral citation: [2021] KEHC 331 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CIVIL CASE 133 OF 2020
DAS MAJANJA, J
DECEMBER 3, 2021**

BETWEEN

JONES BITANGE NYAMBARIGA PLAINTIFF

AND

EVANS KIPNGETICH 1ST DEFENDANT

JOYCE KAMENE PAUL 2ND DEFENDANT

AND

IMAP INTERNATIONAL LIMITED INTERESTED PARTY

COMMUNICATIONS AUTHORITY OF KENYA INTERESTED PARTY

RULING

1. The Plaintiff has approached the court by way of the Notice of Motion dated 6th August 2021 made *inter alia* under section 3, 3A and section 63 (c) the [Civil Procedure Act](#) (Chapter 21 of the Laws of Kenya) and Order 40 rule 3, Order 51 rules 1 and 3 of the [Civil Procedure Rules, 2010](#) (“the Rules”), section 5 (1) of the [Judicature Act](#) (Chapter 8 of the Laws of Kenya) seeking the following orders:
 1. Spent
 2. That an Order be and is hereby issued by this Honourable Court against the 1st & 2nd Respondents to show cause within seven (7) days from the date thereof why they should not be held in contempt of Court Orders for the disobedience of the Orders issued on 10th June, 2021 by Hon. Justice F. Tuiyott sitting in the



Milimani Commercial Case No. E133 of 2020 - Jones Bitange Nyambariga Vs Evan Kipngetch, Joyce Kamene Paul and Imap International Limited.

3. That an Order Be and is hereby issued citing the Respondents for being in contempt of Court Orders issued Orders issued on 10th June, 2021 by Hon. Justice F. Tuiyott sitting in the Milimani Commercial Case No. E133 of 2020 - Jones Bitange Nyambariga Vs Evan Kipngetch, Joyce Kamene Paul and Imap International Limited.
 4. That an Order be and is hereby issued by this Honourable Court against the Respondents committing them to civil jail for contempt for the disobedience of the Court Orders issued Orders issued on 10th June, 2021 by Hon. Justice F. Tuiyott sitting in the Milimani Commercial Case No. E133 Of 2020 - Jones Bitange Nyambariga Vs Evan Kipngetch, Joyce Kamene Paul and Imap International Limited.
 5. That an order be issued giving leave for the proposed 2nd interested party to be enjoined in the suit herein for purposes of enforcement of the court orders issued on 10th June, 2021 by Hon. Justice F. Tuiyott sitting in the Milimani Commercial Case No. E133 of 2020- Jones Bitange Nyambariga Vs Evan Kipngetch, Joyce Kamene Paul and Imap International Limited
 6. That an Order be and is hereby issued by this Honourable Court directing the proposed 2nd Interested Party to disclose to the Applicant all payments made to the 1st Interested Party before and after the Ruling on 10th June, 2021 by Hon. Justice F. Tuiyott as regards to the Tender contract CA/PROC/RFP/13/2018-2019 for the provision of consultancy Services to undertake implementation of National Addressing System (NAS) and to specific Bank accounts involved.
 7. Any other orders that the court deems to be appropriate
 8. That cost of this Application be provided for
2. The application is supported by the Plaintiff's affidavits sworn on 6th August 2021 and 24th August 2021 respectively. It is opposed by the Defendants and the Interested Party ("the Company") through the Replying Affidavit of the 2nd Defendant sworn on 19th August 2021. The application was disposed by way of written submissions with the parties advancing their respective positions.
 3. It is common ground that on 21st May 2021 Tuiyott J., delivered a ruling ("the Ruling") in respect of the Plaintiff's amended Notice of Motion dated 25th May 2020 where he had sought the following orders:
 - a. That this application be certified urgent
 - b. THAT the service of the said application be dispensed with in the first instance owing to the urgency of the matter.
 - c. THAT the Applicant do have leave to continue this suit as a derivative action on behalf of Imap International Limited.



- d. THAT indemnity be granted by the said Imap International Limited, the interested party, for all costs and expenses reasonably incurred in prosecuting this suit.
 - e. THAT the Respondents be restrained from banking its income in any other bank account apart from its bank account No. 024*****33 at Equity Bank Limited or opening any bank accounts on behalf of the interested party pending hearing and determination of this suit.
 - f. THAT the Respondents be restrained from signing of tender contract No. CA/PROC/RFP/13/2018-2019 for the Provision of Consultancy Services to undertake implementation of National Addressing System (NAS) pending hearing and determination of the suit.
 - g. That the Respondents be and are hereby restrained whether by themselves, agents, servants or otherwise howsoever from taking and making decisions, giving instructions, writing and signing letters, notices, forms, deeds, minutes, resolutions, returns and any other documents with regard to contract No. CA/PROC/RFP/13/2018-2019 in the name of and/or on behalf of the interested party without the consent and concurrence of the Plaintiff, pending the hearing of this application suit.
 - h. THAT the Respondents be restrained from holding an extra ordinary general meeting at any other future date pending the hearing and determination of this suit.
 - i. THAT the Respondents be restrained until further orders from serving as directors of Imap International Limited.
 - j. THAT the costs of this application be provided for.
4. In the Ruling, the court conditionally and partly allowed the Plaintiff's Notice of Motion to the extent inter alia that the Defendants and the Company were restrained from banking all or any company income in any other Bank account other than Bank Account No. 02*****33 at Equity Bank ("the Equity Bank Account").

The Application

5. In his application, the Plaintiff contends that on 7th June 2021, through his Advocates on record, wrote a letter to the Director General, Communications Authority of Kenya, the proposed 2nd Interested Party ("CAK") informing it of the Ruling. The Plaintiff demanded that payment of pending bills for work done be channeled through the Equity Bank Account. On 14th July 2021, CAK informed the Defendants' advocates of the Plaintiff's letter and sought the Defendants' response to enable it deal with the payment of pending bills in respect of the contract between it and the Company.
6. The Plaintiff avers that to date, the Defendants and CAK have not responded to his letters. He views this as an attempt on the part of the Defendants and CAK to delay the payment and facilitate conversion of those funds to the Defendants' private usage at the expense of the Company's shareholders. He accuses the Defendants of delaying the processing of payments by CAK in an effort to frustrate the Ruling ordering that funds be deposited in the Equity Bank Account.
7. The Plaintiff states that the Defendants have disregarded the directions contained in the Ruling and have kept transacting with the prohibited accounts and neglected the orders of this court, to the



detriment of the Plaintiff. He depones that because of continued contempt of the court orders, the Plaintiff has lost and continues to lose significant control of the Company's business through the Defendant's refusing to confirm that that money from CAK has been deposited in the Equity Bank Account. He submits that it is imperative for the court to give effect to its orders that the Defendants be committed to civil jail as they continue to violate his and the Company's economic rights.

The Defendants' and Company's ("the Defendants") Reply

8. The Defendants oppose the Plaintiff's application. It states that the application is based on a misinterpretation of the Ruling. It submits that it is only the Defendants who were restrained from depositing all or any Company income in any other Bank account other than the Equity Bank Account. They further submit that although the orders were directed to the Defendants, the Plaintiff has irregularly and without any colour of right made issued unlawful demands to third parties to comply with orders which were never made against them.
9. The Defendants contend that it is the Plaintiff's conduct of harassment and intimidation of the Company's existing clients that has resulted in the Company's loss clients and business. They fault the Plaintiff for failing to adduce evidence against the Defendants for willful disobedience of the subject court orders.
10. The Defendants submit that the Plaintiff's application is incompetent and invites the court to embark on a fishing expedition through seeking to join third parties such as CAK against whom the subject orders were never made, with the intention of fleshing out unsubstantiated allegations of contempt of court.
11. In any event, the Defendants maintain the court in the Ruling, stated that it had "no capacity to micromanage the affairs of Imap" and that this application is an attempt by the Plaintiff to re-open the issues regarding the implementation of the tender number No. CA/PROC/RFP/13/2018-2019 for provision of consultancy services to undertake implementation of the National Addressing System (NAS) ("the Tender") which the court declined. They take the position since the Plaintiff has not appealed against the Ruling and this application is an attempt by the Plaintiff to re-litigate the issues determined by the court in the Ruling. The Defendants add that the Plaintiff is bound by his pleading and in this respect, he only sought an order to restrain them, "from banking all or any company income in any other Bank account other than Bank Account No. 02*****33 at Equity Bank", and that no orders were sought or granted against third parties such as CAK on banking of the Company's income.
12. The Defendants reiterate the Plaintiff has failed to demonstrate any evidence of willful disobedience of the Ruling. They state that the Plaintiff has not exhibited the purported letter dated 7th June 2021 to enable the Defendants comment on its contents and that the annexure marked JNB-2 purportedly referred to in the Plaintiff's deposition is a letter dated 9th October 2020 addressed to the Principal Secretary, Ministry of Environment and Forestry which the Defendants were unaware of, which in any case, were in respect of orders issued on 8th October 2020 which have since lapsed with the Ruling.
13. The Defendants submit that its advocates responded to CAK's letter dated 14th July 2021 and in their view, the Plaintiff's recourse lies in invoking the relevant provisions of the [Access to Information Act](#) ("the AIA") if he wishes to be informed of the contents of the response submitted on the Defendants' behalf to CAK instead of instituting this application. The Defendants urge the Plaintiff should invoke the AIA if it wished to be informed of payments made to the Company before and after the Ruling in respect of the Tender and to specific Bank accounts involved.
14. The Defendants also oppose the application for joinder of CAK on the ground that the Plaintiff has not established that its presence is necessary to enable the Court to effectually and completely adjudicate



upon and settle all questions involved in the suit. The Defendants contend that it is apparent from the application that the Plaintiff has merely sought an order for joinder of CAK to these proceedings solely for purposes of enforcement of the Ruling which is untenable in the circumstances.

Analysis and Determination

15. The Defendants have challenged the procedure for bringing these proceedings. I am firmly of the view that this court has jurisdiction to ensure that its orders are complied with under section 5 of the *Judicature Act* and Order 40 rule 3 of the Rules made pursuant to section 63 of the *Civil Procedure Act* which permit the court to imprison a person who disobeys an order of injunction and or attach the person's property. The underlying concern for the court in both instances is the dignity and authority of the court is maintained and the alleged contemnor is granted due process and opportunity to either comply with the order or show how and why it cannot comply. I therefore do not intend to spill ink on the technical minutiae of the law of contempt but instead deal with the substance of the application.
16. There are two issues for determination in the Plaintiff's application. The first one is whether the Defendants have banked all the Company income in any other account other than the Equity Bank Account. Its resolution turns on the interpretation of the Ruling and the orders issued by the court. The second issue is whether the CAK ought to be joined to this suit as an interested party.
17. I have set out the prayers the Plaintiff sought in his application dated 25th May 2020, at para. 3 above. In the Ruling, Tuiyott J., issued the following final orders:
 - 41.1 Prayer (c) is hereby allowed
 - 41.2 Prayer ((d) is hereby allowed subject to any variation that the Trial Court may grant at the end of the Trial or at whatever point of the proceedings.
 - 41.3 Prayer (e) is granted but on the following terms; the Respondents are restrained from banking all or any company income in any other Bank account other than Bank Account No. 024*****33 at Equity Bank.
 - 41.4 Prayers (g), (h) and (i) are disallowed.
 - 41.5 Each party to bear its own costs
18. In prayer (e), the Plaintiff prayed for an order that the Defendants be restrained from banking the Company income in any other bank account apart from the Equity Bank Account or opening any bank accounts on behalf of the Company pending hearing and determination of this suit. However, and as is evident, the court only restrained the Defendants from banking all or any company income in any other Bank account other than the Equity Bank Account.
19. Further, it is evident that the application was against the Defendants; Evans Kipng'etich and Joyce Kamene Paul and the Company itself. Thus and in line with Order 41.3 of the Ruling, it is only the Defendants and the Company who were restrained from banking income in any other account other than the Equity Bank Account. It should also not be lost that even though the Plaintiff sought to restrain the Defendants and the Company from opening any other bank accounts, this prayer was never granted. The order was limited to restraining the Defendants from banking Company income in any other account other than the Equity Bank Account.
20. An injunction is a remedy in personam directed at a specific person directing or restraining them from doing certain acts. There is nothing in the order that restrains or directs CAK. The order directs the Defendants who must comply with the orders in respect of all or any Company income. Their unconditional obligation is to bank all and any Company income in the Equity Bank Account.



21. In order establish contempt, the applicant bears the burden of proving that the subject order was clear, unambiguous and binding, that the respondents had knowledge of the order and that they wilfully and deliberately disobeyed the order. The standard of proof in cases of contempt of court was explained in *Mutitika v Baharini Farm Limited [1985] KLR 229, 234* where the Court of Appeal held that, “In our view, the standard of proof in contempt proceedings must be higher than proof on the 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, in criminal cases. It is not safe to extend it to an offence which can be said to be quasi-criminal in nature.”
22. That said, I find that the Plaintiff has not adduced any evidence to prove that the Defendants and the Company have been, “banking all or any company income in any other Bank account other than the Equity Bank Account”. There is also no evidence that the Defendants and/or the Company have instructed CAK to deposit the sums in another account other than the said Equity Bank Account in which case, the Defendants’ obligation would be to bank the income in the Equity Bank Account. As admitted by the Plaintiff, his is just a ‘belief’ and the court cannot assume the contents of any such response as that would be speculative. Whether the Defendants responded to CAK or not is immaterial since the court’s orders were quite clear on who was restrained from banking the Company’s income in any other account other than the Equity Bank Account. If at all CAK decides to pay the said sums in any other account other than the Equity Bank Account, it cannot be found guilty of contempt as the Ruling and Orders were not directed at it. I therefore find and hold that the Plaintiff has not established that the Defendants have disobeyed the orders so as to find them to be in contempt.
23. Turning to the issue of whether CAK should be joined as an interested party, Order 1 Rule 10(2) of the Civil Procedure Rules, grants the Court discretion to order joinder of any party to a suit at any stage of the proceedings so long as the presence of that party before the Court is necessary in order to enable the court to effectually and completely adjudicate upon and settle all questions in dispute. In *Pravin Bowry v John Ward & Another* NRB CA Civil Appeal No. 70 of 2009 [2015] eKLR the Court of Appeal adopted with approval the decision in *Departed Asians Property Custodian Board v Jaffer Brothers Ltd [1999] 1 E.A 55 (SCU)* where the Supreme Court of Uganda observed that:
- A clear distinction is called for between joining a party who ought to have been joined as a defendant and one whose presence before the court is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. A party may be joined in a suit because the party’s presence is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the cause or matter....
- For a person to be joined on the ground that his presence in the suit is necessary for effectual and complete settlement of all questions in the suit one of two things has to be shown. Either it has to be shown that the orders which the plaintiff seeks in the suit, would legally affect the interests of that person, and that it is desirable, for avoidance of multiplicity of suits, to have such person joined so that he is bound by the decision of the court in that suit. Alternatively, a person qualifies (on an application of a defendant) to be joined as a co-defendant, where it is shown that the defendant cannot effectually set a defence he desires to set up unless that person is joined in it, or unless the order to be made is to bind that person.
24. As the court stated in the Ruling, this suit involves a dispute between the Plaintiff and the Defendants on whether the former is a director and shareholder of the Company. As the Company’s client, I fail to find what interest or stake CAK has in the affairs of the Company and neither do I find any prejudice that will be occasioned upon the Company or indeed the Plaintiff if CAK is not joined in



this proceedings. Its presence in this matter is not necessary for the court to effectually and completely settle all questions in this suit in relation to the Company's shareholding and directorship.

25. Further, since I have already found that the Ruling and orders of the court were not directed to CAK, it follows that CAK does not have to join the suit, 'to set the record straight', as pleaded by the Plaintiff. I therefore reject the prayer for joinder of CAK as an interested party by the Plaintiff.
26. The fact that I have denied the Plaintiff's application to join CAK does not mean that he does not have relief in seeking the necessary documentation to prosecute its suit. The Plaintiff was granted leave to proceed with this suit as a derivative suit and he is entitled to full discovery of all payment received by the Company from the Defendants who are in control. I say no more.

Conclusion and Disposition

27. In conclusion I find and hold that the Plaintiff has not proved that the Defendants have been in contempt of the Ruling dated 21st May 2021 and in particular the order that, "the Respondents be restrained from banking its income in any other bank account apart from its bank account No. 024*****33 at Equity Bank Limited or opening any bank accounts on behalf of the interested party pending hearing and determination of this suit."
28. For the reasons I have set out above, I dismiss the Plaintiff's Notice of Motion dated 6th August 2021 with costs to the Defendants.
29. Since the Plaintiff has been granted permission to continue this suit as a derivative suit and to obviate the need for further applications, I direct the Defendants on behalf of the Company and the Company to produce and deliver to the Plaintiff all the documents in their power and possession in relation to this suit on oath within thirty (30) days from the date hereof.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF DECEMBER 2021.

D. S. MAJANJA

JUDGE

Court of Assistant: Mr M. Onyango

Mr Manwa instructed by Otwal Manwa and Company Advocates for the Plaintiff

Mr Omollo instructed by Sigano and Omollo Advocates LLP for the Defendants and Interested Party.

