



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & TAX DIVISION
CIVIL CASE NO. 51 OF 2017

BANK OF AFRICA KENYA LIMITED.....PLAINTIFF

-VERSUS-

PUT SARAJEVO GENERAL ENGINEERING LIMITED.....1ST DEFENDANT

ESED BECIREVIC.....2ND DEFENDANT

ADNAN TERZIC.....3RD DEFENDANT

RULING

[1] This Ruling is in respect of the Plaintiff's Notice of Motion dated 28 April 2017, which was filed herein pursuant to Sections 1A, 1B, 3A, 94 of the Civil Procedure Act, Chapter 21 of the Laws of Kenya, Sections 5(b) and 27 of the Contempt of Court Act, 2016 and Order 5 Rule 17 of the Civil Procedure Rules, 2010, for the following orders:

[a] Spent

[b] Leave be granted to serve the Plaint, Summons to enter Appearance and the application dated 28 April 2017 upon the 2nd and 3rd Defendants by substituted service by way of advertisement in the Daily Nation newspaper and all advertisement costs incurred be borne by the 2nd and 3rd Defendants;

[c] The 2nd and 3rd Defendants be ordered to enter appearance within 14 days from the date of advertisement;

[d] Leave be granted to the Plaintiff to execute the decree before taxation as against the 1st Defendant;

[e] An order for committal to civil jail for a period not exceeding six (6) months for contempt of court do issue against the directors **Esed Becirevic, Adnan Terzic** and the Finance Officer, **James Muli**, for failure to comply with the Court Order dated 3 February 2017.

[f] The costs of the application be the Plaintiff's in any event.

[2] The application was based on the grounds that the 2nd and 3rd Defendants are the Managing Director and Chairman of the 1st Defendant respectively; and that all attempts at personal service have been unsuccessful, as it is apparent that they are evading service of summons. It was further the contention of the Plaintiff that the Defendants have not only ceased to service the debt that is the subject of this suit, but have also refused to comply with the Court Order dated **3 February 2017**; and that unless the orders prayed for herein are granted, the Plaintiff will suffer irreparable loss as it has no other security apart from the guarantees executed by the 2nd and 3rd Defendants. Accordingly, the Plaintiff sought leave, pursuant to **Section 94** of the **Civil Procedure Act**, for execution to issue before taxation.

[3] In support of the application, the Plaintiff relied on the affidavit filed therewith, sworn on **28 April 2017** by **Ben Mwaure**, the Senior Manager, Debt Recoveries, in which it was deposed that several attempts had been made by **Nixon Kamadi**, a Process Server employed by **Wamae & Allen Advocates**, to effect service on the 2nd and 3rd Defendants at the 1st Defendant's registered office along **Lenana Road**, but that on each occasion, he was told that the 2nd and 3rd Defendants were not available. It was thus deposed that it is necessary to serve the 2nd and 3rd Defendants by substituted service, it being apparent that they are the ones in charge of the operations of the Company from the set of documents exhibited as annexures to the application.

[4] It was further prayed that the Court grants an order for the committal of the directors of the 1st Defendant as well as the Finance Officer, **Mr. James Muli**, to civil jail for a term not exceeding 6 months plus a fine not exceeding **Kshs. 100,000/=** for disobeying the Order of the Court. It was the contention of the Plaintiff that, by failing to disclose the information requested, the 1st Defendant is admittedly receiving payments for the contracts it is carrying out and diverting funds instead of settling the debt. It was further averred by the Plaintiff that the 1st Defendant has dishonoured and breached the terms of the said loan facility; failed and/or defaulted in payment, and fallen into arrears; and that as at **31 December 2016**, the 1st Defendant was indebted to the Plaintiff in the sum of **USD. 1,275,996.92** and **Kshs. 42,219/=** with interest at commercial rates. Accordingly, it was the Plaintiff's prayer that leave be granted to it under **Section 94** of the **Civil Procedure Act**, for execution to issue before taxation.

[5] The 1st Defendant opposed the application and to this end an affidavit, sworn by its Finance Officer, **Mr. James Muli**, was filed herein on **12 May 2017**. Its contention was that the Plaintiff had not provided any reason as to why it should be taken through multiple execution process and neither had any reason been provided why the Plaintiff should be granted leave to execute the Decree before taxation. It was further the contention of the 1st Defendant that having filed its application dated **24 April 2017** on **11 May 2017** seeking the setting aside of the default judgment, the said application would be rendered nugatory should execution be approved. It accordingly urged for the hearing and determination of its said application before execution can issue.

[6] As regards the allegations of contempt, the 1st Defendant's averment was that, in a Ruling delivered on **17 March 2017**, the Court dismissed the Plaintiff's application dated **31 January 2017**, which sought, inter alia, an order for the 1st Defendant to provide a receipt under oath of all schedules of ongoing contracts, showing the status of completion and the payments made by **Kenya National Highway Authority** and **Kenya Rural Roads Authority**. It was thus the contention of the 1st Defendant that, the Court having dismissed the Plaintiff's application dated **31 January 2017**, there was no outstanding order to be complied with.

[7] The brief background to the instant application is that by its Plaint dated **31 January 2017**, the Plaintiff sought Judgment against all the Defendants jointly and severally for **USD 1,280,881.73**, which was due as at **19 January 2017** in respect of a Term Loan Facility given to the 1st Defendant, together with interest thereon and costs of the suit. The facility was secured by Corporate Guarantee and Indemnity by the 1st Defendant as well as Directors Guarantees and Indemnity Instruments issued by the 2nd and 3rd Defendants. It was the averment of the Plaintiff that, in breach of the terms of the said Loan Facility, the 1st Defendant defaulted in repayment and fell into arrears, such that by **19 January 2017**, a

total of **USD 1,280,881.73** was due and outstanding.

[8] Along with the Plaintiff, the Plaintiff filed an application dated **31 January 2017** seeking orders, inter alia, that the 1st Defendant be compelled to provide a receipt under oath of the schedules of the on-going contracts showing the status of completion and outstanding payments, as well as all payments made by **Kenya National Highways Authority** and **Kenya Rural Roads Authority** between **1 January 2015** and **31 December 2016** within 7 days of the order of the Court. That prayer was granted *ex parte* on **3 February 2017**, thereby provoking the 1st Defendant's application for setting aside, dated **13 February 2017**; which application was dismissed on **17 March 2017**. Thereafter on the **11 April 2017**, the Plaintiff obtained a default judgment against the 1st Defendant, and a Decree was drawn to that effect and issued on **12 April 2017**.

[9] Feeling aggrieved by this turn of events, the 1st Defendant sought intervention vide its application dated **24 April 2017**, seeking orders that, pending the hearing and determination of the application, the Court be pleased to grant a stay of execution of the Default Judgment and the Decree together with all its consequential orders. It was also the 1st Defendant's prayer that the Court be pleased to set aside the Default Judgment and all its consequential orders. In the meantime, the Plaintiff also moved the Court, vide the instant application for contempt of court as well as leave to execute the Decree herein before taxation, among other prayers. Accordingly, directions were given on **30 May 2017** for the Plaintiff's contempt application to be disposed of first; and that written submissions be filed in that regard. It is noteworthy however that only the Plaintiff complied within the specified timelines and filed its written submissions dated **4 July 2017**.

[10] I have given consideration to the Plaintiff's application dated **28 April 2017**, the affidavits filed in respect thereof, as well as the submissions filed herein and the pleadings and proceedings to date. **Prayers 2 and 3** of the said Notice of Motion seek for leave to effect service of process on the 2nd and 3rd Defendants by way of one advertisement in the Daily Nation Newspaper. That prayer is based on **Order 5 Rule 17(1)** of the **Civil Procedure Rules**, which provides that:

"Where the court is satisfied that for any reason the summons cannot be served in accordance with any of the preceding rules of this Order, the court may on application order the summons to be served ... in such other manner as the court thinks fit."

Order 5 Rule 17(4) further provides that:

"Unless otherwise directed, where substituted service of a summons is ordered under this rule to be by advertisement, the advertisement shall be in Form No. 5 of Appendix A with such variations as the circumstances require."

[11] The Plaintiff's contention herein is that all attempts at personal service of the 2nd and 3rd Defendants have been unsuccessful, and as was rightly pointed out by Counsel for the Plaintiff, Prayers 2 and 3 of the Notice of Motion dated **28 April 2017** are unopposed. The same are accordingly granted as prayed, and orders issued in the following terms:

[a] That leave be and is hereby granted to serve the Plaintiff, Summons to Enter Appearance and the application dated **28 April 2017** upon the 2nd and 3rd Defendants by substituted service by way of advertisement in the Daily Nation newspaper and that all advertisement costs incurred be borne by the 2nd and 3rd Defendants;

[b] The 2nd and 3rd Defendants be and are hereby ordered to enter appearance within 14 days from the date of advertisement.

[12] Prayer 4 seeks leave for the Plaintiff to execute the Decree against the 1st Defendant before taxation. That prayer was made pursuant to **Section 94** of the **Civil Procedure Act**, which recognizes that:

"Where the High Court considers it necessary that a decree passed in the exercise of its original civil jurisdiction should be executed before the amount of the costs incurred in the suit can be ascertained by taxation, the court may order that the decree shall be executed forthwith, except as to so much thereof as relates to the costs; and as to so much thereof as relates to the costs that the decree may be executed as soon as the amount of the costs shall be ascertained by taxation."

[13] The rationale for the aforesaid provision was well explicated in **Mercedes Sanchez Rau Tussel vs. Samken Limited & 2 Others [2002] eKLR** thus:

"The principle behind this section is not far to search. When awarded costs are not agreed, it often takes a considerable time before the costs are taxed by a taxing officer. In order not to permit a judgment-debtor to hold up execution of a decree for a known sum or a sum to which there can be no sensible contest, section 94 provides that the court may permit the execution of a decree except as to so much thereof as relates to unsettled costs...aspects of the judgments may still be in question on appeal or review application; but it would be wrong to hold as a principle, that once there is an appeal, threatened appeal, or an application for a review ... no part of a judgment is executable until after determination of the review or appeal. Such a view would permit any person desirous of jamming the justice process or merely to postpone the pay-day simply to lodge a notice of appeal or to file an appeal itself, or to pretend anything, and thereby deny a party the whole judgment..."

[14] Whereas the Plaintiff has judgment in its favour herein for a known sum, it can hardly be said that there is no sensible contest in connection therewith; for there is a pending application for setting aside the Default Judgment. The 1st Defendant's application was filed earlier than the instant application, and it would only be fair and just that the 1st Defendant be given an opportunity to prosecute its application before any application for execution before taxation can be proceeded with in the manner proposed by the Plaintiff. Accordingly, it is my finding that the prayer for leave to levy execution before taxation, having been made after the 1st Defendant's application for setting aside Judgment is premature, and is accordingly disallowed.

[15] Prayer 5 of the Plaintiff's Notice of Motion dated **28 April 2017** seeks the committal to civil jail for a period not exceeding 6 months for Contempt of Court, the directors **Esed Becirevic, Adnan Terzic** and the Finance Officer, **James Muli**, for failure to comply with the Court Order dated **3 February 2017**. The record does show that on the **3 February 2017**, an order was made, at the instance of the Plaintiff, for the provision of certain schedules by the 1st Defendant to the Plaintiff of its ongoing contracts, payments made in respect thereof and outstanding payments due thereon, for the period between **1 January 2015** and **31 December 2016**. Accordingly, the Order was extracted and issued to that effect on **3 February 2017** for service on the 1st Defendant.

[16] The 1st Defendant thereafter filed an application dated **13 February 2017** for the setting aside of that Order, on the grounds that the Plaintiff did not present all the material facts before the Court at the time the Order was made. That application was however ruled to be unmeritorious and was dismissed on **17 March 2017**. In its Ruling, the Court was satisfied that:

"...it was a term of the Contract that schedules would be provided of the 1st Defendant's ongoing contracts with the Kenya National Highways Authority and Kenya Rural Roads Authority between 1 January 2015 and 31 December 2016. The Letter of Offer dated 15 September 2014 (exhibited at pages 1 to 5 of the Plaintiff's Bundle of Documents) is explicit at Clause 7 thereof as to the conditions of disbursement, and these included the condition that "...receipt of the schedules of the on-going contracts showing the status of completion and outstanding payments..." Thus, as at the date when the order was made, the Court was not in any doubt that this was a simple and summary act which could "...easily be remedied... and that the defendant was out to steal a march on the plaintiff by failing to adhere to this particular term of the contract...In the foregoing circumstances, there was a sound basis ...

for the 1st Defendant to be required to provide the schedules as contracted, pending the hearing *inter partes* of the application. The provision of the schedules cannot, by any stretch of imagination, be considered to be a final order affecting the rights and obligations of the parties..."

[17] The Court having dismissed the 1st Defendant's application as aforementioned, it cannot validly be argued that the Order lapsed with the dismissal of the Plaintiff's application dated **31 January 2017**. Indeed the Order in issue was tacitly affirmed for compliance purposes; yet by **28 April 2017** when the instant application was filed, the 1st Defendant had not complied. There is no explanation in the Replying Affidavit for this state of affairs.

[18] Needless to say that obedience of court orders is at the very heart of the rule of law. As was emphasized by **Ibrahim J**, (as he then was) in **Econet Wireless Kenya Ltd vs. Minister for Information & Communication of Kenya & Another [2005] 1 KLR 828:**

"It is essential for the maintenance of the Rule of Law and order that the authority and the dignity of our Courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against or in respect of whom, an order is made by a Court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or void."

[19] Thus, the elements that the Plaintiff herein needed to prove are:

[a] that the order of **3 February 2017** was clear, unambiguous and binding on the 1st Defendant;

[b] that the 1st Defendant had knowledge of or proper notice of the terms of that Order;

[C] that the 1st Defendant has deliberately failed to obey the terms of the Order;

(see **Katsuri Limited vs. Kapurchand Depar Shah [2016] eKLR**)

[20] Section 5 of the Judicature Act, Chapter 8 of the Laws of Kenya, is explicit that:

"(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 such power shall extend to upholding the authority and dignity of the 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."

[21] There is no disputation as to the clarity of the Order of **3 February 2017**, or that it was binding on the 1st Defendant. There is similarly no disputation that the Order was extracted and served as by law required. Indeed the gist of the 1st Defendant's application dated **13 February 2017** was an attack of that very Order. In any event, it is now trite law that even knowledge of a court order suffices. Thus, in the case of **Shimmers Plaza Limited vs. National Bank of Kenya Limited [2015] eKLR**, the Court of Appeal made it clear that:

"...this Court has slowly and gradually moved from the position that service of the order along with the penal notice must be personally served on a person before contempt can be proved. This is in line with the dispensations covered under 81.8 (1) (supra). Kenya's growing jurisprudence right from the High Court has reiterated that knowledge of a court

order suffices to prove service and dispense with personal service for purposes of contempt proceedings. For instance, Lenaola, J in the case of Basil Criticos vs Attorney General and 8 Others [2012] eKLR pronounced himself as follows:

"...the law has changed and as it stands today knowledge supersedes personal service... where a party clearly acts and shows that he had knowledge of a Court Order; the strict requirement that personal service must be proved is rendered unnecessary."

[22] Thus, the 1st Defendant was under obligation to obey the Orders of the Court notwithstanding that it was aggrieved thereby. In the Shimmers Plaza Case, the Court of Appeal went on to state that:

"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. For as Theodore Roosevelt, the 26th President of the United States of America once said:

"No man is above the law and no man is below it; nor do we ask any man's permission to obey it. Obedience to the law is demanded as of a right; not as a favour."

[23] In the premises, I am satisfied that the Plaintiff has made a good case to warrant the citing of the 1st Defendant for contempt of Court as prayed in the Plaintiff's application dated **28 April 2017**. The said application is hereby allowed with an order that the costs thereof be in the cause. Accordingly, it is hereby ordered and directed that the 1st Defendant's Chairman, **Adnan Terzic** (the 3rd Defendant herein), the Branch Managing Director, **Esed Becirevic** (the 2nd Defendant herein) and the Finance Officer, **James Muli** (who is the deponent of the Replying Affidavit pertinent to the instant application), do appear before this Court to show cause why they should not be committed to jail for contempt of court.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 6TH DAY OF DECEMBER, 2017

OLGA SEWE

JUDGE