



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION

CIVIL CASE NO. 342 OF 2015

CFC STANBIC BANK LIMITED.....PLAINTIFF

- VERSUS -

FLORENCE WAIRIMU MBUGUA.....DEFENDANT

RULING

1. The plaintiff's application dated 20th August 2015 seeks orders for the arrest of **GEORGE ABUGA, ESTHER MATU** and **JONATHAN KINYENZE**, so that they can thereafter be committed to Civil Jail because they had disobeyed the orders which the court had made on 15th July 2015.
2. The persons named above were said to be the Chairman; the Secretary and the General Manager, respectively, of the **CO-OPERATIVE BANK HOUSING CO-OPERATIVE SOCIETY LIMITED**.
3. On 15th July 2015 the court had made an order in the following terms;

“3. THAT until 16/07/2015 the Co-operative Bank Housing Co-operative Society Limited is ordered NOT to release to the defendant or her advocates or any of her agents or servants the sum of Kshs. 30.4 Million which the plaintiff had disbursed in connection to the Sale transaction of L.R. No. 14750/2 MAVOKO?.

4. On 16th July 2015 Mr. Ogoro advocate attended court, holding brief for Miss Matunda the learned advocate for the Co-operative Bank Housing Co-operative Society Limited (*Hereinafter “the Co-op Society?”*).
5. Mr. Ogoro made the following statement to the court;

“However, as the orders sought are not averse to my client, the same may be extended?.

6. On the basis of that statement court extended the orders upto 29th July 2015.
7. The parties then commenced negotiations, and on 29th July 2015 they jointly sought more time to continue with the said negotiations. In order to give themselves time to negotiate, the parties asked the court to adjourn the case to 10th August 2015.
8. In the meantime, whilst the negotiations were going on, the parties agreed to have the prevailing status quo maintained.
9. The applicant now asserts that notwithstanding the court orders, the Co-op Society had paid out the money which it was supposed to have continued holding.
10. But the alleged contemnors contended that;

- a. *None of them was ever personally served with the orders in question; and that*
- b. *The Co-op Society never instructed M/s MORONGE & COMPANY ADVOCATES to act for it; and that*
- c. *MORONGE & COMPANY ADVOCATES have categorically denied ever sending any advocate from that firm to appear in this case, on behalf of the Co-op Society.*

11. Whereas the lawyers for the Co-op Society in the Sale Transaction were Messrs **MORONGE & COMPANY ADVOCATES**, that would not necessarily imply that the said firm of advocates had also been duly instructed to represent the Co-op Society in these court proceedings.
12. A perusal of the letter-head of the Law Firm Moronge & Company Advocates reveals that one of the lawyers in that firm is named **G.K. MATUNDA**.
13. In the circumstances, it would be possible that it is the said G.K. Matunda advocate whose brief was held by advocate Ogoro on 16th July 2015.
14. However, as matters currently stand, this court does not even know whether or not the person named G.K. Matunda is a male or a female.
15. On the other hand, if the said G.K. Matunda had not instructed Mr. Ogoro advocate to hold his/her brief in court on 16th July 2015, the easiest thing would have been for him/her to swear an affidavit making that position clear.
16. The fact that G.K. Matunda advocate did not deem it necessary to swear an affidavit to enable her make his/her position clear, leaves the court with suspicion concerning his/her possible role in this matter. But then again, the onus was upon the applicant to provide proof. And in this case, the applicant did not expressly assert that the person whose brief was held by Mr. Ogoro advocate was G.K. Matunda.
17. In principle, court orders ought to be served personally upon the persons against whom the orders have been made. However, as the Court of Appeal has recently held, in **SHIMMERS PLAZA LIMITED Vs NATIONAL BANK of KENYA LIMITED, CIVIL APPEAL No. 33 OF 2012**, the;

“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.

....

Kenya’s growing jurisprudence, right from the High Court has reiterated that knowledge of a court order suffices to prove service and dispensed with personal service for the purposes of contempt proceedings?.

18. The applicant submitted that the knowledge of Moronge & Company Advocates can be imputed on the Co-op Society.
19. This court finds itself unable to agree with the applicant’s said contention. I so find because there is no proof that the said Moronge & Company Advocates had been instructed by the Co-op Society to act in this case, at the time which is material to the contempt proceedings.
20. The standard of proof in contempt proceedings is not on a balance of probabilities.
21. In **PROFESSOR FRANCIS M. NJERU Vs. PROFESSOR MABEL IMBUGA, INDUSTRIAL CAUSE No. 1539 of 2013** the Court quoted with approval the following words of Lord Denning M.R, in **Re: Bramblevale Ltd [1963] ALL. E.R. 1062**;

“A contempt of court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved. To use the time honoured phrase, it must be proved beyond reasonable doubt....?”

22. It must be proved that the person was either personally served with the order or that he had notice of the said order.
23. In **SAM NYAMWEYA & 3 OTHERS Vs. KENYA PREMIER LEAGUE LIMITED & 2 OTHERS, Hccc No. 69 of 2015**, Aburili J. reiterated the importance of the alleged contemnor

having been made aware of the order. This is how the learned Judge stated the position;

“It is important, however, that the court satisfies itself beyond any shadow of a doubt that the person alleged to be in contempt committed the act complained of with full knowledge or notice of the existence of the order of the court forbidding it. The threshold is quite high as it involves possible deprivation of a person’s liberty?.

24. Another aspect of the order is the Penal Notice. In the order which the plaintiff has exhibited herein, there is no Penal Notice indorsed on its face.

25. In **OCHINO & ANOTHER Vs. OKOMBO & 4 OTHERS, CIVIL APPEAL No. 36 of 1989**, the Court of Appeal said;

“The copy of the order served must be indorsed with a notice informing the person on whom the copy is served that if he disobeys the order, he is liable to the process of execution to compel him to obey it?.

26. The absence of the Penal Notice from the order rendered it incomplete if it were to the foundation upon which to base contempt proceedings.

27. In the light of the shortcomings in the service of the order, and also because there was no Penal Notice indorsed on the order, this court lacks jurisdiction to punish the alleged contemnors for contempt of court. Therefore, the application is struck out.

28. The costs of the said application shall follow the event. In effect, costs are awarded to the Defendant.

DATED, SIGNED and DELIVERED at NAIROBI this 8th day of February 2016.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of:

Ogunde for the Plaintiff

Oigara for the Defendant

Collins Odhiambo – Court clerk.