



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 252 OF 2001

SOUTHERN CREDIT BANKING

CORPORATION LTD.....PLAINTIFF

- VERSUS -

KIBIC STAR ELECTRO LTD.....1ST DEFENDANT

MR. KANG SUK LEE.....2ND DEFENDANT

MRS. YOUNG SOOK LEE CHO.....3RD DEFENDANT

RULING

1. The application before me was filed by the Objector, who sought 2 substantive orders. The said orders were for:

- i. *Committal to civil jail of **ELIJAH MPUTHIA IRURA**, the Managing Director of **EQUITORIAL COMMERCIAL BANK**, because he had willfully and deliberately disobeyed the Orders issued on 26th June 2012 and 31st July 2012.*
- ii. *Issuance of writs of attachment of the property belonging to the said **ELIJAH MPUTHIA IRURA**, because he had willfully disobeyed the Orders made on 26th June 2012 and 31st July 2012.*

2. According to the Objector, the orders issued on 26th June 2012 lifted the attachment of the motor vehicle Registration Number **KAU 752 D** and directed that the vehicle be released to the Objector or that the vehicle be returned to the Objector's premises, from where it had been attached.

3. And in relation to the orders made on 31st July 2012, the Objector said that the same "*raised and also set aside the attachment of the motor vehicle registration No. **KBN 106 X***".

4. Notwithstanding the fact that the Respondent was duly served with the 2 orders, the Respondent and the auctioneer failed, refused and/or neglected to release the 2 vehicles to the Objector: that was the Objector's case.

5. As far as the Objector was concerned, the Respondent had chosen to disregard the dignity of the Court by the resolute refusal to release the vehicles to the Objector.

6. Instead of releasing the vehicles, the Respondent is said to have demonstrated a defiance to the dignity and integrity of the sanctity of the court by advertising the vehicle Registration No. **KAU 752 D**, for sale.

7. The Objector submitted that the persistent refusal to release the vehicles constituted contempt of court.

8. The Objector relied on the case of **HADKINSON VS HADKINSON [1952] ALL E.R. 567**, at page 569 wherein Romer L.J expressed himself thus;

“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 it 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 even void”.

9. The position of the law is no different in Kenya. In the case of **COMMERCIAL BANK OF AFRICA LIMITED Vs ISSAC KAMAU NDIRANGU CIVIL APPEAL No. 157 of 1991**, Kwach J.A started his judgment by saying;

“It is a fundamental tenet of the rule of law that court orders must be obeyed”.

10. In that same case Muli J.A. said;

“It is imperative that orders of the court be obeyed as a cardinal basis for endurance of judicial authority and dignity. To do otherwise would erode the dignity and authority of the court”.

11. In the case of **REFRIGERATOR & KITCHEN UTENSILS LTD Vs GULABCHAND, CIVIL APPLICATION No. 39 of 1990**, the Court of Appeal punished the contemnors by ordering that each of them to detained in prison for a period of 14 days.

12. The court did so because it had a responsibility to deal firmly with contemnors. And in arriving at its decision, the Court said that courts ought not to condone deliberate disobedience of its orders.

13. Meanwhile, in the case of **TOTAL SECURITY SURVEILLANCE LTD & ANOTHER Vs TELCOM KENYA LIMITED, HCCC No. 218 of 2007**, Osiemo J. fined each of the defendants Kshs. 30,000/-, which was to be paid within 7 days.

14. The learned Judge ordered that if there was a default of payment of the fine as well default in respect to the other 2 orders which had been earlier disobeyed, the property of the contemnors would be liable to attachment.

15. There can be no doubt that the court will take serious action against persons who are proved to have deliberately disobeyed orders.

16. As is evident from the cases cited above, the contemnor could be imprisoned or fined. And if he was fined but failed to pay up, his property could be attached.

17. In the light of the very serious actions which the court can take against a contemnor, it is imperative that the person who is alleging that there has been disobedience of the court orders must prove his assertions.

18. Lord Denning MR said the following, concerning the standard of proof;

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

- Per Lord Denning MR in the case of **RE: BRAMBLEVALE LIMITED [1969] 3 ALL E.R. 1062**, at page 1063.

19. I appreciate the reason why Lord Denning MR. insisted that the standard of proof must be beyond reasonable doubt. That was because he started on the premise that contempt of court was an offence of a criminal character.

20. Considering the fact that the punishments to be meted out against a contemnor included possible imprisonment or the imposition of a fine, it is not difficult to understand why the Master of Rolls held that the offence be proved beyond reasonable doubt.

21. Nonetheless, the Court of Appeal for Kenya did not accept the reasoning of Lord Denning. In **MUTITIKA Vs BAHARINI FARM LTD CIVIL APPLICATION No. 24 of 1985**, the learned Judges of Appeal had the following to say;

“With the greatest possible respect to the eminent English Judge (Lord Denning MR), that proof is much too high for an offence ‘of a criminal character’ and ipso facto, not a criminal offence properly so defined.

We agree with Mr. Khaminwa’s submissions in that respect. 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”.

22. The questions that need to be answered are as follows;

- Was Elijah Mputhia Irura served with the orders dated 26th June 2012 and 31st July 2012?*
- If the answer to (i) is in the affirmative, did he deliberately disobey the said orders or either of them?*

23. In order to answer those questions, I will first set out the terms of the 2 orders which are in issue.

24. On 26th June 2012, Ogola J. made the following orders;

“1. **THAT** the Motor Vehicle **KAU 752 D** be released to the Objector, or it be returned from where it was attached.

2. **THAT** each party do bear its own costs”.

25. In the Ruling which gave rise to the orders above, the learned Judge had concluded that there was no evidence to prove that the vehicle **KAU 752 D** belonged to the Judgment-Debtor.

26. But the Judge also said;

“The Objector’s claim to that vehicle is also not convincing. The Objector’s claim is hinged only on the fact that it was attached while under the premises which belong to the Objector. In my view, attachment of a moveable asset can be levied at any place the asset is located. The Objector has not annexed a Certificate of Registration or log book. It would have been much easier to do that and to prove ownership. However, since both the Judgment Debtor and the Objector have laid claim to this motor vehicle, this court cannot allow it to be sold until the true ownership is established”.

27. Nonetheless, the court held that the attachment of the vehicle **KAU 752 D** was not proper.

28. It was ordered that the vehicle be released either to the Objector or it be returned to the Objector’s premises, from where it was attached.

29. On 28th June 2012 the Objector filed an application, seeking the review of the orders made on 26th June 2012. The basis of that application was, *inter alia*, that;

“1.THAT on the 26th day of June 2012, the Hon. Mr. Justice Ogola made an order granting the Respondent liberty to proceed with the attachment and sale of Motor Vehicle registration No. KBN 106 X”.

30. The Objector was apprehensive that if the plaintiff was not restrained by an order for stay of execution, the plaintiff would proceed to dispose of the said vehicle.

31. On 31st July 2012 Ogola J. gave a Ruling on the application dated 28th June 2012. By that Ruling, the learned Judge set aside the attachment of the motor vehicle registration No. **KBN 106 X**.

32. I have carefully perused the affidavits of service pertaining to the 2 orders in issue.

33. Service was effected by **JOEL MWANZIA**, a licensed Court Process Server. In an affidavit sworn on 30th August 2012, Joel Mwanzia said that the Court Order issued on 27th June 2012 was served upon the Advocates for the plaintiff, the Auctioneers and the Respondent. All the 3 were said to have been served on 29th August 2012.

34. At the offices of the Respondent it was the Legal Officer, **BRIAN ASIN**, who was served.

35. There can be no doubt that service upon the Respondent’s Legal Officer was good service upon the Respondent. The Respondent in this case is **EQUATORIAL COMMERCIAL BANK**, (which was previously called the **SOUTHERN CREDIT BANKING CORPORATION LIMITED**).

36. Considering that the Objector aptly conveyed the message about the need for personal service, the question then arises is about whether or not the service upon the Legal officer of the plaintiff constituted personal service upon the plaintiff’s Managing Director.

37. The Objector had stated his understanding thus;

“It is a hackneyed principle of law that no order requiring a person to do or abstain from doing any act may be enforced (by committing him for contempt of court) unless a copy of the Order has been personally served on the person required to do or to abstain from doing the act in question”.

38. First, the Orders in question were directed against or in respect to the Plaintiff and the Court Broker. The orders did not require the Managing Director to do any act or to abstain from doing any act.

39. Indeed, there had never arisen any contention directed against the Managing Director, that he had done anything which the Objector considered to be wrongful.

40. The Managing Director had not attached any vehicle belonging to the Objector. I so find because the process of execution of Decrees or of any court orders is carried out by officers of the court. If the process of execution was through the attachment of the property belonging to a Judgment – Debtor, the officer of the court who would execute the Decree would be a Court Broker.

41. The Decree – Holder has no legal authority or capacity to execute a Decree against the Judgment – Debtor.

42. And although the Decree – Holder may ask the Court to issue the warrants of attachment to a specific Court Broker, the said Court Broker would not be the agent of the Decree – Holder, when he was executing the Decree.

43. In this case, the Objector has not shown that the Managing Director had personally refused to return the vehicle which had been attached.

44. Furthermore, the Objector has not demonstrated that the Managing Director had been personally served with the orders which he is now alleged to have disobeyed.

45. In the case of **KARIUKI & 2 OTHERS Vs. MINISTER OF GENDER, SPORTS, CULTURE & SOCIAL SERVICES & 2 OTHERS [2004] 1 KLR 588**, the Court held *inter alia* as follows;

“.... in England, as a general rule, no order of the court requiring a person to do or abstain from doing any act may be forced unless a copy of the order has been served personally on the person required to do so or abstain from doing the act in question. The copy of the order served must be endorsed with a notice informing the person on whom the order is served that if he disobeys the order, he is liable to the processes of execution to compel him to obey it.

... service on the alleged contemnor’s advocates did not constitute personal service and even if the alleged contemnor had knowledge of the court order, he would not be liable for contempt...”

46. Another issue which is worthy of note is that there is no clarity of the factual position concerning the vehicle registration **KAU 752 D**. I say so because, although the court ordered that it be released to the Objector, the Respondent and the Court Broker insisted that that vehicle had never been attached.

47. From the exhibit “JJW6”, which was annexed to the affidavit of the Objector, the vehicles which were advertised for sale were registration Nos.

a) *KBN 106 X; and*

b) *KAU 758 D.*

48. The Plaintiff’s advocates wrote to the Objector’s advocates on 9th August 2012, stating that the auctioneer was not holding the vehicle registration No. **KAU 752 D**.

49. If there be any truth in that contention, then it would not be possible for the Respondent to release a vehicle which they say that the auctioneer never had.

50. In those circumstances, it would be inaccurate to assert, as the Objector has done, that the Respondent or its Managing Director had deliberately chosen to disobey the Orders of the Court.

51. That same position would ring true in relation to the vehicle registration **KBN 106 X**, which appears to have been sold on 28th June 2012.

52. The Objector deponed thus in paragraph 17 of his Verifying Affidavit;

“THAT I am informed by my advocates on record that the Hon. Mr. Justice Ogola as of 31st day of July 2012, was alive to the allegations by the Auctioneer that the motor vehicle had been sold, yet the learned Judge still granted the Orders setting aside the purported sale and/or transfer”.

53. If, as was alluded to by the Objector, the vehicle registration No. **KBN 106 X** may have been already sold, it cannot be correct that the Respondent had deliberately chosen to disobey the orders of the court requiring it to release that vehicle.

54. I find no willful and deliberate disobedience of the Court Orders dated 26th June 2012 and 31st July

2012.

55. I also find no reasons in law or in fact for finding that the Plaintiff's Managing Director was in contempt of court.

56. In a nutshell, the application dated 21st September 2012 fails. It is dismissed, with costs to the Respondent and also to the Respondent's Managing Director.

DATED, SIGNED and DELIVERED at NAIROBI this 3rd day of June 2015.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Begisen for the Plaintiff

No appearance for the 1st Defendant

No appearance for the 2nd Defendant

Mwangi for Odera Objector.

Collins Odhiambo – Court clerk