



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL SUIT NO. 146 OF 2012**  
**ASHFORD MURIUKI MUGWUKU T/A ASHFORD & CO.**  
**ADVOCATES...PLAINTIFF/RESPONDENT**

**VERSUS**

**MRS. NANCY WANJA GATABAKI.....DEFENDANT/  
**APPLICANT****

**AND**

**EQUITY BANK  
**LTD.....GARNISHEE****

**RULING**

1. The application dated 2<sup>nd</sup> April, 2013 brought by the Plaintiff under the auspices of **Sections 1A (3), 3A and 98** of the *Civil Procedure Act* and **Order 51 Rule 1** of the *Civil Procedure Rules* seeks the following prayers;

1. **THAT** the Court orders of 10<sup>th</sup> September, 2012 be varied and the Court do direct that an interest earning account in which Kshs. 75 Million together with interest should be invested shall forthwith be opened in the joint names of the advocates for the Plaintiff and Registrar of the High Court of both whom shall be the account sole signatories at Equity Bank, Equity Centre Upper Hill.

2. **THAT** the Garnishee do forthwith furnish a statement of account showing accrued interest on the amount of Kshs. 75 Million held by them from 26<sup>th</sup> March, 2012.

3. **THAT** the costs of this application be borne by the Defendant.

The application is predicated upon the grounds that the Defendant has consistently and continually failed to comply with the orders of the Court made on 10<sup>th</sup> September, 2012. It is the Plaintiff’s contention that the Defendant’s continued refusal to comply with court orders is a mockery of the judicial process and

tantamount to contempt of Court.

2. The application is supported by the Affidavit of **Ashford Muriuki Mugwuku** sworn on the same date as the application. The deponent contends that his Advocates on record, **Messrs. Mbugua Ng'ang'a & Co. Advocates**, made several attempts to comply with the Court orders issued on 10<sup>th</sup> September, 2012, but all were in vain due to the Defendant's advocates conduct. He deponed that vide its letters dated 10<sup>th</sup> September, 2012, 4<sup>th</sup> October, 2012 and 1<sup>st</sup> March, 2013, they invited the Defendant's advocates to open a joint account as per the Court Orders, which letters and pleas, as the deponent alleges, were ignored. Further, the deponent contends that the conduct of the Defendant undermines the dignity and integrity of the Court and should be deprecated.

3. In opposing the Application, the Defendant filed her Replying Affidavit and Grounds of Opposition dated 18<sup>th</sup> April, 2013 and a Preliminary Point of Law dated 23<sup>rd</sup> April, 2013. In the Replying Affidavit of **Mrs. Nancy Wanja Gatabaki** it is deponed that the application is an abuse of the process of the Court and should be dismissed. It is also contended that the application seeks to block her advocates and herself from running, operating or being a signatory to an account holding in her name. In the Grounds of Opposition, the Defendant contends that the application seeks to invoke sections of the law which are wrong and is an attempt to defeat the intended appeal lodged by the Defendant. Further, the deponent contends that the application is a variation of an ex-parte order issued by the Court which has not been fully canvassed and determined by the Court to which an appeal has been proffered.

4. In determining an application for variation of orders, to which an applicant invokes the inherent jurisdiction of the Court, the matter has to be determined on its merits. The jurisdiction of this Court to vary, set aside or discharge an Order is not in question, neither is its unfettered jurisdiction and inherent powers to hear and determine such an application. What question arises, therefore, is whether the applicant has allayed sufficient cause and reason to invoke the Court to exercise its powers in making the further Orders as prayed for by the Plaintiff. At the hearing of the application on 2<sup>nd</sup> May, 2013, the Plaintiff's counsel submitted that his firm had made valiant efforts at contacting the Defendant with the aim of complying with the Court orders issued on 10<sup>th</sup> September, 2012. **Mr. Ng'ang'a** on behalf of the Plaintiff, submitted that they had written several letters to the Defendant which had not been responded to, and which therefore necessitated the present application. He referred the Court to the Defendant's advocates letter dated 23<sup>rd</sup> April, 2013 at paragraph 5 in which the advocate expressed himself as follows;

**“Our client therefore is not agreeable to the opening of a new joint account and we stand guided by the Court order dated 27<sup>th</sup> April, 2012 where the sum is to be held by the Garnishee in an interest bearing account at its usual commercial rate of interest offered to its customers...”**

The Plaintiff responded to the letter vide its letter dated 26<sup>th</sup> April, 2012. **Mr. Ng'ang'a** further contended that the Defendant has never been willing to comply with the Court Orders, given the number of applications that she had made and which had been dismissed, referring particularly to the application dated 28<sup>th</sup> February, 2013 for Review, and the Court of Appeal application which was determined by Kiage, JA on 19<sup>th</sup> April, 2013. However, he submitted that he had received a letter from the Defendant's advocate dated 26<sup>th</sup> April, 2013, to which they were agreeable to the contents albeit it being made late in the day. The letter reads in part:

**“With instructions from our client and pursuant to the Court Orders of 26<sup>th</sup> March, 2012 and 10<sup>th</sup> September, 2012 we advise that we are ready for the opening of a joint account and suggest as follows: ...”.**

5. The Defendant's case is that it has not failed and/or refused to comply with the Court Orders issued on 10<sup>th</sup> September, 2012. **Mr. Githinji** appearing for the Defendant, submitted that the orders issued on 10<sup>th</sup> September, 2012 were not time bound and hence his client could not have been in contempt. He went on further to submit that his firm had submitted the names of the signatories to the joint interest earning account as per the Court orders.

6. The Court had issued its orders on the modalities of opening of the joint interest earning account when it rendered its Ruling on 10<sup>th</sup> September, 2012. The Ruling, in essence, reviewed paragraph 4 of the Ruling delivered on 26<sup>th</sup> March, 2012 and reads in part:

**“Consequently, I certainly had in mind that the garnishee herein should establish a separate interest bearing account in the joint names of the advocates for the Plaintiff and Defendant into which the sum of Kshs. 75 Million would be paid and held. Accordingly, I direct that the advocates of the parties herein shall immediately contact the Garnishee bank first to clarify in which branch such joint account should be opened and secondly, to detail the signatories on each side in respect of the mandate of the account. I further direct that once the account has been opened, the Garnishee do transfer the said sum of Kshs. 75 Million thereto without any further delay. Orders accordingly.”** (underlining mine).

In as much as the Defendant’s counsel alleges that the Orders were not time bound, it should not have taken his firm over seven (7) months to comply with the Court’s Orders. The Plaintiff has clearly established that it made efforts at contacting the Defendant’s advocates on several occasions, from which it had been unsuccessful. Hence necessitating the present application being filed. Indeed, it would seem that the Defendant has been most reluctant in complying with the Court’s Orders, which in my opinion, is tantamount to contempt of Court. The letter dated 26<sup>th</sup> April, 2013 from the Defendant’s advocates seems to have come only after the Plaintiff had threatened, in its application, to have the Defendant cited for such contempt.

7. This Court is a Court of justice and will not allow an injustice to any party based on issues bordering on technicalities and it is bound to resolve matters amicably and expediently. The Plaintiff’s application for variation of this Court’s Orders will not be put on hold purely on account of the Defendant submitting her list of names to be signatories to the joint interest account to be opened. In as much as the list of signatories came late in the day and was sent after the Plaintiff’s application had been filed, it would be in the best interest of the parties involved that they proceed from that point so as to ensure that the Court Orders of 10<sup>th</sup> September 2012 are complied with immediately and without any further delay. The delay in submitting the signatories is inordinate but in any event, no prejudice shall be suffered by the Plaintiff should its prayers not be allowed at this stage. The Defendant will however, not go scot free. It is by her unseemly conduct that the parties find themselves back before this Court on an issue that should have been resolved without this Court’s intervention.

8. As a consequence, I stand over the Plaintiff’s said Application dated 2<sup>nd</sup> April 2013 for a period of 21 days from the date hereof. This will allow the parties time to fully comply with this Court’s Orders of 10<sup>th</sup> September 2012. Should the Defendant not so comply or drag her feet as regards the opening of the Account, the Court shall consider *sui moto* issuing an appropriate Order of contempt against both her and her counsel who the Court considers has contributed extensively towards the delay. Mention of this matter for compliance purposes will be on 25<sup>th</sup> June 2013.

**DATED and delivered at Nairobi this 4<sup>th</sup> day of June, 2013.**

**J. B.HAVELOCK**

**JUDGE**