



REPUBLIC OF KENYA

High Court at Eldoret

Miscellaneous Application 252 of 2009

IN THE MATTER OF AN APPLICATION THE MANAGEMENT COMMITTEE NANDI HEKIMA SACCO SOCIETY LTD TO PROCEED WITH CONTEMPT PROCEEDINGS AS AGAINST THE RESPONDENTS THE COMMISSIONER FOR CO-OPERATIVE OFFICER NANDI CENTRAL/NORTH DISTRICT MR. DAVID K. KERICH IN RESPECT OF A COURT ORDER DATED 6/4/2009 OF HONOURABLE LADY JUSTICE ROSELYN NAMBUYE IN NAIROBI HIGH COURT JUDICIAL REVIEW MISC. CIVIL APPLICATION NO. 212 OF 2009 THE MANAGEMENT COMMITTEE NANDI HEKIMA SACCO SOCIETY LTD VS THE COMMISSIONER FOR CO-OPERATIVE DEVELOPMENT.

**THE MANAGEMENT COMMITTEE NANDI HEKIMA SOCIETY LTD.....APPLICANT
-VS-
THE COMMISSIONER FOR COOPERATIVE DEVELOPMENT.....1ST RESPONDENT**

THE DISTRICT CO-OPERATIVE OFFICER, NANDI CENTRAL/NORTH DISTRICT.....2ND RESPONDENT

RULING

This ruling is in respect of a Notice of Motion application dated 8th May 2009 brought under section 5 of the Judicature Act High Court Practice and Procedure Rules, Order L Rules 1 of the Civil Procedure Act for the following Orders:-

- 1. That this Honourable Court be pleased to cite the Respondents herein the Commissioner for Cooperative Development and the District Cooperative Officer Nandi Central/North District Mr. David K. Kerich for contempt of court for having disobeyed a lawful court order made on 6th of April 2009 by Honourable Lady Justice Roselyn Nambuye in Nairobi HCCMA 212 of 2009.**
- 2. In the event of the Respondents failing to attend court this Honourable Court be pleased to issue a warrant of arrest of the Respondents herein and their subsequent committal to jail for contempt of court and for a period that this court may deem fit and appropriate.**
- 3. That the O.C.S Eldoret Police Station/Kapsabet to facilitate the arrest and presentation to the court of the Respondents.**
- 4. Cost of this application be provided for.**

The Applicant's case is that court issued orders restrain the Respondents from presenting the Contents of Inquiry on 7th April 2009 or any other subsequent date and that the order had a penal consequence and

that the same was duly served upon the Respondents. That notwithstanding the service, the Respondents disrupted a Special General meeting and proceeded to read and adopt an inquiry report thus constituting a New Management Committee for the Sacco. That they stormed the offices of Nandi Hekima Sacco in a bid to effect a Change of Management and that the Respondents notified the Society's bankers to effect a change of signatories. All these, in his view, were done in contravention of court orders. He wants the court to punish the Respondents for contempt.

On the 6th April 2009, the Applicant filed in the High Court at Nairobi Misc Civil Application No. 212 of 2009 and appeared before Nambuye J who issued, inter alia, the following orders:

“1)

2)

3) **THAT the applicant be and is hereby granted leave to apply for an order of certiorari to remove into the High Court and quash the decision of the Commissioner for Co-operative Development vide a notice/order dated 20th January 2009 ordering an enquiry into the by-laws working and financial conditions of Nandi Tea Growers Sacco Society Ltd.**

4) **THAT the applicant be and is hereby granted leave to apply for an order of prohibition directed to the Commissioner for Co-operatives Development and all his officers prohibiting them from presenting, reading or implementing the contents of such inquiry report on 7th April 2009 or any subsequent date.**

5) **THAT the leave hereby granted shall operate as a stay of the decision or any subsequent order of the Commissioner of Co-operative Development until the determination of the substantive application.**

6).

7).

Although, these orders were issued on the same day, the Applicant's Advocate only managed to instruct a process server to effect service on the 7th April 2009.

One Benjamin Mutia, a Process Server depones that he received from M/s Walter Wanyonyi & Co. Advocates a copy of the order issued on 6th April 2009 (referred to above) to serve upon the Commissioner for Co-operative Development. That he proceeded to NSSF Building, 9th Floor and served the Respondent's Legal Officer, Mr. Abuga who acknowledged service by date stamping at the back of his original now returned to the Court. The returned copy has the Respondent's stamp noting that the same was received on 7th April 2009. Mr. Wanyonyi advocate appearing for the applicant urged the court to punish the respondents for contempt. He relied on the affidavit of service to confirm that the Respondents were served with the court orders but disobeyed.

The Application is opposed by both the 1st and 2nd Respondents. The 1st Respondent on his part swore an affidavit on the 25th May 2009. In paragraph 7, 8 and 9 he depones that though the *ex parte* order was obtained on the 6th April 2009, the same was not served upon him until the afternoon of 7th April 2009. He swears that the team reading the report left Nairobi for Kapsabet on the 6th April 2009.

He further depones that after service in Nairobi, all he could do was to try and call the team on telephone but those efforts were fruitless and in any case too late.

The 2nd Respondent on his part also swore an affidavit on 22nd May 2009. In paragraph 7 he depones that prior to and in the course of the aforesaid meeting, he had not been served with the said orders. He went

on to swear that he was only informed by the 1st Respondent of the orders served in Nairobi when it was too late.

Both Respondents have pointed out that the exercise of inquiry challenged by the Applicant commenced on 20th January 2009 and the Applicant was not only aware but participated. They were at a loss as to why the applicant only elected to go to court at the very eleventh hour, when even the orders obtained could not practically bar the exercise.

I have considered the submissions and pleadings before me. An application for contempt is quasi criminal and carries a sentence that could commit the contemnor to civil jail and payment of penalties. The court stamps it's authority in contempt proceedings to maintain the rule of law and dignity of the judicial process. The need to obey court orders at all times cannot be over emphasized.

The standard of proof in an application is above the standard in ordinary civil claims. This is a burden the applicant must discharge.

It is not in dispute that the order was served on the 7th April 2009 on the legal officer. The Respondents testify that this was in the afternoon and only after the horse had bolted. Can the respondents be punished actions & omission prior to the service of the court order? In my view, they cannot be punished.

The Affidavit of service relied on by the Applicant is also inadequate to address this issue. The said process server deliberately or by an oversight does not indicate what time he served the 1st Respondent. I also note that it is only the order that he served.

I, therefore hold that there is no sufficient evidence to show that the Respondents disobeyed Court Orders in any manner and therefore they cannot be punished for contempt.

The upshot is that the application for contempt must be and is hereby dismissed with no orders as to costs. It is so ordered.

Dated AND signed at Nairobi on this 24th day of August 2012.

M. K. Ibrahim
Judge

DATED and Delivered at Eldoret on this 10TH DAY of October 2012.

F.AZANGALALA
Judge

In the presence of: Mr Keter H/B for Mr Wanyonyi for the Applicant and Ms Wanjiku for the Respondents.