IN THE COURT OF APPEAL AT NAIROBI

(CORAM : GITHINJI, MUSINGA & KIAGE, JJ.A.)

CIVIL APPEAL NO. 311 OF 2006

BETWEEN

ROSE DETHO...1ST APPELLANT

VERSUS

RATILAL AUTOMOBILES LIMITED............1ST RESPONDENT

MAHESH TAILOR..2ND RESPONDENT

GEMINI TAILOR..3RD RESPONDENT

PRAMUKH ENTERPRISES LIMITED..........4TH RESPONDENT

CHARTERHOUSE BANK LIMITED............5TH RESPONDENT

SANJAY SHAH...6TH RESPONDENT

THE ATTORNEY GENERAL.........................7TH RESPONDENT

(Appeal from the ruling and order of the High Court of Kenya at Eldoret

(Gacheche, J.) dated 24th November, 2006)

in

Misc. Civil Application No. 649 of 2006)

****

JUDGMENT OF THE COURT

1. This is an appeal from the ruling and order of the High Court of Kenya at Eldoret (**Gacheche J**.) made on 24th November 2006. By the aforesaid ruling and order, the learned Judge allowed an application made by the **1st to 4th respondents herein** on 26th September, 2006 in which they sought the following orders:

> **I. That the respondents jointly and/or severally be committed to civil jail for a term not exceeding six months for contempt of the orders of this Honourable Court issued on 15th September**
>
> **2006.**
>
> **II. That the assets of the respondents jointly and/or severally be attached for contempt of court.**
>
> **III. The respondents be condemned to the costs of this application.**

The persons who had been named as respondents in the aforesaid application were the appellant herein, Rose Detho, the Governor of the Central Bank of Kenya, and one Momanyi Bundi. The learned judge found that the Governor and Bundi had wrongly been named as respondents because the two were not parties to the application for leave to commence judicial review proceedings that gave rise to the

application that was before her.

2. The learned judge proceeded to find that **Ms**. **Rose Detho**, the appellant herein**,** acted in contempt of court and directed her to regularize her position within the next thirty six hours failing which she stood to suffer imprisonment for six months.

3. The brief background preceding the above direction is well captured on the face of the notice of motion as well as the affidavits sworn by **Ravinder Tailor** (1st respondent's Director) and **Mahesh Patel** (2nd respondent herein) on 26th September 2006, summarily stated as hereunder.

4. On 15th September 2006, the learned judge at Eldoret granted the 1st to 4th respondents leave to apply for judicial review by way of diverse orders of Certiorari, Prohibition and Mandamus. Together with the grant of leave, the learned judge further directed as follows:

> **"a. That the leave granted herein do operate as a stay of the transfer of the funds from the 1st interested party to the 1st respondent, the withdrawal/suspension of the 1st interested party from the clearing house and/or any decision, action and report made pending and/or intended by any of the respondents herein, and/or their servants or agents which in anyway affect the rights, interests and or is adverse against the applicants,1st and 2nd interested parties pending and until the determination of this suit/judicial review application.**
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> **b. That the leave granted do operate as a stay against any decision, action, investigation, demand, audit, reports, recommendations, whatsoever and/or refusal to renew the 1st interested party's banking licence by any of the respondents whatsoever until the determination of this application."**

5. The respondents averred that upon the grant of the aforesaid orders, they extracted the formal order of the court and duly served it upon the appellant.

6. On 20th September 2006, a licensed court process server, one **Stephen Maina Macharia,** deposed that he served the aforesaid order upon the **Central Bank of Kenya, (CBK)** Eldoret branch. He averred that on 21st September 2006 at Nairobi he served the court order upon one **Jimmy Muiwa**, a representative of **Ms. Rose Detho** who was not available. On that same day, the process server effected service of the order upon CBK, Nairobi.

7. It is alleged that despite service of the order, since 20th September 2006 the appellant and the other named respondents jointly and/or severally have repeatedly defied the orders of the court by refusing to hand over the operations of **Charterhouse Bank Limited,** (the 5th respondent herein) to its directors and/or allow the applicants to transact their normal banking business in the Bank. It is also alleged that despite the service of the order the appellant had declined and continued refusing to honour the present respondents' bills of exchange properly drawn on the Bank.

8. Moreover, the appellant remained adamant and even beefed up security on the Bank's countrywide outlets thereby denying depositors access to the bank and scaring customers away.

9. The appellant filed a replying affidavit sworn on 6th October 2006 controverting the respondents' claim. She categorically stated that the said order was never served upon her personally. She further stated that the Clearing House is an organ of **Kenya Bankers Association (KBA)** and neither CBK nor herself had any control over its activities.

10. She averred that neither herself nor CBK had made any decision, taken any action, made any reports, investigation, audit or recommendation of or concerning the 5th respondent bank after the 15th September 2006 ruling. She particularly denied the allegation that she instructed one **Momanyi Bundi** not to issue any banker's cheque as alleged by the 2nd respondent herein. Ms. Detho also stated that she had challenged the jurisdiction of the High Court in issuing the disputed orders she allegedly breached.

11. The application for contempt of court was subsequently heard by **Gacheche, J.** The court proceeded to issue the impugned orders, the subject matter of this appeal.

12. The appeal is based on 20 grounds. The appeal was canvassed by way of written submissions.

13. The appellant, represented by the firm of **Oraro & Company Advocates,** in her written submissions crystallized her grounds into four (4) main clusters. First, it was submitted that the Judicature Act gives the High Court and this Court the power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England. Counsel placed reliance on **Wang'ondu v Nairobi City Commission, Civil Appeal No. 95 of 1988** where this Court held that the procedure to be adopted in

such cases is the procedure set out in the Supreme Court Rules, which provide that before a person can be committed for contempt of court, it must be shown that the order he is accused of breaching was personally served on him.

14. The appellant cited **Order 45 rule 7** of the **Supreme Court Practice** which sets out the procedure that must be complied with strictly. Further reliance was placed on **Chiltern DC v Keane [1985] 2 All ER 118** in which the Court of Appeal of England held that failure to strictly comply with the procedure is fatal to an application seeking to commit a person for contempt. The appellant complained that there was lack of personal service of the order upon her, hence she should not have been committed.

15. It was the appellant's contention that it was incumbent upon the respondents to demonstrate to the degree required by law that the order was personally served upon her, a burden the respondents failed to discharge.

16. The appellant invited us to examine the affidavit sworn by the process server, **Stephen Maina Macharia,** on 26th September 2006 where he deposed that he did not find the appellant at **Charterhouse Bank** premises and that he was advised that she was premised at **CBK**. In her view, the process server made no attempt to go to where he was advised he could find the appellant but instead chose to leave the documents with her assistant, who had no authority to accept service on her behalf.

17. The appellant faulted the learned judge for finding, without any evidence or credible material, that the process server was threatened and further, that the appellant evaded service without any deposition by the process server that he made attempts to serve the appellant personally. The judge was also faulted for relying on the affidavit evidence of the process server and failing to consider the appellant's evidence.

18. Secondly, the appellant submitted that evasion of service is a matter of fact that must be proved like any other fact. In this case, there was no evidence or proof of evasion of service. According to the rules of the Supreme Court of England, personal service can only be dispensed with if the person has notice of the order and is evading service. The process server made no statement that he had difficulty in locating the appellant, it was submitted.

19. Thirdly, it was the appellant's contention that the High Court exceeded its jurisdiction in issuing the order and hence the application for an order of stay could not properly be founded, which she said was like an ex-parte mandatory injunction, to which the court had no jurisdiction to grant under **Order 53** of Civil Procedure Rules. To buttress that submission, the appellant referred to **Grain Bulk Handlers Limited v J.B. Maina & Company Ltd & others**, **Civil Application No. 295 of 2003** where this Court had occasion to comment on the jurisdiction of the High Court under the provisions of **Order 53** of the Civil Procedure Rules.

20. The appellant emphasized that where an order is given without or in excess of jurisdiction, it is null and void ab initio and contempt of court proceedings cannot be founded on it. (**See Macfoy v United Africa Company Limited [1961] 3 All ER 1169, and Mucuha Vs Ripples Limited, Civil Appeal No. 19 of 1998.** In her view, the order of stay was interpreted to mean that the appellant was required to hand over the management of the 5th respondent to its directors to allow them to resume their banking business or to perform any of the actions she was accused of failing to perform, in which case then the order was granted in excess of jurisdiction.

21. According to her, an order of stay cannot properly direct a party to take any action but it can only stop the party from taking some action. If the respondents' desire was to compel the appellant to take some action then the appropriate order would have been a mandatory injunction and not a stay. Hence the court did not have the jurisdiction to grant such an order. She argued that a question of jurisdiction must be raised at the earliest time possible as a person who fails to do so will not be allowed to raise it after the matter has been heard and determined.

22. It was the appellant's submission that the standard of proof in committal proceedings is the criminal standard and that any allegations against her ought to have been proved beyond reasonable doubt.

23. Lastly, the appellant maintained that the court was commanding her to carry out that which she was not mandated to do as per **Sections 34(2) (a), 34(5) and 34(6)** of the **Banking Act**. She further stated that the court was directing her to carry out the acts contrary to **Section 34(6) (a**). Under **Section 36(8)** the appellant was insulated from liability in respect of any act or omission done in good faith in the exercise of her duties. She urged us to allow the appeal and grant the prayers sought.

24. In opposing the appeal, the 1st to 4th respondents entirely relied on their written submissions filed in a related matter, **Civil Appeal No. 279 of 2006,** the substantive appeal, which was also heard together with this appeal on the same day. They submitted that the judge was alive to the fact that the issue at hand related to the propriety of the procedure leading up to the appointment of the statutory manager and not the merits of the decision. They agreed with the judge's holding that the issue raised in the application was in regard to the appointment of the statutory manager.

25. They maintained that the High Court had jurisdiction in the matter and there was no failure to apply the correct test in granting leave**.** They also cited **Aga Khan Education Services Kenya v Republic & Others [2004] 1 EA 1** in support of their argument**.** According to them**,** an order of mandamus is available when one has shown that there is a public duty owed which remains unperformed. Referring to **Section 34 (2) a** of the **Banking Act,** CBK has powers to appoint a statutory manager for a bank and if it chooses to appoint a statutory manager pursuant to **Section 34 (1) (d)**, a duty to act in the interest of, inter alia, its depositors and creditors is

imported, as was the case in this instance.

26. They placed reliance on **Mirugi Kariuki v Attorney General [1992] eKLR** where this Court stated that a decision affecting the legal rights of an individual which is arrived at by a procedure that offends the principle of natural justice is outside the jurisdiction of the decision making authority.

27. The 1st to 4th respondents were never given an opportunity to be heard by CBK and therefore the principles of natural justice were breached, the court had the jurisdiction to grant leave to file for judicial review proceedings, they contended.

28. On the issue of whether the High Court ought to have considered and determined the veracity of each order sought before it, they submitted that at the leave stage the court is neither expected nor obliged to go into the details of the dispute.

29. In their skeleton submissions, the 4th respondent briefly reiterated that wherein the appellant avoided and evaded personal service of the court process, this Court unequivocally stated in **Abu Chiaba Mohamed v Mohamed Bwana Bakari & 2 others [2005] eKLR** that an appellant cannot seek to benefit from his own misconduct and wrongdoing and invoke the court's discretion in his favour. Furthermore, knowledge of a court order alone is sufficient, and the requirement of personal service may be dispensed with, hence a reason to be held in contempt of the said court order. (See also; **Shimmers Plaza Ltd v NBK (CA) (2015) eKLR.**

30. It was further submitted that the decision to be made in this appeal is whether the court will protect its process or whether contemnors will be allowed to flout the process of the court by disobeying court orders and evade service while knowing that court orders were in existence. It was pointed out that when the matter came up for mention days after the ruling was delivered, the appellant appeared to have gone to the UK and was on leave hence she could not be contacted. The appellant's counsel could have easily reached her on phone or email if indeed he was desirous of having her come and purge her contempt, which shows that she was not keen on availing herself and thus was not deserving of this Court's leniency, they argued.

31. For the reasons stated above, the 1st to 4th respondents urged this Court to find the appeal devoid of merit, and dismiss it with costs to them.

32. On their part, **Charterhouse Bank,** the 5th respondent, in opposing the appeal, referred to the process server's affidavit and submitted that his attempts to personally serve the appellant with the orders were frustrated and the only logical inference to be drawn from the appellant's conduct is that she was evading service and in the process rendering it impossible to effect personal service upon her. He countered that the burden of proof was upon the appellant to demonstrate that there was no evasion of service since there already exists a presumption of service as stated in the process server's affidavit.

33. Further, the Bank stated that the appellant ought to have made an application for the process server to be cross examined as enunciated in the case of **Shadrack Arap Baiywo v Bodi, Civil Appeal No. 122 of 1986 and Kingsway Tyres & Automart Limited v Rafiki Enterprises Limited, Civil Appeal No. 220 of 1995.**

34. It was its assertion that the appellant neither controverted nor denied the fact that the orders were left in the hands of her assistant and the legal manager of CBK. In that same regard, **Jimmy Muiwa** did not deny that he brought to the attention of the appellant the fact that he had been served with the order.

35. As regards the issue of the appellant denying knowledge of the order, the 5th respondent argued that if indeed she was not aware of the order she would not have appointed an advocate on the 22nd of September

2006 and filed a notice of appeal. The 5th respondent cited several cases in which the issues of sufficiency of knowledge of a court order to prove service for the purpose of contempt proceedings have been exhaustively considered by this Court.

36. On the issue of jurisdiction, the 5th respondent asserted that notwithstanding the appellant's unfounded proposition that the orders were made without jurisdiction, the law imposes a duty on everyone to respect, observe and comply with the orders made by courts of competent jurisdiction. This was reaffirmed by Romer, L.J. in the case of **Hadkison v Hadkison [1952] ALL ER 567**.

37. Relying on several cases in support of their proposition, the 5th respondent was of the view that the appellant was under an obligation to obey the order unless and until the same is vacated or otherwise set aside.

38. The 5th respondent concurred with the learned judge's decision in granting the orders for leave to apply for judicial review orders, having been satisfied that based on the material before it, without going into the depth of the matter, the respondents had established an arguable case.

39. As regards the standard of proof in contempt cases, the 5th respondent submitted that the suggestion by the appellant that the learned judge applied the wrong standard of proof or that she wrongly shifted the burden of proof to the appellant was unsubstantiated.

40. It is also argued by the appellant that the penal notice did not refer to her by name. According to **Order 45 rule 7** of the **Supreme Court**

Rules, penal notice on an order should inform the contemnor of the consequences of the disobedience of the order. The 5th respondent argued that the issue of validity of the penal notice cannot be challenged on the mere ground that it lacked the contemnor's name, further it was highly unlikely that where one is served with an order, it would be addressing any other person in its contents other than the person being served. In its view, the mere failure to mention the contemnor by name is a technicality which cannot be relied upon by a contemnor in a bid to defeat justice.

41. In conclusion, the 5th respondent called upon this Court to reclaim the dignity and authority which had been trampled upon by the appellant by reaffirming the holding of the learned judge adjudging the appellant to be in contempt of court.

42. The 6th respondent, who was also a customer of the 5th respondent, opposed the appeal on the same arguments as advanced by the 1st to 4th respondents.

43. As correctly observed by the respective counsel, this is an appeal challenging the exercise of judicial discretion by a trial Judge. It is trite law that the power of an appellate court to interfere with the exercise of discretion by a trial court is limited, and the appellate Court will not interfere unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been miscarriage of justice. See **Mbogo v Shah [1968] E.A. 93.**

44. In our view, the main issues for our determination are whether service of the order was effected upon the appellant; whether the appellant had knowledge of the order; and whether the order was disobeyed. The Court shall also consider whether in granting the order of stay in the manner it did the High Court exceeded its jurisdiction.

45. The application was brought under **Section 5** of the **Judicature Act** and **Order 52, rule 3** of the **Supreme Court Practice of England. Section 5** of the **Judicature Act** gave the High Court and Court of Appeal power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England. That section has now been repealed by **Section 38** of the **Contempt of Court, Act No. 46 of 2016** which commenced on 13th January 2017.

46. Having noted that, first, we shall address the issue of personal service of the order. In the dispute, the learned judge relied on the affidavit of the process server to prove that there were deliberate attempts to serve the appellant with the order. She thus expressed herself as follows:

> **"I have perused the affidavit of service with a view to establishing whether it can be said that Detho was served. Macharia deposed on 26/9/2006 that he has served the order of 15/9/2006 together with related documents in the following manner…**
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> **"It is evident that he was threatened when he went to effect service. It is also evident from the pleadings that Detho was stationed within the very premises which he could not access. I form the opinion that Macharia did his best in the circumstances and that he effected service in an acceptable manner."**

47. Was the order dated 15/09/2006 served upon the appellant? **Rule 18.6 of the Civil Procedure (Amendment No. 2) Rules 2012** of England provides that a copy of judgment or orders and any orders or agreements fixing or varying the time for doing an act should be served personally. The appellant contends that she was never personally served with the said order. From the record, there are three affidavits of service in relation to the said order. The first two affidavits were sworn by the process server, **Stephen Maina Macharia**, on 26/09/2006 and 04/10/2006 and the third one by **Alfred King'oina Nyairo**, **Advocate**, on 11/10 2006.

48. Mr. Macharia averred that on 21st September 2006 he went to Charterhouse Bank Limited, the 1st interested party, which is at Longonot place, 6th Floor along Kijabe Street, Nairobi, and served the order upon the Ms. Detho's assistant, one Jimmy Muiwa, who acknowledged receipt but declined to sign, claiming he was not authorized to sign anything on her behalf.

49. The appellant contended that the learned judge only considered the affidavit of service sworn by the process server and failed to consider her evidence. **Order 5 rules 15** of the **Civil Procedure Rules, 2010** provides that where the process server deposes that personal service was not possible, it should be indicated in the affidavit of service the attempts made to effect personal service.

50. In our view, a clear examination of the affidavit shows that Mr. Macharia made several attempts to serve the appellant personally before serving her assistant but was met with hostility. We are persuaded that the affidavit sworn by Mr. Macharia complied with the said requirements in that he set out the unsuccessful efforts made to effect personal service before serving Ms. Detho's assistant.

51. In the same breath, the affidavit of service sworn by **Alfred Nyairo King'oina**, Advocate, deposes as follows:

> **"That upon an order issued by this Honourable court on 4th day of October 2006 (a copy annexed hereto and marked "AKN 1") for substituted service, I proceeded to advertise and/or publish in the**

Daily Nation Newspaper on the 6th day of October 2006."

52. In similar circumstances, this Court in **Justus Kariuki Mate & another v Martin Nyaga Wambora & another [2014] eKLR** held as follows:

> **"Both offices have staff and employees attached thereto who act and perform their duties on behalf of the County Assembly.**
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> **Drawing an analogy that a public institution is the same as a corporate entity, service of summons on an authorized officer or legal officer attached to the corporation is deemed as service on the institution and the holder of the office. It, therefore, follows that service upon Boniface Ireri, the Legal Clerk or Officer attached to the County Assembly can be deemed as proper service upon the Speaker and the Clerk of the County Assembly of Embu."**

53. In this appeal, it has been demonstrated that the court order was served upon the appellant's assistant, Jimmy Muiwa. The reasons for such service were properly explained.

54. We agree with counsel for the respondents that the burden lay upon the appellant to demonstrate that the service was not proper in law, but she did not discharge that burden. The appellant's ground that there was no personal service upon her therefore fails.

55. The second issue for our consideration is whether the appellant had knowledge of service of the order. **Black's Law Dictionary, 9th Ed** defines notice as follows: **"A person has notice of a fact or condition if that person (1) has actual knowledge of it; (2) has received information about it; (3) has reason to know about it; (4) knows about a related fact; or (5) is considered as having been able to ascertain it by checking an official filing or recording."**

56. It is well settled today that knowledge of an order is sufficient for purposes of contempt proceedings. The appellant herein had notice of the said order through service upon Jimmy Muiwa and the same orders were advertised in the local daily newspaper on 6th October 2006 to notify all relevant parties. The newspaper adverts were means of substituted service.

57. In addition to that, by a letter dated 22nd September 2006 addressed to Ms. Detho from one Sanjay Shah, the Managing Director of the 5th respondent Bank, it is clear that the letter was received by both CBK and Ms. Detho's assistant as it bears stamps of acknowledgment of receipt. In the aforesaid letter, Sanjay was notifying Ms. Detho of the order and even went to the extent of attaching a copy of the said order. In the letter he complained of Ms. Detho's disappearance. He expressed himself thus:

> **"Surprisingly since Monday 18th June 2006, I have not seen you nor do I have information of your whereabouts. Also the court's process server has been unable to serve you with the court order, as you have not been within the bank. However, we notice a copy of the said court order was served to Jimmy Muiwa, your assistant, on behalf of the bank but he did not sign it, as he was not the statutory manager**."

58. It is therefore highly unlikely that the letter did not get to Ms. Detho.

In the circumstances, we agree with the learned judge when she observed that "**Detho does not deny that she was aware of the court order; it is on record, and I note that Detho has deposed and confirmed as follows**……"

59. In the case of **Justus Kariuki Mate & Another v Hon. Martin Wambora** (Supra), this Court observed that for a person to be held guilty of contempt of an order of the court it had to be proved that he had knowledge of the order. It was further held that for a person to be found to be in contempt of an order of the court the court had to be satisfied beyond a shadow of doubt that the person alleged to be in contempt had full knowledge or notice of the existence of the order of the court forbidding it.

60. In **Woburn Estate Limited v Margaret Bashforth [2016] eKLR**, this Court reaffirmed the position in **Refrigeration and Kitchen Utensils Ltd v Gulabchand Popatlal Shah & Another**, Civil Application No.39 of 1990, where it was observed:

> **"A party who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it…. It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid-whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question……he should apply to the court that it might be discharged. As long as it exists it must not be disobeyed."**

See also **Chuck** v **Cremer** **(1) (1 Coop. Temp.Cott.342)** cited with approval in this Court's judgment in **Shimmers Plaza Limited** v **National Bank of Kenya Limited, Civil Appeal No. 33 of 2012.**

61. Lastly, was the appellant in contempt of court? The learned judge found that she acted in contempt of court and ordered that she regularizes her position within the next thirty six hours otherwise she stood to suffer imprisonment for six months.

62. In **Econet Wireless Kenya Ltd v. Minister for Information & Communication of Kenya & Another [2005] 1 KLR 828** , Ibrahim , J . (as he then was) relied on this Court's decision in **Gulabchand Popatlal Shah & Another** (supra) where the Court of Appeal stated as follows:

> **"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... In HADKINSON v. HADKINSON** (1952) 2 All E.R. 567**, it was held that: 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."[25]** In **Att-Gen. v. Times Newspapers Ltd. [1974] A.C. 273,** Lord Diplock stated:
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> **"…..There is an element of public policy in punishing civil contempt, since the administration of justice would be undermined if the order of any court of law could be disregarded with impunity**."

63. The issues that we must now address ourselves to are whether the appellant deliberately disobeyed the court order; and whether the High Court, having ordered the applicant to regularize the position within thirty six hours she was capable of doing so but intentionally failed to comply.

64. The High Court having granted leave to the 1st, 2nd, 3rd and 4th respondents to apply for various orders of mandamus, certiorari and prohibition, further directed that the leave granted do operate as stay of various acts as stated under paragraph 4 of this judgment. The order was directed against the five respondents to the application who were **the Central Bank of Kenya; the appellant; the Minister for Finance; Kenya Bankers Association and the Kenya Revenue Authority.**

65. The actions that required to be stayed pending hearing and determination of the Judicial Review application included: transfer of funds from Charterhouse Bank to the Central Bank of Kenya, suspension of Charterhouse Bank from the Clearing House; any action, investigation, demand, audit, reports, recommendations and refusal to renew Charterhouse Bank's licence by any of the named respondents.

66. In a related appeal that was heard by this Court together with this appeal, **Civil Appeal No. 279 of 2006, Central Bank of Kenya & Anor v Ratilal Automobiles Limited & Others,** the Court held that some of the acts that the High Court required the appellant to stay were not within her powers and the Court exceeded its jurisdiction in granting the same. The Court held, inter alia:

> **"45. We have looked at the certified copy of the orders that were extracted pursuant to delivery of the impugned ruling. It is apparent that some of the orders appear to have been issued at the behest of CHB which was not one of the ex parte applicants but had merely been named as an interested party. For example, the effect of the stay order was to prohibit: the appellants from interfering with the management or running of CHB; the 1st appellant from refusing to grant CHB a certificate confirming its operational status and its liquidity; KBA from refusing CHB to transact at the clearing house; the 2nd appellant from adversely exercising any functions of powers and/or interfering with the business and operations of CHB; Kenya Revenue Authority (KRA) from investigating, accessing, auditing, demanding or taking any action against CHB. The court also stayed any action or decision, investigation, reports or recommendations whatsoever regarding refusal to renew the licence of CHB. In other words, the order was interpreted to mean, inter alia, that the appellants were directed to return the control of CHB to its directors, which, in our view, could not have been the case.**
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> **46. In Grain Bulk Handlers Limited v J.B. Maina & Company Limited and 2 others (supra) this Court noted that the order of stay that had been granted in that matter was so wide, imprecise and ambiguous that it was doubtful whether it was capable of implementation. The court also faulted the learned judge for failing to consider the full implications of the order of stay."**

67. Considering the nature of the orders of stay that were issued by the High Court, we do not think that the appellant can be said to have intentionally failed to comply with the same. The grounds upon which the contempt application was made were that despite service of the orders of stay the respondents (the Governor of the Central Bank of Kenya, the appellant and Momanyi Bundi) jointly and severally had:

> **(i) declined and continue refusing to honour the 1st to 4th respondents' bills of exchange drawn in the name of Charterhouse Bank.**
>
> **(ii) refused to hand over the operations of Charterhouse Bank to its directors and/or allow the said respondents to transact their normal banking business**

(iii) remained adamant and even beefed up security on the Charterhouse Bank's countrywide outlets.

68. In her replying affidavit, the appellant stated that the Clearing House is an organ of the Kenya Bankers Association and neither she nor the Central Bank of Kenya had any control of its activities. As such, she could not be accused of having refused to honour the 1st to 4th respondents' bills of exchange (cheques).

69. The appellant further stated that neither herself nor the Governor of the Central Bank of Kenya had made any decision, taken any action, made any reports, investigation, audit or recommendation concerning Charterhouse Bank after the date of issuance of the orders of stay.

70. Considering the fact that the learned judge dismissed the respondents' application against the Governor of the Central Bank of Kenya as well as Momanyi Bundi; the appellant could not be said to have disobeyed the court orders in the manner complained of. The learned judge observed in her impugned ruling that it was clear that the ex parte applicants had abandoned the prayer for stay of the placing of Charterhouse Bank under statutory management and the appointment of the appellant as a statutory manager; and that the appellant as the statutory manager would remain in office, save that she would be required to comply with the orders issued by the court.

71. The acts complained of that were said to have amounted to disobedience of the orders issued were either outside the scope of the appellant's duty, or were such that a statutory manager could not perform the statutory functions of that office without being accused of breaching the orders. For instance, the appellant, having lawfully declared a moratorium on the payment by Charterhouse Bank to its depositors and creditors, she could not authorize payment of any bill of exchange without breaching the law. The appellant and the Governor of the Central Bank of Kenya had, in a different application, taken the necessary steps to challenge the ex parte orders that had been issued but the contempt application was decided before the other application could be disposed of.

72. In such circumstances, it is not conceivable how the appellant, having been lawfully appointed a statutory manager of Charterhouse Bank, could, in the circumstances aforesaid, be accused of having breached court orders in the performance of her statutory duties, as long as the performance was within the law. It is trite law that before a person is cited for contempt, the Court must be satisfied that the impugned order is clear and unambiguous. See this Court's decision in **Jihan Freighters Limited v Hardware & General Stores Limited [2015] eKLR** where it was held:

> **"The rationale of the requirement that a court order must be clear, precise and easy to understand is founded on the self-evident fact that breach of a court order may result in contempt of court proceedings as well as the severe sanctions, including loss of liberty or property, that are visited upon a contemnor. Accordingly, the grave consequences that attend a violation of a court order ought not to be casually visited upon a person unless and until it is clear what the court order required him to do or to abstain from doing."**

We cannot say that the orders granted by the High Court were clear, precise, unambiguous and capable of execution or implementation by the appellant on her own.

73. It is evident that Charterhouse Bank had interpreted the order of stay to mean, inter alia, that control of the bank's operations was to revert to its directors, considering the averments by the 6th respondent and his concerted effort to remove the appellant from office as a statutory manager, which we dare say was not the case. As we stated in the related matter, **Civil Appeal No. 279 of 2006**, some of the ex parte orders were rather imprecise and ought not to have been issued at the leave stage. We agree with the appellant's counsel that the High Court did not have jurisdiction to grant some of the orders it issued at an exparte stage of the proceedings. For example, the court had no jurisdiction to grant an interlocutory exparte mandatory order to compel CBK to renew the 5th respondent's banking licence. An exparte mandatory injunction cannot be issued in judicial review proceedings. An order issued without jurisdiction is null and void and any purported breach thereof cannot attract criminal sanctions.

74. All in all, we are not satisfied that there was deliberate breach or willful disobedience of the ex parte orders by the appellant. Consequently, we allow this appeal and set aside the ruling delivered on 24th November, 2006. We substitute therefor an order dismissing the Notice of Motion dated 26th September, 2006.

75. The costs of this appeal are awarded to the appellant.

Dated and delivered at Nairobi this 20th day of December, 2018.

E.M. GITHINJI

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR