



Waweru v Ngama & another; TO K’opere & Co Advocates (Applicant); Managing Director/CEO NCBA - Bank (Contemnor) ((In the Matter of Contempt)) (Civil Appeal 273 of 2018) [2025] KEHC 1851 (KLR) (Civ) (27 February 2025) (Ruling)

Neutral citation: [2025] KEHC 1851 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
CIVIL APPEAL 273 OF 2018
TW CHERERE, J
FEBRUARY 27, 2025

BETWEEN

JAMES NJOMO WAWERU APPELLANT

AND

PAUL KIBERA NGAMA 1ST RESPONDENT

ROBERT TANUI 2ND RESPONDENT

AND

TO. K’OPERE & CO ADVOCATES APPLICANT

AND

THE MANAGING DIRECTOR/CEO NCBA-BANK CONTEMNOR
(IN THE MATTER OF CONTEMPT)

RULING

1. Before me is a notice of motion amended on 06th December 2024. The prayers in it are as follows:
 - i. That the Managing Director/Chief Executive Officer of NCBA-Bank, Mr. John Gachora be and is hereby summoned to show cause why he should not be punished for contempt of court orders given on 16th May 2023 and issued on 31st May 2023 and served upon the bank on 05th June 2023.



- ii. That in default of such cause being shown, the Managing Director/Chief Executive Officer of NCBA-Bank, Mr. John Gachora be punished for contempt of court orders by imprisonment for a term not exceeding six months and/or a fine or both
 - iii. That the Senior Legal Counsel of NCBA-Bank Kenya PLC Ms. Christine Wahome be summoned to court for cross-examination and to show cause why she should not be punished for perjury in her replying affidavit sworn on 06th August 2024 on the allegation that the contemnor bank does not have a person holding the position of CEO
 - iv. That the amount of withheld interest by NCBA Bank be paid to the 1st Applicant's advocates together with further interests thereon from 14th April 2022 together with costs of this application and the application dated 09th September 2022 be borne by the contemnor
 - v. That the contemnor bank do provide a statement of account of the withheld interest from 14th April 2022 until 27th June 2024 when the sum of KES. 130,960.45 was released
 - vi. That the contemnor be condemned to pay the costs of these proceedings herein from 08th September 2022 to date to be assessed or taxed
2. The application is based on grounds among others that:
- i. 1st Applicant's advocate deposited KES. 1,764,925.50 with NCBA Bank
 - ii. By an order given on 16th May 2023 and issued on 31st May 2023, the court directed that the money be released to the firm of T.O.K'Opere & Co. Advocates
 - iii. That on 14th April, 2022, the Bank released the sum of KES. 1,764,925.50 to the firm of T.O.K'Opere & Co. Advocates
 - iv. That on 27th June 2024, the Bank subsequently, released KES. 130,960.45 to the firm of T.O.K'Opere & Co. Advocates interest being interest on the principal sum
 - vii. That in response to the application dated 15th May 2024, Ms. Christine Wahome the Senior Legal Counsel of NCBA-Bank Kenya PLC swore a replying affidavit sworn on 06th August 2024 indicating that the contemnor bank did not have a person holding the position of CEO yet the NCBA Group PLC annual report for the year ending 31st December 2023 reveals that Mr. John Gachora is the Group Managing Director
3. The application is additionally supported by an affidavit sworn on 06th December 2024 by Tom. O.K'Opere, Advocate for the Appellant in which he reiterates the grounds on the face of the application.
4. Annexed to the affidavit are the following documents which I have enumerated for ease of reference.
- a. Extracts of Website and NCBA Group PLC annual report for the year ending 31st December 2023 indicating that Mr. John Gachora is the Group Managing Director
 - b. Application dated 08th September 2022 and annexures thereto
 - c. Order given on 16th May 2023 and issued on 31st May 2023 directing that interest on KES. 1,764,925.50 with NCBA Bank be released to the firm of T.O. K'Opere & Co. Advocates
 - d. Letter dated 06th June 2023 to NCBA Bank Head office to release the money as ordered by the court



- e. Letter dated 25th March 2024 indicating that NCBA Bank had released the sum of KES. 1,764,925.50 to the firm of T.O. K’Opere & Co. Advocates on 14th April 2022 and asking for the release of interest thereof in the sum of KES. 129,972.50
5. The application is opposed by the contemnor bank by a replying affidavit sworn by Ms. Christine Wahome on 20th February 2025 in which she avers that the Bank is not in contempt. The deponent reiterates the contents of her affidavit sworn on 06th August 2024, stating that NCBA Group PLC is an independent entity separate from NCBA Bank Kenya PLC and that Mr. John Gachora is the Group Managing Director of NCBA Group PLC and neither the CEO nor the MD of NCBA Bank Kenya PLC.

Analysis

6. I have considered the application in light of the affidavits on record and annexures thereto. I have identified the issues for determination in this application as follows:
 1. Whether Mr. John Gachora is personally liable for contempt of court orders issued on 31st May 2023
 2. Whether Ms. Christine Wahome is guilty of perjury
 3. Whether NCBA Bank should provide a full statement of account to the Applicant
 4. Whether NCBA Bank is withholding interest due
 5. Who bears the costs of this application.
7. Contempt of court refers to any conduct that defies, disrespects, or disobeys the authority, justice, and dignity of a court. It is a mechanism used to uphold the rule of law and ensure compliance with court orders. The primary purpose is to safeguard the integrity of judicial proceedings and maintain public confidence in the judiciary.
8. Contempt proceedings are quasi-criminal and since a person’s liberty is at stake, the standard of proof is higher than in civil cases. This principle was restated in the case of *Mutikika v Baharini Farm Ltd* [1985] KLR 227 where it was held as follows:

“The Courts take the view that where the liberty of the subject is, or might be involved, the breach for which the alleged contemnor is cited must be precisely defined. A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be satisfactorily proved... I must be higher than proof on a balance of probabilities, almost, but not exactly, beyond reasonable doubt. The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to offence, which can be said to be quasi-criminal in nature. However, the guilt has to be proved with such strictness of proof as is consistent with the gravity of the charge... Recourse ought not be had to process of contempt of court in aid of a civil remedy where there is any other method of doing justice. The jurisdiction of committing for contempt being practically arbitrary and unlimited, should be most jealously and carefully watched and exercised with the greatest reluctance and the greatest anxiety on the part of judges to see whether there is no other mode which is not open to the objection of arbitrariness, and which can be brought to bear upon the subject. A judge must be careful to see that the cause cannot be mode of dealing with persons brought before him. Necessary though the jurisdiction may be, it is necessary only in the sense in which extreme measures are sometimes necessary to



preserve men's rights, that is, if no other pertinent remedy can be found... Applying the test that the standard of proof should be consistent with the gravity of the alleged contempt... it is competent for the court where a contempt is threatened or has been committed, and on an application to commit, to take the lenient course of granting an injunction instead of making an order for committal or sequestration, whether the offender is a party to the proceedings or not.”

9. Section 5 of the *Judicature Act* Cap 8 Laws of Kenya provides that:

The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate courts.

10. The court in *Koilel & 2 others v Koilel & another (Civil Appeal E002 of 2021)* [2022] KEHC 10288 (KLR) (30 June 2022) (Judgment) cited (*Kristen Carla Burchell vs Barry Grant Burchell*, Eastern Cape Division Case No. 364 of 2005) with approval and reiterated that to succeed in civil contempt proceedings, the Applicant has to prove;

- i. The terms of the order;
- ii. Knowledge of these terms by the Respondent; and
- iii. Failure by the Respondent to comply with the terms of the order

11. There is evidence that the court order given on 16th May 2023 and issued on 31st May 2023 directed that interest in respect of KES. 1,764,925.50 deposited with NCBA Bank be released to the firm of T.O. K'Opere & Co. Advocates. The existence of a clear and unambiguous court order is therefore not in dispute.

12. The documents on record reveal that the Bank delayed compliance with the court order and only released a sum of KES 130,960.45 on 27th June 2024, well over a year later from the date of the order. The failure by the Bank to comply with the court order promptly in my considered view constitutes a prima facie case of contempt.

13. It is on record that the contemnor was not a party to the proceedings in which the order in question was issued. In the case of *Shimmers Plaza Limited v National Bank of Kenya Limited* [2015] eKLR the Court of Appeal considered whether knowledge of a Court order or judgment by an Advocate of the alleged contemnor would be sufficient for contempt proceedings and stated in the affirmative that: -

“We hold the view that it does. This is more so in a case as this one where the Advocate was in Court representing the alleged contemnor and the orders were made in his presence. There is an assumption which is not unfounded, and which in our view is irrefutable to the effect that when an Advocate appears in Court on instructions of a party, then it behoves him to report back to the client all that transpired in Court that has a bearing on the clients' case...”

14. The foregoing jurisprudence reveals that the court is more concerned with knowledge of the existence of Court orders than with strict personal service.

15. The application seeks to summon Mr. John Gachora, to show cause why he should not be punished for contempt of the court order issued on 31st May 2023.

16. In determining this issue, it would be important to determine whether Mr. John Gachora was made aware or became aware of the court order in issue.



17. In this case, the Applicant has not filed an affidavit of service of the court order and it has therefore not been demonstrated on whom the order was served. The record however demonstrates that a copy of the order was subsequently annexed to a letter dated 06th June 2023 that was served on the same day and acknowledged by the Legal Office of NCBA Bank.
18. The bank's position, as supported by the affidavit of Ms. Christine Wahome sworn on 20th February 2025 is that the Bank is not in contempt. The deponent reiterates the contents of her affidavit sworn on 06th August 2024 that Mr. Gachora is not the CEO or Managing Director of NCBA Bank Kenya PLC. The NCBA Group annual report for the year ending 31st December 2023 filed by the Applicant indeed confirms that Mr. Gachora is the Group Managing Director of NCBA Group PLC, a separate entity.
19. The consequences of non-compliance with court orders constitute contempt (See Republic v Principal Secretary, Ministry of Defence Ex Parte George Kariuki Waithaka [2020] eKLR). Contempt of court is personal in nature and liability cannot be imposed on a person who is not directly responsible for implementing the order. (See Sang v Keter & 5 others (Environment & Land Case E010 of 2023) [2024] KEELRC 2376 (KLR) (1 October 2024) (Ruling)).
20. From the evidence on record, the Applicant has not demonstrated that Mr. Gachora in his capacity as the Group Managing Director of NCBA Group PLC was personally involved in the decision to withhold the funds owed by NCBA Bank Kenya PLC. The claim against him is therefore unsubstantiated, and he cannot be held in contempt.
21. This application also seeks to summon Ms. Christine Wahome, Senior Legal Counsel of NCBA Bank, for cross-examination regarding her affidavit sworn on 06th August 2024. It is alleged that she misrepresented the existence of a CEO at NCBA Bank Kenya PLC.
22. The bank's response maintains that Mr. Gachora is not the CEO of NCBA Bank Kenya PLC but rather the Group Managing Director of NCBA Group PLC as supported by the NCBA Group annual report for the year ending 31st December 2023 filed on behalf of the Applicant.
23. Perjury requires proof that a person knowingly and intentionally made a false statement under oath. In the absence of evidence that Mr. Gachora is CEO or Managing Director of NCBA Bank Kenya PLC, the Applicant has failed to provide evidence that Ms. Wahome's affidavit sworn on 06th August 2024 is false. Consequently, the request to summon Ms. Wahome's for cross-examination on allegations of perjury on the contents of the said affidavit lacks merit and is declined.
24. The application further seeks that the bank be directed to provide a statement of account of the withheld interest from 14th April 2022 until 27th June 2024 when the sum of KES. 130,960.45 was released
25. Before the court can safely grant the order for production of an account statement as sought in this matter, there must be evidence that the Applicant requested the statement from the Bank and the Bank refused and or failed to provide it.
26. Courts only determine disputes that actually exist. In Speaker of the National Assembly v Karume [1992] KLR, the Court of Appeal emphasized that where a procedure exists for resolving a dispute, it must first be followed before seeking court intervention.
27. In the absence of evidence that the Applicant requested for the statement and it was not provided, I find that there is no dispute for the court to resolve regarding its production and the order is thus declined.



28. The application additionally seeks interest from 14th April 2022. Courts do not assume that interest is due unless there is evidence or a legal basis to support such a claim.
29. In *Prem Lata v Peter Musa Mbiyu* [1965] EA 592, the court held that interest must either be expressly agreed upon, provided for by statute, or proven to have accrued before it can be awarded.
30. Under the provisions of Section 107 of the *Evidence Act* (Cap 80, Laws of Kenya), the Applicant bears the burden to prove that further interest accrued after 27th June 2024 when the interest in the sum of KES. 130,960.45 was released and that the bank was under a legal obligation to pay such interest.
31. In the absence of such evidence, the prayer for interest is speculative and it is declined.
32. Finally, the application seeks costs of this application and the application dated 09th September 2022. Section 27(1) of the *Civil Procedure Act* gives courts unfettered discretion to determine by whom costs are to be paid. It is trite that costs follow the event and a successful litigant ought not to be denied costs unless for good cause to be shown. (See *Farah Awad Gullet v CMC Motors Group Limited* [2018] KECA 158 (KLR)). The application having failed, the burden to bear the costs of the application lie with the Applicant.
33. From the foregoing analysis, I find that the notice of motion amended on 06th December 2024 has no merit and it is dismissed in its entirety with costs to NCBA Bank Kenya PLC.

DELIVERED AT NAIROBI THIS 27TH DAY OF FEBRUARY 2025

WAMAE.T. W. CHERERE

JUDGE

Appearances

Court Assistant - Ubah

For Applicant - Mr. Okocho for T.O. K'Opere & Co. Advocates

For Contemnor - Mr. Kongere for Muriu Mungai & Co. Advocates LLP

For the Appellant - Mr. Kariuki for Kimondo, Gachoka & Co. Advocates

For Respondents -N/Afor Kang'ethe & Mola Advocates

