



Muthama & another v Athusi Bar and Restaurant Company Limited & 3 others (Civil Case E067 of 2021) [2023] KEHC 18238 (KLR) (Commercial and Tax) (26 May 2023) (Ruling)

Neutral citation: [2023] KEHC 18238 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E067 OF 2021**

DAS MAJANJA, J

MAY 26, 2023

BETWEEN

JOYCE NZISA MUTHAMA 1ST PLAINTIFF

CONNIE MBITHE MUIA 2ND PLAINTIFF

AND

ATHUSI BAR AND RESTAURANT COMPANY LIMITED 1ST DEFENDANT

JOHN MUTAKI 2ND DEFENDANT

BEN MUKULA 3RD DEFENDANT

PATRICK MAKOANI NGONYO 4TH DEFENDANT

RULING

1. On September 6, 2022, the court issued orders to the effect that the Defendants were

“.....directed to supply to the plaintiffs a true and accurate record of the financial affairs of the Company from 1957 to-date within 14 days of this court’s ruling.”

When the matter was mentioned before the court on February 21, 2023 to confirm compliance, the Defendants had yet to comply with the order. The court directed the Defendants to show cause why they have not complied and why they should not be held in contempt of court. The Defendants have filed affidavits sworn on March 1, 2023 in response to this direction by the court.

2. The Defendants depone that they have been having challenges complying with the order of the court for a number of reasons. First, that for the period between 1957 to 1968 the 1st Defendant (“the Company”) was not in existence as it was registered in 1969 by the Registrar of Companies and according to the repealed [Companies Act](#) and therefore they cannot comply with the order to supply



- the Plaintiffs with an accurate financial record of the Company for the period between 1957 and 1968 as such records do not exist.
3. Second, that before the orders of September 6, 2022, they supplied the Plaintiffs with financial records from 2016 to 2020 and that it was after these records were provided that the Plaintiffs raised issues, inter alia, that the records did not contain sufficient information and that the list of properties was not exhaustive as they were aware of other properties owned by the Company that were not on the list. The Plaintiffs further pointed out that the bankers and bank accounts provided were misleading.
 4. The Defendants state that they appointed new auditors to look at the available information afresh in an effort to comply with the court orders. The said auditors prepared the financial records for the period between 2020 and 2021 which have been provided. They further state that they have provided an exhaustive list of properties owned by the Company and detailed the financial status of the Company. The Defendants maintain that the only Company records available have been provided to the court and that the Company has no other or further financial records available.
 5. The Plaintiffs responded to the Defendants' depositions through the 1st Plaintiff's supplementary affidavit sworn on March 13, 2023. They stated that the year of incorporation of the Company has never been disputed and that the Defendants have never objected to producing financial reports from 1957. They contend that the Company has been in operation since 1957 but that it was registered on August 18, 1969. In any case, they state that the Defendants have not explained why they have not produced the financial reports from 1969 to-date since the said year and period is covered by the order. The Plaintiffs state that the Defendants have a duty to keep proper accounting records of the Company and that their averment that they cannot trace previous financial records is clearly in breach of the duty of care and diligence that they owe the Company.
 6. The Plaintiffs state that the financial records for the period between 2020 and 2021 annexed in the Defendants' depositions have never been shared to the Plaintiffs or the Company's shareholders. They add that in the annexed financial documents, the 2nd to 4th Defendants have not indicated who the directors of the Company are. The Plaintiffs thus aver that the Defendants' contention that they cannot trace the financial records for the period in question means that they are in contempt of the orders of September 6, 2022. That they are also in breach of section 628 of the *Companies Act, 2015* and have committed an offence and that the Company is liable under section 629 of the *Companies Act, 2015* to a fine not exceeding Kshs 2,000,000.00 and the 2nd to 4th Defendants, a fine not exceeding Kshs 1,000,000.00 or to imprisonment for a term not exceeding 2 years or both. The Plaintiffs pray that the 2nd to 4th Defendants be committed to civil jail for being in contempt of the orders issued on September 6, 2022.
 7. The Defendants have been summoned to show cause why they should not be held in contempt of court for failing to supply the Plaintiffs with financial statements or reports on the Company's financial affairs from 1957 to-date. They have given their reasons for not doing so which I have already highlighted above. They state that the records are just not available even after proper diligence as they relate to a period spanning 46 years and that the auditors who may have had those financial reports have either closed their offices or have not been helpful in tracing the records due to lapse of time. Further, that former officials of the Company have since died.
 8. The court found in its ruling of September 6, 2022 that the Defendants were able to furnish a list of properties including title deeds and letters of allotment, records of the Company including the certificate of incorporation and articles of association, land rates payment receipts and annual financial statement reports of the Company for the years 2015-2019. The Defendants have since provided financial statements for the years 2020 and 2021.



9. What has not been provided are the said financial records from 1957 which are the subject of the present proceedings. Whereas the Plaintiffs insist that the Defendants have a duty to comply with the orders of the court and furnish it with the Company from 1957 to date, the court cannot be blind to the fact that there is a possibility of documents dating back to the year 1957 are not available. The reasons given for failure to trace the documents are not unreasonable and are indeed plausible. If indeed the financial records cannot be traced, then it would be futile to compel the Defendants to produce them as the court can never issue orders in vain.
10. In order to commit the Defendants for contempt, the court must be satisfied that the disobedience is deliberate. In this respect I associate myself with the observations of the court in *Samuel NM Mweru and others v National Land Commission and 2 others* [2020] eKLR that:
 - (38) The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed 'deliberately and mala fide.' A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe he/she is entitled to act in the way claimed to constitute the contempt. In such a case good faith avoids the infraction. Even a refusal to comply that is objectively unreasonable may be bona fide (though unreasonableness could evidence lack of good faith).
11. I cannot say that the Defendants have not made attempts to comply with the orders of the court or that it is not possible that the said financial records are unavailable. They have given reasonable explanations as to why they cannot comply with the orders.
12. Before I close this matter, I wish to point out that this suit for the purpose of directing the Company to disclose all the documents in their possession. It is not a suit for dealing the sufficiency or otherwise of the contents of the documents or the duties of the office holders in safeguarding documents. Those are issues the Plaintiffs will not have the opportunity to litigate in another forum.
13. In conclusion, I am satisfied that the Defendants have deliberately disregarded or disobeyed the orders of the court issued on September 6, 2022. They have shown cause that the said orders cannot be complied with as the records relating to the period between 1957 and 2014 cannot be traced. They have also provided the more recent documents in the companies possession.
14. The order *nisi* is now discharged. The file is closed.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF MAY 2023.

D. MAJANJA

JUDGE

Court of Assistant: Mr M. Onyango

Ms Maina instructed by Maina King'ara and Company Advocates for the Plaintiffs.

Mr Mutinda instructed by M. Mutinda and Associates Advocates for the Defendants.

