



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Gupta v Gupta & 4 others (Commercial Case E70 of 2021)  
[2022] KEHC 17065 (KLR) (30 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 17065 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
COMMERCIAL CASE E70 OF 2021  
MN MWANGI, J  
NOVEMBER 30, 2022**

**BETWEEN**

**RUPA GUPTA ALIAS RUPA BULI BULI BOSE ..... PLAINTIFF**

**AND**

**DAMAN GUPTA ..... 1<sup>ST</sup> DEFENDANT**

**VARUN GUPTA ..... 2<sup>ND</sup> DEFENDANT**

**KUNJ GUPTA ..... 3<sup>RD</sup> DEFENDANT**

**BAMBURI SUPERMARKET LTD ..... 4<sup>TH</sup> DEFENDANT**

**REGISTRAR OF COMPANIES ..... 5<sup>TH</sup> DEFENDANT**

**RULING**

1. The application for determination by this Court is the plaintiff's Amended Notice of Motion dated September 9, 2021 brought under Order 40 Rule 3(1), (3) of the *Civil Procedure Rules, 2020* and Sections 1A, 1B, 3A and 63(c) of the *Civil Procedure Act*. The plaintiff prays for the following orders:
  1. Spent;
  2. That the 4<sup>th</sup> defendant's account Number xxxx under the name Bamburi Supermarket Ltd in SBM Bank be suspended and deactivated pending the hearing of the Notice of Motion scheduled for interparty hearing on the October 25, 2021;
  3. That Mr Varun Gupta (2<sup>nd</sup> defendant) and Mr Kunj Gupta (3<sup>rd</sup> defendant) be cited for contempt of the Court orders made by Hon. Lady Justice Njoki Mwangi on the July 30, 2021 and be committed to jail for a term the Court shall find suitable not exceeding 6 months, or as the Court may deem fit; and



- 3a. That Willis O. Oluga, be held in breach of the terms of the orders made by Lady Justice Njoki Mwangi on the July 30, 2021 and appropriate action be taken as the Court deems fit.
2. The application is premised on the grounds on the face of it and the supporting affidavit sworn on August 31, 2021 and a further affidavit sworn on September 10, 2021 by the plaintiff. In summary, the grounds are that the Court on July 30, 2021, made orders in reference to the management, ownership, and the running of the affairs of the building known as Gupta Complex Premises (hereinafter “the suit property). The said orders were served upon the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants but upon service, the said defendants purporting to act for the 4<sup>th</sup> defendant, proceeded to notify the tenants that they needed to enter into new lease agreements with them, failure to which they would be evicted.
  3. The plaintiff deposed that through a letter dated September 7, 2021, the firm of Oluga & Co. Advocates wrote to a tenant, Lloyd Masika, and notified the said tenant that they would be arrested if they did not comply with Justice Naikuni’s order issued on August 19, 2021, and that the Court orders made on July 30, 2021 did not affect the 4<sup>th</sup> defendant.
  4. The plaintiff further deposed that due to the threatening letter addressed to the 17 tenants within Gupta Complex by the firm of Oluga & Co. Advocates at the instruction of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants, the tenants within Gupta Complex wanted to move out. The plaintiff urged this Court to step in to bring order and that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants should face the penal consequences as provided by statute for contempt of Court orders.
  5. The 1<sup>st</sup> to 4<sup>th</sup> defendants opposed the instant application by way of a Notice of Preliminary Objection dated September 27, 2021 on the following grounds-
    1. The dispute is purely about the use and occupation of the property known as Land Reference No. 3413 Section 1 Mainland North on which is erected a building known as Gupta Complex and therefore falls squarely within the jurisdiction of the Environment and Land Court pursuant to Article 162(2)(b) of the [Constitution of Kenya, 2010](#) and not the jurisdiction of this Court.
    2. The dispute regarding use and occupation of the property known as Land Reference No. 3413 Section I Mainland North has since been referred to the Environment and Land Court for determination by the 4<sup>th</sup> defendant who is the registered owner thereof in ELC Case No. 165 of 2021: [Bamburi Supermarket Limited v Rupa Gupta alias Rupa Buli Buli Bose](#).
    3. The issue of whether the shares of the late Premlal Ramnath alias Premlal Ramnath Gupta should devolve to the plaintiff can only be determined in a succession cause and not in this commercial case.
    4. The issue of how to distribute the shares (assets) of the late Premlal Ramnath alias Premlal Ramnath Gupta is pending determination in High Court Succession Cause No. 5 of 2020: The Estate of late Premlal Ramnath alias Premlal Ramnath Gupta which was filed by the plaintiff herself. The issue is therefore sub judice and cannot be dealt with in this case.
    5. The plaintiff has no *locus standi* to file this suit because she is not the owner of the suit property and therefore has no legal capacity to seek orders for the protection of the suit property by restraining interference thereof by any person.
    6. No authority, sanction, and resolution of the 4<sup>th</sup> defendant was passed to file this suit and seek orders of injunction to protect the 4<sup>th</sup> defendant’s suit property from interference as sought in the plaint.



6. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants opposed the amended application by way of a replying affidavit sworn on September 23, 2021 by the 2<sup>nd</sup> defendant. In summary, he averred that it is not true that the 2<sup>nd</sup> and the 3<sup>rd</sup> defendants have violated or breached the orders made by the Court on July 30, 2021, since the said orders only restrained the 2<sup>nd</sup> and 3<sup>rd</sup> defendants from interfering with the management, ownership and running of the suit property. They deposed that the orders did not restrain the 2<sup>nd</sup> and 3<sup>rd</sup> defendants from discharging their duties as the directors of the 4<sup>th</sup> defendant. They averred that the 4<sup>th</sup> defendant as a limited company is free to pass resolutions to file suit or carry out any undertaking within its objectives, open bank accounts and collect rent from Gupta Complex.
7. The 2<sup>nd</sup> defendant also averred that the letter dated August 27, 2021 written by Willis Oluga & Company Advocates was written on behalf of, and on the instructions of the 4<sup>th</sup> defendant which is a separate legal entity from the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, and no evidence had been furnished by the plaintiff to prove when, how much, and how the rent was collected and/or paid to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. He stated that since a contempt application is a serious one capable of denying the 2<sup>nd</sup> and 3<sup>rd</sup> defendants their liberty, it was reckless for the plaintiff to casually make allegations not backed by evidence. It was averred that issuing of threats is a criminal offence and therefore, any tenant that is alleged to have been threatened should report the matter to the police.
8. It was deposed by the 2<sup>nd</sup> defendant that the resolution passed on the January 12, 2021 by the 4<sup>th</sup> defendant was passed over six months before the Court orders were made on July 30, 2021, and therefore, there was no way that resolution could be in violation of the Court orders since the Court orders never restrained the 2<sup>nd</sup> and 3<sup>rd</sup> defendants from running the affairs of the company, and passing resolutions. The 2<sup>nd</sup> defendant further deposed that Account Number xxxx was opened as early as July 13, 2021 and there was no way an account which was operational as at July 13, 2021 could be in violation of the Court orders issued on July 30, 2021.
9. The 2<sup>nd</sup> defendant stated that there was no reason for interference with the running of the 4<sup>th</sup> defendant's Account Number xxxx, since no wrong doing had been pleaded against the said defendant either in the plaint or in the instant application.
10. It was averred that although there is no specific prayer against the 1<sup>st</sup> defendant in the instant application, accusations had been made against him in the supporting affidavit which is a clear manifestation of bad faith on the part of the plaintiff, whereby baseless accusations are made against all and sundry.
11. The 2<sup>nd</sup> defendant deposed that the issue of who should receive rent from the tenants was not raised by the plaintiff in the suit, and there is no prayer in the plaint seeking the Court's directions on who should receive rent. He stated that the Court orders made on July 30, 2021 did not give the plaintiff the right to collect, and receive rent from the suit property since it is the 4<sup>th</sup> defendant who is the registered proprietor of the suit property. It was stated that vide a letter dated September 3, 2021, the plaintiff through her Advocate on record wrote to all tenants occupying the suit property, and informed them that the Court orders directed them to continue paying rent to her, and as a result of the misinformation and misrepresentation, the tenants had expressly written to the 4<sup>th</sup> defendant indicating that they would not pay rent to it.
12. It was claimed that the plaintiff is a thief who is currently receiving rent from the suit property in her personal capacity leaving nothing for the benefit of the 4<sup>th</sup> defendant, and its shareholders including the purported estate of Premlal Ramnath Gupta, which ironically the plaintiff purports to protect. It was further claimed that that the plaintiff is not deserving of any protection orders from this Court.



13. The 2<sup>nd</sup> defendant averred that in the interest of justice, rent ought to be paid to the 4<sup>th</sup> defendant, instead of the same being squandered by the plaintiff but if the Court finds that the late Premal Ramnath Gupta was a shareholder of the 4<sup>th</sup> defendant, then the share of rent due to the deceased's estate will simply go to the deceased's beneficiaries who include the 2<sup>nd</sup> defendant, who is a biological son to the deceased.
14. Through a replying affidavit sworn on September 23, 2021 by Mr Willis Oluga, the Counsel for the defendants, he opposed the amended application and averred that vide a resolution made on May 31, 2021, the 4<sup>th</sup> defendant appointed his law firm to take over the management and running of the suit property from the plaintiff, who according to the 4<sup>th</sup> defendant is an imposter. Mr Oluga further averred that his express mandate was to write to all the tenants occupying the suit property informing them to sign proper leases with the 4<sup>th</sup> defendant, to pay rent to an account opened and designated by the 4<sup>th</sup> defendant for purposes of receiving the rent.
15. Mr Oluga averred that in relation to the letters dated July 13, 2021 and August 27, 2021, he wrote them on instructions of the 4<sup>th</sup> defendant and not on instructions of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. It was further deposed that the letter dated July 13, 2021 was written way before the Court made the Order on July 30, 2021. He stated that as far as the letter dated August 27, 2021 is concerned, the same was written on a "without prejudice" basis and cannot be used against the Advocate or his clients. He averred that even if the said letter was to be considered, its contents clearly show that the 4<sup>th</sup> defendant's Advocate did not tell the tenants to contact the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, because they were all aware at that time, of the orders of the Court. He also averred that the said letter was clear that the tenants should contact the law firm of Willis Oluga & Company Advocates for further information and instructions. He stated that the plaintiff was deliberately misleading the Court about what was plainly clear in black and white.
16. Mr Oluga deposed that being an Advocate representing the 1<sup>st</sup> to 4<sup>th</sup> defendants, he is an agent of disclosed principals and he cannot be cited for breach of a Court order to which he was not a party. He stated that the amended application is a lame attempt by the plaintiff and her Advocates on record to intimidate and instill fear in him so that he does not render his otherwise competent, quality, and excellent services to his clients.
17. The application herein was disposed of by way of written submissions. The plaintiff's submissions were filed on October 25, 2021 by the law firm of Martin Tindi & Co. Advocates, while the 1<sup>st</sup> to 4<sup>th</sup> defendants' submissions were filed on January 21, 2022 by the law firm of Wills Oluga & Company Advocates. Parties dispensed with highlighting of their written submissions.
18. On the issue of whether the 4<sup>th</sup> defendant was affected by the orders of the Court made on July 30, 2021, Mr Tindi, learned Counsel for the plaintiff submitted that the said orders directly affected the 4<sup>th</sup> defendant since the current directors have been accused of acting in a fraudulent manner by fraudulently transferring the share of the deceased; and that the 4<sup>th</sup> defendant as currently constituted is a fraud. He submitted that all orders directly affect the 4<sup>th</sup> defendant, and the 2<sup>nd</sup> and 3<sup>rd</sup> defendants cannot hide under the corporate veil of the 4<sup>th</sup> defendant when the case is one of fraud and their defence shows willful contempt of Court orders.
19. He also submitted that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants are the mind and will of the 4<sup>th</sup> defendant and must be presumed to have informed it that the Court order did not affect it. He asserted that the 4<sup>th</sup> defendant's actions are willful disobedience of the Court orders which should not be taken lightly. He urged this Court to lift the corporate veil and find the 2<sup>nd</sup> and 3<sup>rd</sup> defendants guilty of contempt of Court and punish them accordingly. He cited the finding in *John Warungu Wanjeru vs Family Bank Limited & 5 others* [2021] eKLR, where the Court held that even though the company was a separate legal entity



from its directors in the eyes of the law, the Court could lift the corporate veil and hold the directors personally liable.

20. Mr Tindi also submitted that it is plain and an unqualified obligation for every person against or in respect of whom an order is made by a Court of competent jurisdiction to obey it until that order is discharged. He further submitted that instead of obeying the Court Orders herein, the defendants opted to file a separate claim being ELC No. 165 of 2021, misleading the ELC Judge and obtaining conflicting orders. He stated that the 1<sup>st</sup> to 4<sup>th</sup> defendants are guilty of abuse of the Court process.
21. On whether an Advocate can be cited for contempt, he submitted that the privilege under the “without prejudice” rule is not absolute, exceptions being where there is misrepresentation/fraud and/or undue influence and in this case, there is direct contempt of Court orders.
22. On the issue of jurisdiction, Mr Oluga submitted that the Court lacks jurisdiction to entertain the instant suit because the dispute is purely about ownership, use and occupation of the land known as Land Reference No. 3413 Section I Mainland North on which Gupta Complex is erected. Therefore, the dispute falls squarely within the jurisdiction of the Environment and Land Court pursuant to Article 162(2)(b) of the *Constitution*. He stated that the said dispute has already been referred to the Environment and Land Court for determination by the 4<sup>th</sup> defendant, who is the registered owner thereof, in ELC Case No. 165 of 2021: Bamburi Supermarket Limited v. Rupa Gupta alias Rupa Buli Bose, and as such, the dispute herein is sub judice.
23. He submitted that the issue of whether the share of the late Premlal Ramnath should devolve to the plaintiff could only be determined in Succession Cause No. 5 of 2020: In the estate of Late Premlal Ramnath Alia Premlal Gupta which was filed by the plaintiff. He contended that the issue is sub judice and cannot be dealt with in this case.
24. Mr Oluga contended that the plaintiff has no locus standi to file the instant suit because she is not the owner of the suit property and she has no legal capacity to seek orders for the protection of the suit property which does not belong to her. He stated that no authority, sanction and resolution of the 4<sup>th</sup> defendant was passed to file the instant suit and seek orders of injunction to protect the 4<sup>th</sup> defendant’s suit property from interference.
25. On the issue of contempt of Court orders, the defendants’ Counsel submitted that the orders in issue did not restrain the 4<sup>th</sup> defendant from operating, running and managing the affairs of the building known as Gupta Complex erected on the suit property. He argued that the 4<sup>th</sup> defendant is a separate legal entity from its directors and was at liberty to pass resolutions to file suit, open bank accounts and collect rent from the suit property.
26. In winding up his submissions, he stated that the Amended Notice of Motion ought to be dismissed because the exhibits annexed to the application are not marked as required under the *Oaths and Statutory Declarations Act*.

### **Analysis and determination**

27. I have considered the amended application and the responses thereto, and the Preliminary Objection raised by the defendants herein. I have similarly perused and considered the rival submissions and authorities filed by the Advocates for the parties. The issues that fall for determination are-
  - (i) Whether this Court has jurisdiction to deal with this suit and the present application; and
  - (ii) If the Court orders of July 30, 2021 were clear and precise so as to leave no doubt as to what a party was supposed to do or refrain from doing.



Whether this Court has jurisdiction to deal with this suit and the present application.

28. Jurisdiction of a Court is everything as was held in the case of the *Owners of the Motor Vessel Lillian S'v Caltex Kenya Limited* (1989) KLR, where the Court of Appeal held that:

“... it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence...”

29. Jurisdiction of the High Court is conferred on the said Courts by Article 165(3) of the *Constitution* which provides as follows:-

3. Subject to clause (5), the High Court shall have— (a) unlimited original jurisdiction in criminal and civil matters; (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened; (c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this to consider the removal of a person from office, other than a tribunal appointed under Article 144; (d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of— (i) the question whether any law is inconsistent with or in contravention of this Constitution; (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution; (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and (iv) a question relating to conflict of laws under Article 191; and (e) any other jurisdiction, original or appellate, conferred on it by legislation.”

30. Article 165(5) of the *Constitution of Kenya, 2010* provides that the High Court shall not have jurisdiction in respect of matters-

- (a) Reserved for the exclusive jurisdiction of the Supreme Court under the constitution
- (b) Falling within the jurisdiction in Article 162(2) (a) and (b) of the constitution.”

31. Mr Oluga’s contention is that the none of the defendants is in contempt of this Court’s orders and that he has not as their Advocate acted contrary to the said orders, as the subject matter of the suit herein is the preserve of the Environment and Land Court and not the High Court. Section 13 of the *Environment and Land Court Act* provide as follows-

- (1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
- (2) In exercise of its jurisdiction under Article 162(2) (b) of the Constitution, the Court shall have the power to hear and determine disputes—
  - a. relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals, and other natural resources;
  - b. relating to compulsory acquisition of land;



- c. relating to land administration and management;
  - d. relating to public, private, and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
  - e. Any other dispute relating to the environment and land.
- (3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69, and 70 of the Constitution.”
32. In order to determine if this Court is properly seized of the matter before it, it has perused the averments in the plaint. Paragraphs 7, 8, 9 & 10 of the plaint deal with the issue of shareholding of the 4<sup>th</sup> defendant and the ownership of the suit property before the demise of the plaintiff’s husband, whom the plaintiff claims was a director and shareholder of the 4<sup>th</sup> defendant. Paragraphs 11, 12, 13 & 14 of the plaint refer to the fall out between the plaintiff and the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants where there are allegations of fraud committed by the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> defendants by removing the deceased as a shareholder of the 4<sup>th</sup> defendant and interfering with the running of the 4<sup>th</sup> defendant. The plaintiff therefore avers in the plaint filed before this Court that it was necessary to protect the suit property from being disposed of.
33. In the prayers sought in the plaint, prayer (1) asks for a permanent injunction against the 1<sup>st</sup>, 2<sup>nd</sup>, & 3<sup>rd</sup> defendants from interfering with the management, ownership of the suit property, prayers (2), (3) and (4) seek a declaration that the C.R.12 of the 4<sup>th</sup> defendant is a fraud, and for the Registrar of Companies to rectify the 4<sup>th</sup> defendant’s C.R.12 to include the plaintiff as a shareholder, being the Administrator of the estate of the deceased.
34. It is evidently clear that the primary dispute herein relates to alleged fraudulent removal of the late Premal Gupta as a shareholder of the 4<sup>th</sup> defendant, and the management of the suit property which is an asset belonging to the 4<sup>th</sup> defendant. In regard to the issues in prayers (3) and (4) of the plaint, they are dependent on the findings of the Court on the issue of the shareholding of the 4<sup>th</sup> defendant.
35. Having considered the above, it is the finding of this Court that the dominant issue herein being a commercial dispute, this matter falls within the ambit of the High Court. In my view, the Preliminary Objection raised by the defendants lacks merit and the same is dismissed with costs to the plaintiff.
36. Having found that this Court has jurisdiction to entertain the instant suit, the only issue remaining for determination is whether the 2<sup>nd</sup> and 3<sup>rd</sup> defendants as well as their Advocate, Mr Willis Oluga, should be cited for contempt of the Court orders made on July 30, 2021 as per the amended Notice of Motion by the plaintiff.
37. It is worth mentioning that prayer 2 of the amended Notice of Motion has lapsed since this Court did not sit on the October 25, 2021 and the said prayer was never amended. Therefore, there is nothing for this Court to determine on the said prayer.
38. The law guiding instances of alleged contempt of Court where injunctive orders have been granted is Order 40 Rule 3(1) of the *Civil Procedure Rules*, which stipulates as follows-
- “In cases of disobedience, or of breach of any such terms, the Court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the Court directs his release.”



39. In the case of *Woburn Estate Limited v Margaret Bashforth* [2016] eKLR, the Court of Appeal held as follows on the issue of contempt of Court-

“For many years in the history of the Judiciary of Kenya the Courts have, pursuant to section 5 (1) of the *Judicature Act*, resorted to the prevailing law of England in the exercise of the power to punish for contempt of Court...”

40. The Court of Appeal in *Geoffrey Kathuri Kison & 10 others v East African Portland Cement Co. Ltd & 5 others* [2021] eKLR held thus:

“It is trite that to commit a person for contempt of court, firstly, the court must be satisfied that the person has deliberately and willfully disobeyed a court order that he was aware of. Secondly, the order of the court that is alleged to have been disobeyed must be clear and precise so as to leave no doubt as to what a party was supposed to do or refrain from doing. (See: *A.B & Another v R.B* [2016] eKLR). Lastly, the standard of proof in committal proceedings is higher than proof on a balance of probabilities but not as high as proof beyond reasonable doubt. In *Mutitika v Baharini Farm Limited* [1985] KLR 229, the court stated that:

“... the standard of proof in contempt proceedings must be higher than proof on the 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 an offence which can be said to be quasi-criminal in nature.”

And Lord Denning in *Re Bramblevale Ltd* [1970] 1 CH 128 stated that:

“A contempt of court is an offence of criminal character. A man may be sent to prison for it. It must be satisfactorily proved showing that when the man was asked about it, he told lies. There must be some further evidence to incriminate him.”

41. . Having addressed the issue of the standard of proof in contempt proceedings, it is my finding that it is uncontroverted that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants were aware of the Court orders made on the July 30, 2021 which read as follows-

1. Thatthe application dated July 30, 2021 be and is hereby certified urgent.
2. Thata temporary injunction be and is hereby granted against the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> Defendant (sic) restraining them from interfering with the management, ownership and running of the affair (sic) of the building Known as Gupta Complex Premises on the premises Known as Land Reference No. 3413 especially the Tenant (sic) therein who had been managed by the deceased Prem Lal Ramnath & the Plaintiff (now administrator of the estate of the deceased) pending hearing and determination of the application interparty (sic).
3. Thatthe applicant will effect service of the application forthwith.
4. Thatthe Defendants are given 21 days to file and serve a replying affidavit.
5. Thatthe Plaintiff will within 21 days of service by the Defendants file and serve a further Affidavit, if need be, she will also file and serve written submission within said duration of time.
6. Thatthe Defendants will within 21 days of service file and serve their written submissions.
5. Thathighlighting of submissions will be on October 25, 2021”.



If the Court orders were clear and precise so as to leave no doubt as to what a party was supposed to do or refrain from doing.

42. I have carefully considered the arguments by Counsel for the 1<sup>st</sup> to the 4<sup>th</sup> defendants and it is my finding that it has not been alleged that the Court orders were ambiguous and incapable of being complied with. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants' argument is that the said Court orders were directed to them in their personal capacity as directors of the 4<sup>th</sup> defendant and that the said orders never restricted the 4<sup>th</sup> defendant from running its affairs. From the foregoing, it is apparent that the alleged contemnors have not complained that the Court orders were ambiguous or vague. If anything, the Court orders were as clear as day and the defendants had the advantage of an Advocate at their disposal to advise them of the meaning, purport and effect of the said orders.

43. The Court of Appeal in *Justus Kariuki Mate & another -vs- Martin Nyaga Wambora & another* [2014] eKLR cited Lord Cottentam L. C in *Chuck -vs- Cremer* (1) Coop Temp. Cott 342 held as follows-

“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 the suitors or their solicitors, could themselves judge whether an order is null or valid whether regular or irregular. That they should come to court and not take it upon themselves to determine such a question. That the course of a party knowing of an order, which was null or irregular, and who might be affected by it, was plain. He should apply to court that it might be discharged. As long as it exists, it must not be discharged.”

44. Mr Oluga for the 1<sup>st</sup> to 4<sup>th</sup> defendants' contention is that all the resolutions passed by the 4<sup>th</sup> defendant were made prior to the issuance of the subject order. In the same breath, he contends that that the 4<sup>th</sup> defendant being the registered owner of Gupta Complex is free and at liberty to continue its actions as a separate legal entity from its directors, who are the alleged contemnors. He asserted that the 4<sup>th</sup> defendant was within its right to direct its tenants occupying the suit property on how and where to pay rent and the Court orders in issue, in his view, have therefore not been violated.

45. Nothing can be further from the truth. Although the Court orders made on July 30, 2021 never restrained the 4<sup>th</sup> defendant from performing its day to day activities. However, it is settled law that a company can only operate and undertake actions through its directors. In this case, the directors who are the heart of the 4<sup>th</sup> defendant had been restrained from interfering with the tenants occupying Gupta Complex. The Court of Appeal in *Director of Public Prosecutions v Attorney General & 12 others* (Civil Appeal 206 of 2016) [2022] KECA 397 (KLR) (Civ) (4 March 2022) (Judgment) stated as follows:

“It is also settled that a company can only operate and undertake actions through its directors. The consequences of the above is that any director who is in office becomes responsible for the acts of the company both the past, the present and the future. Gikonyo, J, in *Agricultural Development Corporation of Kenya v Nathaniel K. Tum & Another* [2014] eKLR put this issue as succinctly as possible when he stated as follows:

“I find myself re-stating the celebrated legal innovation in *Salomon & Co Ltd V Salomon* [1897] A.C. 22 H.L.; that a company is a legal entity distinct from the its shareholders and the directors, in other words, it is a juristic person-a legal person- with corporate legal personality separate from those who compose it. Except, however, a company operates through human agents- the board of directors who are appointed in accordance with



the Article of Association and registered with the Registrar of Companies. Therefore, the directors assume the responsibility of ensuring that the company abides by all legal requirements; all that will preserve its juristic personality and property; and avoiding default that would attract serious legal sanctions, or affect its juristic personality and assets. The legal requirements include; accountability of its business to the shareholders and to the law; operations; directorship; liabilities; assets; payment of taxes, only to mention but a few. Besides liability on the directors, if a company fails to observe the legal responsibilities and obligations set out in law, it will face serious legal penalties and sanctions.”

46. The Court orders made on July 30, 2021 restrained the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> defendants from interfering with the management, ownership and running of the affairs of the building that stands on the suit property and especially interfering with the tenants who had been managed by the deceased Prem Lal Ramnath & the plaintiff (now administrator of the estate of the deceased). However, vide a letter dated August 27, 2021 and another one dated September 7, 2021, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants through their Advocate on record circumvented the Court orders by interfering with the tenants who had been managed by the deceased Prem Lal Ramnath & the plaintiff (now administrator of the estate of the deceased) by declaring the said tenants to be trespassers, and threatening them with eviction if they did not enter into new proper leases with the 4<sup>th</sup> defendant.
47. In *Wildlife Lodges Ltd v County Council of Narok and another* [2005] 2 EA 344, on the issue of obedience to Court orders, it was held that:
- “it was a plain and unqualified obligation of every person against or in respect of whom an order was made by the court of competent jurisdiction to obey it until that order was discharged and that where a party considers an *ex parte* order to cause him undue hardship, simple application will create an opportunity for an appropriate variation to be effected thereto; and therefore there will be no excuse for a party to disobey a court order merely on the grounds that it had been made *ex parte* and this argument will not avail...”
48. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants did not move this Court and share the challenges, if any, they may have experienced in complying with the Court orders, since as directors of the 4<sup>th</sup> defendant, they are required to participate in the day to day affairs of the 4<sup>th</sup> defendant. Moreover, if there was a misapprehension in the minds of the 2<sup>nd</sup> & 3<sup>rd</sup> defendants and their Advocate on record as to the reasonable meaning of the orders, what would have been expected of them is to make an application to the Court for the resolution of any misunderstanding, and this would have been the lawful course.
49. It is worth noting that the 2<sup>nd</sup> & 3<sup>rd</sup> defendants acknowledged awareness of the Court orders in issue but opted to disregard the same by hiding behind the corporate veil, and arguing that even though the Court orders restricted their duties outlined in the said orders, the 4<sup>th</sup> defendant company was not affected by the Court orders made on July 30, 2021. This Court’s finding is that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants colluded to defeat the essence of the orders made on July 30, 2021, with the assistance of their Advocate on record. From the foregoing, I find and hold that there was willful disobedience of the Court orders made on July 30, 2021. I also hold that the plaintiff has proved to the required standard of proof of above a balance of probabilities and below that of beyond reasonable doubt, that the 2<sup>nd</sup> defendant, Varun Gupta, and 3<sup>rd</sup> defendant, Kunj Gupta, are in contempt of the Court orders made on July 30, 2021.
50. The failure to comply with Court orders is tantamount to disrespecting this Court, and this ought not to be taken lightly. The dignity, and authority of this Court and all Courts must be protected and upheld at all times, and that is why those who flagrantly disobey Court orders must be punished, lest



they lead us all to a state of anarchy. In *Ultimate Laboratories vs. Tasha Bioservice Limited* Nairobi H.C.C.C No. 1287 of 2000 referred to in *Masefield Trading (K) Ltd v Rushmore Company Limited & another* Civil Suit No. 1794 of 2000; [2008] eKLR Ringera, J (as he then was) on the issue of lifting of the corporate veil held inter alia:

“However, that fundamental principle of incorporation may be disregarded, lifted, or pierced in exceptional circumstances both under express statutory provisions (of which Section 323 of the *Companies Act* is but one example only) and under judicial interpretation or intervention. As regards the latter, English authorities establish the broad principle that the corporate veil will be lifted by the courts if, among other situations, corporate personality is being used as a mask for fraud or improper conduct (See the cases of *Gilford Motor Co. Vs. Horne* [1933] Ch. 935 and *Jones Vs. Hipman* [1962] 1W.L.R. 832).”

51. It is evidently clear that the plaintiff never sought the lifting of the 4<sup>th</sup> defendant’s corporate veil. Be that as it may, the instant matter being where the 2<sup>nd</sup> & 3<sup>rd</sup> defendants’ contempt flies in the face of the Court, this Court cannot perch itself on the judicial fence and then fold its arms and mourn, while the 2<sup>nd</sup> & 3<sup>rd</sup> defendants run roughshod on its orders, while hiding behind the 4<sup>th</sup> defendant’s corporate status.

52. As a Court of equity, and in exercise of its inherent jurisdiction, this Court will not suffer a wrong to be without a remedy. The Court of Appeal in *LTI Kisii Safari Inns Ltd & 2 others v Deutsche Investitions-Und Entwicklungsgesellschaft (‘Deg’) & others* [2011] eKLR stated as follows on the issue of a wrong being without a remedy-

“It is regrettable that despite these lamentations, the learned Judge did not render justice between the parties according to law. It is not enough for a Court of law to tell a victim of injustice that a wrong had been perpetrated against him without offering a remedy. It is a maxim of equity that Equity will not suffer a wrong to be without a remedy. The idea expressed in this maxim is that no wrong should be allowed to go unredressed if it is capable of being remedied by Courts of justice. See *Snell’s Equity* 23<sup>rd</sup> Edn page 28.”

53. I find the 2<sup>nd</sup> & 3<sup>rd</sup> defendants guilty of contempt of the Court orders made on July 30, 2021. They shall attend Court on a date to be appointed for mitigation and sentencing.

54. In regard to the defendants Counsel, Mr Willis Oluga, this Court’s view is that the plaintiff did not make any mistake when she sought orders against him in these proceedings. It matters not that he was not a party to these instant proceedings. He was the Advocate who advised the defendants on the orders issued by the Court and wrote two letters to tenants within Gupta Complex on the changes to be effected. The plaintiff however did not specifically cite him for contempt of Court in the amended application but prayed for Mr Willis Oluga to be found to be in breach of the terms of the orders made by this Court on July 30, 2021 and for appropriate action to be taken against him. This Court discharges Mr Willis Oluga Advocate with a caution for the role he played in this matter which led to disobedience of Court orders by his clients, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants.

55. The plaintiff shall have costs of the Amended Notice of Motion dated September 9, 2021.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT MALINDI ON THIS 30<sup>TH</sup> DAY OF NOVEMBER, 2022.  
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**NJOKI MWANGI**



## **JUDGE**

### **In the presence of:**

Mr Tindi for the plaintiff

Mr Oluga for the defendants

Mr Oliver Musundi- Court Assistant.

