



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

HCCC MISC NO. E 267 OF 2020

ESTHER GATETE APPLICANT

VERSUS

BASHIRI KIPIMO..... 1ST RESPONDENT

ANTHONY KIBERU..... 2ND RESPONDENT

BASHY AFRICAN CREDIT LTD..... 3RD RESPONDENT

BRIAN ELLY OPAR

T/A SKYPACK CONSULT AUCTIONEERS.....4TH RESPONDENT

RULING

This is an application dated 28th July 2020 seeking the committal of the directors of the 3rd respondent, who are the 1st and 2nd respondents, to civil jail for a period of six months for disobeying a court order given on 22nd June, 2020 by the Senior Resident Magistrate in CMCC No. 2312 of 2020.

The order said to have been disobeyed was given in favour of the applicant herein and which is said to be still in place. Following service of the application, the respondents through Anthony Kiberu, who is the 2nd respondent, filed a replying affidavit and also a Notice of Preliminary Objection dated 25th August, 2020. For good order the preliminary objection had to be addressed first.

Both parties then filed their submissions. The matter in the lower court is still active. The preliminary objection states that the application before this court is sub judice, and the coming of the applicant before this court is an abuse of the court process as the lower court has power to deal with execution and contempt issue.

Section 6 of the Civil Procedure Act states as follows,

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

The order alleged to have been breached by the respondents was issued by the lower court in CMCC No. 2312 of 2020. I have looked at the heading of the case in the lower court and the parties are applicants herein Esther Gatete against Bashy African Credit Limited and Tango Auctioneers and General Merchants.

In the present application, the applicant is the same and the matter is against Bashiri Kipimo and Anthony Kiberu as 1st and 2nd respondents, who are said to be the directors of Bashy African Credit Limited named as the 3rd respondents. The 4th respondent is Brian Eli Opar t/a Skypac Consult Auctioneers. Whatever the case, the subject matter in the lower court, and which was subject to the court order, was motor vehicle registration number KBQ 608Q which is the same cited in the present application.

The question is whether or not disobedience of the order given by the lower court can be litigated in the present application in the lower court. Section 10 of the Magistrates Court Act No. 26 of 2015 states at subsection (3) as follows,

“In the case of civil proceedings, the wilful disobedience of any judgment, decree, direction, order or other process of a court

of wilful breach of an undertaking given to a court constitutes contempt of court.”

If that be the case, then subsection (1) of Section 10 applies in that, a magistrate’s court shall have power to punish for contempt. This leads to the irresistible conclusion that, the filing of the application before this court to punish the respondents for disobeying the lower court order is misplaced. I elect to say no more save to hold the application is devoid of any merit and therefore dismissed with costs to the respondents.

Dated and delivered at Nairobi this 25th day of February, 2021.

A.MBOGHOLI MSAGHA

JUDGE