



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 29 OF 2019

AL-KHEIR MUSLIM SCHOOL LIMITED.....PLAINTIFF/APPLICANT

-VERSUS-

OBUTO CALEB OMBATI.....DEFENDANT/RESPONDENT

RULING

1. The application before this Court is a Notice of Motion dated 12th November, 2020 brought under the provisions of Sections 1A(3) and 63 of the Civil Procedure Act, Cap 21 Laws of Kenya and Order 40 Rules 3(1) and 4(1) of the Civil Procedure Rules and all enabling provisions of the law. The plaintiff/applicant seeks the following orders-

- (i) That the applicant be granted leave to commence contempt proceedings against the respondent Mr. OBUTO CALEB OMBATI, who has blatantly ignored and disobeyed this Honourable Court order issued on 22nd November, 2019;
- (ii) That this Honourable Court be pleased to order the defendant Mr. OBUTO CALEB OMBATI, to be committed to a civil jail for a period of six months for contempt of the Court order dated 22nd November, 2019; and
- (iii) That costs of this application be borne by the defendant.

2. The application is brought on the grounds on the face of it and is supported by an affidavit sworn on 12th November, 2020 and a further affidavit sworn on 10th December, 2020 by Fardhosa Woche Mude, the applicant's director. On 27th March, 2020 the defendant/respondent, Obuto Caleb Ombati, filed a replying affidavit sworn on 25th November, 2020, in opposition to the application.

3. The application herein was canvassed by way of written submissions. The applicant's submissions were filed on 19th February, 2021 by the law firm of John Magiya & Co Advocates while the respondent's submissions were filed on 28th February, 2021 by the law firm of Mogaka Omwenga & Mabeya Advocates.

4. Mr. Magiya, learned Counsel for the applicant submitted that the respondent herein had purported to take all the shares and management of the applicant company which led to the institution of this suit. That prior to the conclusion of the matter, parties consented to the orders sought in the plaint and thereafter extracted a decree issued on 22nd November, 2019. He also submitted that the respondent partially complied with the said decree but had been unwilling to fully comply and had instead continued to interfere with the proper running of the applicant's affairs.

5. It was submitted by Mr. Magiya that the applicant through its Advocates on record wrote various letters to the respondent's Advocates as a follow up on the issue of handing over, only to get a response that there was a criminal case pending in Court. He stated that the respondent had refused to sign the necessary documents and affidavits inspite of several reminders to do so.

6. The applicant's Counsel submitted that the respondent was still a director of the applicant company and he had refused to hand over or transfer the shares he fraudulently allocated to himself. He further submitted that the respondent had all along been aware of the Court order, thus the willful disobedience of the same amounts to contempt of Court and that this Court has inherent power to punish for contempt. Mr. Magiya further submitted that the law on contempt is intended to protect the dignity of the Court and that one needs to comply with Court orders, so as not to interfere with the administration of justice unless there is an order staying such. He relied on the case of **Munubi & 3 others v Muhammed Swazuri & others** [2019] eKLR.

7. Mr. Magiya submitted that the respondent's allegation was that the applicant's director broke into the school, which allegation amounts to a criminal offence. The applicant's Counsel however stated that the foregoing had nothing to do with handing over of the company to the

applicant's director and that it did not stop him from drafting and signing the necessary letters of resignation, handing over shares of the company, from closing all other accounts in the name of the school and handing over the statements of payments made through the respective banks. He submitted that the respondent's response did not hold sufficient reasonable grounds for not complying with Court orders and he should be committed to civil jail as prayed, unless he complies with the orders of the Court or provides a justifiable explanation.

8. This Court was urged to allow the application as prayed since no appeal or any application had been made to give a reasonable explanation. Mr. Magiya indicated that compliance with Court orders is a fundamental concern of any civilized society and judicial authority is established to assist and protect the rule of law by enforcing compliance.

9. Mr. Omwenga, learned Counsel for the respondent submitted that in the audit report dated 25th June, 2019, the Auditor did acknowledge receipt of a number of documents which the applicant's director was also seeking from the respondent. He stated that the said documents were with known Auditors of both the parties hence the applicant could not demand for some of the documents which are in the hands of a known 3rd party. He also stated that the illegal and unlawful acts of the applicant were reported at the Makupa Police Station.

10. He indicated that as at 29th November, 2019, there was nothing to hand over to the applicant's director since on 23rd November, 2019, she hired goons who broke into the school premises and/or offices and took possession of all the records and documents. Mr. Omwenga contended that the respondent did not willingly disobey any Court orders since the applicant's named directors hacked into the email account of the respondent and also took a hard disk and took over the running of the school forcefully, thus the respondent was not given access to hand over. Mr. Omwenga submitted that no documents were ever prepared by the applicant and/or a Certified Public Secretary for the respondent to sign for the purpose of resignation of his shareholding and/or directorship of the applicant company.

11. He relied on the **Black's Law Dictionary, 9th Edition** on the definition of contempt of Court as conduct that defies the authority or dignity of a Court because such conduct interferes with the administration of justice and is punishable by fine or imprisonment. He also relied on the case of **Christine Wangari Wachege vs Elizabeth Wanjiru Evans & 11 others and Shimmers Plaza Ltd vs National Bank of Kenya Limited** [2014] eKLR, where it was held that an order cannot be enforced unless the copy of the order was previously displayed and served and the person required to do or not to do the act in question is warned that disobedience of the order would result in contempt of Court which is punishable by imprisonment.

12. The respondent's Counsel submitted that service of the order in issue must be personal on the contemnor unless the Court dispenses with that requirement and that the only exception is if the Court is satisfied that the contemnor was present when the order was made or if he was notified by phone or email or if the Court thinks it fit to dispense with service. He contended that in this case, no evidence was adduced by the applicant to show that the respondent was ever served with the order he is alleged to have disobeyed.

13. Mr. Omwenga also relied on the case of **Mutitika vs Baharini Farm Limited** [1985] KLR 229, where the Court held that the standard of proof of contempt of Court matters must be higher than proof on a balance of probabilities, and almost but not exactly beyond reasonable doubt. He submitted that in this matter, there was no evidence produced by the applicant's director to demonstrate that the respondent was in contempt of any of the orders that had been issued by the Court.

14. He submitted that in an application of this nature where the liberty of the respondent is at stake, such an order ought not to be granted unless in the clearest circumstances. He further submitted that the allegations of contempt against the respondent had not been proved to the required standard since the acts allegedly committed by the respondent were not precise. He stated that it was clear that it is the applicant's director who was a contemnor and not the respondent. He urged this Court to dismiss the application dated 12th November, 2020 with costs to the respondent.

ANALYSIS AND DETERMINATION.

15. This Court has considered the issues raised in the present application, the affidavits in support and in opposition thereof and the written submissions by Counsel for the parties. The issue that arises for determination is whether the respondent is in contempt of Court.

16. The applicant's director in her affidavit deposed that through a consent entered in, on 12th November, 2019, the respondent was to hand over all the applicant company's books of accounts, documents, records and all other assets that belong to the company but that he had failed to do so. She took the position that the respondent's actions amount to contempt of Court and are an act of bad faith thus making the handing over exercise a sham.

17. The applicant's director averred that repeated demands to the respondent to hand over fully had been declined. That on 22nd November, 2019, this Court restrained the respondent from maliciously interfering with the management of the company without authority but the respondent had refused to comply with the said orders despite service of the orders upon him.

18. In the replying affidavit by the respondent in opposition to the application, he deposed that upon recording the consent dated 22nd November, 2019, the applicant forcefully took over the operations of the school, all the records and assets leaving nothing to be handed over as at 29th November, 2019. That the said issue was raised immediately through a letter dated 25th November, 2019 addressed to Court and on 16th December, 2019, the matter was marked as closed by the Court. The respondent averred that he could not be cited for contempt and outlined the applicant's director's alleged illegal acts which were reported at Makupa Police Station on 23rd November, 2019 through OB No. 36/23/11/2019.

19. The respondent averred that when he attempted to do a hand over on 29th November, 2019, he noted that so many documents were missing and he also reported the same at Makupa Police Station through OB No. 62/29/2019 (sic). He deposed that the applicant through its director hacked into his email account and changed many features and that the same was reported to the said Police Station vide OB No.

20. It was stated by the respondent that he had no reason to refuse to comply with Court orders and in any case, the matters complained of by the applicant's director were part of active criminal proceedings in Court. He further stated that most of the documents requested for by the applicant's director were with the Court appointed Auditor Mr. D.A.G Omenye, hence he could not hand over the documents in possession of a third party and/or which were forcefully taken by the applicant's director.

21. The respondent denied having willfully disobeyed Court orders and stated that the applicant through its director was estopped from alleging any contempt of Court as she violated Court orders openly by forcefully taking over the documents and the running of the school. The respondent urged this Court to protect its dignity by not hearing a person who openly disobeys Court orders.

22. In response to the respondent's replying affidavit, the applicant's director in her further affidavit deposed that the allegations to the effect that she hired goons who took over the school and the allegations of hacking of the respondent's email were not true.

23. The applicant's director averred that the respondent's refusal to facilitate the handing over of the company's documents by executing the necessary documents did not constitute any criminal element, thus the respondent should not use the criminal case as an excuse for not complying with Court orders that were yet to be set aside.

24. It is worth noting that the High Court of Kenya in **Kenya Human Rights Commission v Attorney General & another** [2018] eKLR, nullified the Contempt of Court Act in its ruling delivered on 9th November, 2018. This Court therefore reverts to Section 5 of the Judicature Act which had been repealed by Section 38 of the nullified Contempt of Court Act No. 46 of 2016, as the law under which to punish for contempt of Court. This was the position taken by the Court of Appeal in **Christine Wangari Gachege vs. Elizabeth Wanjiru Evans & 11 Others (supra)**, where it was held that-

“This section was repealed by section 38 of the Contempt of Court Act of 2016, and as the said Act has since been declared invalid, the consequential effect in law is that it had no legal effect on, and therefore did not repeal section 5 of the Judicature Act, which therefore continues to apply. In addition, the substance of the common law is still applicable under section 3 of the Judicature Act.”

25. Section 5 of the Judicature Act was also restated by the Court of Appeal in **Christine Wangari Gachege vs. Elizabeth Wanjiru Evans & 11 others (supra)** as follows-

“the English law on committal for contempt of court under Rule 81.4 of the English Civil Procedure Rules, which deals with breach of judgment, order or undertakings, was applied by virtue of section 5(1) of the Judicature Act which provided that:

(1). 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 the subordinate courts.”

26. It is therefore clear that presently, the law governing contempt of Court proceedings in Kenya is the English law applicable in England at the time the alleged contempt is committed. On 1st October, 2012, the Civil Procedure (Amendment No. 2) Rules, 2012 came into force. Part 81 which relates to applications and proceedings in relation to contempt of Court, provides different procedures for different forms of violations. In the case before this Court, Rule 81.4 which deals with committal for breach of a judgment, order or undertaking to do and/or abstain from doing an act is the relevant one. The Court of Appeal in **Christine Wangari Gacheche** (supra) held that leave is not required where committal proceedings relate to a breach of a judgment, order, or undertaking.

27. It is therefore evident that a party ought not to first seek leave of Court prior to bringing an application for committal for contempt of Court orders. Bearing the foregoing in mind, prayer No. 1 of the application herein is superfluous.

28. The High Court and the Court of Appeal are vested with the power to punish those who indulge in acts that undermine the Court's authority. Each and every person, against or in respect of whom an order is made by a Court of competent jurisdiction, has an obligation to obey its orders unless and until the orders are varied and/or set aside, regardless of whether the person affected by the orders regards them as being irregular or void, as Court orders are not given in vain. It is considered illegal to willfully disobey Court orders. It is an established principle that the test for what amounts to contempt when it comes to disobedience of Court orders arising from civil proceedings is whether the disobedience was committed deliberately and with *mala fides*.

29. In **Samuel M. N. Mweru & others v National Land Commission & 2 others** [2020] eKLR, the Court while disallowing an application similar to the present one held as follows-

“It is an established principle of law that in order 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. (iii) Failure by the Respondent to comply with the terms of the order. Upon proof of these requirements the presence of willfulness and bad faith on the part of the Respondent would normally be inferred, but the Respondent could rebut this inference by contrary proof on a balance of probabilities. Perhaps the most comprehensive of the elements of civil contempt was stated by the learned authors of the book *Contempt in Modern New Zealand* who succinctly stated:-

“There are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases) that: -

- a) *the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;*
- b) *the defendant had knowledge of or proper notice of the terms of the order;*
- c) *the defendant has acted in breach of the terms of the order; and*
- d) *the defendant's conduct was deliberate.* (emphasis added).

30. Although proceedings of contempt of Court are civil in nature, it is well established that the degree of prove is almost beyond reasonable doubt but definitely higher than on a balance of probabilities. In the present case, it was not disputed that the terms of the Court order were clear and unambiguous and were binding on the respondent. It is also apparent that the respondent had knowledge of the said order. That is so since the Court order of 22nd November, 2019 emanated from a consent that was recorded between the parties herein on the same date.

31. The said order required the respondent to vacate the company premises immediately, hand over all the applicant company's books of accounts, documents, records and all other assets that belong to the company. The applicant's director was to enter the premises forthwith and repossess the premises of the company and any other properties that belong to it. A mandatory and permanent injunction was issued against the respondent from maliciously interfering with the management of the company without authority and for the parties to meet at the school compound on the 29th November, 2019 at 3.00 p.m., for purposes of handing over.

32. The applicant's director averred that the respondent refused to resign from the company and that he refused to execute the documents to facilitate the transfer of the shares he fraudulently allocated himself. The respondent on the other hand averred that the applicant's director forcefully took over the operations of the school and took all records and assets leaving nothing to be handed over on 29th November, 2019. He further averred that the issue was not only reported at Makupa Police Station but was also brought up in Court on 16th December, 2019

33. Through a letter dated 6th October, 2020 annexed to the applicant's director's supporting affidavit, she demanded for a number of items from the respondent. In response thereto, the respondent stated that most of the documents requested by the applicant's director were with the Court appointed Auditor hence he could not hand over documents that he was not in possession of.

34. This Court has perused the application dated 16th December, 2019 together with the proceedings of the same day and found that Judge P.J. Otieno held that this matter had ended conclusively save for the question of the school bank account at Cooperative Bank of Kenya. The parties agreed that the said account should be closed and any monies therein used to settle outstanding school liabilities. The Court further directed that the account be closed on the same day in the presence of both parties and the sums in the said account be used to settle outstanding school liabilities. The Court was also of the view that that it had become *functus officio* and directed that the file be closed.

35. In view of the foregoing directions given by the Court, parties ought to have addressed this Court on whether the bank account at Cooperative Bank was closed and whether the sums of money in the said account were used to settle outstanding school liabilities. Unfortunately, they did not. In **Samuel M. N. Mweru & Others v National Land Commission & 2 others** (supra) the Court observed as hereunder in regard to the issue of committal to civil jail for contempt of Court-

“Two principals emerge. The first is liberty:- it is basic to our Constitution that a person should not be deprived of liberty, albeit only to constrain compliance with a court order, if reasonable doubt exists about the essentials. In this regard, I am not satisfied that willful disregard of the court order has been established.

The second reason is coherence. It is practically difficult, and may be impossible, to disentangle the reasons why orders for committal for contempt are sought and why they are granted. in the end, whatever the applicant's motive, the court commits a contempt respondent to jail for Rule of Law reasons; and this high public purpose should be pursued only in the absence of reasonable doubt. Accordingly, it is impermissible to find an alleged contemnor guilty of contempt in the absence of conclusive proof of the essential elements. The requisite elements must be established beyond reasonable doubt. In such a prosecution the alleged contemnor is plainly an 'accused person'.

Third, accidental or unintentional disobedience is not sufficient to justify one for holding guilty of contempt. It is further relevant to bear in mind the settled law on the law of contempt that casual or accidental or unintentional acts of disobedience under the circumstances which negate any suggestion of contumacy, would amount to a contempt in theory only and does not render the contemnor liable to punishment.” (emphasis added).

36. **The applicant's director failed to address the only outstanding issue about the account held at Cooperative Bank of Kenya. The applicant has therefore** failed to demonstrate that it has met the pre-requisites for contempt of Court orders, and more particularly, to specify and prove the Court order that **the respondent** willfully failed, refused and or neglected to obey.

37. This Court's finding therefore is that the application dated 12th November, 2020 is bereft of merit and the same is hereby dismissed. Costs are awarded to the respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA ON THIS 24TH DAY OF SEPTEMBER, 2021.

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued

by his Lordship, the Chief Justice on the 17th April, 2020 and subsequent directions, the ruling herein has been delivered through Teams Online Platform.

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Magiya for the plaintiff/applicant

Mr. Omwenga for the defendant/respondent

Mr. Oliver Musundi – Court Assistant.