



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL & TAX DIVISION**

**CIVIL SUIT NO. E419 OF 2018**

**LABAN GATHUNGU..... PLAINTIFF**

**VERSUS**

**ERNST & YOUNG LLP .....DEFENDANT**

**RULING**

(1) Before this Court is the Notice of Motion application dated 4<sup>th</sup> May 2020 by which LABAN GATHUNGU, (the “Plaintiff/Applicant”) seeks the following orders:-

1. SPENT

2. SPENT

3. That the Plaintiff either personally or in the company of, or through his authorized agents, auditors or accountants be and are hereby authorized to ingress the Defendant’s offices and take necessary steps to access systems and processes of the firm, financial reports, partner profit allocation processes and tax returns of all partners for the period from July 2012 to December 2018, for the purposes of undertaking the audit of envisaged in the order of this Honourable Court made on 13<sup>th</sup> December, 2019.

4. That any or all of the following Respondent’s bank accounts be frozen to the extent of Kshs. 16,000,000/- pending hearing and determination of this application:

(a) AB STANBIC BANK, Chiromo Branch, Account number \*\*\*\*.

5. Any other bank account held in the names of the Defendant firm in any bank as shall be ascertained, be frozen to the extent of Kshs. 16,000,000/- pending hearing and determination of this application.

6. Any of the foregoing banks be and are hereby directed to transfer any or all of the funds in the bank accounts held by the Defendant, be transferred to the Plaintiff as shall be ordered by the Court.

7. Any or all of the foregoing banks be and are hereby ordered to debit the Defendant’s respective accounts and transfer to the Plaintiff a sum of Kshs. 875,000/- on a monthly basis until this court orders otherwise.

8. That the Respondents be fined such sums not less than Kshs. 20,000,000/-.

9. That the partners in the Respondent firm namely Herbert Chiveli Wasike, Gitahi Gachahi, Francis Ndirangu Munyua Kamau, Julius Mumo Ngong’a, Anthony Makenzi Muthusi, Peter Obondo Kahi, Allan Kihara Gachuhi, Catherine Wangui Mbogo, Michael Mutie Kimoni, Churchill Ochieng Atinda, Peter Nyamondo Anchinga, Avani Sahmsheer Gilani, Joseph Kiketer C Arap Cheboror and Geoffrey Gichangi Karuu be cited for contempt of Court.

10. That the partners in the Respondent firm namely Herbert Chiveli Wasike, Gitahi Gachahi, Francis Ndirangu Munyua Kamau, Julius Mumo Ngong’a, Anthony Makenzi Muthusi, peter Obondo Kahi, Allan Kihara Gachuhi, Catherine Wangui Mbogo, Michael Mutie Kimoni, Churchill Ochieng Atinda, Peter Nyamondo Anchinga, Avani Shamsheer Gilani, Joseph Kiketer C Arap Cheboror and Geoffrey Gichangi Karuu be and are hereby committed to civil jail for a term of six months for contempt of court for having deliberately disobeyed the Court order dated 16<sup>th</sup> December, 2019.

11. That the partners in the Respondent firm be fined such sums not less than Kshs. 20,000,000/- each and the managers of the Respondent namely HERBERT CHIVELI WASIKE and GITAHI GACHAHI, be and are hereby committed to civil jail for a term of six months for contempt of court for having deliberately disobeyed the court order dated 16<sup>th</sup> December, 2019.

12. That the Respondents be directed to continue paying monthly installments of Kshs. 875,000/- being the half of the monthly drawings that the Appellant is entitled to final determination of the main suit or until contrary orders are made by a Court of competent jurisdiction.

13. The costs of this application be provided for.

(2) The application was premised upon **Order 23 Rule 1 and 2, Order 40 Rule 3(1) and (2); Order 51, Rule 1** of the **Civil Procedure Rules, 2010, Sections 1, 1A, 3, 3A and 63(e)** of the **Civil Procedure Act, 2010** and the **Contempt of Court Act and Article 159(1) and (2)** of the **Constitution of Kenya, 2010**.

(3) **ERNST & YOUNG LLP** the Defendant/Respondent opposed the application through the Replying Affidavit dated **16<sup>th</sup> June 2020** sworn by **ANTHONY MAKENZI MUTHUSI** the Defendants Chief Operating Officer. The application was canvassed by way of written submissions. The Plaintiff/Applicant filed his written submissions dated **23<sup>rd</sup> July 2020** whilst the Defendant/Respondent filed their submissions dated **11<sup>th</sup> September 2020**.

#### **BACKGROUND**

(4) On **6<sup>th</sup> November 2018**, **ERNST & YOUNG LLP**, the Defendant/Respondent through their **CEO** purported to remove the Plaintiff from the Council of Partners of the Defendant firm. The Plaintiff/Applicant vide his letter dated **8<sup>th</sup> November 2018** objected to his purported removal from the Council of Partners on grounds that such a move totally contravened the Partnership Agreement. However in his letter dated **13<sup>th</sup> November 2018**, the Defendants **CEO** persisted in affirming the Plaintiffs said removal without giving reasons.

(5) This led the Plaintiff/Applicant to file the present suit which was instituted by way of a Plaint dated **5<sup>th</sup> December 2018**, challenging his removal and membership from the Defendants Council of Partners. Contemporaneously with the said Plaint, the Applicant filed a Notice of Motion application dated **5<sup>th</sup> December 2018**, seeking interim orders to be restored to his position as partner pending the hearing and determination of the suit. By a Ruling delivered on **13<sup>th</sup> December 2019** this Court, directed that the Plaintiff/Applicant be paid one half of his monthly drawings pending the hearing and determination of the suit.

(6) The Defendant/Respondents then filed the Notice of Motion application dated **5<sup>th</sup> February 2020** seeking to review the Ruling and orders made by the Court on **13<sup>th</sup> December 2019**. However this Court vide its Ruling delivered on **17<sup>th</sup> December 2019** declined to review and/or set aside its orders of **13<sup>th</sup> December 2019**.

(7) The Plaintiff/Applicant then wrote to the Defendant vide the letter dated **17<sup>th</sup> April 2020** demanding compliance with the Court orders of **13<sup>th</sup> December 2019** specifically regarding payments of accumulated monthly half drawings which the Plaintiff tabulated as follows:-

**“Profit allocation for FY 2017 – 2018 = Kshs. 21,000,000/-**

Half monthly drawings = Kshs. 21,000,000/- \*50% = Kshs. 875,000/- per

month. 12

2018 Drawings due to our client:

November 2018 Kshs. 875,000/-

Less amount paid Kshs. 774,432/-

Total Kshs. 100,568/-

December, 2018 Kshs. 875,000/-

Less amount paid Kshs. 774,432/-

Total Kshs. 100,568/-

Sub-total Kshs. 201,136/-

Interest at 12% P/A for 2 years Kshs. 48,272.64/-

**TOTAL OUTSTANDING FOR 2018: Kshs. 249,408.64/-**

2019 drawings due to our client:

January to December, 2019, (Kshs. 875,000/-\*12) Kshs. 10,500,000/-

Interest at 12% P/A Kshs. 1,260,000/-

**TOTAL OUTSTANDING FOR 2019: Kshs. 11,760,000/-**

2020 drawings due to our Client:

January 2020 Kshs. 875,000/-

February, 2020 Kshs. 875,000/-

March, 2020 Kshs. 875,000/-

April, 2020 Kshs. 875,000/-

**TOTAL OUTSTANDING FOR JANUARY 2020: Kshs. 3,500,000/-**

**GRAND TOTAL KSHS. 15,509,408.64/-**

(8) Following the filing of instant application, the parties engaged with a view to settling this matter and the Defendant/Respondent made to the Plaintiff/Applicant a partial payment of **Kshs. 2,067,692/-** being payment of **Kshs. 344,615/-** per month from **December 2019**. The Applicant contends that this amount represents less than a quarter of his monthly drawings and that such payment totally contravenes the Court's orders of **13<sup>th</sup> December 2019**. Hence the present application seeking contempt orders against the Defendant's partners.

(9) As stated earlier the Defendants opposed the application through the Replying Affidavit dated **16<sup>th</sup> June 2020**. The Defendants deny that they have acted in contempt of Court orders of **13<sup>th</sup> December 2019**. It is contended that no penal notice was personally served upon the Defendant or any of the Defendants partners to warrant their committal to civil jail. That the Applicant is merely relying upon the fact of service of the order on the Defendant's Advocates to prosecute this contempt application. The Defendant asserts that the order served upon the Defendant's Advocates did not have a Penal Notice endorsed on it. The Defendants therefore urge the Court to dismiss this application in its entirety and to award them the costs of the same.

#### **ANALYSIS AND DETERMINATION**

(10) I have carefully considered the submissions filed by both parties in this matter. The only issue for determination is whether it has been proved that the Defendant willfully disobeyed the Court's orders of **13<sup>th</sup> December 2019**. The Applicant's position is that since the delivery of that Ruling the Defendants have failed to pay him one half of his monthly drawings which according to the Plaintiff amounts to **Kshs. 875,000/-**. The Applicant submits that the profit allocation applicable is the one for the financial year **2017/2018**, since the allocation for the year **2018/2019** has been appealed against which appeal is yet to be determined. He submitted that his drawings ought to be computed from the date of his impugned removal from the Defendants Council of Partners. The Plaintiff therefore submits that the failure by the Defendant to pay him half his drawings amounting to **Kshs. 875,000/-** amounted to a disobedience of the court orders of **13<sup>th</sup> December 2019**.

(11) The Plaintiff/Applicant further complained that since the Ruling of **13<sup>th</sup> December 2019**, the Defendants had scrapped his Medical Insurance cover, had terminated his mobile subscription as a Partner and had suspended his official e-mail account. This Plaintiff contends amounts to a breach of the Court order.

(12) Finally the Plaintiff/Applicant complained that the Defendant/Respondents had failed to facilitate an audit and submitted that the Court should order that the Plaintiff be permitted to enter the Defendant's premises in order to carry out an audit supervised by the Court.

(13) The Applicant submitted that the Defendants were duly served with the orders of this Court issued on **13<sup>th</sup> December 2019**. That the Defendant was further reminded to comply with said orders vide the Applicant's letters dated **13<sup>th</sup> January 2020** and **17<sup>th</sup> April 2020**. That said reminders both contained Penal Notices in the event of non-compliance. The Applicants submit that the Defendants actions amount to contempt of Court and urge the Court to grant the orders sought.

(14) On its part the Defendant/Respondent denies that it has acted in contempt of the Courts orders of **13<sup>th</sup> December 2019**. The Defendant asserts that it has paid to the Plaintiff one half of the salary and emoluments due to him totaling **Kshs. 2,067,692/-** from the date the Court order was made (being a payment of **Kshs. 344,615/-** per month). The Defendant pleads that the delay in making payments to the Plaintiff was occasioned by the **Covid-19 Pandemic** which affected the Defendant's business operations.

(15) The Defendant submits that a disagreement over computation of what is due to the Plaintiff ought not be deemed to amount to contempt of Court. That the power to punish party for contempt should only be invoked where there is shown to have been **willful** and **deliberate** disregard of Court orders.

(16) In response to the Plaintiffs complaints over removal of medical cover, airtime and office e-mail the Defendant submits that the

Plaintiff did not seek specific orders for reinstatement of these benefits in his application dated **5<sup>th</sup> November 2018**, and that the above benefits were not mentioned in the Court order. The Defendants contend that the Plaintiff would only be entitled to the above benefits if he was reinstated as a Partner.

(17) On the question of the audit, the Defendant submit that the Plaintiff wanted the audit to be conducted by an auditor of his choice whilst the Court orders were clear that the audit should be conducted by an independent auditor. As such the Plaintiff cannot seek orders to access the Defendants premises as infact it was he who had failed to comply with the Court's direction for the selection of an independent auditor by failing to agree to the auditors suggested by the Defendant.

(18) Finally the Defendant/Respondent submit that the orders being sought by the Plaintiff in the current application are draconian and are unnecessary in the present circumstances. The Defendant insists that it has complied with the Court orders by paying to the Plaintiff one-half of the salary and emoluments due to him. The Defendant further asserts that it has at all times been ready and willing to have an audit conducted by an independent auditor, but rather it is the Plaintiff who has put road blocks to the audit process. The Defendants urge the Court to dismiss this application in its entirety and to award them costs.

(19) The key question requiring an answer in application is whether it has been demonstrated that the Defendant/Respondent have deliberately and willfully disobeyed and/or disregarded the Court's orders made on **13<sup>th</sup> December 2019**. It would be necessary at this stage to restate the orders made by the Court on **13<sup>th</sup> December 2019**, which were as follows:-

**1. THAT I do decline to grant orders of reinstatement as sought by prayers (3) and (4) of the application [dated 5<sup>th</sup> November 2019].**

**2. THAT pending hearing and determination of the main suit, this Honourable Court be pleased to order that Defendant/Respondent by itself, its agents and/or assignees be restrained from proceeding with the process of termination of the Plaintiff's membership of the Defendant's Council of Partners.**

**3. THAT the Plaintiff be paid one half of the salary and emoluments due to him as a partner pending the hearing and determination of the suit. If the Defendants prove their case at the conclusion of the hearing then the amount so paid can be recovered from the final dues to be paid to the Plaintiff.**

**4. THAT all the assets and liabilities of the Defendant be valued and its books of account be audited by an Independent Auditor for the purposes of ascertaining the true entitlement of the Plaintiff in the defendant firm.**

**5. THAT the Defendant/Respondent and/or any of its agents or assignees be restrained from victimizing the Plaintiff in any way by virtue of having field this suit.**

**6. THAT the costs to be borne by the Defendant/Respondent.**

(20) Section 4(1) (a) of the Contempt of Court Act 2016 defines Civil contempt as follows:

**“4(1) Contempt of Court includes:-**

**(a) Civil contempt which means willful disobedience of any judgment decree direction order or other process of a Court or willful breach of an undertaking given to a Court.”**

Section 5 of the same Act provides as follows:-

**“Every superior Court shall have power to:-**

**(a) Punish for contempt of Court on the face of the Court.**

**(b) Punish for contempt of Court; and**

**(c) Uphold the dignity and authority of Subordinate Courts.”**

Therefore any willful disobedience of a Court order amounts to contempt.

(21) It is manifest therefore that where contempt of Court has been proved, the Court has authority to punish the transgressor for such contempt in order to uphold the dignity of the Court. In the case of **ECONET WIRELESS KENYA LMTIED –VS- MINISTER FOR INFORMATION & COMMUNICATION OF KENYA & ANOTHER**; the Court stated as follows:-

***“It is essential for the maintenance of the rule of law and order that the authority and the dignity of our Courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a Court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular***

or void". [own emphasis]

(22) Likewise, in the case of **TEACHERS SERVICE COMMISSION -VS- KENYA NATIONAL UNION OF TEACHERS & 2 OTHERS (2013)eKLR** Ndolo J observed that;

**“The reasons why courts will punish for contempt of court then is to safeguard the rule of law which is fundamental in the administration of Justice. It has nothing to do with the integrity of the judiciary or the court or even the personal ego of the presiding Judge. Neither is it about placating the applicant who moves the court by taking out contempt proceedings. It is about preserving and safeguard the rule of law”**

In that case the Judge further stated as follows:-

**“I am of the same persuasion that the reason why power is vested in courts to punish for contempt of court is to safeguard the rule of law which is fundamental in the administration of justice. The law of contempt has evolved over time in order to maintain the supremacy of the law and the respect for law and the respect for law and order. As it was in the time of Chief Justice Mckean in 1786 so it is today that courts have a duty to ensure that Citizens bend to the law and not vice versa./ Indeed, if respect for law and order never existed, life in society would be but short, brutish and nasty. It is the supremacy of the law and the ultimate administration of justice that is usually under challenge when contempt of court is committed. This is so because, a party who obtains an order from court must be certain that the order will be obeyed by those to whom it is directed. As such, the obedience of a court order is fundamental to the administration of justice and the rule of law. A court order once issued binds all and sundry, the mighty and the lowly equally, without exception. An order is meant to be obeyed and not otherwise.”**

(23) Section 5(1) of the Judicature Act provides as follows:-

**“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.”**

(24) The standard of proof in cases of contempt of Court is well established in the case of **MUTITIKA –VS- BAHARINI FARM LIMITED [1985]KLR 229, 234** the Court of Appeal held that:-

**“In our view 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 offence which can be said to be quasi – criminal in nature.”**  
[own emphasis]

(25) The rationale for this standard is that if cited for contempt, and the prayer sought is for committal to jail, the liberty of the contemnor will be affected. Accordingly, the standard of proof is higher than the standard required in Civil cases. This power, to commit a person to jail, *must be exercised with utmost care, and exercised only as a last resort*. It is of utmost importance, therefore, for the respondents to establish that the alleged contemnor’s conduct was **deliberate**, in the sense that he or she *willfully acted in a manner that flouted the Court Order*.

(26) In the orders made on **13<sup>th</sup> December 2019** the Court directed that the Plaintiff be paid **one half** of the salary and emoluments due to him. A disagreement has arisen between the parties regarding what **amount** constitutes one half of the Plaintiff’s salary and emolument. The Plaintiff asserts that one half of his salary and emoluments amount to **Kshs. 875,000/-** whilst the Defendant asserts that the amount payable is **Kshs. 344,615/-**. The Defendant states that in compliance with the Court order it has already paid out to the Plaintiff a sum of **Kshs. 2,067,692/-** which averment is not denied by the Plaintiff.

(27) It is pertinent to note that the order made by the Court did **not specify** the **amount** which would constitute one half of the Plaintiffs salary and emoluments. It was left to the parties to compute the amount due. The fact that there exists a divergence of views regarding the amount due under this order **does not** mean that the Defendant can be taken to have flouted the Court orders. The Defendants have paid out what they honestly believe is due to the Plaintiff and in so doing have complied with the Court orders. At paragraph **12** of the Replying Affidavit dated **16<sup>th</sup> June 2020** the Defendants have explained how they have computed of the amount due to the Plaintiff to be **Kshs. 344,615.00** which represents the net payable to the Plaintiff as half of his monthly dues. The fact that the Plaintiff has not been paid what he wanted does not constitute contempt. It is my view this is a matter which can only be settled at a full hearing of the suit.

(28) The Defendant has explained the delay in making the required payment. This Court takes judicial notice of the fact that the onset of the **Covid-19 Pandemic** wrecked havoc and greatly interfered with the operations of businesses not only in Kenya but worldwide. In the circumstances such delay cannot be deemed to have been deliberate and/or contemptuous.

(29) The Plaintiff/Applicant also took issue with the cessation of his medical cover, airtime and official e-mail. The Defendant counters that the Applicant did not specifically plead for said services to be reinstated and that the Court did not in its orders of **13<sup>th</sup> December 2019** make specific orders in respect of said benefits. I return to the wording of the Court order which provided as follows:-

**“I do decline to grant orders of reinstatement as sought by Prayers (3) and (4) of the application.”**[own emphasis]

(30) Although the Applicant had sought reinstatement to the Defendant’s Council of Partners, this prayer was specifically denied by the

Court. The benefits in question being medical cover, airtime and access to official e-mail can only be accorded to a person who holds the position of Partner. Indeed benefits like airtime and official e-mail would only be relevant in enabling the Applicant carry out his duties as a Partner. The Plaintiff/Applicant did **not** at the time hold such position. Given that the Applicants prayer for reinstatement as a Partner had been denied by the Court, he would not be entitled to the benefits attached to the officer of partner which are required to enable him perform as a Partner. I therefore find that in the present circumstances the Defendants cannot be said to have been in contempt of an order which the Court clearly did not make.

(31) Finally on the question of the audit, the Court clearly directed that said audit be conducted by an “**Independent Auditor**”. The fact that the parties were not able to agree on such independent auditor does not mean that there was a breach of the Court order. The Plaintiff cannot demand to be allowed access to the Defendants premises and books with his own auditor in tow when the Court clearly provided that the audit be conducted by an **independent auditor**. In the light of such disagreement the parties were at liberty to approach the Court for further guidance on the appointment of such independent auditor. Here again I find no evidence of contempt by the Defendant.

(32) Finally based on the foregoing I find **no evidence** of willful and deliberate disobedience by the defendants of the Court orders of **13<sup>th</sup> December 2019**. I therefore find no merit in the present application. The same is hereby dismissed in its entirety with costs to the Defendant/Respondent.

Dated in **Nairobi** this 21<sup>ST</sup> day of **DECEMBER, 2020**.

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**MAUREEN A. ODERO**

**JUDGE**