



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**

**CONSTITUTIONAL PETITION NO. 54 OF 2013**

**IN THE MATTER OF:ARTICLES 10, 20, 21, 22, 23, 35, 40, 47, 48, 159, 258 & SECTION 19 OF  
THE SIXTH SCHEDULE OF THE CONSTITUTION**

**AND**

**IN THE MATER OF:SECTIONS 27, 28, 31, 63, 142, 143 & 149 OF THE REGISTERED LAND  
ACT (CAP 300, LAWS OF KENYA) (now repealed)**

**AND**

**IN THE MATTER OF:SECTIONS 26, 29, 30, 50 & 156 OF THE LAND REGISTRATION ACT  
2011**

**AND**

**IN THE MATTER OF:SECTIONS 24, 26, 61, 79 & 80 OF THE ACT 2012**

**AND**

**IN THE MATTER OF:THE ALLEGED REGISTRATION OF MOHAMED IQBAL MOHAMED  
RAFIQ ABDALLA KANJI as the absolute proprietor of the property allegedly known as  
MOMBASA/BLOCK XX/315 ON 27<sup>TH</sup> FEBRUARY, 2012**

**AND**

**IN THE MATTER OF:THE CONTRAVENTION OF FUNDAMENTAL RIGHTS AND  
FREEDOMS UNDER ARTICLES 21 & 40 OF THE CONSTITUTION OF KENYA 2010**

**BETWEEN**

**JESSICA HOLDINGS LIMITED.....PETITIONER**

**AND**

**1. MOHAMED IQBAL MOHAMED**

**RAFFIQ ABDALLA KANJI**

**2. THE CHIEF LAND REGISTRAR**

**3. THE LAND REGISTRAR MOMBASA**

**4. COUNTY GOVERNMENT OF MOMBASA**

**5. MOHAMED IQBAL** as the administrator of the estate of the

late Raffiq Abdalla Kanji.....**RESPONDENTS**

**RULING**

**The Application**

1. The Notice of Motion application before the court is dated 14<sup>th</sup> September, 2016 and filed herein on 27<sup>th</sup> September, 2016. The application is filed under Section 1A, 1B and 3A of the Civil Procedure Act, Section 5 of the Judicature Act, The Contempt of Court Act 1981 and Part 23 and 81 of the Civil Procedure Rules 2012 of England. The Applicant prays for the following orders:

**(a) THAT this Application be certified as urgent and be heard as a matter of priority in this matter;**

**(b) THAT MOHAMED IQBAL MOHAMED RAFFIQ ABDALLA KANJI (the 1<sup>st</sup> and 5<sup>th</sup> Respondent herein), MOHAMED JAMIL RAFFIQ and ZAHID RAFFIQ be committed to prison for blatantly refusing, neglecting and/or failing to comply with orders of this Honourable Court made on the 11<sup>th</sup> day of October 2013 (and issued on the 15<sup>th</sup> October 2013) and extended on the 21<sup>st</sup> day of November 2013 (and issued on 9<sup>th</sup> December 2013) which was then confirmed on the 16<sup>th</sup> day of September 2014);**

**(c) THAT the costs of these contempt proceedings be borne by the said Mohamed Iqbal Mohamed Raffiq Abdalla Kanji (the 1<sup>st</sup> and 5<sup>th</sup> Respondents herein), Mohamed Jamil Raffiq and Zahid Raffiq.**

2. The application is premised on the grounds set out therein, that the aforesaid persons against whom this application is made have no regard for the rule of law and/or the authority or dignity of this Court.; the aforesaid persons against whom this application is made have no regard for just and due judicial process and have not only wantonly and deliberately breached the Orders of this Court but have also attempted to threaten, harass and intimidate Mr. Sanjeev Khagram and Mr. Vikram Kanji (partners in the firm of Messrs A. B. Patel & Patel, Advocates, Mombasa) as well as Mr. Ajesh Agravat, a director of **JESSICA HOLDINGS LIMITED** in order to extort concessions in so far as the dispute which is the subject of this suit is concerned; the aforesaid persons have in contravention of the *sub judice* rule, published material concerning this matter which is likely not only to interfere with the course of justice or that which is likely to cause a substantial risk that the course of justice in these proceedings shall be seriously impeded or prejudiced; the aforesaid persons continue with their contumelious and malevolent conduct without any regard or respect whatsoever for the rule of law; and It is only fair and in the interests of justice and to preserve the integrity of this Court as well as the rule of law that this application should be heard expeditiously and allowed.

3. The application is supported by affidavit of **AJESHKUMAR AGRAVAT** sworn on 14<sup>th</sup> September, 2016, and a Supplementary Affidavit of the same deponent sworn on 19<sup>th</sup> October, 2016.

**The Applicant's Case**

4. The Applicant's case is that on 11<sup>th</sup> October 2013, this Court made an Interim Conservatory Order in the form of an injunction to restrain the First and/or Fifth Respondents whether by themselves or through their agents or servants or employees or howsoever else from interfering with the Petitioner's proprietary rights or the quiet possession or occupation of the property known as Mombasa/Block XX/315 or in any other manner howsoever interfering with or causing embarrassment to the Petitioner's sub-tenants pending the hearing and determination of the application inter-partes. The said Order was issued on 15<sup>th</sup> October 2013. The said Order was served on, inter-alia the First and Fifth Respondents on the 23<sup>rd</sup> October 2013 (**the Applicant annexed and marked as exhibit "AA-1" a true photostat copy of the Affidavit of Service and the said Order**). The said Order was subsequently extended was confirmed on 16<sup>th</sup> September, 2015 pending the hearing and determination of this Petition. (**The Applicant annexed as Exhibit 'AA-3' a true photostat copy of the Order issued by this Court on the 18<sup>th</sup> September, 2014 served on all the parties**).

5. The Applicant's case is that since late 2014, the First and Fifth Respondents whether by himself or through his sons, **Mohamed Jamil Raffiq and Zahid Raffiq**, have been conducting themselves maliciously, malevolently and with complete lack of candour including engaging in making obnoxious threats, abuses and harassing and intimidating the Petitioner's directors with a view to extorting certain concession in so far as the Petitioner's proprietary rights are concerned. The Applicant's case is that such malevolent conduct and obnoxious threats and abuse as well as intimidation and harassment was extended to them in yet another bid to extorting a concession in this matter and/or interfering with or influencing the outcome of this matter. Further, the Applicant states that the said 1<sup>st</sup> and 5<sup>th</sup> Respondents and his two sons, Mohamed Jamil Raffiq and Zahid Raffiq have now gone to the extent of making highly defamatory and derogatory remarks about the said Mr. Sanjeev Khagram and Mr. Vikram Kanji in the hope that they may succumb to the extortive conduct perpetrated by them and have, in fact, in complete disregard of the rule of law and sanctity and authority of this Court sought to influence and/or interfere with the outcome of these proceedings by trying to argue their case in the public domain through social media despite the pendency of these proceedings in Court. **The Applicant annexed a bundle collectively mark as Exhibit 'AA-4' being true photostat copies of all the publications allegedly maliciously made by the First and Fifth Respondents and his sons, Mohamed Jamil Raffiq as well as Zahid Raffiq**).

6. This mode of conduct allegedly continued despite the fact that on 24<sup>th</sup> November, 2014 this Court's attention was drawn to the above threats and conduct and the Court warned the 1<sup>st</sup> and 5<sup>th</sup> Respondents' Counsel to ensure that such conduct stopped forthwith. It is alleged that the Counsel representing them on that day, Ms. Muya informed the Court that she would advise her clients to desist from engaging in such conduct. The Applicant also annexed to the application a bundle collectively mark as Exhibit 'AA-5', further correspondence to Messrs Atkinson, Cleasby & Satchu then also acting for the First and Fifth Respondents and his sons Mohamed Jamil Raffiq and Zahid Raffiq drawing his attention to the conservatory orders issued herein. However, the said Advocates have now written to the Applicant's Tenants, **TUSKYS MATTRESSES LIMITED** in contravention of and without any regard for the said Order of this court. The Applicant states that despite the advise from their Advocates and being asked specially to desist from conducting themselves malevolently, the 1<sup>st</sup> and 5<sup>th</sup> Respondents and his sons, Mohamed Jamil Raffiq and Zahid Raffiq, without any regard for the rule of law and for the sanctity of judicial process, have engaged in unbecoming and malicious conduct by disseminating highly defamatory material and making intimidating and obnoxious threats and abuses directed towards directors of the Petitioner and their counsel Messrs. Vikram Kanji and Sanjeev Khagram including attempting to argue, in the public domain, a matter that is clearly subject to the '*sub judice*' rule. The Applicant believes that it is because the 1<sup>st</sup> and 5<sup>th</sup> Respondents and his said sons were unsuccessful in their alleged extortive attempts, they resorted to attempting to interfere with or influence the outcome of these proceedings or, indeed, creating serious impediments to the proper and just determination of these proceedings and/or the proper administration of justice. The Applicant's case is that it is imperative for the maintenance of the rule of law and good order that the authority and dignity of this Court is upheld by enforcing the plain and unqualified obligation of the 1<sup>st</sup> and 5<sup>th</sup> Respondents herein and his sons Mohamed Jamil Raffiq and Zahid Raffiq to obey the orders of this Court. The Applicant's case is that the publications made by the said individuals is clear testimony to the fact that they have little regard, if any or at all, for the rule of law and/or sanctity of judicial process or, indeed, the authority and dignity of this Court.

## The Response

7. The Respondents oppose the application vide a replying affidavit sworn by Mohamed Iqbal Mohamed Raffiq, the 1<sup>st</sup> Respondent herein, sworn on 21<sup>st</sup> October, 2016 on his own behalf. The other alleged contemnors have not opposed the application and have not filed any response thereto.

8. The 1<sup>st</sup> Respondent denies the allegations of contempt or that he has conducted himself maliciously or malevolently towards the Applicant. The 1<sup>st</sup> Respondent denies making any defamatory or derogatory remarks about Mr. Sanjeev Khagram and Mr. Vikram Kanji, and denies knowledge of publications exhibits "AA-4". The 1<sup>st</sup> Respondent's case is that he is a total stranger to the allegations made by the Applicant and that he is not a party to the defamation suit **No. HCCC No. 87 of 2016 Vikram Kanji & Others vs. Zahid Raffiq & Others**, and that he is not in contempt of any court order as alleged and that this application is baseless and should be dismissed with costs.

9. Mr. Ngari counsel for 2<sup>nd</sup> and 3<sup>rd</sup> Respondents successfully applied to be relieved from these proceedings on the basis that the same did not affect his clients.

## Issues for determination

10. (i) Whether the 1<sup>st</sup> Respondent is in contempt of court

(ii) Whether the other alleged contemnors are in contempt of court

## Submissions

11. Parties made oral submissions in court. Mr. Khagram referred court to the orders which were allegedly disobeyed and which appear from page 18-21 of the application. The 2<sup>nd</sup> orders and the rest of the orders appear from pages 23-26. Mr. Khagram submitted that the Petitioner brought this Petition against certain fraud alleged against their property. At page 27 of the application is an email from one of the alleged contemnors. It is alleged to be in foul language. Another email is at page 62. The contemnors accuse Petitioner of fraud. Mr. Khagram submitted that the language used is very abusive. Counsel also referred court to page 69 of application. The alleged abuses are copied to several parties. At page 75-101 are letters written to Mr. Khagram personally. These are all done in alleged breach of court orders. Counsel referred court to pages 123, 125, 127, 129, 132, 140-163, 170-174, 176-203, where there are allegations of Face Book defamation. **(See also pages 209, 304, 207-211 which are press publications).**

12. Mr. Khagram submitted that the alleged contemnors have no regard for reputation of individuals or for court orders. Counsel submitted that Mohamed Jamil Raffiq and Zahid Raffiq have not filed any replying affidavit to the contempt application. Only the 1<sup>st</sup> Respondent has replied to the application and his response is a mere denial. Counsel submitted that the order was made in a general term and covered the 1<sup>st</sup> Respondent and his agents or sons or relatives.

13. Mr. Wachenge for the 1<sup>st</sup> Respondent relied on the 1<sup>st</sup> Respondent's replying affidavit dated 21<sup>st</sup> October 2016. Mr. Wachenge submitted that all the alleged e-mail or Face Book defamation emanated from one Zahid Raffiq and Mohamed Jamil, and not from the 1<sup>st</sup> Respondent, who is their father. Counsel submitted that the alleged authors of defamatory material have already been found in contempt in HCCC No. 87/2016 and Warrants of Arrest were issued which are still out. Counsel submitted that the 1<sup>st</sup> and 5<sup>th</sup> Respondents are not in contempt of any orders issued by this court. They had no knowledge of the e-mail published and never participated in their publication. Mr. Wachenge urged the court to reject the application as against the 1<sup>st</sup> and 5<sup>th</sup> Respondents.

14. In his reply Mr. Khagram admitted that there are warrants of arrests against the authors of the said publications. They have actually fled the jurisdiction and one is in Dubai. However, counsel submitted

that the 1<sup>st</sup> and 5<sup>th</sup> Respondents are responsible for the said publications and for breach of orders of the court, since the order covered their agents and or children. In addition, the 1<sup>st</sup> and 5<sup>th</sup> Respondents disobeyed the court orders when they interfered with the payments of rent and demanded that the tenant in the suit premises pays rent elsewhere rather than to the Petitioner.

### **Brief Background**

15. The Petitioner herein was and still is the registered proprietor as Sub-Lessee of the residue of the term in respect of the property comprised in the Title registered at the Mombasa District Lands Registry as Msa/Block XX/315 (hereinafter called ‘**the suit property**’), to which it retains the original title. The Petitioner was registered as Proprietor of the interest in the Sub-Lease on 19<sup>th</sup> December 2002 (the same having been transferred to it by Car and General (Kenya) Limited) and was issued with a Certificate of Lease on 19<sup>th</sup> December 2002, as aforesaid. Since 19<sup>th</sup> December 2002, the Petitioner has had and enjoyed uninterrupted open possession and control in respect of the suit property and has allegedly carried out improvements thereon. The suit property was registered in the name of the Petitioner pursuant to the Provisions of The Registered Land Act (**Cap 300, Laws of Kenya**). The Petitioner believes that its title registered as Msa/Block XX/315 was indefeasible save for as provided under the aforesaid Act. The Petitioner also believes that its proprietary and other rights are protected pursuant to the Provisions of the Constitution.

16. The Petitioner’s above title has however come under threat by the 1<sup>st</sup> and 5<sup>th</sup> Respondents who have allegedly interfered with and continues to interfere with the Petitioner’s quiet possession and enjoyment of the same. The Petitioner alleges that the said interference is a fraudulent scheme orchestrated by the 1<sup>st</sup> and 5<sup>th</sup> Respondents in collusion with the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents to deprive the Petitioner of its property and have referred to the Petitioner as a trespasser to the suit property. It is this state of affairs which drove the Petitioner to come to this court praying for conservatory orders in the form of an injunction which were issued first in the interim, and later confirmed, pending the hearing and determination of the Petition herein.

17. From the above submissions and also from the pleadings the only issue for determination is whether or not the Respondents are in contempt of court orders. In order to establish this it is first necessary to establish the existence of the said court orders. At pages 18-21 of the application is the first order issued on 15<sup>th</sup> October, 2013. The order, accompanied with a penal notice, reads thus:

**(i) The application be and is hereby certified as urgent and service hereof on the Respondents be dispensed within the first instance.**

**(ii) Interim conservatory orders in the form of an injunction be and are hereby issued to restrain the 1<sup>st</sup> and/or 5<sup>th</sup> Respondents whether by themselves or through their agents, servants or employees or howsoever else from interfering with your Petitioners’ proprietary rights of the quite possession or occupation of the property known as MSA/BLOCK XX/315 or in any other manner howsoever interfering with or from causing embarrassment to your Petitioners’ sub-tenants pending the hearing and determination of this application inter partes.**

**(iii) Counsel to serve the Respondents and dates for inter partes hearing to be taken on priority basis at the Registry.**

18. At page 23-26 of the application we find the confirmation of the first orders which were given in the interim. The confirmed orders, accompanied with penal notice, were issued on 18<sup>th</sup> September, 2014 read thus:

**(i) The conservatory orders in the form of an injunction be and is hereby issued to restrain the 1<sup>st</sup> and/or 5<sup>th</sup> Respondents whether by themselves or through their agents, servants or employees or howsoever else from interfering with the Petitioners’ proprietary rights or the**

**quite possession or occupation of the property known as MSA/BLOCK XX/315 or in any other manner howsoever interfering with or from causing embarrassment to the Petitioners' sub-tenants pending the hearing and determination of this Petition.**

**(ii) The Petition is hereby fixed for hearing on the 24<sup>th</sup> November, 2014.**

**(iii) Hearing notices to be served on the 1<sup>st</sup> and 5<sup>th</sup> Respondents.**

19. It is to be noted that the injunctive orders above specifically restrained the 1<sup>st</sup> and the 5<sup>th</sup> Respondents. Clearly, although there is a reference to other joint contemnors, the orders prayed for in this application specifically concern the 1<sup>st</sup> and 5<sup>th</sup> Respondents. This has nothing to do with HCCC No. 87 of 2016 defamation case in which Zahid Raffiq and Mohamed Jamil Raffiq have been convicted for contempt.

20. Having confirmed the existence of the said orders, the next step is to establish whether the same were served upon the Respondents, and whether the same were disobeyed.

21. The existence and service of the above orders is not disputed. The 1<sup>st</sup> Respondent's case is that he has not disobeyed those orders. That being the case it is the duty of this court to scrutinize the actions of the Respondents vis-à-vis those orders and to determine if there was any breach by the 1<sup>st</sup> and 5<sup>th</sup> Respondents.

22. Now, the conservatory order was expressed in such general and generous terms, and it injuncted and restrained the Respondents

**“Whether by themselves or through their agents, servants or employees, or howsoever else from interfering with the Petitioner's proprietary rights or the quiet possession or occupation of the property known as MSA/BLOCK XX/315 or, in any other manner howsoever interfering with or from causing embarrassment to the Petitioner's sub-tenants pending the hearing of the Petition.”**

23. I have looked at the record of the application. The record discloses very embarrassing communication between the sons or relatives of the 1<sup>st</sup> and 5<sup>th</sup> Respondents and the Petitioner's counsel. Those email correspondences and Facebook communications are found between page 27 and page 296. The nature of the correspondences is abusive, defamatory and arrogant, and are directed to the counsel for the Petitioner. Sample this

**“Unfortunately the unwarranted abusive, obnoxiousness, indecency and offensive vulgarity directed towards yourself, your partner Vikram Kanji and your firm as well as your client Jessica Holding Limited and or Mr. Ajesh Agravat by one Mr. Zahid Raffiq have been justified due to your firms, your partner's and your client Mr. Aajesh Agravat's lack of moral etiquette together with your sheer dismissive attitude towards matters pertaining to your clients occupation of a property owned by Mr. Zahid Raffiq.”**

**“I advise all citizens of Mombasa to be extremely cautious when dealing with these two individuals and this law firm! They seem to operate above and beyond the law! Especially when it comes to dealing with bank loans and property transfers as I have been a victim to their fraud which I shall now make them pay for!**

**I look forward to beating them in court and disbarring them from ever practicing law in Kenya! At all costs!**

**AB&P! and Partners I look forward to your defamation case against me! I shall finish you in court and finish your reputation!”**

24. There are also unprintable abuses and defamation of the Petitioners in Facebook. All these are schemed harassment and interference with the Petitioner's enjoyment of quiet possession of the premises.

25. Although the 1<sup>st</sup> Respondent claims that he is not the author of those defamatory statements, harassment and interference, this court notes that the authors thereof are his sons or close relatives or his agents the subject of the aforesaid conservatory orders. If people who are restrained from doing certain actions can leave the jurisdiction of the country, and blatantly continue to disobey the orders of court simply because they cannot be arrested, can be allowed to do that then soon court orders will have little or no substance or relevance. The injunctive order was in very general terms. The 1<sup>st</sup> and 5<sup>th</sup> Respondents were always bound by those orders to restrain his sons or agents from disobeying the orders.

26. The above withstanding, I have carefully scrutinized the actions of the 1<sup>st</sup> and 5<sup>th</sup> Respondents since the conservatory injunction orders were issued. He has behaved as if those orders did not exist. He has continued to deal with the suit property, or make comments thereon, as if the injunction was not in place. In particular, the 1<sup>st</sup> Respondent has tried to interfere with the Petitioner's sub-tenant M/s Tusker Mattresses Limited by advising the sub-tenant not to sign the sub-lease. This is in contravention of the said court orders.

27. By the letter dated 4<sup>th</sup> August, 2016 addressed by M/S Atkinson Cleasby & Satchu to Managing Director Tuskys Mattresses Limited written on instructions of 1<sup>st</sup> Respondent it is clear that the instructions given to the firm of M/S Atkinson Cleasby & Satchu were in disregard of the said court order. In that letter the 1<sup>st</sup> Respondent purported to be the owners of the freehold reversion interest in the suit property. The 1<sup>st</sup> Respondent purported to direct the tenants on how the rent over the suit property should be paid. As clearly observed by M/S A. B. Patel and Patel in their letter dated 2<sup>nd</sup> September, 2016, that letter was in contempt of the said court order. Those instructions emanated directly from the 1<sup>st</sup> Respondent, and so his submission that he was not in breach of the court orders has no merit.

28. From the foregoing, the court finds that the application before the court for contempt is merited, and is allowed as prayed.

**Dated, Signed and Delivered in Mombasa this 29<sup>th</sup> day of May,**

**2017.**

**E. K. O. OGOLA**

**JUDGE**

In the presence of:

Mr. Khagram for Petitioner

Mr. Chebkaka holding brief Mwarandu for 1<sup>st</sup> Respondent

Mr. Kaunda Court Assistant