



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI  
ELC APPEAL NO. 22 OF 2017**

**ELECTRICAL MARKETING (WHOLESALE) LIMITED...APPELLANT**

**VERSUS**

**THE NAIROBI CITY COUNTY.....1<sup>ST</sup> RESPONDENT**

**GOPA HARISH.....2<sup>ND</sup> RESPONDENT**

**VEKARIA LALJI GOPAL.....3<sup>RD</sup> RESPONDENT**

**AND**

**CINATINE ENTERPRISES LIMITED.....INTERESTED PARTY**

**RULING**

The Appellant filed the application dated 18/12/2020 seeking to cite the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents for contempt and to have them committed to civil jail for an appropriate period, or fined an amount not exceeding Kshs. 20,000,000/= for disobedience of the court orders issued on 3/11/2020. Further, the Appellant sought orders of eviction against the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents from the premises known as land reference number 209/8323 (“the Suit Property”) and to have the orders supervised by the Officer Commanding Industrial Area Police Station. In addition, it sought to have the court make such orders and issue such directions as would expeditiously ensure that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents honored their obligations.

The application was made on the grounds that this court gave orders on 3/11/2020 in the presence of the advocates for the parties, granting the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents stay of execution of the judgement delivered on 15/7/2019 on condition that the rent collected from the Suit Property was deposited in a joint interest earning account to be opened in the names of the advocates for the Appellant and 2<sup>nd</sup> and 3<sup>rd</sup> Respondents with effect from October 2020. The sum deposited was to abide the determination of the appeal by the Court of Appeal. The Appellant contended that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents were yet to honor their obligation as directed by the court on 3/11/2020. It added that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent had knowledge of the order and its contents but that they had refused to take steps to comply with the court order despite numerous reminders. The Appellant urged that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents had willfully disobeyed the court orders and were in contempt.

The application was supported by the affidavit sworn by Sunil K. Patel who deponed that the Appellant’s advocates wrote to the Respondents’ advocate on 12/10/2020 requesting their availability to open a joint account for purposes of having the rent deposited in that account in compliance with the judgement of the court but they did not respond or acknowledge receipt of that letter. He deponed that reminders were sent out to the Respondents’ advocates on 15/10/2020 and 10/11/2020. He averred that the Respondents had failed to disclose the details of the tenants and the rent collected from the Suit Property and that they had declined to surrender the rent for October and November 2020. He added that since the orders for stay had lapsed and the Suit Property had reverted to Appellant, he believed that the Respondents were in the suit premises illegally and prayed for orders of eviction and payment of mesne profits.

Gopal Harish Vekaria swore the replying affidavit in opposition to the application. He averred that the court noted in its ruling of 7/10/2020 that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents had sold the Suit Property to third parties for valuable consideration and that the third parties had leased the land to tenants but that the court erroneously observed that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents had stated that they had rented the Suit Property to persons who carried out various businesses on the land. He added that they lodged an appeal against the judgement of this court and successfully sought orders for stay because the contractual obligations of the current owners of the Suit Property fell on the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents as vendors and if the occupiers of the Suit Property were evicted it would render the appeal nugatory should it succeed. He deponed that they were not the proprietors and were not in occupation of the Suit Property and further that they did not receive income or rent from the Suit Property. He urged that they should not be condemned to deposit in court rent which they do not receive.

The Appellant filed submissions and set out four elements to be proved in a case for civil contempt. These are, that the terms of the order were clear, unambiguous, that they were binding on the defendant, the defendant had knowledge of the terms of the order and that he deliberately acted in breach of those terms. The Appellant submitted that the orders issued on 7/10/2020 were plain and binding on the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. Further, that the terms of the order requiring the parties to open a joint interest earning account in the names of the advocates into which the rent collected from the Suit Property would be paid from October 2020 until the appeal was determined were clear and unambiguous. The Appellant submitted that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents were aware of the court orders because they were represented by Mr. Leonard Anyonje in court when the court made its orders. In addition, the Appellant's advocates wrote to the Respondents' advocates as a follow up.

The Appellants relied on the decisions in **Katsuri Limited v Kapurchand Debar Shah [2016] eKLR**, **Shimmers Plaza Limited v National Bank of Kenya Limited [2015] eKLR** and **Kenya Tea Growers Association v Francis Atwoli and 5 Others [2012] eKLR**. The Applicant relied on Order 22 Rule 29 of the Civil Procedure Rules which stipulates that where a decree is for the delivery of immovable property possession shall be delivered to the party to whom it has been adjudged or to a person he appoints to receive delivery on his behalf and if necessary by removing any person bound by the decree who refuses to vacate the property. It further relied on Section 38 (a) and (f) of the Civil Procedure Act. The Appellant also relied on **Marico Ndwiga v Edith Muthanje [2020] eKLR** where the court observed that the Respondent was entitled to an eviction order there where there was no order for stay of execution in force. The Appellant urged the court that it was trite law that a decree holder must enjoy the fruits of its decree in a reasonably expeditious manner. It sought to have the eviction supervised by the Officer Commanding the Industrial Area Police Station.

The issue for determination is whether the court should cite the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents for contempt with the consequences attendant thereto and whether an order of eviction should issue against them.

The court made orders on 3/11/2020 vide which it granted the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents stay of execution of the judgement it delivered on 15/7/2019 on condition that the rent collected from the Suit Property was deposited in a joint interest earning account which was to be opened in the names of the advocates for the Appellant and of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents with effect from October 2020. The sum deposited was to abide the determination of the appeal by the Court of Appeal. The Appellant seeks to have the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents cited for contempt of those orders. The orders were clear and unambiguous. These Respondents argued that they had sold the Suit Property to third parties for valuable consideration and that those third parties had leased the land to tenants. They contended that if the occupiers of the Suit Property were to be evicted it would render the appeal nugatory. The Respondents did not apply for review or setting aside of those orders. The orders were binding on the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents have deliberately acted in breach of those orders.

The court's jurisdiction to commit defendants for contempt of its orders should be carefully exercised with great reluctance in instances where there is no other mode which can be brought to bear on the contemnor.

Order 41 of the Civil Procedure Rules provides for the appointment of receivers of property by the court in specified circumstances. The receiver appointed can exercise powers such as the management, protection or improvement of the property in issue. He may also collect rent and profits from the property. The court may confer upon the receiver the power to apply and dispose of the rent and profits. In the court's view, the Appellant can secure compliance with the orders which this court made on 3/11/2020 by seeking the appointment of a receiver to manage the Suit Property and collect rent from the property which can be deposited in an interest earning account or as directed by the court.

The court declines to grant the orders sought in the application dated 18/12/2020.

**DELIVERED VIRTUALLY AT NAIROBI THIS 9<sup>TH</sup> DAY OF AUGUST 2021**

**K. BOR**

**JUDGE**

**In the presence of: -**

Mr. F. Muuo holding brief for Mr. A. Mulekyo for the Appellant

Ms. C. Munda holding brief for Ms. A. Merichi for the 1<sup>st</sup> Respondent

Mr. Isaac Rene for the 1<sup>st</sup> Respondent

Mr. V. Owuor- Court Assistant

No appearance for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents and the Interested Party