



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**CONSTITUTIONAL PETITION NO.5 OF 2018**

**KILIMANI PROJECT FOUNDATION.....APPLICANT**

**VERSUS**

**B CONCEPT LIMITED T/A B CLUB NAIROBI.....1<sup>ST</sup> RESPONDENT**

**KIZA RESTAURANT AND LOUNGE.....2<sup>ND</sup> RESPONDENT**

**SPACE LOUNGE AND GRILL.....3<sup>RD</sup> RESPONDENT**

**EXPLORERS TAVERN.....4<sup>TH</sup> RESPONDENT**

**DIRECTOR OF ENVIRONMENT**

**NAIROBI CITY COUNTY GOVERNMENT.....5<sup>TH</sup> RESPONDENT**

**NATIONAL ENVIRONMENTAL**

**MANAGEMENT AUTHORITY.....6<sup>TH</sup> RESPONDENT**

**ALCOHOLIC DRINKS AND**

**LICENSING BOARD.....7<sup>TH</sup> RESPONDENT**

**NAIROBI CITY COUNTY GOVERNMENT.....8<sup>TH</sup> RESPONDENT**

**RULING**

**1. Judgment was delivered in this matter on the 17<sup>th</sup> day of October 2019. The Petitioner then filed the Notice of Motion Application dated 9<sup>th</sup> October 2020 seeking the following orders:-**

**a) Spent.**

**b) Spent.**

**c) *The Honourable court do find that the proprietor of the 1<sup>st</sup> Respondent is in contempt for disobedience of the judgement and order given on 17<sup>th</sup> October 2019.***

**d) Spent.**

**e) *That this Honourable Court do issue an order that the proprietors of the 1<sup>st</sup> Respondent herein be committed to civil jail.***

**f) *That the court issues an order that the above mentioned proprietors of the 1<sup>st</sup> Respondent herein does purge his contempt within 24 hours of the date hereof by closing down the 1<sup>st</sup> Respondent's business operations within the Applicant's area of residence.***

*g) Any other or further relief that this Honourable Court may deem fit to grant.*

*h) Costs of this application.*

2. The application was supported by the grounds on the face of the application and the affidavit of Houghton Irungu; Chairperson of Kilimani Project foundation, sworn on 8<sup>th</sup> October 2020.

3. He deponed that in the judgement delivered by this court on 17<sup>th</sup> October 2019, the Court ordered that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents continued operation of business within the Applicant's area of residence is a violation of the Applicant's right to a clean and healthy environment as contemplated in Article 42(1) of the Constitution.

4. He further deponed that there is no stay of the orders in this court and in the court of Appeal and that despite knowledge of the orders, the 1<sup>st</sup> Respondent has continued to operate and continues to disturb the peace of the Applicant's members. He annexed photographs of the premises and event invite posters posted by the 1<sup>st</sup> Respondent on social media inviting the public to its premises.

5. The 1<sup>st</sup> Respondent opposed the application.

#### **Applicant's submissions**

6. They are dated 31<sup>st</sup> May 2021. Counsel for the Applicant submitted that the principles of law in order to succeed in civil contempt proceedings were established in **Kristen Carla Burchell v Barry Grant Burchell, Eastern Cape Division Case No. 364 of 2005** which was cited with approval in **Samuel M. N. Mweru & Others v National Land Commission & 2 Others [2020]e KLR** as:-

*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."*

7. Relying on the above case, he submitted that despite the existence and knowledge of the judgement and order of this court given on 17<sup>th</sup> October 2019.

8. The 1<sup>st</sup> Respondent has continued to operate business within the Applicant's area of residence and thus continues to disturb the peace of residents who are members of the Applicant thereby continuing to violate the Applicant's right to clean and healthy environment as contemplated by Article 42 (1) of the Constitution of Kenya.

9. He also submitted that a court order is binding on the party against whom it is addressed and until set aside remains valid and is to be complied with. In that regard, he submitted that the 1<sup>st</sup> Respondents herein filed an application dated 30<sup>th</sup> June 2020 for stay of execution at the Court of Appeal pending the hearing and determination of the intended appeal and the application was dismissed on 18<sup>th</sup> December 2020 and as such no stay of execution is in place and the judgement and order of this court given on 17<sup>th</sup> October 2019 is still valid. He called upon the court not to condone disobedience of its orders.

#### **1<sup>st</sup> Respondent's written submissions**

10. They are dated 28<sup>th</sup> June 2021.

11. Counsel for the 1<sup>st</sup> Respondent submitted that the application has no legal foundation as the Applicant did not cite the provisions of law that the application is sought to be brought under.

12. He also submitted that to cite the 1<sup>st</sup> Respondent which is a limited liability company, the Applicant was required to 1<sup>st</sup> apply to lift the corporate veil then go for the directors in their personal capacity, thus citing the limited liability company was a misapprehension of law. He relied on the Court of Appeal's decision in **Kiru Tea Factory Company Ltd v Stephen Maina Githiga & 14 Others [2019]**.

13. He also submitted that for a party to charge, assert that a person is in contempt of a court order, the court alleging the contempt must show two foundational facts:-

*a) An unequivocal, clear, precise order of the court directed at the party being alleged to be in contempt.*

*b) That the order has no condition precedents to its being complied with by the party to whom it is directed.*

14. He further submitted that the 1<sup>st</sup> Respondent is not in breach of the orders of the court as the said orders were ambiguous as they are directed to the 5<sup>th</sup>, 6<sup>th</sup> and 8<sup>th</sup> Respondents and not to the 1<sup>st</sup> Respondent as the Applicant seeks to skew. In that regard, he relied on the case

of **Rose Detho v Ratilal Automobile & Others [2018] eKLR** and the case of **Alken Connections Limited v Safaricom Limited & 2 Others [2013] e KLR**.

15. I have considered the notice of motion and the affidavit in support. I have also considered the affidavit in response, the written submissions filed on behalf of the parties and the authorities cited. The issues for determination is whether the 1<sup>st</sup> Respondent is in contempt of the court orders issued on 17<sup>th</sup> October 2019.

16. The 1<sup>st</sup> Respondent together with the 4<sup>th</sup> Respondent had earlier filed the notice of motion dated 31<sup>st</sup> October 2019 seeking orders:-

***“4. That this honourable court be pleased to issue an order of stay of execution of the judgment delivered on 17<sup>th</sup> October 2019 the resultant decree as well as all other consequential orders issued to thereon pending the filing, hearing and determination of the intended Appeal”.***

The affidavit in support of this application was sworn by Barry Ndengeyingoma, Managing Director and Co-director of the 1<sup>st</sup> Respondent sworn on the 31<sup>st</sup> October 2019.

17. The Directors of the 1<sup>st</sup> Defendant were therefore aware of the judgment and the orders issued on 17<sup>th</sup> October 2019.

18. The principles of law in order to succeed in contempt proceedings were established in the case of **Kristen Carla Burchell vs Barry Grant Burchell; Eastern Cape Division Case No 364 of 2005** which cited with approval in the case of **Samuel M. N. Mweru & Others vs National Land Commission & 2 Others [2020] eKLR** that:-

***“...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 a proper notice of the terms of the order;***

***(c) the defendant has acted in breach of the terms of the orders; and***

***(d) the defendant’s conduct was deliberate”***

It is the Petitioner’s/Applicant’s case that the 1<sup>st</sup> Respondent has continued to operate their business despite being aware of the said court orders.

19. The 1<sup>st</sup> Respondent on the other hand contends that the orders No4 and 5 have not been disobeyed.

20. However, this court in order No (a) stated:-

***“A declaration is hereby issued that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents continued operation of business within the Petitioner’s area of residence is a violation of the Petitioner’s rights to life and right to a clean and healthy environment as contemplated by Article 26(1) and 42(1) of the Constitution of Kenya”.***

In order No (d) the 5<sup>th</sup>, 6<sup>th</sup> and 8<sup>th</sup> Respondents were directed to enforce closure notices against the 1<sup>st</sup> – 4<sup>th</sup> Respondents and No (e) the 8<sup>th</sup> Respondent was directed to revoke the liquor licenses issued to the 1<sup>st</sup> – 4<sup>th</sup> Respondents.

21. The decree has not been stayed. I find that the orders are clear. In the case of **Eliud Muturi Mwangi (practicing in the name and style of Muturi & Company Advocates) vs LSG Lufthansa Services Europa/Africa GMBH & Another (2015) eKLR**; it was held thus:-

***“18. The law is that any person who has committed an act of contempt of court is liable for indictment. Therefore, even third parties who are not parties in a suit may be committed for contempt of court and classic examples are contempt on the face of the court, contempt by officers of a company or corporation, contempt by persons who are claiming under the title of a party in a suit or as assigns or successors in title.”***

22. I am satisfied that the continued operation of business of the 1<sup>st</sup> Respondent in the absence of any stay orders from the Court of Appeal amounts to contempt of this court’s Judgement of 17<sup>th</sup> October 2019.

23. In conclusion I find merit in this application and I grant the orders sought. In essence I find the directors of the 1<sup>st</sup> Respondent in contempt of the orders issued on 24<sup>th</sup> October 2019. They or whoever is nominated by the 1<sup>st</sup> Respondent should present themselves before court on 15<sup>th</sup> February 2022 for mitigation and sentencing.

It is so ordered.

**DATED, SIGNED AND DELIVERED IN NAIROBI ON THIS 18TH DAY OF NOVEMBER 2021.**

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**L. KOMINGOI**

**JUDGE**

**IN THE PRESENCE OF:-**

**MR. CHEGE FOR THE PETITIONER**

**MR. OPWAKA FOR MR. MASAVU FOR THE RESPONDENTS**

**STEVE -COURT ASSISTANT**