



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 191 of 2018

JOHARI SCHOOL LIMITED.....PLAINTIFF

-VERSUS-

ROSEMARY WAMBUGU

T/A JOHARI SCHOOL.....DEFENDANT

R U L I N G

1. Before Court are two applications. The first one is by the defendant dated 28/6/2019 while the second one is dated 22/6/2020 and was filed by the Plaintiff. The two applications are intertwined and I will address both at the same time.
2. The first application was brought under **Order 51 Rule 1 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act**. In the application, the defendant sought for the extension of time within which she was to comply with the orders made by Kasango J. on 9/05/2019 from 3 months to 6 months from the effective date of 9/05/2019. She further sought a stay of execution of the said ruling pending the determination of the application.
3. The application was supported by the affidavit of **Rosemary Wambugu** sworn on 28/6/2019. The grounds upon which the application was made were set out on the face of the Motion and the supporting affidavit. These were that; the 3 months period given to comply with the order restraining her from carrying on business, representing herself, transacting or displaying the name JOHARI SCHOOL was too short. That she had made substantial effort to comply therewith and needed the 6 months sought to fully comply. There was no response to that Motion.
4. The second application by the plaintiff was brought under **section 5 of the Contempt of Court Act No. 46 of 2016, section 1A, 1B and 3A of the Civil Procedure Act**. It sought to cite the defendant for contempt of court and for her to be committed to civil jail for disobeying the order issued on 17/10/2019 by Kasango J.
5. The grounds for the application were set out in the body thereof and in the supporting affidavit of **Salome Muhia-Beacco**. The plaintiff contended that the defendant had disregarded the said order by continuing to use the name JOHARI SCHOOL in her business almost 6 months since the ruling of 17/10/2019.
6. That application was opposed vide a replying affidavit sworn by the defendant on 15/1/2020. It was the defendant's contention that she had taken measures to ensure compliance with the order of 17/10/2019. That she had since registered a new business name '**Creative Integrated Johari school**' and applied to the Ministry of Education to be registered under the new name; that there was a delay in the issuance of a certificate of registration from the Ministry of Education but the same had finally been issued. That all her correspondence now bears the new name of the School.
7. Both parties filed their respective submissions in support of their contentions which the Court has carefully considered.
8. As far as the first application is concerned, I think and so hold that, the same is overtaken by events. I say so because it sought the extension of time for 6 months only from 9/5/2019. The Court suspended the order until 31/12/2019 by the order of 17/10/2019. That was the time by which the six months was to expire.
9. That leaves the application for contempt.
10. **Section 63 (c) of the Civil Procedure Act** provides: -

“In case of disobedience, or breach of any such terms, the court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the court directs his release.”

11. Civil contempt is the willful disobedience of a court order or process. In this regard, when a court grants an injunction and its terms are disobeyed, the person guilty of such disobedience may be detained in prison for a term not exceeding 6 months.

12. In the present case, vide a ruling of 9/05/2019, this Court issued an interlocutory injunction restraining the defendant from carrying out business in the name of **JOHARI SCHOOL** within 3 months of delivery of the ruling. That period was extended to 31/12/2019. The pertinent part of ruling and order read: -

“Within three (3) months from today’s date, Rosemary Wambugu t/a JOHARI SCHOOL is hereby restrained, by an interlocutory injunction, whether by herself, her officers, her employees and her servants or agents from carrying out business, representing herself, transacting or displaying the name of JOHARI SCHOOL”.

13. What was in dispute was the use of the name **JOHARI SCHOOL**. It is its use that the defendant was restrained from. It was the defendant’s contention that she had fully complied with that order by having the name of the School changed from **JOHARI SCHOOL** to **CREATIVE INTERGRATED JOHARI SCHOOL**. That she had rebranded the school uniforms and school buses with the new name. It was her case that since the name was lengthy, it was logical to have the first two names initialed to read C.I. JOHARI SCHOOL on the school uniforms and the school bus.

14. Having evaluated the evidence on record and the submissions of the parties, the Court’s view is that, as already stated what is in contention and from which the defendant was restrained was the use of the name **JOHARI SCHOOL** in her business. All that the defendant did was to undertake steps that were, to say the least, mischievous, in order to circumvent the Court Order. Why would she insist on using the name **JOHARI** by whatever name called for her school?

15. Her rebranding or changing the name to ‘**CREATIVE INTEGRATED JOHARI SCHOOL**’ or ‘**C.I JOHARI SCHOOL**’ as opposed to the previous plain name of ‘**JOHARI SCHOOL**’ did not help. It did not change the fact that there was use of the name ‘**JOHARI SCHOOL**’ in that business which was in breach of the subject order. The name she registered is so strikingly similar to that of the plaintiff’s which the Court had restrained her from using. Bearing in mind that the businesses run by both parties are schools, the inclusion of the words **CREATIVE INTEGRATED** to **JOHARI SCHOOL** does not make any difference.

16. In the case of **Africa Management Communication International Limited v Joseph Mathenge & another [2013]** it was stated:

“To my mind, when a party is faced with an application for committal for alleged contempt and it is alleged that there is in existence an order which he has disobeyed, it is incumbent upon him to defend his position. He has to show either that he was not aware of the order or his actions did not amount to breach of the order.”

17. In the instant case, the Court finds that the Defendant was fully aware of the Court order requiring her to refrain from ***“carrying out business, representing herself, transacting or displaying the name of JOHARI SCHOOL”***. Despite this explicit and unambiguous order, and with the knowledge that this is a passing off claim, the defendant went ahead and registered a new name of her school with the words **JOHARI SCHOOL** in it, thereby making a mockery of the subject order.

18. In **Cecil Miller v Jackson Njeru & Another [2017] Eklr**, the Court set out the elements of a civil contempt as found in the book ***“Contempt in Modern New Zealand”*** 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.”***

19. In the present case, I find that the terms of the order were unambiguous, the defendant had knowledge of it and deliberately acted in breach of it. In this regard, the Court finds the defendant to be in contempt of court by disobeying the Order of 17/10/2019 that had reinstated the order of 09/05/2019 and cites her accordingly.

20. The Court will now address whether the Defendant should be committed to civil jail in light of the contempt of Court.

21. It is imperative that Court orders are obeyed in order to uphold the fundamental supremacy of the law. In **Shimmers Plaza Limited v National Bank of Kenya Limited [2015] Eklr**, the Court of Appeal stated: -

“We reiterate here that court orders must be obeyed. Parties against whom such orders are made cannot be allowed to trash them with impunity. Obedience of Court orders is not optional, rather, it is mandatory and a person does not choose whether to obey a court order or not.”

22. **Order 40 Rule 3 of the Civil Procedure Rules** gives the Court the power to commit a party found guilty of contempt to jail for a term not exceeding 6 months. In **Katsuri Limited v Kapurchand Depar Shah [2016] Eklr**, the court observed that the power to commit for contempt is one to be exercised with great care and that an order committing a person to prison for contempt is to be adopted only as a last resort.

23. In view of the foregoing, the Court finds that a committal to prison for contempt is to be adopted as a last resort. In the premises, the Court having found the defendant in contempt, it shall reserve the sentence until after the contemnor is heard on mitigation. The contemnor is to appear before this Court on a day to be fixed for mitigation and sentencing.

DATED AND DELIVERED AT NAIROBI THIS 11TH DAY OF MARCH 2021.

A. MABEYA, FCI Arb

JUDGE