



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC NO. 75 OF 2017**

**SUTTON HOLDINGS LIMITED.....PLAINTIFF**

**-VS-**

**ABDULAHI OMAR SAID.....DEFENDANT**

**RULING**

1. By a Notice of Motion dated 16<sup>TH</sup> April 2019 the Defendant/Applicant moved this court under Section 5 of the Judicature Act Cap 8 Laws of Kenya and Order 52 of the Supreme Court of England Rules as well as Section 3A of the Civil Procedure Act seeking for orders that the plaintiff's managing Director Aman Kurji be summoned before court to show cause why he should not be committed to civil jail for blatantly refusing; neglecting and/or failing to comply with the orders issued by this court on 29<sup>th</sup> June 2017 and that on failing to show necessary cause and in the alternative the said Aman Kurji be committed to prison for a maximum period of six (6) months for contempt. The applicant also wants the named contemnor to be barred from addressing the court in this matter unless and until he shall have purged himself of the contempt. The application is premised on the grounds that Mr. Aman Kurji as the Managing Director is responsible for the overall management of the plaintiff company. That on 16<sup>th</sup> June 2017, the Plaintiff filed a Notice of Motion application dated 15<sup>th</sup> June 2017 seeking leave of the court to amend the plaintiff's Notice of Motion dated 8<sup>th</sup> March 2017. That on 29<sup>th</sup> June, 2017, when the matter came up for mention before the court and in the presence of counsel for both parties, the court ordered i) the respondent to file his response within 21 days, ii) the application dated 15<sup>th</sup> June 2017 was fixed for hearing on 20<sup>th</sup> September, 2017 and iii) that status quo to be maintained. The despite the orders issued by the court, the Managing Director of the Plaintiff has blatantly breached the same as follows:

- i. By ordering his staff members to demolish the defendant's structure**
- ii. By ordering his staff members to vandalize the Defendant's materials on site.**
- iii. By ordering his staff members to maliciously damage and totally destroy the defendant's structure.**
- iv. By allowing activities on the suit property at the behest of the Interested Party.**
- v. The statement Karim Amirali, the Manager of the plaintiff signed on 5<sup>th</sup> November, 2018 filed in Shanzu Criminal Case No. 1702 of 2018 clearly shows contempt by the contemnor.**

2. The application is supported by the affidavit of Abdullahi Omar Said, the applicant sworn on 16<sup>th</sup> April 2019 in which he deposed that the orders issued by the court on 29<sup>th</sup> June 2017 were extracted and included notice of penal consequence. That sometime in November 2018 the plaintiff's employees by the names Mr. Karim Amirali and Mr. Jembe Said Hassan were charged at Shanzu Law Court for maliciously damaging the defendant's property, the subject of this suit. That the arrest and prosecution of Mr. Aman Kurji had been recommended by the Director of Public Prosecutions and the Directorate of Criminal Investigation but were suspended because of the case herein. The applicant now urged the court to punish the contemnor for the willful disobedience of the orders of court.

3. In opposing the application, the respondent filed a preliminary objection dated 22<sup>nd</sup> July, 2019 on the grounds that:

- 1. The court does not have jurisdiction to hear the application because;**
  - a. The jurisdiction of the court is limited to the parties before the court.**
  - b. The alleged contemnor/respondent has not been named as a party to the suit or the Application.**

**2. The application is fatally defective because,**

**a. It purports to have been brought under Section 5 of the Judicature Act.**

**b. No application notice was filed or served as required under Rule 81.4 of the Procedure applicable in England.**

**c. Accordingly, the court has not assumed jurisdiction over the respondent to punish him or the alleged contempt.**

4. The respondent also filed a replying affidavit sworn by Aman Kurji on 22<sup>nd</sup> July, 2019 in which he denies breaching the orders of status quo issued on 29/6/2017. The respondent states that he never ordered any of the plaintiff's staff to demolish the defendant's structure. He further states that they never vandalized material on the site and that they have never destroyed any property of the defendant. The respondent avers that the statements by Karim Amirali do not impose any liability on him since he never authorized any person to destroy the defendant's property, adding that the said statements were obtained unlawfully and under duress. He has annexed a statutory declaration sworn by Karim Amirali Jaffer Mohamed recanting his statement dated 5<sup>th</sup> November 2018 alleging the same was taken under duress. The respondent states that the applicant has been using the police to arm-twist the plaintiff to withdraw or abandon the proceedings herein.

5. Both the applicant and the respondent filed written submissions through their respective advocates. M/s Khalid Salim & Company Advocates for the Applicant filed their submissions on 15<sup>th</sup> August, 2019 in which they submitted inter alia, that this court has the jurisdiction to find the respondent's director in contempt of the orders of the court being the person in conduct of the company's business. Counsel submitted that through the alleged contemnor has not been named as a party in the suit, he was aware of the orders of 29<sup>th</sup> June 2017 and knew of the terms which were issued in the presence of counsel for both parties. That his decision not to comply with the orders was willful and intentional. Counsel relied on the case of **Ocean Foods Limited –v- Osotspa Company Limited & 2 Others (2018) eKLR and Eliud Muturi Mwangi (practicing) in the name and style of Muturi & Company Advocates –v- LSG Lufthansa Services Europa/Africa GMBH & Another (2015)eKLR**. It was further submitted that the allegation that the statements of Mr. Karim Amirali was obtained under duress is an afterthought and a ploy by the respondent to try and distance himself from the demolitions. On the argument that the application is defective, the applicant's counsel submitted that the court should be guided by Article 159 of the Constitution which encourages courts to administer justice without undue regard to procedural technicalities and cited the case of **Garun Investment Ltd –v- City Council of Nairobi (2019)eKLR**. Counsel urged the court to allow the application and relied on the case of **Econet Wireless Kenya Ltd –v- Minister for Information & Communication of Kenya & Another (2005) KLR 825**.

6. M/s Muthee Soni & Associates Advocates for the respondent in their submissions filed on 8<sup>th</sup> October, 2019 submitted that the court does not have jurisdiction to hear the application, arguing that the jurisdiction of the court is limited to the parties before it and that the alleged contemnor has not been named as a party to the suit or application and has not even been alleged that he was served with the court order. The respondent's counsel relied on the case of **Abdi Satarhaji & Another –v- Omar Ahmed & Another (2018)eKLR**. It was further submitted that the application is fatally defective because it purports to have been brought under Section 5 of the Judicature Act whereas no Application notice was filed or served as required under Rule 81.4 of the Procedure applicable in England. The respondent submitted that the application has no merit because the order did not describe the status quo as at 29/6/2017 and does not prohibit or compel the alleged contemnor to act or to refrain from acting. Further, that if treated as an injunction the same will have no legal effect after the lapse of two years. It was further submitted that the materials which were allegedly vandalized is frivolous because the applicant has not given the particulars of the material destroyed. That the evidence in the criminal case is not admissible. The respondent urged the court to dismiss the application.

7. I have considered the application, the affidavits and the rival submissions. The first issue to determine is whether the court does not have jurisdiction to determine the application because the court's jurisdiction is limited to the parties before the court and because the alleged contemnor has not been named as a party to the application. To answer this issue, I am persuaded by what Obaga, J stated in the case of **Eliud Muturi Mwangi (practicing in the name and style of Muturi & Company Advocates) –v- LSG Lufthansa Services Europa/Africa GMH & Another (supra)** where he states:

**“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...”**

In this regard, it is my finding that the court certainly has jurisdiction to hear the application and the court's jurisdiction cannot be limited to the parties before the court. Moreover, the person named as the alleged contemnor is the managing director of the plaintiff company. Companies are usually represented by its directors or officers. In my view, the application cannot fail because the alleged contemnor has not been named as a party to the application. This objection in my view, is purely of a technical nature which cannot be entertained. Article 159 of the Constitution is clear that courts should not give undue regard to technicalities.

8. Turning to the merits of the application, it is trite law that in contempt proceedings, proof must be made beyond the standard in civil cases as contempt is quasi-criminal. The burden of proof lies on the applicant. In the case of **Gatharia K. Mutikika –v- Balianin Farm Ltd (1985) KLR 27**, it was held as follows:

**“The courts take the view that where the liberty of the subject is, or might be involved in breach for which the alleged contemnor is cited must be precisely defined. A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be satisfactorily proved...it must be higher than proof on a balance of probabilities, almost but not exactly, beyond reasonable doubt.”**

9. Therefore, the applicant in an application for contempt must prove beyond peradventure that the respondent is guilty of contempt. The

prayers sought is for contempt. The power to commit for contempt is one to be exercised with great care. An order committing a person to prison for contempt is to be adopted only as a last resort and in clearest of cases.

10. In the present application, the orders allegedly violated was one stating that the status quo was to be maintained. I agree with the respondent's submissions that the order did not describe what the status quo to be maintained was. It is the applicants' contention that the respondents breached the said orders by ordering the applicant's structure and to vandalize the applicant's materials on site. The applicant relied on statements recorded by police from certain witnesses in a criminal case. However, the same persons have sworn an affidavit recanting the said statements, and alleging that the same were in fact taken under duress. From the application, it appears the applicant is admitting that the acts complained of were committed by known third parties under the instructions of the respondent. However, the applicant in my view, has failed to prove that such instructions were indeed given by the respondent. The court cannot commit for contempt based on mere allegations.

11. In the instant application, I am unconvinced that the allegation of contempt of court has been proved to the required standard. In as much as the respondent may have been aware of the court orders issued on 29<sup>th</sup> June, 2017, I am not satisfied that the applicant has demonstrated that the respondent has willfully disobeyed the said orders. Moreover, the acts allegedly committed by the respondent are not precise and no evidence of the alleged demolitions or vandalism has been exhibited, at least to assist the court appreciate what might have transpired. It is not clear to this court how the orders were violated.

12. It is my finding that the Notice of Motion dated 16<sup>th</sup> April 2019 lacks merit and hereby dismiss it with costs.

**DATED, SIGNED and DELIVERED at MOMBASA this 30<sup>th</sup> day of January 2020.**

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**C.K. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

Ms. Wafula holding brief for Khalid for applicant

Ms. Nduku holding brief for Karina for respondent

Yumna Court Assistant

**C.K. YANO**

**JUDGE**