



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND TAX DIVISION**

**MISCELLANEOUS APPLICATION NO. E251 OF 2019**

**PAPINDER KAUR ATWAL.....APPLICANT**

**VERSUS**

**ASHISH MAGON.....RESPONDENT**

**RULING**

1. This ruling in respect to the application dated 30<sup>th</sup> July 2019 wherein the applicant seeks orders:-

**1. Spent**

**2. Spent**

**3. That ASHISH MAGON the respondent herein, the Directors of RICHLAND PROPERTIES LIMITED namely RISHAD HAMID AHMED and LILLY SULEIMAN SHARBAID be committed to civil jail and detained in person for a term of six (6) months or such period as this Honourable court will deem fit or both be fined and imprisoned for contempt of this honourable court orders made on 15<sup>th</sup> July, 2019.**

**4. That costs of this application be provided for.**

2. The application is supported by the applicant's affidavit and is premised on the grounds that on 15<sup>th</sup> July 2019, this court issued an order restraining the respondents and his agents from terminating the contract dated 10<sup>th</sup> November 2015 and the special Power of Attorney dated 29<sup>th</sup> August 2016 but that despite personal service of the said order on the respondent, he proceeded to terminate the said agreements. The applicants case is that the respondent's agents **Rishad Hamid Ahmed and Lilly Suleiman Sharbaid** locked the applicant out of the suit premises.

3. The respondent opposed the application through its replying affidavit filed on 23<sup>rd</sup> October 2019 wherein he avers that the applicant deliberately failed to serve him with the application dated 25<sup>th</sup> June 2019 so that he could be condemned unheard through the issuance of orders that are detrimental to him and his various companies.

4. He avers that the termination of the Memorandum of Understanding and Power of Attorney had already taken place at the time the impugned order was issued as at the time the owners of the suit premises had already appointed **M/S Richland Properties Limited** to act in place of the applicant.

5. He further states that through a letter dated 6<sup>th</sup> June 2019, the respondent expressly communicated the termination of the Management Agreement to the applicant. It is the respondent's position that in the application dated 25<sup>th</sup> June 2019 the applicant admitted knowledge of the termination.

6. The respondent contends that the applicant misled the court to issue the impugned orders of 15<sup>th</sup> July 2019 through non-disclosure of material facts regarding the termination of their management agreement and that the impugned order is ambiguous and does not mirror the material developments that had already taken place.

7. Parties filed written submissions which I have considered. I note that the main issue for determination is whether the respondent is in contempt of the court order of 15<sup>th</sup> July 2019.

8. *Black's Law Dictionary*; [14] 9th Edition, page 360 defines contempt of court as follows:

*"Contempt is a disregard of, disobedience to, the rules, or orders of a legislative or judicial body, or an interruption of its proceedings by disorderly behavior or insolent language, in its presence or so near thereto as to disturb the proceedings or to impair the respect due to such a body."*

9. In *Halsbury's Laws of England* it is stated:-

*"It was the plain and unqualified obligation of every person against or in respect of whom an order was made by a court of competent jurisdiction to obey it unless and until it was discharged and disobedience of such an order would as a general rule result in the person disobeying it being in contempt and punishable by committal or attachment .....an application to court by him not being entertained until he had purged his contempt"*

10. In *Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & Another* [2005] 1KLR 828 **Ibrahim J** (as he then was) stated as follows:-

*"It is essential for the maintenance of the Rule of Law and order that the authority and the dignity of our Courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against or in respect of whom, an order is made by Court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or void."*

11. From the above definition of contempt of court and the cited authorities, it is clear that contempt of court is the willful disobedience of court orders that brings the court into disrepute. By their very nature contempt of court proceedings are quasi criminal in nature since the liberty of a person is at stake as they can culminate in the jail sentence should a contemnor be found to be guilty of contempt. For this reason, the standard of proof in contempt cases is higher than proof in ordinary civil cases. This is the position that was reiterated in the case of *Gatharia K. Mutikika v Baharini Farm Ltd* (1985) KLR 227 where it was held as follows:-

*"The Courts take the view that where the liberty of the subject is, or might be involved, the 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... I must be higher than proof on a balance of probabilities, almost, but not exactly, beyond reasonable doubt. The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to offence, which can be said to be quasi-criminal in nature. However, the guilt has to be proved with such strictness of proof as is consistent with the gravity of the charge... Recourse ought not be had to process of contempt of court in aid of a civil remedy where there is any other method of doing justice. The jurisdiction of committing for contempt being practically arbitrary and unlimited, should be most jealously and carefully watched and exercised with the greatest reluctance and the greatest anxiety on the part of judges to see whether there is no other mode which is not open to the objection of arbitrariness, and which can be brought to bear upon the subject. A judge must be careful to see that the cause cannot be mode of dealing with persons brought before him. Necessary though the jurisdiction may be, it is necessary only in the sense in which extreme measures are sometimes necessary to preserve men's rights, that is, if no other pertinent remedy can be found... Applying the test that the standard of proof should be consistent with the gravity of the alleged contempt..... it is competent for the court where a contempt is threatened or has been committed, and on an application to commit, to take the lenient course of granting an injunction instead of making an order for committal or sequestration, whether the offender is a party to the proceedings or not."*

12. In *Peter K. Yego & Others v Pauline Nekesa Kode* Nakuru HCCC No. 194 of 2004 the court recognizing that contempt of court is criminal, held that it must be proved that one has actually disobeyed the court order before one is cited for contempt. This means that the applicant in an application for contempt must prove beyond peradventure that the respondent is guilty of contempt.

13. In the present case, I note that the impugned court order dated 10<sup>th</sup> March 2015 that the respondent is alleged to have disobeyed was as follows:

***A. That an interlocutory injunction be and is hereby issued restraining the respondent by himself or through his agents and/or servants from terminating the contract dated 10<sup>th</sup> November, 2015 and the Special Power of Attorney dated 29<sup>th</sup> August, 2016 duly registered as P/A 70031/1 both executed by the applicant and respondent pending the hearing and determination of this application.***

14. While the applicant argued that the respondent was duly served with the said order and opted to deliberately disobey it, the respondent contends that the subject contract dated 10<sup>th</sup> November 2015 and the Special Power of Attorney dated 29<sup>th</sup> August 2016 had already been terminated as at the time the impugned order was issued a fact which the applicant was fully aware of.

15. The question which then arises is whether the impugned order was issued to restrain the respondent from doing an act that had already taken place. I have perused the respondents annexure marked "AM4" attached to the replying affidavit. I note that it is a letter dated 6<sup>th</sup> June 2019 from the respondent to the applicant in which the respondent states as follows:

**"REF: MANAGEMENT OF MY VARIOUS COMPANIES**

***The above and my letter of 29<sup>th</sup> May 2019 refer;***

*This is to inform you that in light of your failure to action and comply with my request for a statement of accounts and a list of all current tenants, I hereby through this letter terminate your management of any of my properties with effect from close of business 6<sup>th</sup> June 2019.*

*I further authorize Mr. Chege Kariuki Advocate to collect from your invoice to date, if any, the statement of accounts as of close of business 6<sup>th</sup> June 2019 detailing each tenant's payments, rent schedules, leased and offer letters, copies of court pleadings filed plus any other documents he may require to enable his action. Do offer him the requisite assistance.*

*I wish to thank you for your service during our period together and wish you all the best in your future endeavors.*

*Yours faithfully*

**ASHISH MAGON**

16. I further note that in the applicant's own affidavit in support of the earlier application dated 25<sup>th</sup> June 2019, which application gave rise to the impugned orders herein, the applicant states as follows at paragraph 21 thereof:

*“That it has now become clear to me that in breach of both the agreement dated 10<sup>th</sup> November, 2015 and the Power of Attorney dated 29<sup>th</sup> August, 2016, the respondent has now terminated my Agreement and revoked the Special Power of Attorney.”*

17. Having regard to the above contents of the letter dated 6<sup>th</sup> June 2019 and the applicant's affidavit, I find that the applicant was already aware of that the Agreement and Power of Attorney has already been terminated as at the time he approached the court for the impugned orders.

18. It is therefore my finding that the respondent cannot be said to have acted in contempt of the impugned orders when the action that the applicant sought to restrain the respondent from doing had already taken place. Consequently, I find that the instant application is not merited and I therefore dismiss it with no orders as to costs.

**Dated, signed and delivered via Microsoft Teams at Nairobi this 14<sup>th</sup> day of May 2020 in view of the declaration of measures restricting court operations due to Covid -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17<sup>th</sup> April 2020.**

**W. A. OKWANY**

**JUDGE**

**In the presence of:**

Chege for respondent

C/A & DR Wanyama

**W. A. OKWANY**

**JUDGE**