



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC MISC CAUSE NO. 158 OF 2019**

**DESIGNER TEXTILE CO. LIMITED.....1<sup>ST</sup> APPLICANT**

**MOHAMUD BARRE ADAD.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**BARAKA HOUSE LIMITED .....1<sup>ST</sup> RESPONDENT**

**DOLLAR FOREX BUREAU LIMITED.....2<sup>ND</sup> RESPONDENT**

**HANIFA MOHAMUD AHMED.....3<sup>RD</sup> RESPONDENT**

**HASSAN MOHAMUD AHMED.....4<sup>TH</sup> RESPONDENT**

**MULID AHMED MOHAMUD.....5<sup>TH</sup> RESPONDENT**

**RULING**

1. This is the notice of motion dated 10<sup>th</sup> September 2019 brought under order 51 rules 1 of the Civil Procedure Rules, section 5(1) Judicature Act Cap 8 and Section 63(c) of the Civil Procedure Act Cap 21 Laws of Kenya and order 52 of the rules of the Supreme Court of England.

2. It seeks orders:-

*(a) Spent.*

*(b) Spent.*

*(c) Spent.*

*(d) That the 1<sup>st</sup> and 2<sup>nd</sup> respondents be ordered to pay such fine as the court deems fit while the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents be and are hereby committed to jail for contempt of court for disobeying the express orders of the Business Premises Rent Tribunal issued by Hon. Mbichi Mboroki on 13<sup>th</sup> June, 2012 and 31<sup>st</sup> July 2019.*

*(e) That the said 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> Respondents be kept in Kamiti Maximum Security Prison or such other prison as the court may prescribe for a term not exceeding 6 (six) months or for a term this honourable court may deem fit and just.*

*(f) That the respondents do pay costs of this application.*

3. The grounds are on the face of the application and are set out in paragraphs 1 to 17.

4. The application is supported by the affidavit of Hassan Ahmed Musa, a director/shareholder of the 1<sup>st</sup> Applicant sworn on the 10<sup>th</sup> September 2019 and a supplementary affidavit sworn on 3<sup>rd</sup> December 2019.

5. The application is opposed. There is a replying affidavit sworn by Hanifa Mohamud Ahmed, the 3<sup>rd</sup> respondent sworn on the 24<sup>th</sup>

September 2019.

6. On the 15<sup>th</sup> October 2019, the court with the consent of the parties directed that the application be canvassed by way of written submissions.

### **The applicant's submissions**

7. On 8<sup>th</sup> August 2019, the 4<sup>th</sup>, 5<sup>th</sup> Respondents broke into the stores of the 1<sup>st</sup> Applicant on the 3<sup>rd</sup> floor and demolished a grilled door and parts of the premises within the suit property in blatant defiance of court orders. The incident was reported at Pangani police station and recorded as OB No 66 and 76 of 8<sup>th</sup> August 2018. There are photographs annexed showing the damage on the 1<sup>st</sup> and 3<sup>rd</sup> floors. They have put forward the case of **Aloise Chweya Obaga vs Ouru Power Limited & 2 Others [2017] eKLR**.

8. The respondents by the time of making the application to set aside the orders on 21<sup>st</sup> August 2019 were fully aware of the existence of the court orders yet they kept breaching the same by harassing the applicants and engaging in acts of demolition of part of the premises. The court has time and again affirmed that knowledge of a court order supersedes personal service. They have put forward the cases of **Basil Criticos vs Attorney General & 8 Others [2012] eKLR; Shimmers Plaza Limited vs National Bank of Kenya Limited, Civil Appeal No. 33 of 2012**.

9. On 5<sup>th</sup> October 2019 the county government of Nairobi, wrote a letter dated 5<sup>th</sup> October 2019 to the 2<sup>nd</sup> respondent, acknowledging receipt of a letter dated 4<sup>th</sup> October 2019 from the 2<sup>nd</sup> respondent seeking to carry out demolition works yet the orders were still in place. The 3<sup>rd</sup> – 5<sup>th</sup> respondents are shareholders of the 2<sup>nd</sup> respondent and therefore crucial players, in writing letters to undermine court orders. The respondents have merely denied service of the said orders. The 3<sup>rd</sup> and 4<sup>th</sup> respondents have visited the premises to take photographs in clear acts of harassment.

10. The existence of a permit from Nairobi City County Government cannot override a court order. The letter from the Nairobi County dated 14<sup>th</sup> October 2019 confirms that no permit was issued to demolish the building. The respondents are in clear breach of the court orders. They pray that the application be allowed.

### **The Respondents' submissions**

11. The respondent deny ever having been served with a court order issued on 31<sup>st</sup> July 2019. Upon learning of the existence they applied to have the same set aside. That the respondents have obtained orders from the Nairobi City County to have the building demolished confirming that indeed the building was dangerous and it was for their own interest and safety that the building be demolished.

12. The applicants failed to serve the court order upon the respondents. They have to prove that the respondents have willfully disobeyed the said court order. The orders being sought herein are meant to stop proceedings in the Business Premises Rent Tribunal in order to continue occupying the premises. The respondents have confirmed there were many tenants in the building other than the applicants who were served with notices of termination. The other tenants have moved out and were entitled to remove their fixtures which they had fixed to enhance their security. They pray that the applicants be found to have failed to prove their case and the application ought to be dismissed.

13. I have considered the notice of motion and the affidavit in support together with the annexures. I have considered the replying affidavit together with the annexures. I have considered the written submissions made on behalf of the parties and the authorities cited. The issues for determination are:-

*(i) Whether or not the alleged contemnors are guilty of disobeying court orders.*

*(ii) Who should bear costs?*

14. It is the applicant's case that the respondents are guilty of disobeying court orders issued by the Business Premises Rent Tribunal in Tribunal case No. 541 of 2019. On the 31<sup>st</sup> July 2019, the tribunal issued the following orders:-

*“The landlord/respondent whether by themselves, their agents, employees, servants and/or any one acting on their instructions are restrained from harassing, unlawfully evicting, demolishing, the business premises and building and/or any manner whatsoever interfering with the applicant's quiet occupation and lawful enjoyment of the suit premises being a shop at LR No. 36/11/2, First Avenue, Baraka Plaza Eastleigh Nairobi pending the hearing and determination of the reference/suit herein”.*

15. Jackson Mutinda, a process server in his affidavit stated as follows:-

#### **Paragraph 3:**

*“That on 2<sup>nd</sup> August 2019, I went to the said premises and pinned the order and penal notice at around 10:00 am, later on received a call from Hassan Ahmed Musa, Director of the 1<sup>st</sup> applicant who informed me that officers of the respondents namely; Hanifa Mohhamud Ahmed, Hassan Mohamud Ahmed and Mulid Ahmed Mohamud were at the premises. I rushed there and I was shown the said persons. I introduced myself and the purpose of my visit, I tendered to them copies of order and notice of penal. Consequences at around 2.30 pm.”*

*In paragraph 4 he states:*

***“That on 6<sup>th</sup> August 2019, I proceeded to postal corporation of Kenya offices at General Post Office and at 11:00 am I tendered an order and penal notice in an envelope addressed to the respondents to a lady known as Brenda Anyango Oballa who received and issued me with a payment receipt. I attach copy herein”.***

16. It is the applicant’s case that after all these were done the 4<sup>th</sup> and 5<sup>th</sup> respondents broke into the stores of the 1<sup>st</sup> applicant on the 3<sup>rd</sup> floor and demolished a grill door and parts of the suit premises. The incident was reported at Pangani Police Station vide OB NO. 66 and 76 of 8<sup>th</sup> August 2019. The applicants have annexed photographs showing the damage on the 1<sup>st</sup> applicant’s stores.

17. The respondents on the other hand state that they were not served with the court orders issued on 31<sup>st</sup> July 2019. In paragraph 8 of the replying affidavit sworn by Hanifa Mohamud Ahmed, She denies that they were never served with the court order nor were they aware. She also denied that there was any demolition on the 1<sup>st</sup> applicant’s stores.

18. The process server’s affidavit is very clear on who was served. The respondents ought to have applied to cross examine him if indeed they claim they were not served. Court orders must be obeyed. In the **Hadkinson vs Hadkinson [1952] ALL ER 567**. It was held thus

***“It is plain and unqualified obligation of every person against or in respect of whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The compromising 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 even void”.***

19. I find that the respondents were aware of the said orders. It is not in doubt that the 1<sup>st</sup> – 5<sup>th</sup> respondents were served by way of registered post as directed by the Business Premises Rent Tribunal. The order was also pinned on the wall of the suit premises. Furthermore on 2<sup>nd</sup> August 2019 the 3<sup>rd</sup> – 5<sup>th</sup> respondents visited the suit premises and they were served. I am satisfied that the respondents were served with the said orders.

20. It is also the applicant’s case that even after they were served the respondents disobeyed the said orders by demolishing the grill door and parts of the stores of the 1<sup>st</sup> applicant on the 3<sup>rd</sup> floor. The windows on the 1<sup>st</sup> floor were also demolished. Further that the 3<sup>rd</sup>- 5<sup>th</sup> respondents have always visited the suit premises to harass the applicants asking them to vacate. All these instances have not been rebutted by the respondents. I find that the respondents have failed to give a reasonable explanation as to why they have not complied with the court orders.

21. The standard of proof in contempt of court cases had been settled in the case of **Mutitika vs Baharini Farm Limited [1985] KLR 299**, the court of appeal held:

***“In our view, the standard of proof in contempt proceedings 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 an offence which can be said to be quasi criminal in nature”.***

Also in **Justus Kariuki Mate & Another vs Martin Nyaga Wambora Civil Appeal No, 24 of 2015**, the Court of Appeal held that:-

***“It is important that the court satisfies itself beyond any shadow of doubt that the person alleged to be in contempt committed the act complained of with full knowledge or notice to the existence of the order of the court forbidding it. The threshold is quite high as it involves possible deprivation of a person’s liberty”.***

22. The applicants have annexed photographs showing the extent of the damage to the suit premises. I am satisfied that the respondents have willfully disobeyed the court orders issued on 31<sup>st</sup> July 2019. In the case of **Econet Wireless Kenya Ltd vs Minister for Information & Communication of Kenya & Another [2005] eKLR 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 a 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”.***

I am guided by the above authority.

23. Similarly, in the case of **Shimmers Plaza Ltd vs National Bank of Kenya Ltd Civil Appeal No. 33 of 2012** the Court of Appeal held that:-

***“The courts should not fold their hands in helplessness and watch as their orders are disobeyed with impunity left right and center. This would amount to abdication of our sacrosanct duty bestowed on us by the constitution. The dignity and authority of***

***the court must be protected and that is why those who flagrantly disobey them must be punished, lest they lead us all to a state of anarchy. We think we have said enough to send this message across”***

I am guided by the above authority.

24. I have considered the circumstances herein and I find that the respondents knowingly disobeyed the orders of the Business Premises Rent Tribunal issued on 31<sup>st</sup> July 2019. I find the 3<sup>rd</sup> – 5<sup>th</sup> respondents to be in contempt of those orders. They are the directors of the 1<sup>st</sup> and 2<sup>nd</sup> respondents. In conclusion, I find merit in this application and grant the orders sought namely:-

***a. That the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> respondents is each fined Kshs.200,000 in default two (2) months imprisonment.***

***b. That costs of this application be borne by the respondents.***

It is so ordered.

**Dated, signed and delivered in Nairobi on this 14<sup>TH</sup> day of MAY 2020.**

.....

**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

No appearance for the Applicants

No appearance for the Respondents

Kajuju -Court Assistant