



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

**MILIMANI LAW COURTS**

**MISC. APPLICATION NO. 236 OF 2015**

**LUNGA LUNGA TRANSPORTERS LIMITED .....APPLICANT**

**VERSUS**

**LUNGALUNGA PETROLEUM CO. LIMITED .....RESPONDENT**

**RULING**

1. Before me is a Motion on Notice dated 5<sup>th</sup> June, 2015 brought under Section 5(1) of the Judicature Act seeking leave to cite one OSMAN MAHAMUD MAHAMED the Managing Director of the Respondent for contempt of court. The application was supported by the statement of facts dated 5<sup>th</sup> June, 2015 and a Verifying Affidavit of even date.
2. It was contended by the Applicant that the Business Premises Rent Tribunal made an order on 29<sup>th</sup> May, 2015 ordering the Respondent to re-open offices and two stores situated on LR No. 209/8849 (“suit property”) along Lunga Lunga Road Nairobi. That order was served upon the Respondent on 2<sup>nd</sup> June, 2015; that despite being served as such, the Respondents Managing Director aforesaid declined to obey the said order and in the premises he was in contempt thereof. In the circumstances, the Applicant sought leave to commence contempt proceedings against the aforesaid managing Director.
3. The application was opposed vide a Replying Affidavit of Osman Mohamud Mahamed sworn on 15<sup>th</sup> June, 2015. He contended that the application was incompetent and an abuse of the court process. He denied having been served with the order of 29<sup>th</sup> May, 2015 or having disobeyed the same; or breached any order at all. He further contended that upon an application made by the Respondent on 5<sup>th</sup> June, 2015, the Tribunal did on 8<sup>th</sup> June, 2015 stay the order of 29<sup>th</sup> May, 2015. He contended that the Applicant had earlier on been restrained by an order of the Chief Magistrates court made on 7<sup>th</sup> May, 2015. In the circumstances, the intended contemnor urged that the application be dismissed.
4. I have considered the Affidavits on record and the submissions of learned Counsel. This is an application under Section 5(1) of the Judicature Act, Cap 8 Laws of Kenya. That section directs the court to discern the procedure and practice for contempt of court for the time being in England. In this regard, the law of contempt of court in England has changed pursuant to the 2012 amendments which did away with the former Orders 45 and 52 of the Rules of the Supreme Court of England and in its place Part 81 of the Civil Procedure Act of England enacted. Under Parts 81:13 and 81.14 thereof, what was formerly called an application for leave is now an application for permission to make a committal application. Whilst such permission is not required for breach of an order, judgment or an undertaking given to court (Parts 81.4 and 81.10), such permission is necessary for interference with the due administration of justice which includes disobeying an order of a subordinate court.

5. Under Part 81.14, such an application for permission is no longer *ex parte*. It is always *inter partes* and that is why although the current motion was marked *ex parte*, I ordered the same to be served for hearing *inter partes*.
6. For an applicant to succeed in such an application, he must establish that there are proceedings in which an order directed upon the intended contemnor has been issued; that the contemnor has been served or has been made aware of the terms of such an order but has breached the terms of the said order or disobeyed the same.
7. In the present case, there is no dispute that there is BPRT case No. 348 of 2015 wherein an order was made on 29<sup>th</sup> May, 2015. That order directed the Respondent to re-open the suit premises. Although the Respondent denies having been served with the said order on the basis of the Affidavit of service of James Mwangi Waburi sworn on 08/06/15 and produced as exhibit "B", I am satisfied that the alleged contemnor was properly served. He did not specifically deny the contents of the said Affidavit of service. In any event, how did the Respondent know of the existence of the proceedings in the BPRT for it to have made its applications dated 5/6/13 before that tribunal?
8. As regards breach of that order, I am satisfied that the Respondent did not obey that order as it did not re-open the premises as ordered. What it did was to go back to that tribunal and cause the order of 29/06/15 to be stayed on 8/06/15. The order of stay was exhibited at page 7 of Exhibit "OMM1".
9. The question that arises is whether there has been contempt to warrant an order for permission to make a committal application. According to Ms Kiniti, Learned Counsel for the Applicant, since the Respondent had disobeyed the order of 29/5/15 when served upon it, it is in contempt and it does not matter if the said order was subsequently stayed. On the other hand, Mr. Lakicha learned Counsel for the Respondent argued that since the order of 29/5/15 was no longer in force, there cannot be said to be disobedience thereof and no contempt can arise.
10. In my view, before someone can be committed for contempt of court for disobedience, it must be shown that he was aware of the terms of the order; he disobeyed that order and that he has had the opportunity to obey or purge his contempt, but has persisted in such willful disobedience. It is clear from the record that, as at the time the present application was being argued, the order of 29/5/15 had been stayed by the very tribunal that had issued it. Once that order was stayed by a court of competent jurisdiction, it ceased to have any force of law. It ceased to have effect. One cannot therefore purport to obey it as a way of purging his contempt.
11. My view is, there cannot be contempt on an order that has since ceased to have any effect such as the one of 29/5/15. What the Applicant can do is to go back and persuade the Tribunal to re-instate the same. In this regard, granting the permission sought will be acting in vain of which no court can do so.
12. In the circumstances, I find the application to be without merit and the same is dismissed with costs.

**DATED** and **DELIVERED** at Nairobi this 10<sup>th</sup> day of July, 2015.

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**A. MABEYA**

**JUDGE**