



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CIVIL CASE NO. 501 OF 2012**

**AHIF M. GULAM (suing on behalf of and the duly authorized attorney of NOORBANU ABDULAZIZ GULAM the legal representative of the Estate of**

**ABDUL AZIZ MOHAMMED ALIBHAI GULUM).....PLAINTIFF/APPLICANT**

**VERSUS**

- 1. THE ESTATE OF ROSHAN HASANALI KASSAM SHIVJI**
- 2. NIZAR KASSAM**
- 3. PAUL KAMAU T/A WORLD RICH LIMITED**
- 4. ANN AKWERA OTOKOMA ANJICHI**
- 5. TIBITONE BOOKSHOP**
- 6. SALAMU LINK AFRICA LIMITED**
- 7. WILLIAM KAMAU KAMUNYU T/A COMPRINET SYSTEM TECHNOLOGIES LIMITED**
- 8. JOSEPH MUNGAI WANENE T/A ESSENTIAL LOGISTICS**
- 9. BHARAT SHAT T/A NEH-KOM COLLECTION**
- 10. NYALOGERA TAILORING T/A NYALOGERA ENTERPRISES**
- 11. MAINA KARANJA T/A INTERGRATED DIGITAL TECHNOLOGIES.....DEFENDANTS/RESPONDENTS**

**RULING**

**1. This is the Notice of Motion dated 15<sup>th</sup> April 2014 and amended on 2<sup>nd</sup> July 2014 brought under Section 3a, 63 (c) (e) of the Civil Procedure Act; Order 40 rule (2), (3) of the Civil Procedure Rules, Section 33 of the Interpretation and General Provisions Act, and all other enabling provisions of the law.**

**2. It seeks orders:-**

**(1) That the Honourable Court be pleased to declare that the actions of the 2<sup>nd</sup> defendant herein of continuing to refuse, ignore and neglect to remit 23% of the total monthly rental income collected from LR NO. 209/665, Tom Mboya Street, Nairobi, is an act in contempt of the court orders issued by consent of the parties on 10<sup>th</sup> July, 2013.**

**(2) That the honorable court be pleased order the person of Mr. Nizar Kassam be arrested and be committed to civil jail for such period as the court may deem fit.**

*(3) That the honourable court be pleased to order the 2<sup>nd</sup> defendant to pay immediately the sum of Kshs563,528.00 as at April, 2014 and Kshs.58,631.60 every subsequent month in order to purge the contempt.*

*(4) That the honourable court be pleased to fine the 2<sup>nd</sup> defendant such amounts of money as it may deem fit and or order his property be sequestrated for being in contempt of court.*

*(5) That this honourable court be pleased to order that the OCS (officer Commanding Station) Parklands Police Station and or the court bailiffs do assist in enforcing orders granted herein.*

*(6) That the costs of this application be in the cause.*

3. The grounds are on the face of the application and are set out in paragraphs a to e.
4. The application is supported by the affidavit Ashif Gulam, the plaintiff/applicant herein sworn on the 15<sup>th</sup> April 2014.
5. The application is opposed. There is a replying affidavit by Nizar Kassam the 2<sup>nd</sup> defendant/respondent sworn on the 5<sup>th</sup> May 2014.
6. On the 13<sup>th</sup> July 2016 the court directed that the application be canvassed by way of written submissions.

#### **The Plaintiff's/applicant's submissions**

7. By a consent recorded in court on the 10<sup>th</sup> July 2013, the 2<sup>nd</sup> defendant agreed and it was ordered that he will remit 23% of the total monthly rent income collected from the suit property to the plaintiff's advocates effective 30<sup>th</sup> July 2013. That since the recording of the said orders, the 2<sup>nd</sup> defendant has only paid Kshs 22,788/- That the total amount due is Kshs.563,528/- as at April 2014 and continues to accrue at Kshs.58,631/60 every month.
8. It is evident that the 2<sup>nd</sup> defendant has totally refused to honour the said consent. The consent order was made on the strength and admission of the 2<sup>nd</sup> defendant that he has solely been collecting rent from the suit property for over ten years and has not been given the plaintiff anything. By blatant refusal to obey a valid court order the 2<sup>nd</sup> defendant is in contempt of court and ought to be punished.
9. He has put forward the cases of **Awadh vs Murumbi Bungoma HC Misc. Application No. 53 of 2014; Africa Management Communication International Limited vs Joseph Mathenge Mugo & Another [2013] eKLR.**
10. He prays that the 2<sup>nd</sup> defendant be punished and do purge the contempt by making all payments outstanding as at 1<sup>st</sup> July 2014 Kshs.739,422/80.

#### **The 2<sup>nd</sup> Defendant's/Respondent's Submissions**

11. The 2<sup>nd</sup> defendant/respondent is not in contempt. He has forwarded the leases and a comprehensive statement of income for all the years he was in charge. The demand for Kshs.915,713/60 has no basis. The 2<sup>nd</sup> defendant/respondent remitted some money which was reflected by the plaintiff. There is no evidence that the 2<sup>nd</sup> defendant was served with the court order. He has also put forward the case of **Awadh vs Murumbi KLR [2004] 458; Mwangi Wangondou vs Nairobi City Commissioner Civil Appeal No. 59 of 1988.** The 2<sup>nd</sup> defendant has dutifully remitted 23% of the monthly rental collection to the plaintiff who has declined to accept the same.
12. I have considered the notice of motion, the affidavit in support and the annexures. I have also considered the replying affidavit and the annexures, the written submissions of counsel and the authorities cited. The issue for determination is whether or not the 2<sup>nd</sup> defendant is in breach of court order and should be punished for contempt.
13. It is not in doubt that there was a consent order entered into on 10<sup>th</sup> July 2013. The terms of the consent were:-

*“ 1. That the 2<sup>nd</sup> defendant remit 23% of the total monthly rental income collected from the suit property to the plaintiff's advocate effective 30<sup>th</sup> July 2013.*

*2. That the 2<sup>nd</sup> defendant should notify the plaintiff or his advocates on record of any claim due for payment immediately he learns of them.*

*3. That the 2<sup>nd</sup> defendant do avail all the current leases, and contracts to the plaintiff's advocates on or before 25<sup>th</sup> July 2013.*

*4. That the notice of motion dated 9<sup>th</sup> August 2012 be and is hereby fixed for hearing on 21<sup>st</sup> November 2014.*

*5. That the plaintiff do file and serve supplementary affidavit in answer to any new issues raised in the further replying (mis titled supplementary affidavit filed on 9<sup>th</sup> July 2013 by 10<sup>th</sup> August 2013.”*

14. Both parties are in agreement that Order No 3 has been complied with. The plaintiff/applicant however has issue with order no 1. He states that the 2<sup>nd</sup> defendant/respondent has only remitted Kshs 22,788/-. The 2<sup>nd</sup> defendant/respondent in his part states that he has complied but the plaintiff has declined to accept the payments. Nothing could have been easier than for the 2<sup>nd</sup> defendant/respondent to attach all the monthly payments he made to the plaintiff/applicant but were rejected. A casual look at the leases attached to the plaintiff's supporting, show that there was quite a substantial amount of money coming in. The 2<sup>nd</sup> defendant/respondent has failed to demonstrate that he complied with order no. 2.

15. Another issue he raises is that there is no evidence that he was served with the court order. It should be noted that this was a consent order. He was duly represented by Mr. Khalwale of Karen Mosoti & Co. Advocates. He therefore cannot deny knowledge of the said orders. He admits in paragraph 4 of his replying affidavit that a consent order was entered on 10<sup>th</sup> July 2013. He therefore cannot deny knowledge of the said orders. In my view the burden was on the 2<sup>nd</sup> defendant to demonstrate that he had complied with the said order No. 1. I find that he has failed to do so.

16. He also failed to inform the court the difficulty he was having in complying with the said order. In the absence of any reasonable explanation, the court can conclude that he has wilfully refused to comply with the said orders. It was held by J Serгон in the case of **Awadh vs Murumbi Bungoma HC Miscellaneous Application No. 53 of 2004** that:-

*“It must be remembered that court orders must be obeyed at all times in order to maintain the rule of law and good order. This of course means that the authority and dignity of our courts must be upheld at all times. This differentiates civilized societies from those applying the law of jungle at times referred to as banana republics. It is the duty of this court not to condone deliberate disobedience of its orders nor .....from its responsibilities to deal decisively and firmly with proved contemnors”.*

17. In conclusion, I find that the 2<sup>nd</sup> defendant/respondent is in breach of the consent order of 10<sup>th</sup> July 2013. I find merit in this application and grant the orders sought namely:-

*(a) That the 2<sup>nd</sup> defendant/respondent herein is in contempt of the court order issued by consent on 10<sup>th</sup> July 2013.*

*(b) That the 2<sup>nd</sup> defendant/respondent to pay to the plaintiff's advocates the sum of Kshs563,528.00 which was due as at April, 2014 and Kshs.58,631.60 every subsequent month. This to be done within sixty (60) days from the date of this ruling. In addition he is fined Kshs.50,000/- or be committed to civil jail for six (6) months.*

*(c) The Officer in Charge Parklands Police Station and/or the court bailiff do assist in the enforcement of these orders.*

*(d) That costs of the application be on the cause.*

It is so ordered.

Dated, signed and delivered in Nairobi on this 3<sup>RD</sup> day of APRIL 2019.

.....

L. KOMINGOI

JUDGE

In the presence of:-

.....Advocate for the Plaintiff

.....Advocate for the Defendants

.....Court Assistant