



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC CIVIL SUIT NO. 37 OF 2016**

**TAIB INVESTMENTS LIMITED.....PLAINTIFF/APPLICANT**

**-VERSUS-**

**FAHMI SALIM SAID.....1<sup>ST</sup> RESPONDENT**

**TOOL HOUSE LIMITED.....2<sup>ND</sup> RESPONDENT**

**BUILD MY HOME LIMITED.....3<sup>RD</sup> RESPONDENT**

**MUWA HOLDINGS LIMITED.....4<sup>TH</sup> RESPONDENT**

**THE NATIONAL ENVIRONMENT**

**MANAGEMENT AUTHORITY.....<sup>TH</sup> RESPONDENT**

**THE COUNTY GOVERNMENT OF MOMBASA .....6<sup>TH</sup> RESPONDENT**

**RULING**

1. The Plaintiff/Applicant has moved this Court under the provisions of Order 51, 40 rule 2 (2) & 3 (1) of Civil Procedure Rules, section 5 (1) of Cap 8, Order 52 of Civil Procedure Rules of England, Practice Directions Supplementary to RSC, Sections 1A, 1B, 3A, 3B, 63 (c) & (e) of Cap 21. In the motion the applicant seeks for orders that:

**1) Spent**

**2) That to ensure that this Honourable Court is not made to act in vain, and to ensure that the orders of this Honourable Court made on 16<sup>th</sup> March 2016 and all amendments and extensions thereto including that made on 8<sup>th</sup> April 2016 and issued on 14<sup>th</sup> April 2016 are enforced both in their letter and spirit and that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants/Respondents be directed to immediately ensure full compliance with the said Orders.**

**3) That the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants/Respondents and or their Directors herein FAHMI SALIM SAID, LILIAN WAIRIMU, PHYLLIS NJERI, YALCIN SAKAR and EKREM SAKAR be cited for contempt of this Honourable Court and be committed to civil**

**jail for 6 months for defying and being in flagrant and contemptuous breach of the Honourable Court's Orders of 16<sup>th</sup> March and all amendments and extensions thereto including those made on 8<sup>th</sup> April 2016 and issued on 14<sup>th</sup> April 2016 issued by the Honourable Court.**

**4) That the 1<sup>st</sup> 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants/Respondents and or their Directors herein FAHMI SALIM SAID, LILIAN WAIRIMU, PHYLIS NJERI, YALCIN SAKAR and EKREM SAKAR be condemned to pay the costs of this application.**

2. The application is premised on the grounds listed on the face of it inter alia; that the orders made on 16.3.2016 and 8.4.2016 were extracted and duly served upon the 1<sup>st</sup> – 4<sup>th</sup> Respondents personally. That these Respondents were aware of these orders together with the amendments. However they have flagrantly violated the same as the said Respondents continued with commercial and business activities on the suit premises. The applicant relied on a video clip which it said was captured on the 3<sup>rd</sup>, 5<sup>th</sup> & 15<sup>th</sup> May 2016 and also on 16<sup>th</sup> July 2016 of the Construction; Commercial & Industrial business undertaken by the Respondents' agents and or employees. The applicant stated further that these acts are malicious and contemptuous. It urged the Court to uphold the rule of law by punishing all those who are in contempt of the Court Order.

3. The application is also supported by the affidavits of Abdalla Ali Taib and Samson David Mwadzoya Nguma. Mr Mwadzoya Nguma is the one who deposed that he captured the photographic and video evidence. Mr Nguma said he witnessed stock piles of aluminium and liquid products in containers that indicated a fully fledged storage facility alongside the manufacturing facility set up on the suit premises. Mr Nguma deposed that he had been informed by Mr Taib advocate that there was a Court Order in operation preventing the defendants from carrying out commercial activities. He deposed that the noise levels from the manufacturing activities are clearly audible from 100 yards especially the grinding and cutting noises.

4. The application is opposed by the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents. He deposed that on 14.4.16, the impugned order was extended by consent without the words **“or any other activity”**. That subsequently from May 2016 the 1<sup>st</sup> – 4<sup>th</sup> Respondents and the Applicant commenced negotiations and letters were exchanged. That the gist of the negotiations was that the plaintiff agreed that the 2<sup>nd</sup> Respondent was to vacate the suit premises by April 2017 and the only issue not agreed upon was on costs. The 1<sup>st</sup> Respondent deposes that he is not a director or shareholder of the 2<sup>nd</sup> 3<sup>rd</sup> & 4<sup>th</sup> Respondents. He also does not know the persons named as directors of 1<sup>st</sup> – 4<sup>th</sup> Respondents i.e. Lilian Wairimu, Phylis Njeri, Yalcin Sakar & Ekrem Sakar. The 1<sup>st</sup> Respondent deposed further that Yalcin & Ekrem are based in Turkey and are unaware of the actions or omissions of the 2<sup>nd</sup> & 3<sup>rd</sup> Respondents.

5. Mr Fahmi stated the video clips were not annexed as documents served on him as claimed by the applicant. He deposed that he was horrified by the action of the applicant who was engaged in capturing videos of the suit premises without knowledge and permission of the Respondents. He denied there is heavy duty cutting machinery going on stating that they are only involved in assembling PVC windows. The 1<sup>st</sup> Respondent deposed that the activities he has been carrying out on the suit premises reflect the nature of the consent order recorded on 14.4.16. That the application is intended to mislead the Court and ought to be dismissed.

6. The 4<sup>th</sup> Respondent on its part filed grounds of opposition dated 10<sup>th</sup> December 2016. One of the grounds states that there is no evidence that the 4<sup>th</sup> Respondent was served with the order alleged to have been breached. That the affidavits in support of the application dated 15.3.2016 confirm that the plaintiff has knowledge that the 4<sup>th</sup> Respondent is merely a lessor of the suit premises and not directly involved in the activities taking place in the premises.

7. The respective advocates who participated in the application filed written submissions which I have

read and considered. It is not in dispute that an order was given on 16.3.16 and later extended on 8.4.16 and 14.4.16. When the order was extended on the latter date, the words “**or any other activity**” were deleted from the original order. In paragraph 5 of the affidavit of service annexed as **AAT00 3**, the process server deposed that he served the 1<sup>st</sup> Respondent’s secretary called Ms Iman Omar Mohamed. That the said secretary also said she is an accountant of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents so she also received service on behalf of the two defendants having been instructed to do so by the 1<sup>st</sup> Respondent. The 4<sup>th</sup> Respondent was served by pasting a copy of the order at the gate of the residence of the owner of the 4<sup>th</sup> Respondent. The process server deposed that the caretaker informed him the owner of the property was called Lilian Mungai. He also sent a copy of the order via registered mail to the last known address.

8. From this background, this Court is tasked to determine two questions

**i) Was the order properly served upon all the Respondents?**

**ii) Has there been proof of breach of the said order?**

In the case of **Abdalla Ali Taib & 3 others vs Rabinder Kaur Ahluwala (2015) eKLR**, the principle espoused is that knowledge of the Order supersedes personal service. In that case, the Respondent was in Court when the Order was made forbidding her from further publication of the defamatory matters.

9. In the current application, the order was extended in the presence of the 1<sup>st</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> Respondents counsels. The order was amended by consent of the applicant’s and 1<sup>st</sup> 3<sup>rd</sup> Respondent’s advocates. The 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents cannot therefore complain of not being served as they were made aware of the order at the time the same was extended. This position of knowledge superseding personal service was also elucidated in the case of **Econet Wireless (K) Ltd vs Minister for Information & Communication & Another (2005) eKLR**. What about service on the 2<sup>nd</sup> & 3<sup>rd</sup> Respondents? In his Replying Affidavit, the 1<sup>st</sup> Respondent denied being a director or shareholder of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. He also deposed that the directors of the two companies are based in Turkey and thus are unaware of the acts or omissions of their employees if any.

10. The person served on behalf of the 2<sup>nd</sup> & 3<sup>rd</sup> Defendants is described as Miss Iman Omar Mohamed who the process server described as a secretary to the 1<sup>st</sup> Respondent and an accountant to the 2<sup>nd</sup> & 3<sup>rd</sup> Respondents. This Omar is said to have received a call from the 1<sup>st</sup> Respondent authorizing her to receive the Court process for the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> Respondents. If the 1<sup>st</sup> Respondent is not a director/shareholder of the 2<sup>nd</sup> & 3<sup>rd</sup> Respondents it follows that he had no capacity to authorize anyone whether Ms Iman to receive documents on behalf of the 2<sup>nd</sup> & 3<sup>rd</sup> Respondents. Once the 1<sup>st</sup> Respondent denied any association with these two Respondents, it was incumbent upon the applicant to lay evidence to the Court linking the 1<sup>st</sup> Respondent to the 2<sup>nd</sup> & 3<sup>rd</sup> Respondents by sharing details of their directorship which he could have easily obtained from the Companies Registrar. No evidence was put forth to revert this assertion. The burden was upon the applicant to discharge and he failed to discharge. It is therefore my finding that the 2<sup>nd</sup> & 3<sup>rd</sup> Respondents were neither personally served with the Order nor did they have knowledge of its existence.

11. The second issue is whether there is breach of the order by the 1<sup>st</sup> & 4<sup>th</sup> Respondents who are aware of the order. The 4<sup>th</sup> Respondent in his grounds of opposition stated that the applicant was aware that the 4<sup>th</sup> Respondent was merely a lessor. I have looked at **paragraph 5 of the plaint** and note that the 4<sup>th</sup> Respondent is described as the registered owner of the suit premises which it has leased to the 1<sup>st</sup> Respondent. In paragraph 12 it is pleaded that the 1<sup>st</sup> – 4<sup>th</sup> Respondents illegally commenced and have continued to construct a warehouse house structure/commercial structure using the plaintiff’s perimeter wall as one of the main walls of the warehouse structure. Throughout the plaint, the complaint is raised against the 1<sup>st</sup> – 4<sup>th</sup> Respondents. The 4<sup>th</sup> Respondent therefore cannot be excluded from breach of the order if any is proved until the application and suit is heard & determined on its merits.

12. For a Court to punish for contempt, the applicant must prove there was contempt committed on a standard that is above the one civil proceedings and closer to beyond reasonable doubt because it is quasi-criminal proceedings in nature. Was there proof of disobedience? The applicant placed reliance on the video/photo evidence stated to have been taken on the 5<sup>th</sup>, 15<sup>th</sup> May and 16<sup>th</sup> July 2016 after the issuance of the order. The 1<sup>st</sup> Respondent complained of not being served with the video evidence but there were photographs annexed to the contempt application. He therefore had a chance to see what the applicant was referring to. I asked to be supplied with the flash disk that was said to have been annexed but was not and the same was provided on 15.12.17.

13. I have watched the said flash/video from my computer. One of the things I noted is that it is undated and does not have a name of the author although Mr Nguma deposed to have recorded the contents. Secondly the video just have people moving around and or sitting here & there in the suit premises. There is noise which is heard in the background of these pictures which sounds like grinding/welding machine but there was no clear capture/taken of the actual grinding machine to enable the Court form the opinion that such grinding was actually being undertaken by the 1<sup>st</sup> & 4<sup>th</sup> Respondents and or their employees post 14.4.2016. I have also had occasion to compare the photographs annexed to the application seeking injunctive orders and the present application. I find similarity in the photograph annexed and marked as **AAT 019 & 024** at page 204 and 209 of the original bundle with some photographs appearing in the video/flash disk. Similarly the clip has a page showing Daily nation newspaper cutting headlined **“now Raila links Uhuru to case against Ruto”** that is similar to the one at page 208 of the injunction application documents.

14. With these similarities and the applicant’s own pleadings at page 205 & 206 explaining that the start of the construction of shed was noted on the 29<sup>th</sup> July 2015 and at page 206 showing a boundary wall built by the Respondents on the applicant’s existing wall, it appears the applicant left it to the Court to edit the video/photographic evidence and decipher what was done before the order was issued and what has continued being done irrespective of the issuance of the injunctive orders. However in as much as this is not my role as it is tantamount to arguing for a party his case, the scenario is worsened by the fact that the Court did not have the opportunity to see a video recording of the activities being done before the order was issued. In view of the similarities pointed out, it is difficult to conclude that these video clips/photographs annexed or provided was taken before after the order as the applicant deposed. For these reasons, I can only conclude that the applicant has failed to demonstrate the disobedience of the impugned order by the Respondents whether individually or severally.

15. The applicant pleaded that the suit premises is adjacent to its land Ref No 5219/1/MN. The applicant also pleaded that the suit premises 3242/1/MN was leased to the 1<sup>st</sup> Respondent by the 4<sup>th</sup> Respondent. What he sought before the Court and which was granted is an interlocutory injunction and not mandatory injunction. The order given was to restrain the Respondents from continuing any further construction or development on the suit premises and from carrying out any business or commercial activities until the suit is determined. The order did not require the 1<sup>st</sup> – 4<sup>th</sup> Respondents to vacate the suit premises. Therefore if what was there before the order was granted was not removed, such action cannot constitute contempt.

16. The Court of appeal in the case of **Wangondu vs Nairobi City Council, Court of Appeal No 95 of 1988** stated that before a Court can punish for contempt, it must be satisfied that the terms of the injunction was clear and unambiguous in what was required to be done or abstained from doing. They also quoted the case of **Odrino & Another vs Okombo & 4 others (1988) KLR IKLR**. The order granted by the Court cannot be said that it required the 1<sup>st</sup> – 3<sup>rd</sup> Respondents to vacate the suit premises. In the end I am not satisfied this applicant has proved that there was contempt committed within the set standards. I therefore hereby dismiss the application with costs to the 1<sup>st</sup>, 3<sup>rd</sup> & 4<sup>th</sup> Respondents.

**Dated, signed & delivered at Mombasa this 19<sup>th</sup> December 2017.**

**A. OMOLLO**

**JUDGE**