



**Said v Hatibu (Sued as the Legal Administrator of the Estate of)  
Fauzia Mohamed Ebrahim - Deceased) (Environment & Land Case  
78 of 2021) [2024] KEELC 13895 (KLR) (20 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 13895 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 78 OF 2021  
LL NAIKUNI, J  
DECEMBER 20, 2024**

**BETWEEN**

**SAID OMAR SAID ..... PLAINTIFF**

**AND**

**ABDULRAHMAN HATIBU (SUED AS THE LEGAL ADMINISTRATOR OF  
THE ESTATE OF) FAUZIA MOHAMED EBRAHIM - DECEASED) DEFENDANT**

**RULING**

**I. Introduction**

1. This Honourable Court has been called upon to determine two (2) Notice of Motion applications, one dated 21<sup>st</sup> June, 2024 by Abdulrahman Hatibu (Sued as the Legal Administrator of the Estate of) Fauzia Mohamed Ebrahim (Deceased), the Defendant herein and the other being Notice of Motion application dated 5<sup>th</sup> August, 2024 by Said Omar Said, the Plaintiff herein.
2. Upon service of the Notice of Motion applications, the Defendant responded to the application dated 5<sup>th</sup> August, 2024. Further, the Plaintiff filed a Supplementary Affidavit dated 24<sup>th</sup> September, 2024. The Honourable Court will deal with these responses in depth accordingly.

**II. The Notice of Motion application dated 21<sup>st</sup> June, 2024 by the Defendant**

3. The Application was brought under the dint of Section 5(1) of the *Judicature Act* Cap 8 Laws of Kenya, Part 81.4 of the Civil Procedure Rules, 1999 of the Supreme Court of England, Sections 1A,1B,3A and 63 of the Civil Procedure Rules Act.
4. The Defendant sought the following ORDERS:
  - a. Spent.



- b. That this Court be Pleased to cite the Plaintiff, Mr. SAID OMAR SAID for Contempt of Court Orders given on 13<sup>th</sup> March, 2024 for his act of unlawfully, illegally and contemptuously failing to deposit the rental income for Title No. Mombasa/Block XVI/487 into an escrow account opened by the parties' advocates at NCBA Bank PLC being account No.9368210019.
  - c. That this Court be pleased to issue a warrant of arrest directing the OCS Nyalı Police Station to arrest the said contemnor Mr. Said Omar Said and bring him to court during the hearing of this application for contempt.
  - d. That upon grant of prayers (b) and (c) above, this court be pleased to commit Mr. Said Omar to Civil Jail at Shimo La Tewa Prison for a period of 6 months for being in contempt of this Honourable Court orders.
  - e. That the personal property of Mr. Said Omar Said be sequestered for contempt of Court orders given on 13<sup>th</sup> March, 2024 unless the Plaintiff deposits the entire 3 months' rent as ordered by this court on 13<sup>th</sup> March, 2024 now being Kshs.600,000.00.
  - f. That costs of this application be provided for.
5. The application is premised on the grounds, testimonial facts and the averments made out under the 19 Paragraphed Supporting Affidavit of ABDULRAHMAN HATIBU, the legal representative of the deceased Defendant by virtue of letters of administration issued to him on 26<sup>th</sup> April, 2024 and further by virtue of an order of this court allowing substitution of my deceased mother on 27<sup>th</sup> May, 2024 dated and sworn the 21<sup>st</sup> June, 2024 together with four (4) annexure marked as "AH - 1 – AH - 4" annexed thereto. He averred as follows:-
- a. On 13<sup>th</sup> March, 2024 this Honourable Court delivered a ruling in respect of the Plaintiff's Application dated 19<sup>th</sup> October, 2023. A copy of the said ruling is in the court record.
  - b. Order (b) of That ruling was an order for the status quo to be maintained meaning all the rental income garnered from the suit premises with effect from 1<sup>st</sup> April 2024 to be deposited and held in an Escrow Joint Bank Account in a reputable Commercial financial institution to be held in the names of both Advocate for the Plaintiff and the Defendant the Law firm of Messrs. Maulidi O. A. Advocates and Wachira Kingángái Advocates.
  - c. Even though those orders were given pursuant to consent of the parties in light of the developments That the Defendant was deceased at the time the ruling was delivered and there was need to replace the Defendant, which has now been done, the Plaintiff appealed against the said ruling vide the Notice of Appeal dated 25<sup>th</sup> March, 2024. Produced and shown to him a copy of the Notice of Appeal marked "AH - 2.
  - d. Subsequently the Plaintiff filed an application dated 3<sup>rd</sup> May, 2024 at the Court of Appeal under Rule 5 (2) (b) of the *Appellate Jurisdiction Act* seeking stay of the further proceedings pending the hearing and determination of That application and the appeal. There is now produced and shown to me a copy of the said application marked as "AH - 3".
  - e. The orders sought to stay further proceedings were tailored in such a manner as to defeat the consent orders of the parties given on 13<sup>th</sup> March, 2024.
  - f. The Plaintiff did not seek stay of the consent order requiring him to deposit the entire rental income garnered from the suit premises with effect from 1<sup>st</sup> April 2024.



- g. The Plaintiff did not get any court orders at the Court of Appeal necessitating the Plaintiff to comply with the order for opening of a joint escrow account in the names of the Advocates for the parties which was opened at NCBA Bank PLC being Account No.9 3668210019. There now produced and shown to me the account details at the said bank marked as “AH - 4”.
- h. There were therefore no orders protecting the Plaintiff from complying the consent orders on deposit of rental income for which the Plaintiff had willfully disobeyed. The Plaintiff had always been aware of those orders.
- i. The party’s advocates appeared before this Court on 23<sup>rd</sup> May, 2024 whereupon the court was informed That indeed an account had been opened and That what was pending was the deposit of the rental income.
- j. It was indeed the court opinion That the court needed not to supervise the parties on the question of deposit of the rental income into the said account.
- k. However, despite numerous calls to the Plaintiff’s former advocates by his advocates, not a single cent had been deposited into That account and the Plaintiff had now changed advocates to further frustrate him in further violation and disobedience of court orders given on 13<sup>th</sup> March, 2024.
- l. It was clear That the Plaintiff had no intention of complying with the court orders as he has misled this Honourable Court and himself on behalf of the deceased estate into believing That he would comply with the orders given on 13<sup>th</sup> March, 2024.
- m. The Plaintiff’s refusal to ensure That the orders given on 13<sup>th</sup> March, 2024 were complied with was calculated to undermine the rule of law and this court and was also aimed at defeating the ends of justice.
- n. The aforesaid contemptuous actions of the Plaintiff will not only interfere with the cause of justice but is likely to cause substantial and irreparable losses to the estate of the deceased Defendant.
- o. The Plaintiff refusal to comply with the said orders amount to offence of tampering with an estate of a deceased person which is prohibited under the provision of Section 45 of the [Law of Succession Act](#), Cap. 160 of the Laws of Kenya.
- p. Unless the application was heard urgently and the Plaintiff was cited for contempt and sent to Shimo La Tewa Prison for a period of six (6) months unless he complied with the court orders, the Estate of the deceased Defendant would be greatly prejudiced.

### **III. The Plaintiff’s case in the Notice of Motion application dated 5<sup>th</sup> August, 2024**

6. The Application was brought under the dint of Sections 1,1A, 3A, 63(e) of the [Civil Procedure Act](#) CAP.21 & Order 51 of the Civil Procedure Rules and all enabling provisions of the Laws of Kenya.
7. The Plaintiff sought for the following ORDERS:-
  - a. Spent.
  - b. Spent.
  - c. That this Honourable Court be pleased to make a finding That the Plaintiff has complied with the court orders made in reference to monthly rental monies from the suit property



being deposited into the joint - accounts of the 2 law firms which is continuous until the determination of this suit.

- d. That the Honourable court confirms the pre - trial compliance and gives a hearing date of the suit at the earliest possible time.
  - e. That the costs be in the cause.
8. The application is premised on the grounds, testimonial facts and the averments made out under the 10 Paragraphed Supporting Affidavit of SAID OMAR SAID, the Plaintiff/ Applicant herein dated and sworn the 5<sup>th</sup> August, 2024 together with three (3) annexure marked as “SOS1 – SOS 4” annexed thereto. He averred as follows:-
- a. The Notice of Motion application dated 21<sup>st</sup> June, 2024 seeking to cite him for contempt of court orders given on 13<sup>th</sup> March, 2024 pegged on the act of unlawfully, illegally and contemptuously failing to deposit the rental income for Title No. MOMBASA/BLOCK XVI/487 into an escrow account opened by the parties’ advocates at NCBA BANK PLC being account NO.9368210019;...and the other prayers were to commit him to jail at Shimo-la-Tewa Prison for 6 months for being in contempt of this Honourable court’s orders.
  - b. They had since complied with the said orders since the court record showed That on the 3<sup>rd</sup> July, 2024, his new Advocates on record moved this court seeking order’s to direct and order the bank to replace the Law firm of Messrs. ‘Mauldi & co. Advocates in the joint - account already opened or in the alternative separate accounts be opened in the joint-names of the 2 law firms( annexed in the affidavit a copy of the order issued by this court on the 3<sup>rd</sup> July, 2024 as marked ‘SOS 1’).
  - c. On 25<sup>th</sup> July, 2024, the Bank sent a notification to his advocates confirming That the joint - account had been opened and hence ready to receive the rental proceeds from the subject suit property. Aannexed in the affidavit a copy of the communication from NCBA BANK marked as ‘SOS - 2’).
  - d. On the same day, he proceeded to deposit the rental proceeds within the new joint account number 9368210019 and simultaneously instructed his Advocates to confirm the compliance with a letter to the Defendant’s advocates and also copied to the court through the Deputy Registrar which was prepared on the 25<sup>th</sup> July, 2024 and letters delivered on the same day. Annexed in the affidavit a copy of the said letter with the statement of the payment status for the months of April, May, June 2024 respectively marked as ‘SOS - 3’.
  - e. The statements were for the rents collected from the houses 3 to 10 excluding house 4 in which the tenant was in arrears and an explanation was hereunder given in detail annexed within “SOS – 3” confirmed That:-
    - i. Total rent collected in the month of April was a sum of Kenya Shillings One Hundred & Fourty Thousand (Kshs.140,000/-) and deductions were for Care - Taker, electricity bills and bore-hole maintenance fee/rent collector’s fees all totaling to a sum of Kenya Shillings Ninety Seven Thousand (Kshs.97,000/-) and remainder being a sum of Kenya Shillings Fourty Three Thousand (Kshs.43,000/-);
    - ii. Total rent collected in the month of May was a sum of Kenya Shillings One Hundred and Fourty Thousand (Kshs.140,000/-) and deductions for caretaker, bore-hole & KPLC electricity payments & rent collectors fees come to a sum of Kenya Shillings



Sixty two Thousand (Kshs. 62,000/-) and reminder being a sum of Kenya Shillings Seventy Eight Thousand (Kshs. 78,000/-);

- iii. Total rent collected in the month of June was a sum of Kenya Shillings One Hundred and Twenty Thousand (Kshs.120,000/-) and deductions for caretaker, borehole & electricity totaling to a sum of Kenya Shillings One Hundred Thousand (Kshs. 100,000/-) and reminder being a sum of Kenya Shillings Twenty Thousand (Kshs. 20,000/-);
- iv. Total rent collected for flat number 1 and 2 for the months of April, May and June 2024 totaling to a sum of Kenya Shillings Sixty Thousand (Kshs. 60,000/-).
- v. Hence, the amount of a sum of Kenya Shillings Two Hundred and One Thousand (Kshs. 201,000/-) as on 25<sup>th</sup> July 2024 had been deposited within the new account pending the rent for July 2024 which shall be deposited once more into the accounts.
- f. When the matter was mentioned on the 15<sup>th</sup> July 2024, the Court had indicated That upon compliance of opening the joint-account as well as depositing the monthly rents within the joint-account, the court should be notified in any way including a notice of withdrawal by the defendants but on their part, they opted to file this application That indeed demonstrates That the Plaintiff has complied and ought not to be cited for contempt of a court order since the Bank account had to be replaced so That a new account is opened in the face of appointing a new advocate and upon the bank confirming the opening of a new account, the rental proceeds were deposited within the new account That was ready on 25<sup>th</sup> July 2024.
- g. It was indeed in the interest of justice That the Honourable court arrests the ruling scheduled to be delivered on the 18<sup>th</sup> September 2024 since the Plaintiff had complied with the court orders and rental collections was a continuous process That can easily be monitored by the court as we await the final hearing of this contentious matter.
- h. The affidavit in support of the application filed herein.

### **III. The Response to the Notice of Motion application dated 5<sup>th</sup> August, 2024**

9. The Defendant opposed the application through a 14 paragraphed Replying affidavit sworn on 5<sup>th</sup> September, 2024 by ABDULRAHMAN HATIBU, the legal representative of the deceased (Fauzia Mohamed Ebrahim) where he averred That:-
  - a. Whereas it was true That a joint account was opened by the parties' advocates and a deposit of a sum of Kenya Shillings Two Hundred and one Thousand (Kshs. 201,000.00/=) made by the Plaintiff as at 25<sup>th</sup> July 2024 pursuant to orders of this Honourable Court issued on 13<sup>th</sup> March 2024 the said amount was not a true reflection of all the rental income garnered from the suit premises.
  - b. There were a total of 10 apartments. To the best of his knowledge there was full occupancy on the said apartments. Rent collectable per apartment was a sum of Kenya Shillings Twenty Thousand (Kshs. 20,000/-). The total rental income was therefore a sum of Kenya Shillings two Hundred Thousand (Kshs. 200,000/-) per month which translated to a sum of Kenya Shillings One Million (Kshs. 1,000,000/-) for 5 months. What had been deposited was therefore a mere 20% of all the rental income garnered from the suit premises. A sum of Kenya Shillings Three and Two Thousand Nine Hundred Two (Kshs. 302,900/-) never amounted to all rental income garnered from the suit premises for 5 months.



- c. Order number (b) issued by the Court on 13<sup>th</sup> March, 2024 was very specific. The court in issuing status quo orders went ahead to qualify what status quo meant to wit That all the rental income garnered from the suit premises with effect from 1<sup>st</sup> April, 2024 to be deposited and held in an escrow account in a reputable financial institution to be held in the names of both the Advocates for the Plaintiff and the Defendant.
- d. As aforesaid the total rental income for 5 months amount to a sum of Kenya Shillings One Million (KShs. 1,000,000/-) as at 1<sup>st</sup> August 2024. What has been deposited was only a sum of Kenya Shillings Three and Two Thousand Nine Hundred (KShs. 302,900/-). The sum of Kenya Shillings Six Ninety Seven Thousand One Hundred (KShs. 697,100/-) had not properly been accounted for.
- e. The order for the deposit of all rental income garnered from the suit premises did not make any provision for deposit of the rental income less expenses. The Plaintiff had taken advantage of the expenses to not fully comply with the orders of this court.
- f. Further to the above, the expenses as exhibited by the Plaintiff as annexure “SOS - 3” was highly contested. It could not be That income garnered from the suit premises was less than total expenses incurred in running the suit premises.
- g. He had obtained a KPLC statement of account for Account No.367871. The said statement show That the said account has always been in arrears from 1<sup>st</sup> August, 2023. The Plaintiff has not explained why the electricity bills were not being settled prior to the orders of this court for the deposit of all rental income. As at 17<sup>th</sup> July, 2024 the outstanding electricity bill was a sum of Kenya Shillings Thirty Four Thousand Nine Thirty One Hundred and Fifteen cents (KShs. 34,931.15/=). The Plaintiff did not seek before this court to first settle any outstanding bills before he complies with the order for the deposit of all rental income garnered from the suit premises. The same a copy of the said statement marked as “AH - 1” was produced.
- h. He had following comments in regard to paragraph 6 of the supporting affidavit in support of the Plaintiff motion dated 5<sup>th</sup> August, 2024:-
  - i. The Plaintiff confirmed in That affidavit That the statement provided are for houses 3 to 10 excluding house 4 in which it is alleged That the said tenant was in arrears. The Plaintiff was therefore estopped from making any contrary allegations That the said rental income so far deposited includes rental income collected from flat nos. 1 and 2.
  - ii. The Plaintiff had not offered any explanation why the tenant for house number 4 had not paid any rent for the last 5 months and what steps if any he had taken to recover those arrears.
  - iii. As per the statement of account in respect of rent collected for Apartment nos. 1 and 2 it was evident from That statement provided by the Plaintiff as annexure “SOS - 3” That only apartment 1 had paid rent for the months of April, May and June. Para 6(d) of the averment contained in the supporting affidavit of the Plaintiff is therefore false. There was no indication of any rent paid by apartment no. 2. What was indicated of That apartment was That the said tenant was in arrears.
  - iv. No explanation has been given why the tenant for apartment number 2 had not paid any rent for the last 5 months and what steps have been taken if any to recover the arrears due. As stated in paragraph 4 of his affidavit the suit premises has full occupancy.



It was doubtful That the Plaintiff would allow some tenants to live in the suit premises for free while others are paying rent. The Plaintiff had not exhibited anywhere in response to his application for contempt or in this application any notices for demand of payment of rent by the tenants who were in arrears for over 5 months now.

- v. As at 12<sup>th</sup> August, 2024 the Plaintiff had not made any further deposits for all rental income garnered from the suit premises. As a matter of fact, the deposit for a sum of Kenya Shillings Two hundred and One Thousand (Kshs. 201,000/-) was made on 26<sup>th</sup> July, 2024 at 12.11 pm. That deposit according to the Plaintiff was for the months for April, May and June. It was therefore evident That no deposit was made in the month of July. There was now produced and shown to him a copy of the said bank statement from 1<sup>st</sup> August, 2024 to 31<sup>st</sup> August, 2024 marked as “AH - 2”.
- vi. There were 2 deposits made on 13<sup>th</sup> August, 2024 and 16<sup>th</sup> August, 2024 for a sum of Kenya Shillings Eighty Three Thousand (Kshs. 83,000.00/=) and Kenya Shillings Twenty Thousand (Kshs. 20,000/-) respectively. Those deposits total to a sum of Kenya Shillings One Hundred and Three Thousand (Kshs. 103,000/-). The 10 apartments ought to fetch a total of a sum of Kenya Shillings Two Hundred Thousand (Kshs. 200,000/-) per month which translated to a sum of Kenya Shillings Four Hundred Thousand (Kshs. 400,00/-). The expenses for the said 2 months could not be a sum of Kenya Shillings Two Ninety Seven Thousand (Kshs. 297,000/-). The Plaintiff was therefore in further contempt of the court orders.
  - i. He urged the Honourable Court to hold and find That partial compliance of this court order never exonerated the Plaintiff from contempt proceedings as what was required from the Plaintiff was full compliance with your orders unless of course there had been a variation of those orders which was not the case herein.
  - j. The Plaintiff had therefore perjured himself by stating That he had complied with the court orders made in reference to deposit of monthly rental income from the suit property.
  - k. He asked for an order That this court directed the Plaintiff to deposit into the escrow account all rental income garnered from the suit property without any deductions of whatever nature. The Plaintiff was at liberty to apply for any expenses which were disputed from the said account. The provision of expenses would be upon a verification process by this court if indeed those expenses exist.

### **III. The Supplementary Affidavit by the Plaintiff/Applicant**

10. With the leave of Court, the Plaintiff responded to the Replying Affidavit sworn on 5<sup>th</sup> September, 2024 through filing an 11 Paragraphed Supplementary Affidavit sworn on 24<sup>th</sup> September, 2024 by SAID OMAR SAID. The Plaintiff/Applicant herein who told the court That:-
  - a. The Defendant was being unreasonable, litigious and was currently using the sword of contempt orders in a matter That the Plaintiff had fully complied.
  - b. The expenses included a bore - hole maintenance repairs. Care-taker fees & rent collector's fees which indeed were mandatory and without the managing of the apartments, it would be challenging and in a habitat without electricity and water, the tenants would give quit notices since it was common sense That rented premises must have running waters & monthly repairs That arise during the tenancy. It was indeed highly unreasonable for the Defendant to propose



That Plaintiff had to seek leave of the court every week on miscellaneous expenses on day to day managing of the rental units.

- c. The hearing of this matter had been derailed and shelved and contempt proceedings taken center-stage at the expense of the Plaintiff.
- d. Hence, contempt proceedings were a matter of public interest. More so they were allegations made to the effect That the Defendant was misusing the same to get at the Plaintiff without due process. This was since contempt proceedings would lead to imprisonment which was a breach of the right to fair hearing. This court ought to lend an ear to the complaining Plaintiff.
- e. In response to the contents of Paragraphs 3 and 4 of the Replying Affidavits, he reiterated by confirming That rent collected for the months of April, May, June, July and August on house numbers 3, 4, 5, 6, 7, 8, 9 and 10 was a sum of Kenya Shillings eight hundred and ten thousand and ten (Kshs. 810,010/-) less expenses of a sum of Kenya Shillings Three hundred and seventy-eight thousand & twelve (Kshs.378,012/-) and hence the amount deposited within the joint-account was a sum of Kenya Shillings Four Fourty Three Thousand Nine Ninety Eight Thousand (Kshs.443,998/-) which amount had been deposited within the joint account. (annexed in the affidavit a copy of the income statements for the months of April 2024, May 2024, June 2024, July 2024 and August 2024 marked as “SOS - 4” and the current bank statement marked as “SOS - 5”).
- f. Hence, it was not true That the rental income was not being deposited within the joint accounts since he had demonstrated That he had complied as shown within paragraph 3; On the issue of House No.10 it had been vacant in in the months of June & July and a new tenant- HABIB moved in within the month of August 2024. The court should take note That for apartment nos. 1 and 2, the full rent was deposited without any deductions since the same belong to FAUZIA EBRAHIM and the whole sum of Kenya Shillings Fourty Thousand (Kshs. 40,000/-) was being deposited within the joint-account; he had fully born all the expenses of construction of all the apartments which the defendant- MR. HATIBU never contributed to their construction and common sense dictates That tenants can only stay in apartments That are properly maintained and depositing the whole rental income without maintenance shall lead to a situation where the property shall be in a state of disrepair without water and electricity and there is no tenant That can stay in a house That had no water, electricity and in a state of disrepair.
- g. In response to the contents of Paragraph 9 wherein the Defendant disputed the electricity payments, the monthly electricity is as follows; April 9<sup>th</sup>, 2024 - Kshs.40,000/- was paid; 9<sup>th</sup> May, 2024- Kshs. 30,000/- was paid; 7<sup>th</sup> June, 2024 -Kshs. 50,000/- was paid; 7<sup>th</sup> August 2024 – Kshs. 34,932/- was paid; Kshs.18,012/- paid on 6<sup>th</sup> September 2024; Therefore, to KPLC a total of a sum of Kenya Shillings One Hundred and Seventy Two Thousand Nine Ninety Four Hundred (Kshs.172, 994/-) had been paid for electricity as shown within the annexures herein from KPLC and not manufactured by the Plaintiff. If the whole rental proceeds were deposited within the joint account as suggested by the defendant and it would be ridiculous to move the court every month pay the electricity bill. Furthermore, KPLC would disconnect the power immediately if the electricity was not settled. Annexed in the affidavit statements of payments to KPLC marked as “SOS - 6”).
- h. In response to the contents of Paragraph 7, the Defendant contended That the order for deposit of rental income garnered from the suit premises never made provisionexpenses to be



deducted and the Plaintiff had taken advantage of the expenses to not fully comply with the orders of the court of which he responded as hereunder:

- i. The monthly bills needed to be catered for and if same not paid, then there shall be no electricity for the tenants which shall result to quit notices and the building remaining vacant; this was not the intent of the order;
  - ii. Any rational person knows That tenants were attracted to a place That was well maintained and maintenance has its own expenses and if the proceeded would have been deposited, then there would have been no water for the tenants as shown by the receipts of PIONEER WAVES- 16<sup>th</sup> April, 2024-bore-hole servicing, pump supply and installation and also 12<sup>th</sup> June, 2024 totaling to a sum of Kenya Shillings Eighty Five Thousand (Kshs. 85,000/-). Annexed in the affidavit a copy of the same marked as “SOS - 7”.
  - iii. The purpose of the amount being deposited in an escrow account was to preserve the subject matter and common sense dictated That part of the preservation of the subject-matter included maintaining the premises in a good habitable state with running water/electricity supplied to all the tenants who were entitled to enjoy the same and provision of the same falls under expenses; There was no free electricity or water in Mombasa and a borehole supplying water to all this tenants needed to be maintained and hence the expenses of PIONEER WAVES in annexure marked as “SOS – 7”.
  - iv. Hence, depositing all the cash into the account shall halt the operations of the buildings That shall lead to immediate loss of tenants and hence immediate damages and losses to both the parties awaiting the Judgement in their favor and who is entitled to possession of the rental units That were built solely by the Plaintiff and a hearing date should be a priority to enable the court confirm the proprietary rights of the parties.
- i. The Defendant contented at para.10 (i),(ii) and (iii)That the tenant for house no.4 was in arrears and no explanation had been offered by the Plaintiff of which he confirmed That the said tenant was in arrears of 4 months being a senior tenant who had been with them since 2020 and within the covid period, being unemployed had arrears of a whole year which he settled and cleared at once; currently he was in arrears of 4 months and he had recently started making payments and hence, he trusted him to settle the arrears and he could not arm twist him by sending notices and auctioneers to such a senior tenant who they trusted would settle all the arrears and it ought not to a subject of contempt. Furthermore, they treated tenants differently depending on their source of income because not all of them would pay on the same day. Hence, this one has started payments.
  - j. In response to paragraph 10(iii)& (IV) of the Replying Affidavit, the 1<sup>st</sup> annexure in the affidavit marked as “SOS – 4” had a full statement of apartments nos. 1 and 2 under the heading of Fauzia Ebrahim for the months of April, May, June, July & August 2024 which rent had fully been submitted without any deductions and it is clear That the Defendant did not understand the previous statement of which the current statement marked as “SOS – 4” made it clearer.
  - k. Further repairs had to be done on FLAT NO.4 wherein the old tiles were replaced by new tiles. The old tiles had cracks and breakages within the house causing danger of injuring the young ones and the aged within the house and hence an overall replacement of the house tiles and had to be undertaken to placate the tenant from shifting and the receipt and pictures are annexed



herewith to show the court the state of FLAT NO.4(annexed in the affidavit the copies of the receipts marked as ‘SOS - 8’ & ‘SOS - 9’.

1. In paragraph 11, the Defendant contended That this Court ought to find him in contempt of a court order and further stated That partial compliance for this court did not exonerate the plaintiff from contempt proceedings of which he had responded to within paragraph 2 the contents of which he stood with.

### III. Submissions

#### PARA 11.

On 18<sup>th</sup> September, 2024 while all the parties were present in Court, they were directed to have the Notices of Motion applications dated 21<sup>st</sup> June, 2024 and 5<sup>th</sup> August, 2024 be disposed of by way of written submissions. Unfortunately, by the time the Honourable Court was penning down the Ruling, it had not been able to access to the Submissions by any of the parties herein.

#### PARA 12.

Pursuant to That on 25<sup>th</sup> September, 2024 it reserved a Ruling date for 13<sup>th</sup> November, 2024. But due to the on - going interaction over the matter, the delivery of the ruling got slightly delayed until 19<sup>th</sup> December, 2024 thereof.

### III. Analysis and Determination

13. I have carefully read and considered the pleadings herein by the parties, the relevant provisions of *the Constitution* of Kenya, 2010 and statutes.
14. In order to arrive at an informed, just, equitable and reasonable decision, the Honorable Court has three (3) framed issues for its determination. These are:-
  - a. Whether the Notice of Motion application dated 21<sup>st</sup> June, 2024 seeking contempt of court orders and imprisonment amongst other orders related to contempt is merited?
  - b. Whether the Notice of Motion application dated 5<sup>th</sup> August, 2024 is merited.
  - c. Who will bear the Costs of Notices of Motion applications dated 21<sup>st</sup> June, 2024 and 5<sup>th</sup> August, 2024.

#### **ISSUE No. a). Whether the Notice of Motion application dated 21<sup>st</sup> June, 2024 seeking contempt of court orders and imprisonment amongst other orders related to contempt is merited**

15. Under this Sub – title, the main gist of the matter is on whether contempt of court orders can issue against the Plaintiff are sustainable. The Application emanates from an order made by this Court on 13<sup>th</sup> March, 2024. The order read inter alia as follows:
  - b. That there be an order for the Status Quo to be maintained meaning all the rental income garnered from the suit premises WITH EFFECT FROM 1<sup>ST</sup> APRIL, 2024 to be deposited and held in an Escrow Joint bank account in a reputable commercial financial institution to be held in names of both the Advocate for the Plaintiff and the Defendant the Law firm of Messers. Maulidi O. A Advocates and Wachira King’ang’ai Advocates.
16. The Plaintiff averred That in an effort to comply with the said orders he had since complied with the said orders since the court record showed That on the 3rd July, 2024, his new advocates on record moved this court seeking orders to direct and order the bank to replace the Law firm of Messrs. ‘Maulidi



- & Co. advocates” in the joint - account already opened or in the alternative separate accounts be opened in the joint-names of the two (2 ) law firms.
17. On 25<sup>th</sup> July, 2024, the Bank sent a notification to his advocates confirming That the joint-account had been opened and hence ready to receive the rental proceeds from the subject suit property. On the same day, he proceeded to deposit the rental proceeds within the new joint account number 9368210019 and simultaneously instructed his advocates to confirm the compliance with a letter to the Defendant’s advocates and also copied to the court through the deputy Registrar which was prepared on the 25<sup>th</sup> July, 2024 and letters delivered on the same day.
  18. The statements were for the rents collected on house 3 to 10 excluding house 4 in which the tenant was in arrears and an explanation was hereunder given in detail annexed within SOS 3 confirmed That:-
    - i. Total rent collected in the month of April was a sum of Kenya Shillings One Hundred and Fourty Thousand (Kshs.140,000/-) and deductions are for care-taker, electricity bills and bore-hole maintenance fee/rent collector’s fees all totaling to a sum of Kenya Shillings Ninety Seven Thousand (Kshs.97,000/-) and remainder being a sum of Kenya Shillings Fourty Three Thousand (Kshs.43,000/-);
    - ii. Total rent collected in the month of May was a sum of Kenya Shillings One Hundred and Fourty Thousand (Kshs.140,000/-) and deductions for caretaker, bore-hole & KPLC electricity payments & rent collectors fees come to a sum of Kenya Shillings Sixty Two Thousand (Kshs. 62,000/-) and reminder being a sum of Kenya Shillings Seventy Eight Thousand (Kshs. 78,000/-);
    - iii. Total rent collected in the month of June was a sum of Kenya Shillings One Hundred and Twenty Thousand (Kshs.120,000/-) and deductions for caretaker, borehole & electricity totaling to a sum of Kenya Shillings One Hundred Thousand (Kshs. 100,000/-) and reminder being a sum of Kenya Shillings Twenty Thousand (Kshs. 20,000/-);
    - iv. Total rent collected for flat numbers 1 and 2 for the month of April, May and June 2024 totaling to a sum of Kenya Shillings Sixty Thousand (Kshs. 60,000/-).
    - v. Hence, the amount of a sum of Kenya Shillings Two and one Thousand (Kshs. 201, 000/-) as on 25<sup>th</sup> July 2024 had been deposited within the new account pending the rent for July 2024 which shall be deposited once more into the accounts.
  19. On his part the Defendant/Applicant averred That even though those orders were given pursuant to consent of the parties in light of the developments That the Defendant was deceased at the time the ruling was delivered and there was need to replace the Defendant, which has now been done, the Plaintiff appealed against the said ruling vide the Notice of Appeal dated 25<sup>th</sup> March, 2024. Subsequently the Plaintiff filed an application dated 3<sup>rd</sup> May, 2024 at the Court of Appeal under Rule 5 (2) (b) of the [Appellate Jurisdiction Act](#) seeking stay of the further proceedings pending the hearing and determination of That application and the appeal.
  20. The orders sought to stay further proceedings were tailored in such a manner as to defeat the consent orders of the parties given on 13<sup>th</sup> March, 2024. The Plaintiff did not seek stay of the consent order requiring him to deposit the entire rental income garnered from the suit premises with effect from 1<sup>st</sup> April 2024. The Plaintiff did not get any court orders at the Court of Appeal necessitating the Plaintiff to comply with the order for opening of a joint escrow account in the names of the Advocates for the parties which was opened at NCBA Bank PLC being Account No.9 3668210019.
  21. The provision of Section 5 of the [Judicature Act](#) No. 460 provides as follows:-



5. Every superior court shall have power to –
  - a. Punish for contempt of court on the face of the court.
  - b. Punish for contempt of court; and
  - c. Uphold the dignity and authority of subordinate courts”.
22. In the case of “Econet Wireless Kenya Limited – Versus - Minister for Information and Communication of Kenya Authority [2005] eKLR” Hon Justice Ibrahim (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 whom an order is made by court of competent jurisdiction, to obey it unless and until the 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 the order believes it to be irregular or void. (emphasis)

23. The Cromwell J, writing for the Supreme of Canada in the case of:- “Carey – Versus - Laiken, 2015 SCC 17 (16<sup>th</sup> April 2015)”, expounded on the three elements of civil contempt of court which must be established to the satisfaction of the court, thus:

- i) The order alleged to have been breached “must state clearly and unequivocally what should and should not be done.” This ensures That a party will not be found in contempt where an order is unclear. An order may be found to be unclear if, for example, it is missing an essential detail about where, when or to whom it applies; if it incorporates overly broad language; or if external circumstances have obscured its meaning.
- ii) The party alleged to have breached the order must have had actual knowledge of it. It may be possible to infer knowledge in the circumstances, or an alleged contemnor may attract liability on the basis of the willful blindness doctrine.
- iii) The party alleged to be in breach must have intentionally done the act That the order prohibits or intentionally failed to do the act That the order compels.

24. Likewise in the case of “T.N Gadavarman Thiru Mulpad – Versus - Ashok Khot and anor [2005] 5 SCC”, the Supreme Court of India in emphasizing the dangers of disobeying court orders held as follows:

“Disobedience of this Court’s order strikes at the very root of the rule of law on which the judicial system rests. The rule of law is the foundation of a democratic society. Judiciary is the guardian of the rule of law. Hence, it is not only the third pillar but also the central pillar of the democratic State. If the judiciary is to perform its duties and functions effectively and remain true to the spirit with which they are sacredly entrusted to it, the dignity and authority of the Courts have to be respected and protected at all costs. Otherwise, the very corner stone of our constitutional scheme will give way and with it will disappear the rule of law and the civilized life in the society. That is why it is imperative and invariable That Court’s orders are to be followed and complied with. (own emphasis)



25. Contempt of Court is in the nature of criminal proceedings and, therefore, proof of a case against a contemnor is higher than That of balance of probability. In other words, the standard of proof required in cases of contempt is higher than That acquired in an ordinary civil case. Before a finding of contempt can be made, there must a demonstration of willful and deliberate disobedience of a court order. In the case:- “Gatharia K. Mutikika – Versus - Baharini Farm Limited [1985] KLR 227” it was held That:-

“A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be proved satisfactorily..... it 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 criminal cases. It is not safe to extend it to offences 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 to be heard to process 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 the judge 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..... 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 contempt is alleged to or has been committed, and or 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.” (own emphasis)

26. The reason why courts punish for contempt is to uphold the dignity and authority of the court, ensure compliance with directions of the court, observance and respect of due process of law, preserve an effective and impartial system of justice, and maintain public confidence in the administration of justice by courts. Without sanctions for contempt, there would be a serious threat to the rule of law and administration of justice. For a party to be cited for contempt, he must have violated and or disobeyed an order That was directed at him. In the light of the gravity of the personal consequences That would ordinarily flow from a finding of contempt, the law requires proof That the order in question was brought to the attention of the alleged contemnor as proof That he/she had personal knowledge of said order.

27. There is no evidence placed before this Court That shows That the Plaintiff disobeyed the said orders and he had shown prove That his new counsel on record complied with the said orders. In this regard, the Supreme Court of India held in “Indian Airports Employees Union – Versus - Ranjan Catterjee & Another [AIR 1999 SC 880: 1999(2) SCC:537”, That in order to amount to “civil contempt” disobedience must be willful. If disobedience is based on the interpretation of court’s order, notification and other relevant documents, it does not amount to willful disobedience.

28. In the present application, it has not been sufficiently demonstrated That the Plaintiff deliberately disobeyed court orders or at all. Contempt proceedings are a serious undertaking because a court exercising this jurisdiction is minded to ensure the orderly functioning of society and the rule of law. On conviction, the alleged contemnor stands to lose his or her liberty. It should not, therefore, be taken lightly.

29. But even as courts punish for contempt to safeguard the peaceful and development of society and the rule of law, it must be borne in mind That the power to punish for contempt is a discretionary one and



should be used sparingly. That is why the court observed in “Carey – Versus - Laiken (supra)”, That if courts were to find contempt too easily, “a court’s outrage might be treated as just so much bluster That might ultimately cheapen the role and authority of the very judicial power it seeks to protect the court’s contempt power should be used cautiously and with great restraint. It is an enforcement power of last resort rather than first resort.”

30. Taking into account the circumstances of this case and the material placed before court, I am not satisfied That the Defendant/Applicants have proved their case to the required standard. Consequently, the application dated 21<sup>st</sup> June, 2024 is declined and dismissed.

ISSUE No. b). Whether the Notice of Motion application dated 5<sup>th</sup> August, 2024 is merited

31. Under this sub heading, the Honourable Court now wishes to apply the above legal principles to the Notice of Motion application dated 21<sup>st</sup> June, 2024 being That it gave birth to this application. In this application, the Plaintiff prayed for the Court to make a finding That Plaintiff has complied with the court orders made in reference to monthly rental monies from the suit property being deposited into the joint-accounts of the 2 law firms which is continuous until the determination of this suit.
32. I have gone through the records and the documentations filed by the Plaintiff. When the court made the order on 13<sup>th</sup> March, 2024 it did not specify the amount to be deposited on the escrow account. Therefore going by annexures attached to the Plaintiff’s application dated 5<sup>th</sup> August, 2024, there was no deposit slip to indicate That the Plaintiff has deposited any amount in the escrow account.
33. In those premises, there court is therefore inclined to decline to grant the prayers sought by the Plaintiff in the Notice of Motion application dated 5<sup>th</sup> August, 2024. For these reasons, therefore, I proceed to decline and dismiss the same.

ISSUE No. c). Who will bear the Costs of Notice of Motion application dated 21<sup>st</sup> June, 2024 and 5<sup>th</sup> August, 2024.

34. It is now well established That the issue of Costs is a discretion of the Court. Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. The provision of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds That costs follow the events. By event it means the results or outcome of the legal action or proceedings. See the decisions of Supreme Court “Jasbir Rai Singh – Versus - Tarchalan Singh (2014) eKLR” and Cecilia Karuru Ngayo – Versus – Barclays Bank of Kenya Limited, (2014) eKLR”.
35. In the case of “Hussein Muhumed Sirat – Versus - Attorney General & Another [2017] eKLR”, the court stated That costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances. In this case, this Honourable Court has reserved its discretion in not awarding costs.

## **I. Conclusion & Disposition**

36. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties’ interest as regards to balance of convenience. Ultimately in view of the foregoing detailed and expansive analysis to the application, this court arrives at the following decision and makes below order:-
- a. That the Notice of Motion application dated 21<sup>st</sup> June, 2024 be and is hereby found to lack merit and the same is hereby dismissed.
  - b. That the Notice of Motion application dated 5<sup>th</sup> August, 2024 be and is hereby found to lack merit and the same is hereby dismissed.



- c. That the above orders notwithstanding the Plaintiff/Applicant be and is hereby directed to ensure diligent deposit of the monthly rental income into the Joint Escrow bank account without fail and to maintain a comprehensive and proper books of accounts.
- d. That for expediency sake, there should be hearing of this case on 27<sup>th</sup> March, 2025. To enable the parties get fully compliant for the hearing, the matter be mentioned on 4<sup>th</sup> February, 2025 to ascertain full compliance of these orders and for conducting a Pre – Trial Conference pursuant to the provision of Order 11 of the Civil procedure Rules, 2010.
- e. That each party to bear their own costs whatsoever.

It is so ordered accordingly.

**RULING DELIVERED THROUGH THE MICROSOFT TEAM VIRTUAL, SIGNED AND DATED AT MOMBASA THIS .....20<sup>TH</sup> DAY OF ...DECEMBER.....2024.**

**HON. MR. JUSTICE L. L. NAIKUNI,**

**ENVIRONMENT AND LAND COURT AT MOMBASA**

Ruling delivered in the presence of:

- a. M/s. Firdaus Mbula, the Court Assistant.
- b. Mr. Tindi Advocate for the Plaintiff
- c. Mr. Muthuri Advocate for the Defendant

