



**REPUBLIC OF KENYA**

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

**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**

**MISCELLANEOUS CAUSE No. 377 OF 2002**

**IN THE MATTER OF UNI-TRADE PRINTERS LIMITED**

**AND**

**IN THE MATTER OF THE COMPANIES ACT**

**R U L I N G**

1. Before this Court is a Notice of Motion dated 5th October 2012 seeking orders to commit **Charles Gaithuma Munge, Alice Muthoni Munge** (his wife) and **Highway Dynamics Ltd.** to civil jail for a period of three months for contempt of court. Quite how the Applicant expects this Court to jail a limited liability company is beyond contemplation. The Application is brought under the provisions of **Order 40 rule 3** of the *Civil Procedure Rules, 2010* as well as **sections 1A and 3A** of the *Civil Procedure Act*. The Application is based upon the following grounds:

**“a) That on 26/4/2012 the Honourable court ordered that rental income from the said properties be deposited in a joint account in the names of the parties Advocates.**

**b) That in contravention of the said order, the said CHARLES GAIHUMA MUNGE through a company known as Highway Dynamics Ltd where he is a Director with one ALICE MUTHONI MUNGE, has continued to collect rental income from the tenants.**

**c) That their action aforesaid is in clear breach of a court order and lowers the Honour and dignity of the court.**

**d) That the court has already granted leave to the Applicant to commence these proceedings.**

**e) That it is imperative that the court acts to restore its dignity by punishing the Respondents”.**

2. The Application is supported by the affidavit of **Peter Icharia Munge** sworn on even date therewith. The deponent maintained that there was a pending dispute between himself and the said Charles Munge, his co-director as regards the company Unitrade Printers Ltd. (hereinafter “the company”) in relation to the management of the same. Part of the dispute involving the said management is the collection of rent from tenants occupying the premises owned by the company being **L. R. No. Nairobi Block 72/1221 and Nairobi Block 72/1196** (hereinafter “the suit properties”). The deponent noted that the said Charles Munge had been removed as the

Manager of the company by Court Order dated 5th March 2012. It had then been agreed by the parties and the Court further ordered that the rental income from the suit properties with effect from April 2012 should be deposited in a joint account held in the names of the parties' advocates. Indeed, an account was opened for these purposes with I & M Bank, Kenyatta Avenue Branch, Nairobi. The deponent had been advised by his advocates that since the opening of the account only Shs. 53,000/- had been deposited therein. After he had conducted enquiries, the deponent discovered that Charles Munge had continued to collect the rent from tenants using a company known as Highway Dynamics Ltd as aforesaid in which company Charles Munge was a director along with his wife Alice as aforesaid. Mr. Peter Munge attached a number of receipts which had been issued by Highway Dynamics Ltd to a tenant of the suit properties for the payment of rent. He went on to say that it was imperative that this Court should take stern action in the form of punishment for contempt against the said Charles Munge and his wife as directors of Highway Dynamics Ltd in order to protect its honour and integrity.

3. The Replying Affidavit of the said Charles Munge sworn on 9th November 2012 did not state that he swore the same on behalf of himself and his wife. However, he denied that he had been in contempt of any court proceedings and/or Order. He admitted the Orders granted by this Court on 9th February 2012 including his removal as the manager of the company. However, and as ordered by the court, the deponent maintained that he had never attempted to sell, transfer, alienate or dispose of the suit properties. He no longer ran the affairs of the company and had therefore never been in contempt. He maintained that he had received Shs. 53,000/- from the tenants of the suit properties and had forwarded the same to his advocates. That was in April 2012. Thereafter, he denied receiving rent for the suit properties but maintained that the Applicant continued to represent himself as the Managing Director of the company and continued to harass tenants of the suit properties to pay rent to him. Further, in contravention of the Court order, the Applicant had authorised auctioneers to levy distress as against both tenants of the suit properties. The deponent was aware that both tenants Henry Bwire and Tom Chika had sued the company and obtained orders of injunction as against it. The latter had vacated one of the suit properties as a result of the harassment but had obtained an order for the Applicant to attend Court on 24th August 2012 with which the Applicant had not complied resulting in a warrant of arrest being issued as against him.
4. Before this Court could consider the Application dated 5th October 2012, at the instance of the Applicant, it determined the Notice of Motion dated 4th May 2012 and ordered that the Official Receiver be appointed as the manager of the company with immediate effect by directions given on 9th May 2013. Further, this Court ordered the said Charles Munge to deliver such returns and file such accounts as required under **section 353** of the *Companies Act* in relation to the company for the period 29th July 2002 to 9th February 2012. Before Court on 4th December 2013, leave was given to the Respondent to file a Further Affidavit as his counsel informed the Court that there were other facts that the Court needed to consider in relation to the said Application dated 5th October 2012. That Further Affidavit was sworn on 14th January 2014 and immediately the deponent, Charles Munge reiterated that he had never been in contempt of Court proceedings and/or Orders. He maintained that it was the Applicant that has been in contempt. He noted that the Applicant had evicted tenants who had previously occupied the suit properties. The first tenant, the said Henry Bwire had been evicted from his house despite there being a Court Order allowing him to stay there. The deponent annexed a copy of the Court Ruling in that connection delivered by Kipkorir RM on 23rd September 2013.
5. Again with the leave of the Court, the Applicant swore a Supplementary Affidavit on 31st January 2014. First, he pointed out that the said Charles Munge had not complied with this Court's Order given on 9th May 2013 for him to deliver to the Registrar of Companies accounts, including receipts and payments relating to the company since his appointment as manager thereof on 29th July 2002. He maintained that the Further Affidavit did not respond to the issues of contempt

as raised in the Application before Court. He reiterated, once again, that it was imperative that this Court should take stern action in the form of punishment for contempt as against Charles Munge and his wife Alice Munge.

6. The Applicant's submissions were filed herein on 26th February 2014. He set out the prayers as asked for in the Application before Court as well as the facts of the case. He emphasised that the only rents that had been deposited in the joint account in the names of the advocates of the parties was the rent for April 2012 in the amount of Shs. 53,000/=. As regards the law, he maintained that any person affected by a Court order had an unqualified obligation to obey the same and if he wilfully did something to break the Order, he was liable to commitment to jail for contempt of Court. To this end, the Applicant referred the Court to the cases of **Mutitika v Baharini Farm Ltd (1985) KLR 227** as well as **Wildlife Lodges Ltd v County Council of Narok & Anor. (2005) 2EA 344**. The Applicant also referred to the English Case of **Hadkinson v Hadkinson (1952) 2 All ER 567** in which Lord Romer had held:

**“it was the plain and unqualified obligation of every person against or in respect of whom an order was made by a court of competent jurisdiction to obey it unless and until it was discharged, and disobedience of such an order would, as a general rule, result in the person disobeying it being in contempt and punishable by committal or attachment and an application to the court by him would not be entertained until he purged his contempt;”**

The Applicant concluded his submissions by stating that he emphasised the need for the Respondent to be held in contempt taking into consideration that he had neither in any manner or action attempted to purge the same. He had not been apologetic in any manner and continued to display a disregard of the Court, which attitude ought to be punished. He maintained that the Respondent clearly did not respect the rule of law and was in the habit of disobeying Court Orders.

7. The Submissions of the Respondent were filed herein on 19th March 2014. As for the Applicant, he set out the prayers of the Application as well as the facts of the case. He also detailed the Court Order which he was alleged to have been in contempt of. He noted that, as at the 26th April 2012, he had been removed as a director of the company but that there had been no neutral party appointed to run the affairs of the same. By that stage, by letter dated 8th March 2012, the advocates on record for the Applicant had already written to one of the tenants the said Henry Bwire directing him to make all rent payments to their offices. Despite that letter, the Applicant had, without any authority, instructed the auctioneers on 17th April 2012 to demand for rent arrears amounting to some Shs. 90,000/-. As a result, both tenants had moved to Court and those references were still pending before the subordinate Court. He maintained that the Applicant had treated the Orders emanating from the subordinate Court in respect of the two tenants, with contempt. The Respondent maintained that it was not true that he had received rent for the suit properties through the company Highway Dynamics Ltd. Such was not substantiated. The Applicant had not shown anywhere that it was him, the Respondent, who had received rent as alleged. As regards the law, the Respondent referred this Court to **Black's Law Dictionary (9th Edition)** as well as the same authority as put forward by the Applicant being the **Mutitika** case (supra). The Respondent also cited the case of **Johnson v Grant (1923) SC 789** as referred to in the case of **Raphael M. Mkare & 515 Ors v Agricultural Development Corporation (2013) e KLR**. The Respondent concluded that the Application before Court had not brought any evidence of his disobeying a Court Order. The receipts annexed to the Supporting Affidavit did not indicate that rent had been received by the Respondent.
8. The quarrel as between the Applicant and the Respondent as regards the affairs and management of the company has gone on quite long enough. This was the reason that this Court ordered on 9th May 2013 that the Official Receiver should take over as manager of the company.

Although there is nothing before this Court to show what action the Official Receiver has taken, it is hoped that the management of the suit properties is now in hand and the rent has been properly collected, even though it does appear that one of the tenants has vacated one of the suit properties. I have noted the allegations made as between the two Munges, Applicant and Respondent in the four Affidavits in respect of the Application before Court. Such do not make pretty reading and, in my opinion, amount to unnecessary backstabbing.

9. The Order of my learned brother **Musinga J.** (as he then was) dated 9th February 2012 was slightly unfortunate in terms of the second direction that he gave namely, that the Applicant and Respondent should agree upon a new manager within 10 days thereof. Obviously, any agreement between the Applicant and Respondent was quite impossible and, as a result, the affairs of the company in terms of rent collection do not seem to have properly materialised. For this reason, it appears that the Applicant took matters into his own hands in terms of appointing Auctioneers to distraint for rent. This comes over from paragraph 7 of his Replying Affidavit to the Application of the said Henry Bwire sworn on 22nd August 2012 in **CMCC No. 3775 of 2012**, the same being annexed to the Replying Affidavit of the Respondent dated 9th November 2012. The Ruling of the said Resident Magistrate dated 23rd September 2013 annexed to the Further Affidavit of the Respondent dated 14th January 2014 makes interesting reading. The said Henry Bwire as a Plaintiff/applicant in that suit sought amongst other prayers an order for Contempt as against the Applicant herein. It seems that the Applicant was not served with the Order of that Court dated 1st March 2013 as the same was directed to the Officer in charge of the Langata Police station and not the Applicant. To that end, the Applicant can count himself lucky that he was not found guilty of contempt in that suit. What is certain is that the Applicant took matters into his own hands so far as rent collection for the suit properties was concerned without any apparent authority when one bears in mind the Order of **Musinga J.** that a new manager for the company should have been agreed upon. In my view, the Applicant has not come before this Court with clean hands and for that reason alone is undeserving of any Order for contempt being issued as against Charles Munge the Respondent and, more particularly, against his wife, the said Alice Munge.

10. I have considered the authorities put before Court by both parties. I have no quarrel with the definition of what amounts to contempt more particularly as set out in the **Teachers Service Commission** case as cited by the Respondent where **Ndolo J.** quoted from the case of **Econet Wireless Ltd v Minister for Information & Communication of Kenya & Anor (2005) eKLR** as follows:

**“Where an application for committal for contempt of court orders is made the court will treat the same with a lot of seriousness and urgency and more often will suspend any other proceedings until the matter is dealt with and if the contempt is proven to punish the contemnor or demand that it is purged or both. For instance an alleged contemnor will not be allowed to prosecute any application to set aside orders or take any other step until the application for contempt is heard. The reasons for this approach is obvious – a contemnor would have no right of audience in any court of law unless he is punished or purges the contempt.”**

Similarly, the clear holding in the classic Court of Appeal decision in the **Mutitika** case (supra) is very clear:

**“A person who, knowing of an injunction, or an order of stay, willfully does something, or causes others to do something, to break the injunction or interfere with the stay, is liable to be committed for contempt of court as such a person has by his conduct obstructed justice.”**

11. The Respondent has pointed out in his submissions, there is nothing before this Court

connecting either Charles or Alice Munge to the company which is alleged to have collected rents from the said Henry Bwire – Highway Dynamics Ltd. We only have the Applicant’s word for it that Charles and Alice Munge are directors of Highway Dynamics Ltd. I have perused the copies of the 4 receipts allegedly issued by that company to the said Henry Bwire for the collection of Shs. 35,000/- for the months of May, June, July and August 2012 annexed as exhibit “PIM 5” to the Supporting Affidavit to the Application. I have compared the signature on those receipts to that of the Respondent in both his Replying Affidavit and Further Affidavit to the Application. The same are entirely dissimilar. The Applicant has not put before Court any material to prove the connection of Charles and Alice Munge to Highway Dynamics Ltd. The Respondent has gone to great pains to point this out in his submissions before Court. There is no evidence before this Court that the Respondent has wilfully caused Highway Dynamics Ltd to collect the rents from the tenants of the suit properties. Whoever is behind the Company Highway Dynamics Ltd, I have no doubt that the Official Receiver will be chasing for those rents collected totalling Shs.140,000/-. In any event, the Court Order that the Respondent is accused of breaching by the Applicant makes no mention of rent collection in relation to the suit properties.

12. As a result, I find no merit in the Applicant’s Notice of Motion dated 5<sup>th</sup> October 2012 and the same is dismissed with costs to the Respondent.

**DATED and delivered at Nairobi this 31<sup>st</sup> day of July, 2014.**

**J. B. HAVELOCK**

**JUDGE**



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