

**DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR
DALAM NEGERI WILAYAH PERSEKUTUAN KUALA
LUMPUR, MALAYSIA
(BAHAGIAN KUASA-KUASA KHAS)
[PERMOHONAN BAGI SEMAKAN KEHAKIMAN NO: WA-25-
222-08/2020]**

Dalam perkara Mahkamah Rayuan Syariah Wilayah Persekutuan Kuala Lumpur Kes Rayuan Mai No. 1400-041-0048-2019;

Dan

Dalam Perkara Artikel 5, 7 dan 8 Perlembagaan Persekutuan;

Dan

Dalam Perkara Akta Pentadbiran Undang-Undang Islam (Wilayah-Wilayah Persekutuan) 1993, *inter alia* s. 41, 42, 54, 55 dan 56;

Dan

Dalam perkara satu permohonan untuk semakan kehakiman untuk relief di bawah perenggan 1 Jadual kepada Akta Mahkamah Kehakiman 1964 selaras dengan Aturan 53 dan Aturan 92 Kaedah-Kaedah Mahkamah Tinggi 1980.

ANTARA

HISHAM HALIM

(NO. K/P: 820216-10-6079)

... PEMOHON**DAN****1. MAYA AHMAD FUAAD**

(NO K/P: 820720-71-5156)

2. KETUA HAKIM SYARIE MAHKAMAH SYARIAH**WILAYAH-WILAYAH PERSEKUTUAN****3. KETUA PENGARAH JABATAN KEHAKIMAN SYARIAH
MALAYSIA****4. KETUA PENDAFTAR MAHKAMAH SYARIAH****WILAYAH-WILAYAH PERSEKUTUAN****5. KERAJAAN MALAYSIA****... RESPONDEN-
RESPONDEN****Judgment****(Enclosures 119 & 120)****Introduction**

[1] This is an application filed by the First Respondent dated 03.05.2021 (**Enclosure 120**) to set aside the *ex-parte* Order dated 14.04.2021 (**Enclosure 117**) granting leave to the Applicant to commence committal proceedings against the First Respondent, who is the ex-wife of the Applicant.

Background Facts

[2] The background facts of this case are largely undisputed and can be summarised as follows:-

- a. The dispute between the Applicant and the First Respondent commenced in the Syariah Court in Kuala Lumpur.
- b. On 07.08.2020 the Applicant initiated the judicial review (leave) proceedings in this court to challenge the revocation of the appointment of the Chief Syariah judge who heard the proceedings between the Applicant and the First Respondent and/or of the appointment of the new Chief Syariah Judge.
- c. The Applicant's application for leave to commence committal proceedings dated 11.01.2021 (**Enclosure 71**) are based on the following grounds:-
 - (i) the First Respondent had breached the Ad Interim Stay Order dated 14.12.2020;
 - (ii) the First Respondent had interfered with the due administration of justice and intimidation of the Applicant through
 - the First Respondent's invitation to the Syariah Court of Appeal to issue a 'Notice to show cause against the Applicant on the basis that the Applicant had insulted the Syariah Appeal Court through the filing of the judicial review proceedings and to cause committal proceedings to commence in the Syariah Appeal Court vide Syariah Committal Proceedings; and
 - service of the Syariah Committal Application on 07.12.2020
- d. On 14.04.2021, the Applicant had obtained an ex-parte Order (**Enclosure 117**) granting leave to the Applicant to

commence committal proceedings against the First Respondent.

- e. On 18.04.2021, the Applicant filed an application for an order of Committal to commit the First Respondent to prison for contempt of court and for the First Respondent to be punished for her acts of contempt of court (**Enclosure 119**).
- f. Upon being served with the relevant cause papers, the First Respondent filed a Notice of Application dated 03.05.2021 (**Enclosure 120**) seeking the following reliefs (in *verbatim*):-
- 1) Perintah *Ex-parte* Mahkamah bertarikh 14.04.2021 di mana Pemohon diberi kebenaran untuk memfailkan permohonan pengkomitan terhadap **Maya Binti Ahmad Fuaad (No. K/P: 820720-71-5156)**, Responden Pertama di atas, diketepikan;
 - 2) Bahawa segala prosiding-prosiding pengkomitan berikutan Perintah *Ex-Parte* bertarikh 14.04.2021 diketepikan;
 - 3) Bahawa kos berhubung dan berkaitan permohonan ini dan prosiding-prosiding pengkomitan berikutan Perintah *Ex-Parte* bertarikh 14.04.2021 ditentukan dan dibayar serta-merta oleh Pemohon dan Peguamcara Pemohon kepada Maya Binti Ahmad Fuaad (No. K/P: 820720-71-5156)
- g. In gist, the First Respondent is making the application to set aside the *ex-parte* Order dated 14.04.2021 (Enclosure 117) granting leave to the Applicant to commence committal proceedings against the First Respondent.

h. The basis of the First Respondent's application is as follows:-

- i) the committal proceedings are an abusive process of court
- ii) the allegations made by the Applicant are wrong, incorrect and misleading; and
- iii) the Applicant had failed to fully and frankly disclose in his application for the *ex-parte* leave (Enclosure 71) the material facts on what actually transpired in the Syariah Appeal Court.

[3] Both parties agreed that Enclosures 119 and 120 are fixed to be heard together. First of all, I will have to deal with and resolve regarding the First Respondent's application in Enclosure 120 given the First Respondent's application to set aside the *ex-parte* Order dated 14.04.2021 (Enclosure 117).

[4] After the hearing, I allowed the First Respondent's application (Enclosure 120) and dismissed the Applicant's application (Enclosure 119). The reasons for the decision are set down below.

The decision of the Court

[5] Based on the analysis of the First Respondent's application, the court identified the following issues to be considered by this court:-

- a. whether there is a non-disclosure of material facts by the Applicant in filing Enclosure 71;
- b. whether the allegations made by the Applicant are wrong, incorrect and misleading; and

- c. whether the Syariah Appeal Court has the right to proceed with the Decision on 15.12.2020.

Whether there is a non-disclosure of material facts by the Applicant in filing Enclosure 71

[6] Having perused Enclosure 71, the Applicant's 9th Affidavit dated 11.01.2021 (Enclosure 72), Statement under Order 52 rule 3 of the ROC (Enclosure 75), the Applicant's 14th Affidavit dated 03.03.2021 (Enclosure 106) the Applicant's Notice of Intention to use Affidavit dated 03.03.2021 (Enclosure 107), I find that the Applicant only informed this court that:-

- 6.1. the Applicant's Syarie Lawyer on 15.12.2020, before the Syariah Appeal Court in session, had given the Draft Order dated 14.12.2020 to the interpreter to be given to the panels in chambers.
- 6.2. According to the interpreter, the panel judges however, decided to continue with the Decision on that day.

[7] The Applicant did not inform the court of the following material facts:-

- 7.1. the Applicant's Syarie Lawyer is at all material times aware that the attempt to serve the Draft Order dated 14.12.2020 to the panel judges had failed.
- 7.2. Despite that, the Applicant's Syarie Lawyer still did not take any initiatives to object and/or informed the panel judges orally and/or give any response when the panel judges are in sitting.
- 7.3. The First Respondent's Syarie Lawyer at all material times before the panel judges proceeded to deliver the decision, had allowed response from the Applicant's Syarie Lawyer.

- [8] Having perused the minute of proceedings in Syariah Appeal Court as exhibited in Exhibit HH-3 of the Applicant's Affidavit 14 (Enclosure 106), it clearly shows that the Applicant's Syarie Lawyer had failed to address the panel judges with regards to the High Court Stay Order dated 14.12.2020.
- [9] In fact, the minute of proceedings in Syariah Appeal Court had proven to this court that the First Respondent's Syarie Lawyer has allowed the Applicant's Syarie Lawyer to give a response to the Court's intention to proceed with the matter.
- [10] The minute of proceedings in Syariah Appeal Court shows the following

“Peguam Perayu: Assalamualaikum wbt. Dengan izin YAA, YA2, Saya Nurhidayah Binti A. Bakar mewakili perayu. Perayu hadir manakala Responden tidak hadir diwakili oleh rakan bijaksana saya Encik Zulkifli bin Che Yong dan Encik Azmi Bin Mohd Rais. Namun saya tidak kelihatan peguam seorang lagi Datuk Haji Sulaiman hari ini.

Hari ini ditetapkan keputusan dan kami bersedia untuk mendengar keputusan.

Mohon respon daripada pihak Responden.

Peguam

Responden

(En.Azmi): Dengan izin YAA, YA2. Azmi Rais mewakili Responden bersama Encik Zulkifli bin Che Yong. Saya dimaklumkan bahwa Responden akan sampai tidak lama lagi dan dalam perjalanan ke sini. Saya mohon Tangguh sebentar sekiranya dibenarkan oleh Panel. Jika tidak kita boleh teruskan.

(emphasis added)

- [11] Based on the above minute, it clearly shows the Applicant's Syarie Lawyer had failed to take reasonable actions to bring to the Syariah Appeal Court's attention on the High Court Stay Order dated 14.12.2020.
- [12] It is my view that the Applicant's Syarie Lawyer at all material times has a duty and obligation to inform the panel judges on the application made and Order granted by the High Court dated 14.12.2020 as the application in the High Court was initiated by the Applicant himself.
- [13] Inoticed that the Applicant is now trying to shift the blame to the First Respondent and/or the First Respondent's lawyer for not informing the panel judges of the High Court Stay Order dated 14.12.2020 when the obligation to inform the Syariah Appeal Court on the High Court Stay Order dated 14.12.2020 remains on the Applicant's Syarie Lawyer.
- [14] Upon perusal of the Applicant's Enclosures 71, 72, 75,106 and 107, I am of the view that the Applicant only states that the First Respondent's conduct by instructing her Syarie Lawyer to proceed and/or not to proceed with the Syariah Appeal Court decision amounts to disobedience of the High Court Stay Order dated 14.12.2020 which to my mind is incorrect and misleading.
- [15] The Applicant clearly failed to fully and frankly disclose in his *ex-parte* leave application (Enclosure 71) the material facts on what actually transpired in the Syariah Appeal Court.
- [16] Further, I also find the Applicant's Order 52 Statement (Enclosure 75) and the two (2) Affidavits filed by the Applicant did not particularise in detail as to how and in what manner the First Respondent had disobeyed the High Court Stay Order dated

14.12.2020 to enable the First Respondent to appreciate the act of contempt that was alleged against her.

[17] I find support in my view by referring to the Court of Appeal case of *Tan Sri G. Darshan Singh v. Tetuan Azam Lim & Pang* [2013] 2 MLRA717; [2013] 5 MLJ 541; [2013] 1 CLJ 1060 where it was held as follows:-

“[15] It must also be borne in mind that the application for leave to commence committal proceedings is made *ex-parte*. **To enable the court to make a fair and just decision, it must necessarily have all the relevant facts before it.** In an *ex-parte* application, it means that the **applicant must set out the facts fairly, including the facts that are likely to be raised by the proposed alleged contemnor in objecting to the application if it were an inter parte application.** ... It certainly does not mean the applicant is entitled to merely state the facts favouring his application and the court must rely on that alone. Otherwise the **leave procedure would cease to be a safeguard and instead easily become a tool exploited for oppression.**”

(emphasis added)

[18] Based on the above, I am of the considered opinion the disclosure of facts in the Syariah Appeal Court is material for this Court to give a fair consideration in arriving at a fair decision but unfortunately the Applicant had failed to bring to the Court’s attention to the above material facts in his leave application.

[19] The failure of the Applicant to give full, frank and material disclosure in his application for leave to commence with committal proceedings against the First Respondent, to my mind was fatal.

Whether the allegations made by the Applicant are wrong, incorrect and misleading

[20] It is to be noted that committal is a very serious matter, therefore, the Applicant must make out a prima facie case against the First Respondent in his *ex-parte* application by setting out sufficient facts and particulars in the Order 52 Statement to enable the First Respondent to appreciate the act of contempt that was alleged against her.

[21] The Federal Court in *Tan Sri Dato Dr Rozali Ismail & Ors v. Lim Pang Cheong & Ors* [2012] 2 MLRA 717; [2012] 3 MLJ 458; [2012] 2 CLJ 849; [2012] 2 AMR 429 held:-

“[29] It is settled law that committal proceeding is criminal in nature since it involves the liberty of the alleged contemnor. Premised upon that, **the law has provided procedural safeguards in committal proceeding which requires strict compliance.** In this regard, Cross J in *Re B (JA) (An Infant)* [1965] 1 Ch 1112 had this to say:

Committal is a very serious matter. The courts must proceed very carefully before they make an order to commit to prison; and rules have been laid down to secure that the alleged contemnor knows clearly what is being alleged against him and has every opportunity to meet the allegations”

(emphasis added)

[22] In *Dato Ibrahim Ali v. Datuk Seri Anwar Ibrahim* [2015] 1 MLRA 211; [2015] 4 MLJ 98, the Court of Appeal made a reference to the case of *Re Bramblevale Ltd* [1970] 1 Ch 125 in which Lord Denning MR had said:-

[27] **“A contempt of court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved. To use the time honoured phrase, it must be proved beyond reasonable doubt.”**

(emphasis added)

[23] Based on the above, I view that the Applicant had a very strict obligation to establish a prima facie case against the First Respondent

[24] However, based on the facts in the present case, I find that the Applicant did not disclose and/or suppressed all material facts as mentioned in the paragraphs above from the court and therefore, it is my view that the leave to issue committal proceedings was not made a proper manner and fatal to the Applicant’s application.

Whether the Syariah Appeal Court has the right to proceed with the Decision on 15.12.2020

[25] It is not disputed that the Syariah Appeal Court has fixed 15.12.2020 as the date for Decision and had decided to proceed with the Decision upon considering all the evidence brought by the parties notwithstanding the Draft of the Stay Order dated 14.12.2020 been showed or/and has not been shown to them through the interpreter, directly and indirectly expressed that the panel judges are ready with the Decision.

[26] it is my view that it is within the Syariah Appeal Court’s jurisdiction and discretionary power to proceed with the Decision. More so, when the Applicant’s Syarie Lawyer had failed to inform the panel of judges of the Syariah Appeal Court about the High Court Stay Order dated 14.12.2020.

[27] Therefore, it is my view that the allegations made by the Applicant that the First Respondent had in bad faith and insisted for the case to proceed are devoid of merit.

Other related Issues

Allegations are not relevant to the application made.

[28] Having perused the Applicant's leave application, I find that the Applicant had made any allegations against the First Respondent before the Stay Order dated 14.12.2020 was given, namely:-

28.1. interference with the due administration of justice on 23.09.2020 for instructing the First Respondent's Syarie Lawyer and for the preparation of Written Submission; and

28.2. interference with the Applicant's constitutional rights by serving the Syariah committal proceedings on 07.12.2020.

[29] On this issue, I agree with the First Respondent's submission that there was no breach and/or disobedience whatsoever made by the First Respondent since those said acts were done even before the High Court Stay Order dated 14.12.2020 was granted.

[30] It is also my view that until and unless the said Stay Order dated 14.12.2020 was given, the First Respondent was not restricted to exercise her rights under the law.

[31] Further, I find that the Stay Order dated 14.12.2020 was only served to the First Respondent's civil solicitor, Messrs Shukor Baljit & Partners via email on 16.12.2020 at 12.30pm.

[32] Therefore, I view that any of the First Respondent's acts should only be restricted from the date upon which the Order was received.

New facts deposed in the Applicant's Affidavit 17 (Enclosure 126) are not relevant to the application made

[33] The Applicant had deposed new facts in the Applicant's Affidavit 17 not relevant to the application made before the court namely:-

- i. that the First Respondent has been charged with Section 181 of the Penal Code for giving a false statement (Case No. WA-83-715-01/2019);
- ii. that the First Respondent has been charged with Section 182 of the Penal Code (Case No. B-09-28-02/2020).

[34] Further, upon perusal of the Applicant's Order 52 Statement, I find that the two allegations and/or facts deposed are not even pleaded in the said Statement.

[35] It is trite law that the Applicant must set out with sufficient details within the four corners of the Statement and any deficiency in the Statement cannot be supplemented or cured by any further affidavit at a late time.

[36] I find support in my view by referring to the Court of Appeal case of *Wong Chim Yiam v. Bar Malaysia* [2019] 1 MLRA 336; [2019] 2 CLJ 390; [2019] 3 MLJ 129 where it was held as follows:-

“[16] As in any application, the burden of proof is on the applicant to **produce evidence in support of the charge of contempt as set out in the statement** filled by the Applicant.”

(emphasis added)

[37] Further, in *Tan Sri Dato Dr Rozali Ismail (supra)*, the Federal Court held that:-

“[37] We wish to state in clear term that **the alleged act of contempt must be adequately described and particularized in detail in the statement itself.** The accompanying affidavit is only to verify the facts relied in that statement. It cannot add facts to it. **Any deficiency in the statement cannot be supplemented or cured by any further affidavit at a later time.** The alleged contemner must at once be given full knowledge of what charge he is facing so as to enable him to meet the charge. **This must be done within the four walls of the statement itself....”**

(emphasis added)

[38] Based on the above, it is my view that the new facts and/or allegations deposed in the Applicant’s Affidavit 17 (Enclosure 126) cannot be considered and taken into consideration by this Court as it was not pleaded and/or stated within the four walls of the Statement.

Conclusion

[39] Given the reasons above, the court held that:-

- (a) the *ex-parte* application for leave to issue contempt proceedings against the First Respondent in Enclosure 71 was not made properly;
- (b) the leave Order granted on 14.04.2021 is invalid and should be set aside;
- (c) the First Respondent’s application in Enclosure 120 is allowed;
- (d) as consequence, Enclosure 119 is dismissed;

- (e) the Applicant pay costs to the First Respondent in Enclosure 119 RM5,000.00 subject to payment of the allocator fees; and
- (f) the Applicant pay costs to the First Respondent in Enclosure 120 RM5,000.00 subject to payment of the allocator fees.

Dated: 31 MARCH 2022

(AHMAD KAMAL MD SHAHID)

Judge

High Court Kuala Lumpur

Counsel

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Case(s) referred to:

Tan Sri G. Darshan Singh v. Tetuan Azam Lim & Pang [2013] 2 MLRA717; [2013] 5 MLJ 541; [2013] 1 CLJ 1060

Tan Sri Dato Dr Rozali Ismail & Ors v. Lim Pang Cheong & Ors [2012] 2 MLRA 717; [2012] 3 MLJ 458; [2012] 2 CLJ 849; [2012] 2 AMR 429

Dato Ibrahim Ali v. Datuk Seri Anwar Ibrahim [2015] 1 MLRA 211; [2015] 4 MLJ 98

Re Bramblevale Ltd [1970] 1 Ch 125

Wong Chim Yiam v. Bar Malaysia [2019] 1 MLRA 336; [2019] 2 CLJ 390; [2019] 3 MLJ 129

Legislation referred to:

Rules of Court 2012, O. 52 r. 3