



**Mokaya & another v Sayani Investment Limited (Environment & Land Miscellaneous Case E052 of 2020) [2023] KEELC 17796 (KLR) (30 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17796 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND MISCELLANEOUS CASE E052 OF 2020**

**MD MWANGI, J**

**MAY 30, 2023**

**IN THE MATTER OF THE BUSINESS PREMISES RENT  
TRIBUNAL CASE NUMBERS 486 OF 2020 AND 511 OF 2020**

**AND**

**IN THE MATTER OF THE COURT ORDERS ISSUED BY THE BUSINESS PREMISES RENT  
TRIBUNAL CASE NUMBERS 486 OF 2020 AND 511 OF 2020 ON 14TH DAY OF MAY, 2020**

**-AND-**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO INSTITUTE  
CONTEMPT PROCEEDINGS UNDER THE JUDICATURE ACT**

**-AND-**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO  
INSTITUTE COMMITTAL PROCEEDINGS AGAINST KARIMI  
NIZAR JETHA, THE DIRECTOR OF THE RESPONDENT**

**BETWEEN**

**DAVID MOKAYA ..... 1<sup>ST</sup> APPLICANT**

**BENSON OMALE KUBE ..... 2<sup>ND</sup> APPLICANT**

**AND**

**SAYANI INVESTMENT LIMITED ..... RESPONDENT**

*(In respect of the Notice of Motion dated 1st October 2020, seeking for an order of committal of Karim Nizar Jetha, the director of the Respondent company to prison for disobedience of the orders issued by the Business Premises Rent Tribunal in case Nos. 486 of 2020 and 511 of 2020 on 14th May 2020)*



## RULING

### Background

1. The Applicants in this matter were tenants in the premises located on parcel of land, L.R. No. 209/1913 otherwise known as Victoria House along the Tom Mboya Street in Nairobi (hereinafter referred to as the suit premises) owned by the respondent herein, Sayani Investments Ltd. The applicants aver that on the May 14, 2020, they obtained Orders from the Business Premises Rent Tribunal (BPRT) prohibiting the Respondent either by itself, servants and or agents from cordoning, fencing off, closing, evicting or interfering in any manner whatsoever with the Applicants' quiet occupation and lawful enjoyment of the suit premises (as tenants) pending the hearing and determination of the matters by the Tribunal.
2. The applicants further state that the respondent through its Director Karim Jetha, in spite of the Orders, went ahead and pulled down the canopy and or veranda of the demised premises and thereafter the roof, thereby rendering the premises 'untenantable'.
3. It is the applicants' case that when the Orders were served upon the respondent Company, the said Director sent the 2<sup>nd</sup> applicant herein a text message telling him to stop wasting money on lawyers since the Orders were worthless 'than toilet paper.' Further that on June 2, 2020, the same Director went ahead to issue the Applicants with a three months' eviction notice threatening them with forceful eviction. This was despite the fact that the dispute was the subject matter of the references pending before the BPRT in cases No. 486 of 2020 and 511 of 2020.
4. On expiry of the eviction notice, the respondent sent hired goons on the night of September 26, 2020 who actually pulled down the canopy, veranda and the roof of the premises.

### Response by the alleged Contemptor.

5. By way of a replying affidavit sworn on the December 8, 2022, Karim Jetha denied the allegations in the Applicant's application, statement of facts and verifying affidavit. He denied service of the Orders from the Business Premises Rent Tribunal either upon the Respondent or himself as alleged by the applicants. He further averred that the suit premises is no longer owned by the Respondent having already sold it to a 3<sup>rd</sup> party.
6. The deponent further deposed that due to its old age (over a 100 years), the building was condemned in the year 2016 by the local authorities and was the subject of court proceedings in criminal case No. 258A of 2016 in the Chief Magistrate's Court at City Hall. It was while the proceedings were still pending that the building developed structural cracks and the entire roof caved in, partially collapsing thereby causing the criminal court to terminate the proceedings.
7. The deponent asserts that it is misleading, vexatious and in bad faith for the applicants to blame him and the respondent for an event which was inevitable as indicated in the Town Structural Engineer's report yet they are the ones who had refused over the years to pave way for structural renovations that would have saved the building from collapsing and tumbling down as it eventually did.



### **Court's Directions.**

8. The court's directions were that the application be canvassed by way of written submissions. None of the parties filed submissions. The court will proceed to consider the application and the response thereof and make a determination.

### **Issues for Determination.**

9. Considering the applicants' application and the response by the alleged Contemptor, the issue for determination is whether the Applicants have made a case for the committal of Karim Nizar Jetha to prison for contempt of court.

### **Analysis and Determination.**

10. Section 5 of the *Judicature Act* is the law that provides the basis for contempt of court in Kenya. This is after the *Contempt of Court Act*, No. 46 of 2016, was nullified in the case of *Kenya Human Rights Commission v Attorney General & another* (2018) eKLR.

Section 5 provides that:

“(1). The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of justice in England, and that power shall extend to upholding the authority and dignity of the subordinate courts.”

11. The standard of proof in contempt of court proceedings is higher than ‘the balance of probabilities’ as stated by the Court of Appeal in the case of *Mutitika v Baharini Farm Limited* [1985] KLR 229. The court stated that: -

“In our view, the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost, but not exactly, beyond reasonable doubt.”

12. Mativo J (as he then was) in the case of *North Tetu Farmers Co. Ltd v Joseph Nderitu Wanjohi* (2016) eKLR restated the established principle of law as follows: -

“...there are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases) - (a) the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant; (b) the defendant had knowledge of or proper notice of the terms of the order; (c) the defendant has acted in breach of the terms of the order; and (d) the defendant's conduct was deliberate.”

13. The alleged contemptor denied service of the Order either upon him or upon the respondent. He further alleged that the respondent had already sold the suit property to a third party. The applicants did not contradict the averments in the replying affidavit of the respondent. Though the court had granted the applicants leave to file a further affidavit in response to the respondent's replying affidavit, they did not file one.

14. The applicants have demonstrated that indeed the Orders were issued by the BPRT; they have not however, demonstrated that the alleged contemptor had knowledge of the Orders and that he deliberately acted in breach of the terms of the order. The applicants alleged that when the Orders



from the BPRT were served upon the Director of the respondent Company, he sent the 2<sup>nd</sup> applicant a text message telling him to stop wasting money on lawyers since the Orders were worthless. However, no evidence was provided before the court to prove that the mobile phone number from which the text was allegedly sent from was registered in the name of the alleged contemtor. The allegations of demolishing the canopy and the roof too have not been proved. They remain that, mere allegations.

15. As already stated above, the standard of proof in contempt proceedings is higher than proof on the balance of probabilities. I must note that the applicants treated the application like any other ordinary application where the standard of proof is on a balance of probabilities.
16. Consequently, the court finds that the applicants have not proved their case for committal to prison against the alleged contemtor as by law required. The court has no other option but to dismiss the application with costs to the respondent.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30<sup>TH</sup> DAY OF MAY 2023.**

**M.D. MWANGI**

**JUDGE**

**In the virtual presence of:**

Mr. Mongeri for the Respondent.

No appearance for the Applicants.

Court Assistant – Yvette.

**M.D. MWANGI**

**JUDGE**

