



REPUBLIC OF KENYA



**KENYA LAW**  
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**M'Mboga & another v Kagumba (Miscellaneous Civil Case  
E088 of 2022) [2022] KEHC 418 (KLR) (Civ) (28 April 2022) (Ruling)**

Neutral citation: [2022] KEHC 418 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**MISCELLANEOUS CIVIL CASE E088 OF 2022**

**DO CHEPKWONY, J**

**APRIL 28, 2022**

**BETWEEN**

**IAN GONJI M'MBOGA ..... 1<sup>ST</sup> APPLICANT**

**MAGERIA KIBUCHI ..... 2<sup>ND</sup> APPLICANT**

**AND**

**BENJAMIN KIMERIA KAGUMBA ..... RESPONDENT**

**RULING**

**Introduction**

1. The Applicants moved this Court by way of a Notice of Motion application dated 18<sup>th</sup> February, 2022 brought under Sections 1A and 3A of the [Civil Procedure Act](#), Order 40 Rule 3(1) of the [Civil Procedure Rules](#) and Sections 3,4 and 5 of the [Contempt of Court Act](#), 2016 seeking for the following orders;
  - a. Spent;
  - b. That this Honourable Court be pleased to cite Benjamin Kimeria Kagumba, Respondent herein, for contempt of court orders issued on January 10, 2022 and January 13, 2022 respectively and the contemnor be committed to prison for a period of six (6) months for blatant disregard and disobedience of the above mentioned orders, or any other period that this Honourable Court deems fit and/or until Benjamin Kimeria Kagumba purges the contempt or such further orders be made as may be just;
  - c. That the contemnor do purge the contempt by forthwith granting the Applicants access to the business premises known as L.R No. 13147/10 in compliance with the orders of the Business Premises Rent Tribunal issued on January 10, 2022 and 13<sup>th</sup> January, 2022 respectively;



- d. That the Officer Commanding Station (OCS) Hardy Police Station do assist in enforcing the order issued on 13<sup>th</sup> January, 2022 together with the orders herein;
  - e. That the costs of this application be borne by the Respondent in any event.
2. The application is based on the grounds on the face of the application and the annexed affidavit sworn by the 1<sup>st</sup> Applicant, Ian Gonji M’oga on even date. He avers that on 6<sup>th</sup> January, 2022 they filed an application at the Business Premises Rent Tribunal being BPRT No.E010 of 2022 seeking to restrain the Respondent, his agents, employees or any other person from seeking to unlawfully terminate, harass, close, evict or interfere with the Applicants’ quiet enjoyment of the business premises known as L.R No. 13147/10. The orders were granted by the Honourable tribunal on 10<sup>th</sup> January, 2022.
  3. The Applicants deposed that when the order was forwarded to the OCS Langata for enforcement, they were advised to serve the OCS Hardy Police Station for enforcement since they did not have jurisdiction.
  4. The Applicants also state that the orders of January 10, 2022 and January 13, 2022 together with the application were served upon the Respondent who acknowledged receipt as clearly stated in the Respondents’ Replying Affidavit. The Applicants were still in possession of the suit premises when they effected service and infact all their property and those of their clients are still in the suit premises.
  5. The application was opposed by the Respondent who filed a Notice of Preliminary Objection dated March 1, 2022 raising the following grounds;
    - a) The Applicants application seeks to cite the Respondent for contempt of court arising from ex parte court orders issued by the Business Premises Rent Tribunal issued on 10<sup>th</sup> and January 13, 2022 in BPRT Case Number E010 of 2020.
    - b) That this Honourable Court lacks jurisdiction to determine the application for reasons inter alia that by dint of Section 15 of the Landlord and Tenants Act, disputes and orders emanating from the Business Premises Tribunal to a large extent are specifically to be determined by the Environment and Land Court and not the High Court.
    - c) The entire application is incurably defective, hopelessly misconceived and an abuse of the Court process and hence ought to be struck out with costs.
  6. The Notice of Motion application dated February 18, 2022 came up for interpartes hearing on March 7, 2022 but since the Respondent had filed a notice of Preliminary Objection, this Court directed that the same be disposed first on a priority basis. The Court therefore issued directions that the Notice of Preliminary Objection to be disposed by way of written submissions.
  7. Both parties filed their respective submissions in respect of the Notice of Preliminary Objection dated March 1, 2022.

### **Respondent’s Submissions**

8. The Respondent filed written submissions dated March 8, 2022 in support of the notice of Preliminary Objection dated March 1, 2022.
9. The Respondent submitted that the objection is on a pure point of law under Section 15 of the *Landlord and Tenants Act*. The Respondent cited the case of *Mukhisa Biscuits Manufacturing Ltd v West End Distributors* and *Kenneth Kinoti Muriuki & 5 others v Dinara Developers Limited & another* [2020] eKLR.



10. The objection is to the effect that by the dint of the said Section 15, disputes and orders emanating from Business Premises Rent Tribunal are specifically to be determined by the Environment and Land Court and not the High Court.
11. The Respondent relied on the cases of *Wanyonyi v Laayan Lentei* [2018] eKLR and *Michael Jefwa Tinga & Another v Melo Twenty-Seven Holdings Company Limited & 2 others* [2020] eKLR in arguing on the question of jurisdiction with regard to the instant application..
12. In support of his Notice of Preliminary Objection, on the issue of jurisdiction, the Respondent cited the case of *Milkah Bilah v Kasuku Achila*, where the Court in response to a Preliminary Objection on the jurisdiction of the High Court application arising from the order of the Business Premises Rent Tribunal stated as follows;

“Pursuant to Section 15 of the Landlord and Tenant Act, it is the Environment and Land Court that has jurisdiction to hear and determine appeals from the Business Premises Rent Tribunal. Consequently, I find that the appeal herein has been filed before a Court that lacks jurisdiction. Accordingly, this court is obliged to down its tools forthwith. I cannot order that the appeal be transferred to Environment and Land Court. I therefore uphold the preliminary objection and order that the appeal be and is hereby struck out for want of jurisdiction.”
13. The Respondent urged this court to be guided by the rules of procedure as set out in various laws on the fact that the jurisdictional defect cannot be cured by Article 159 (2) (a) of the *Constitution* or Sections 1A, 1B & 3A of the *Civil Procedure Act*.
14. The Respondent asked the court to allow the Notice of Preliminary Objection and strike out the Applicants’ application dated February 18, 2022 with costs to the Respondent.

### **Applicants’ Submissions**

15. The Applicants filed written submissions dated 15<sup>th</sup> March, 2022 in opposition to the Preliminary Objection. They submitted that on February 18, 2022 they filed a Notice of Motion of even date seeking to cite the Respondent for contempt of court for disobeying orders issued by the Business Premises Rent Tribunal on 10<sup>th</sup> and January 13, 2022.
16. In response, the Respondent filed a Notice of Preliminary Objection dated March 1, 2022, challenging the jurisdiction of this Honourable Court to hear and determine the application by the Applicants.
17. The Notice of Preliminary Objection is based on Section 15 of the *Landlord and Tenant Act*, Cap 301, that disputes and orders emanating from the Business Premises Rent Tribunal (“BPRT”) are to a large extent specifically to be determined by the Environment and Land Court and not the High Court.
18. The Applicants urged that the Preliminary Objection is an attempt to further frustrate the obedience of valid court orders issued by Business Premises Rent Tribunal and delay the hearing of the instant application.
19. The Applicants contended that a reading of Section 15 of Cap 301 by the Respondent is misconstrued and merely meant to further frustrate the hearing and determination of the application dated 18<sup>th</sup> February, 2022. It is their submission that this court has the requisite jurisdiction to hear and determine this matter.



20. The Applicants relied on Supreme Court Civil Appeal (Application) No.2 of 2011- [\*Samuel Kamau Macharia & another v Kenya Commercial Bank & 2 others\*](#) and [\*CMAW-M v PAW-M\*](#) [2018]eKLR.
21. The Applicants argued that the applicable law is the [\*Contempt of Court Act\*](#) No. 46 of 2016 and in particular Sections 2 and 5 of the Act.
22. The Applicants submitted that Section 15 of Cap 301 which the Respondent contends that is applicable is misconceived and a wrong interpretation as it only deals with appeals from determinations and orders issued by the BPRT.
23. The Applicants urged this Honourable Court to find that it has the jurisdiction to determine the matter and should proceed to dispose the application dated 18<sup>th</sup> February, 2022 on merit.

### **Analysis and Determination**

24. Upon perusal of the Notice Of Preliminary Objection the following are the issues for this Court to determine:
  - a. Whether the Honourable Court has jurisdiction to entertain this matter;
  - b. Who bears the cost of this suit?

#### **a. Whether this Honourable Court has jurisdiction to entertain this matter?**

25. In his Notice of preliminary Objection, the Respondent has sought to challenge the jurisdiction of this Honourable Court under Section 15 of the [\*Landlords and Tenants Act\*](#) Cap 301. The point of departure for this Court is to determine what amounts to a Preliminary Objection.
26. The circumstances under which a Preliminary Objection may be raised was properly explained in the highly celebrated case of *Mukhisa Biscuits Manufacturing Ltd v West End Distributors Ltd* [1969] EA 696, where Law J A stated;

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings and which objection point may dispose the suit”.
27. The Court further stated;

“A preliminary objection raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any has to be ascertained or if what is sought is the exercise of judicial discretion”.
28. The Respondent has raised several grounds in his notice of Preliminary Objection being that the application seeks to cite the Respondent for contempt of court arising from ex parte orders issued in Business Premises Rent Tribunal No.E010 of 2020, this court lacks jurisdiction to determine the application by dint of Section 15 of the Landlords and Tenants Act and that the entire application is incurably defective, hopelessly misconceived and an abuse of the court process.
29. From the description of a Preliminary Objection in the case of *Mukhisa Biscuits Manufacturing Ltd (supra)*, it is crystal clear that the instant Notice of Preliminary Objection by the Respondent meets the threshold set out of a Preliminary Objection. In short, the Preliminary Objection can be determined without ascertainment of facts from elsewhere but from the pleadings as filed.



30. Jurisdiction of a court emanates from either the *Constitution* or the Statute. It must be expressly stated in the law and no court can assume jurisdiction on its own. This position was clearly stated by the Supreme Court in the case of *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR, where it held, that:

“A Court’s jurisdiction flows from either the *Constitution* or legislation or both. Thus a Court of law can only exercise jurisdiction as conferred by the *Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second Respondents in his submissions that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings.”

31. In the case of *Owners of Motor Vessel “Lilian S” v Caltex Oil Ltd (Kenya)* [1989] eKLR the court stated;

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”.

32. This court has been called upon to determine what the law provides and whether indeed it has the requisite jurisdiction to determine this matter. In answering the question of jurisdiction, this court is guided by the provisions of Section 15(1) of the Landlords and Tenants Act, Cap 301 which provides that;

“Any party to a reference aggrieved by any determination or order of a Tribunal made therein may, within thirty days after the date of such determination or order, appeal to the Environment and Land Court.”

Provided that the Environment and Land Court may, where it is satisfied that there is sufficient reason for so doing extend the said period of thirty days upon such conditions, if any as it may think fit.

33. The *Environment and Land Court Act* No.19 of 2011 under Section 13 provides for the jurisdiction of the Court as having jurisdiction to hear and determine disputes arising from;

- a. Relating to Environment planning and protection, climate issues, land use planning, title, boundaries, rates, rents, valuations, mining, minerals and other natural of land;
- b. Relating to compulsory acquisition of land;
- c. Relating to administration and management;
- d. Relating to public, private and compulsory land and contracts, choses in action or other instruments in granting any enforceable interests in land; and
- e. Any other dispute relating to the environment.”

34. Based on the foregoing, it is clear from the provisions of the law that the proper forum to entertain this matter is the Environment and Land Court.



35. The same position was echoed in the case of *Nancy Wanyonyi v Lemayan Lantei* [2018]eKLR, where the Court held that:

“I have considered the submissions on the Preliminary Objection by the Respondent. It is trite that the dispute and order emanating from Business Premises Rent Tribunal to a large extent is specifically to be determined by the ELC and not High Court. I consider it perfectly appropriate to down tools for the very reason that the subject matter jurisdiction of this Court is ousted by Statute. In the premises I find merit in the Preliminary Objection and do decline to proceed further with the application on the merits.”

The Respondent’s Notice of Preliminary Objection dated 1<sup>st</sup> March, 2022 is therefore merited and succeeds.

36. That notwithstanding, even if this Honourable Court was to find that the Notice of Preliminary Objection dated 1<sup>st</sup> March, 2022 is devoid of merits, the application would still not have succeeded for the simple reason that it is brought under the [Contempt of Court Act](#) No.46 of 2016 which was declared unconstitutional. The said Act was declared unconstitutional for lack of public participation as required under Article 10 and 118 of the [Constitution](#) by Mwita, J in the case of [Kenya Human Rights Commission v Attorney General & another](#) [2018] eKLR

37. Having this background in mind the Applicant ought to have reverted back to the law that existed before the coming into force of the [Contempt of Court Act](#) No.46 of 2016 rather than relying on a law that is invalid.

38. It is well known that contempt of court proceedings are quasi criminal in nature and in the interest of justice, the proper procedure needs to be followed before the contemnor is found guilty of contempt.

39. The Applicant did not annex a Return of Service in his application seeking to cite the Respondent for contempt but only stated that the Respondent was served as acknowledged in his Replying Affidavit. It should be noted that contempt proceedings are serious proceedings and proof of personal service on the affected person is a mandatory requirement.

40. I also note that the Business Premises Rent Tribunal order seeking to cite the Respondent for contempt has not been adopted by the Magistrate’s Court as an order of the Court. Section 14(1) of the [Landlords and Tenants Act](#) provides that;

“A duly certified copy of any determination or order of a Tribunal may be filed in a competent subordinate court of the first class by any party to the proceedings before such Tribunal or by the Tribunal, and on such copy being filed and notice thereof being served on the Tribunal by the party filing the same such determination or order may, subject to any right of appeal conferred by or under this Act, be enforced as a decree of the court.”

41. This is the position that was taken by the Court in the case of [Gilbert Otieno & another v Bernard Mushivoji & Another](#) [2018] eKLR, where it stated that;

“It is my finding that the respective orders from the Chairman of the Business Premises Tribunal should have been first filed in the Magistrates Court for adoption, a Decree extracted, before the Applicants could apply for its enforcement which in this scenario is citing the Respondents for contempt.



**b. Who bears the cost of this suit?**

42. It is trite law that costs follow the event and therefore costs are awarded to a successful party to the proceedings. In this regard this court is guided by the case of *Republic v Rosemary Wairimu Munene, Ex-Parte Applicant v Ihururu Dairy Farmers Co-operative Society Ltd*, Judicial Review Application No.6 of 2014, where the court held that:-

“The issue of costs is the discretion of the court as provided under the above section. The basic rule on attribution of costs is that costs follow the event..... It is well recognized that the principle costs follow the event is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case.”

**Conclusion**

43. The upshot of the foregoing is that the Notice of preliminary Objection dated 1<sup>st</sup> March, 2022 by the Respondent is merited and is allowed. For avoidance of doubt, the Notice of Motion application dated 18<sup>th</sup> February, 2022 is struck out with costs to the Respondent.

Orders accordingly.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 28 TH DAY OF APRIL, 2022.**

**D. O. CHEPKWONY**

**JUDGE**

