



REPUBLIC OF KENYA



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**Oltukai Mara Limited v Tuyu & 7 others (Commercial Case E371 of 2022)  
[2022] KEHC 15704 (KLR) (Commercial and Tax) (24 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 15704 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE E371 OF 2022  
DO CHEPKWONY, J  
NOVEMBER 24, 2022**

**BETWEEN**

**OLTUKAI MARA LIMITED ..... PLAINTIFF**

**AND**

**SAMSON OLE TUYA ..... 1<sup>ST</sup> DEFENDANT**

**DANIEL OLE MPOA ..... 2<sup>ND</sup> DEFENDANT**

**MAKOI OLE KYRIONGOT ..... 3<sup>RD</sup> DEFENDANT**

**STANLEY OLE LENJIR ..... 4<sup>TH</sup> DEFENDANT**

**ROBERT OLE TIPIS ..... 5<sup>TH</sup> DEFENDANT**

**NOAH OLE SAYAGIE ..... 6<sup>TH</sup> DEFENDANT**

**SAMSON OLE LETURA ..... 7<sup>TH</sup> DEFENDANT**

**PAUL OLE LAPORE ..... 8<sup>TH</sup> DEFENDANT**

**RULING**

1. There are two applications pending determination in this matter. The first application is dated September 26, 2022 while the second one is dated October 13, 2022. Both applications have been filed by the Plaintiff.
2. Directions were issued that both applications be canvassed by way of written submissions and as the record reflects, the Defendants opted to file one set of submissions only with respect to the application dated October 13, 2022, whereas the Plaintiff filed submissions on both application.
3. However, having read through the affidavits and material filed by parties, I



am persuaded that there is sufficient material facts to make a determination on both applications. I will however, begin with the 2<sup>nd</sup> application dated October 13, 2022 then proceed to the merits of the application dated September 26, 2022.

#### **Application Dated 13<sup>th</sup> October, 2022**

4. The application dated October 13, 2022 is by way of Notice of Motion expressed to have been brought under Sections 1A, 1B and 3A, all of the *Civil Procedure Act*, Orders 40 Rule 1 and Order 50 Rule 1 both of the *Civil Procedure Rules, 2010* and Section 24 of the *National Police Act*. It seeks the following orders:-
  - a. Spent;
  - b. The Honourable Court be pleased to hold Defendants and/or their legal representatives in contempt of court and be committed to civil jail and detained in prison for a period of six(6) months or such period as the court may deem fit for their willful and mutinous disobedience of the orders issued by the Hon Lady Justice Dorah Chepkwony on September 26, 2022.
  - c. The Commanding Officer Narok Police Station or its subordinate stations and/or police posts to supervise the enforcement of the existing court orders and any other orders the Honourable Court deems fit to issue following this application.
  - d. Costs of this application be borne by the Defendants and/or their legal representation.
5. The application is premised on the grounds on its face which are further explicate in the affidavit of Irene Wambui Ndaru, the Plaintiff's Executive Housekeeper. The Plaintiff's case is simply that despite the court's orders issued on September 26, 2022, the Defendant's and or the representatives, together with their advocates raided the Plaintiff's camp and demanded to take control and evict the Plaintiff from the facility. That albeit the said orders precluded having the Defendants from interfering with the Plaintiff's occupation of the camp, the Defendants forcefully evicted the Plaintiff from the camp on October 12, 2022. In the Plaintiff's view, the Defendants acted willfully in disregard of valid court orders, for maintenance of rule of law, good order and upholding the authority of this court. The Defendant and/or their representatives should be held in contempt and committed to civil jail.
6. The 1<sup>st</sup>, 5<sup>th</sup> and 7<sup>th</sup> Defendants opposed the application vide the Replying Affidavit sworn by Samson Ole Tuya, the 1<sup>st</sup> Defendant herein. He deponed that despite the fact that the Defendants are the registered owners of parcel of land situated in Narok County to which the Plaintiff has leased a portion thereof, the lease was determined by effluxion of time but the Plaintiffs have since then been reluctant to vacate the Defendant's land. Consequently, the Plaintiff sued the Defendants vide Narok ELC Case No E004 of 2022, seeking to compel them to renew the lease. The Plaintiff was then granted interim orders similar to the orders granted by this court on September 26, 2022. However, upon considering the issues before it, the Narok Environment and Land Court dismissed the Plaintiff's suit and vacated the orders in place. Parties were then referred for arbitration.
7. It is further deponed that the orders issued by this court were obtained on misrepresentation of material facts and on glaring abuse of the court process for among other reasons that; the Plaintiff failed to disclose to the court that it had filed a similar suit in Narok Environment and Land Court being ELC No E004 of 2022 which involved the same parties and same subject matter; that the Plaintiff failed to disclose that at the time of filing this suit, it had obtained interim orders similar to the orders sought in the application dated September 26, 2022 and which orders were still in force. Nonetheless, the orders issued in Narok ELC Case No E004 of 2022 were vacated on October 11, 2022 and by that time the Plaintiff had not served the Defendants with the orders issued by this court on September 26, 2022.



Without knowledge of any prevailing court orders, the Defendants then moved to the Plaintiff's camp to gain its possession given that the lease had been determined.

8. It is the Defendants' case that the Plaintiff has never served the orders issued on September 26, 2022 personally to them but only served the orders on the Defendant's advocate on October 12, 2022 notwithstanding that the advocate had not received instructions to act on this matter.
9. In addition to that, the Defendants are of the view that the present case is a classic case of forum shopping in view of Narok ELC Case No E004 of 2022 earlier filed by the Plaintiff. The present case is further described as incompetent for joining the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 6<sup>th</sup> and 8<sup>th</sup> Defendants who are deceased and therefore non-legal persons. For those reasons, the Defendants have urged the court to find the Plaintiff as having approached the court with unclean hands and proceed to dismiss the applications dated September 26, 2022 and October 13, 2022.
10. In rebuttal of the averments made by the Defendants, the Plaintiffs filed a Supplementary Affidavit sworn by its Director, James Mwangi Wainaina on October 24, 2022. His case is that the suit in Narok ELC No E004 of 2022 was not determined on its merit and the same was struck out by virtue of the Arbitration Clause contained in the agreement. That the present case is intended to preserve the status quo as per the interim orders issued by this court pending the intended arbitration. He avers that it was impossible to serve the orders personally upon the Defendants until on October 12, 2022 when the orders were served upon the Defendants through their advocates. He adds that the Defendants and/or their advocates were aware of the orders and that is why they filed the Replying Affidavit and in law, knowledge supersedes service.
11. The Plaintiff denies that the present case displays forum shopping and adds that the same only preserves the parties' relationship pending arbitration and were it not for the interim orders herein issued, the Defendant would have maliciously evicted the Plaintiff from the premises.
12. The Plaintiff also adds that it has all good intentions to proceed with arbitration only that the Defendants' advocate has not approved the suggested arbitrator.
13. Parties files submissions in support of their respective case as directed by the court on October 14, 2022. The Defendants submissions are dated October 24, 2022 whereas the Plaintiff's submissions are dated October 25, 2022. The parties highlighted the same on October 26, 2022. I have read through those submissions and I will reproduce the relevant parts thereof in my analysis.

#### **Determination of the Application dated October 13, 2022**

14. Having considered each of the parties perspective, it is useful to point out that contempt of court is simply a conduct that defies or disrespects the authority of the court. Further, Order 40 Rule (3) of the Civil Procedure Rules, 2010 provides that:

' In cases of disobedience, or breach of any terms of a temporary injunction, the court granting the injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order that person to be detained in prison for a term not proceedings six (6) months unless in the meantime the court directs his release'.
15. This court and others have repeatedly stated that the reason why courts punish for contempt is to uphold the dignity and authority of the court, to ensure observance and respect of the due process of the law to ensure compliance with directions of the court and maintain public confidence in the administration of justice by courts. Needless to say therefore, for a party to be cited for contempt, he/she must have violated and or disobeyed an order directed on him/her. In the present case, it is averred



that the Defendants either by themselves and/or their representatives violated and or disobeyed the courts orders issued on September 26, 2022 by entering into the Plaintiff's camp and demanding its vacant possession whereas the order precluded them from interfering with the Plaintiff's continued possession of the camp pending the hearing and determination of the application dated September 26, 2022.

16. Given that contempt proceedings are criminal in nature, the standard of proof is higher than that of the balance of probabilities in civil cases but slightly lower than proof beyond reasonable doubt in criminal proceedings. The underlying obligation is for the Applicant to show wilful and deliberate disobedience of court orders. This court will primarily be concerned with inquiring into whether the contemnor is guilty of intentional and wilful violation of the court order in question, so as to constitute a civil contempt. In the persuasive Canadian *Case of Carey –vs- Laiken 2015 SCC 17*, the Canadian Supreme Court expressed its jurisprudence that, three elements must satisfactorily be shown for an application for civil contempt to succeed. Which are:-
  - a. The order alleged to have been breached must state clearly and unequivocally what should and should not be done;
  - b. The party alleged to have breached the order must have had actual knowledge of it; and,
  - c. 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.
17. While in agreement with the sentiments of the Canadian Supreme Court as laid down in the case cited above, this court reiterates that in order to succeed in civil contempt proceedings, the Applicant must prove, the terms of the order, knowledge of these terms by the Respondent and the Respondents failure to comply with the terms of the order. Upon proof of those requirements, then the court can infer the Respondents wilful and deliberate violation of the courts dignity repute and authority.
18. In the present case, neither the terms of the order issued on September 26, 2022 are contested nor does the Respondents deny having acted and or done the acts prohibited in the order dated September 26, 2022. However, the Defendants deny having had knowledge of the said orders as at October 11, 2022 when they entered the Plaintiff's camp contrary to prohibition to do so as in the orders dated September 26, 2022. The Defendants case is that they learnt about the orders on October 12, 2022 after the same were served upon their advocates notwithstanding that the advocates had no instructions to act in this matter. On the other hand, the Plaintiff/Applicant does not deny that they did not serve the orders upon the Respondents as directed. The Applicant further agrees that as at October 11, 2022 when the Defendants entered the camp contrary to the terms of the order, they had not served the said order upon them for the reason that they were unable to trace them physically. The Applicant adds that it served the orders upon the Respondent's advocate the following day, being October 12, 2022 after it turned out that the Respondents advocate was among the persons who had raided the camp.
19. Applying the principles discussed herein above to the facts of this case as summarized in the preceding paragraphs, I am not persuaded that the Applicant has demonstrated the Respondents wilful refusal to obey the orders issued on September 26, 2022. I agree with the court's emphasis in the case of *Peter K Yego –vs- Pauline Nekesa Kode [2014]eKLR*, where it stated that it must be proved that one had actual knowledge of the order before being cited for contempt. Similarly, in the case of *Sheilla Cassat Issenberge & Another –vs- Anthony Machatha Kinyanjui [2021]eKLR*, it was observed that there cannot be deliberate and wilful disobedience, unless the contemnor had knowledge of the existence of that order. Thus, in turn, this court concludes that the Applicant herein having failed to prove that the Defendant/Respondents had knowledge of the order as at the date when the Defendants stormed its camp, this court cannot opine that Defendants had acted in wilful and deliberate disobedience of



the orders. Therefore, I find that the Plaintiff/Applicant has not satisfactorily proved its case to the required standard and consequently, the Application dated October 13, 2022 is declined and dismissed. Each party to bear its own costs.

#### **Application dated 26<sup>th</sup> September, 2022**

20. I now proceed to the next application filed by way of Notice of Motion dated September 26, 2022 which seeks for the following orders:-
  - a. Spent;
  - b. Spent;
  - c. Pending the interparties hearing and determination of this application and the arbitral proceedings, the Honourable Court be pleased to grant a conservatory order for the maintain the status quo presently prevailing on of the suit property known as LR No 14898(IR 480661).
21. In support of the application, the Plaintiff adduced 18 grounds on its face and reproduced the same in the affidavit sworn in support of the application by its Director, James Mwangi Wainaina. The Plaintiff's case is simply that the Defendants are the owners of the suit property and which property the Plaintiff has leased and operates a tourist camp thereon. That the lease governing the relationship between the parties was meant to expire on September 27, 2022 by factor of effluxion of time. However, it was an agreed term in the lease that the Defendants would consider the renewal of the lease upon its expiry but upon the Plaintiff/Applicants application for renewal, the Defendants declined to renew the lease. That since the lease agreement under Clause 6 provided for amicable resolution of disputes through arbitration process, it would serve the interest of justice for the court to grant the orders sought pending determination of the Plaintiff's pre-emptive right of renewal of the lease through arbitration, which has allegedly been violated by the Defendants.
22. On the other hand, the Defendant views the Plaintiff's application and the entire suit as a classic case of forum shopping given that the Plaintiffs had sought similar orders before Narok Environment and Land Court vide ELC Case No E004 of 2022. That although the Environment and Land Court had granted interim orders of injunction, the same were vacated and whole case dismissed vide a ruling dated October 11, 2022 for lack of jurisdiction. In the Defendants view, the orders granted herein were obtained in material non-disclosure and ought to be vacated and the application dated September 26, 2022 be as well dismissed. The Defendants further added that although parties were directed by the Environment and Land Court to file arbitration proceedings, the Plaintiff/Applicant has not initiated the process and in that state of affairs the Plaintiff/Applicant appears disinterested in pursuing the arbitration process.

#### **Analysis and Determination of the Application dated September 26, 2022**

23. Having considered the pleadings as filed by the parties and submissions made on behalf of the parties, both written and oral made on October 26, 2022, my view with respect to orders sought in the application dated September 26, 2022 are as follows;
  - a. That a party is at liberty to seek under Section 7 of the [Arbitration Act](#) interim measures of protection and security pending the determination of the dispute through arbitration process.
  - b. Whatever the description of the orders sought, they are merely intended to operate as holding orders pending the outcome of the arbitral proceedings as opposed to anticipating litigation.



24. The case of *Safaricom Limited –vs- Ocean View Beach Hotel Limited & Others [2010]eKLR*, cited by the Plaintiff, laid the essentials to consider in issuing the interim orders of protection under Section 7 of the Arbitration

Act as follows:-

- a. The existence of an arbitration agreement;
- b. Whether the subject matter of arbitration is under threat;
- c. In the special circumstances, which is the appropriate measure of protection after an assessment of the merits of the application;
- d. For what period must the measure be given especially if requested for before the commencement of the arbitration so as to avoid encroaching on the tribunal's decision making powers as intended by the parties.

25. In the present case, I have as well considered pleadings in Environment and Land Court Case No E004 of 2022 alluded to and annexed by the Respondents, and established that the suit was struck out for want of that court's jurisdiction in view of the Arbitration Clause in the lease agreement. In my understanding, a case that has been struck out may be re-opened in some circumstances. For example where the party suing adopts the correct procedure and/or sues before the court clothed with the requisite jurisdiction. In such event, the subsequent case would not be deemed res-judicata the earlier case within the meaning of Section 7 of the *Arbitration Act*. Therefore, this court would be misdirecting itself were it to make a finding that the Plaintiff is precluded from making an application for protection orders under Section 7 of the *Arbitration Act*, for reason that it had instituted a similar suit before the Environment and Land Court which was later dismissed for want of jurisdiction.

26. That being the case, I am persuaded that the application dated September 26, 2022 is well within this court's jurisdiction and the issue for consideration should be whether the orders sought in that application fall within the rubric of interim measures of protection under Section 7 of the *Arbitration Act*.

27. While guided by the *Safaricom Ltd –vs- Ocean View Beach Hotel Ltd Case (supra)*, I do reiterate that interim orders of protection may take many forms necessary to preserve the status quo or preserve the subject matter of the arbitration. However, in considering whether or not to grant the orders, the court sought to proceed with a lot of circumspection so as not interfere with the tribunal's jurisdiction to determine the merits of the matter. In the present case, the subject matter of the intended arbitration is whether or not the lease agreement between the parties should be renewed and whether the Plaintiff has any pre-empting rights over it.

28. It is not denied that the lease in question expired on September 27, 2022 before the parties could reach a viable agreement as to the dispute prevailing and the Plaintiff has remained in the premises only by virtue of the orders issued by this court on September 26, 2022. I am as well persuaded that the Plaintiff has established subject of arbitration is under threat and deserving the court's intervention and protection pending the arbitration process.

29. Lastly, the Defendants describe the suit as fatally defective as against the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 6<sup>th</sup> and 8<sup>th</sup> Defendants since they are deceased. However, no death certificates were annexed in support of those allegations and the court cannot delve further on that issue. However, the court agrees and reiterates that a suit brought against a deceased Defendant in the name in which the Defendant carries on business is a nullity from its inception and no valid orders can be made against a deceased Defendant unless it is made against his estate through the legal representatives.



30. In the resultant, and for the reasons stated herein, the Plaintiff's/Applicant's Notice of Motion application dated September 26, 2022 succeeds to the extent that:-
- a. That pending the hearing and determination of the intended Arbitral proceedings between the parties herein, or pending further orders of the Arbitral tribunal, a conservatory order for the maintenance of status quo presently prevailing on the suit property known as LR No 14898 (IR 48066) be and is hereby issued.
  - b. For the expeditious conclusion of the dispute, the parties are hereby directed to agree on the arbitration within 21 days from the date hereof failure to which either party can write to the Chairman Chartered Institution of Arbitrators (Kenya Branch) for nomination of an arbitrator.
  - c. Each party shall bears its own costs for this application.

It is hereby so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 24<sup>TH</sup> DAY OF NOVEMBER, 2022.**

**D. O. CHEPKWONY**

**JUDGE**

In the presence of:

Mr. Lawrence Atonga counsel for Plaintiff/Applicant

M/S Mwaluko holding brief for Mr. Maina counsel for 1<sup>st</sup>, 5<sup>th</sup> and 7<sup>th</sup> Defendants

Court Assistant - Sakina

