



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL SUIT NO. 104 OF 2021**

**END TO END LIMITED.....PLAINTIFF**

**VERSUS**

**CHIEF OFFICER, ROADS & PUBLIC WORKS.....1<sup>ST</sup> RESPONDENT**

**KWALE COUNTY.....2<sup>ND</sup> RESPONDENT**

**KWALE COUNTY GOVERNMENT.....3<sup>RD</sup> RESPONDENT**

**CREDIT BANK PLC LIMITED.....4<sup>TH</sup> RESPONDENT**

**RULING**

[1] Further to the initial application dated **12/10/2021**, the applicant has filed an application dated **24/11/2021** seeking for the Chief Officer, Roads and Public Works, one A. J Mwachirumbi, who is the 1<sup>st</sup> Defendant herein, be cited for contempt and punished accordingly. The applicant contends that the said contemnor blatantly disobeyed the order of the court issued herein on **18/10/2021**.

[2] On the other hand, the respondents have also filed an application dated **25/11/2021** seeking that the dispute between the parties be referred to arbitration. According to the respondents, this court lacks the jurisdiction to handle the dispute granted that the parties, in their agreement expressly covenanted that any disputes arising be referred to arbitration. They accused the plaintiff of mischief for having failed to make a full and material disclosure as to the existence of the arbitral clause in their agreement.

[3] While the plaintiffs counsel took the stance that the contempt application be heard first; Mr. Kibara for the respondent took the view that the issue of jurisdiction is fundamental, and must therefore be determined at the outset, because proceedings conducted without would be proceedings in vain.

[4] I have given due consideration to the rival submissions made herein by learned counsel. Needless to say that the question of jurisdiction is a fundamental one. Indeed, the first duty of a court is to ensure that it has the requisite jurisdiction to entertain a dispute and make the orders that it is being called upon by the parties to make. Hence, in **the owners of Motor Vessel “Lillians” –vs- Caltex Kenya Ltd [1989] eKLR** Hon. Nyarangi, J. A. Stated that:

**“... a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. 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 downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction...”**

[5] Thus, whereas the general principle is that an application for contempt be prioritized, where there is a competing application impugning an order of the court on the Ground of jurisdiction, the latter application ought to be given priority. This was the position taken in **Econet Wireless Kenya Ltd –vs- Minister for Information & Communication of Kenya & Another [2005] eKLR** in which Hon. Ibrahim J. (as he then was) held that:

**“...due to the gravity with which the law and the court deems any contempt of court or allegations thereof, the court is usually under an obligations that it has taken place. This is in particular where the alleged contemnor is a party in proceedings and is affected by the orders granted by the court. Where an application for committal for contempt of court orders are 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... This is the general rule which must be applied strictly... Be that as it may... the contempt is yet to be proved. It is still an allegation at this stage, however grave it is. The case of jurisdiction or that the order made was in excess of jurisdiction of the court must be distinguished from the case of an order which, although it is within jurisdiction of the court, ought not to have been made or granted. As a result, I do hereby hold that the application by the 2<sup>nd</sup> respondent must in essence be heard first, thus before that of committal.”

[6] In the premises, it is plain that the respondents’ application which impugns the jurisdiction of the court, ranks first in terms of priority and should, consequently, be disposed of first.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 29<sup>TH</sup> DAY OF NOVEMBER 2021.**

.....

**OLGA SEWE**

**JUDGE**