



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT NAROK

ELC MISC. CASE NO 2 OF 2020

LEO INVESTMENT LIMITED T/A MARA CONCORD GAME LODGE.....TENANT/APPLICANT

VERSUS

SAMSON OLOLMAITAI.....LANDLORD/1ST RESPONDENT

NTOORIAN KORIATA.....LANDLORD/2ND RESPONDENT

STANLEY KOINET KORIATA.....LANDLORD/3RD RESPONDENT

SERA NJOKI MUNGE T/A SANJOMU AUCTIONEERS.....AUCTIONEER/4TH RESPONDENT

RULING

1. This ruling is in respect of the Tenant/Applicant's Notice of Motion application dated 27th May, 2020 brought under **Section 5(1) of the Judicature Act, Order 52 Rule 2(2) of the Rules** of the Supreme Court of England, 1965 and **Section 3A of the Civil Procedure Act**. The Tenant/Applicant seeks the following orders from this court:

i) Spent;

ii) That this Honourable Court do issue notices to show cause directed upon the 1st, 2nd and 3rd Landlord/Respondents to personally appear before the Honourable Court and explain as to why they should not be committed to civil jail for a period of 6 months for contempt of court;

iii) That this Honourable Court be pleased to order that the 1st, 2nd and 3rd Landlord/Respondents herein be and are hereby committed to civil jail for contempt for such period as this Honourable Court may deem fit and just for disobedience of the order of the court issued on the 26th day of March, 2020 by Hon. Chairman Mbichi Mboroki sitting at the Business Premises Rent Tribunal in Tribunal Case No 60/2020 Nakuru;

iv) That all necessary and consequential directions be given by the Honourable Court; and

v) That the 1st, 2nd and 3rd Landlord/Respondents be and are hereby condemned to pay the costs of this application.

2. The grounds in support of the application are set out on the face of the motion as well as in the supporting affidavit of Rahim Chatur sworn on 27th May, 2021 wherein he deposed that on 26th March, 2020, the Business Premises Rent Tribunal through Nakuru Tribunal case No 60 of 2020 gave orders restraining all the Respondents from using, operating, attaching, carting away and/or selling the Tenant/Applicant's moveable goods from the suit property Mara Concord Game Lodge situated on the 1st, 2nd and 3rd Landlord/Respondent's parcel of land known as CIS-MARA/LEMEK/173. The Business Premises Rent Tribunal is also said to have issued an order against the 1st, 2nd and 3rd Landlord/Respondents restraining them from occupying, entering into, operating, leasing out to any third party or otherwise occupying the game lodge premises known as Mara Concord Game Lodge.

3. According to the Tenant/Applicant, on 1st April, 2020, the said orders together with the penal notice were served by Mr. Dickson Kariuki, a licensed Court process server, upon all the Respondents who reside at different locations within Narok County. Notwithstanding personal service and knowledge of the existence of the said orders and penal notice, the Tenant/Applicant deposed that the 1st, 2nd and 3rd Respondents disregarded the orders and that through their servants or agents while acting under the instructions of the 1st, 2nd and 3rd Landlords/Respondents went ahead and occupied, entered into and started operating the Game Lodge Premises Known as Mara Concord

Game Lodge in blatant disobedience of a valid court order.

4. Further, the Tenant/Applicant deposed that one of its employees, Mr. Davinder Pal Singh, visited the Game Lodge on 14th May, 2020 together with Mr. Boniface M. Nzinga, an insurance assessor, and police officers from Mulot Police Station and they met two guards, Oldongo Ondiek and Konaka Koriata, manning the gate of the Game Lodge under the instructions of the Respondents. It was the Tenant/Applicant's case that in spite of bringing to the attention of the two guards that there was a court order barring the Respondents from going to, occupying, entering and/or otherwise operating the Game Lodge, while acting with reckless impunity and arrogance, they still flatly disregarded the orders citing instructions from the 1st, 2nd and 3rd Respondents.

5. It was also the Tenant/Applicant's contention that it is essential for the rule of law and administration of justice that court orders are respected, thus, it urged that it is imperative for the court to commit the contemnors to jail to compel obedience of the said court orders. Unless the orders sought are granted, the Tenant/Applicant averred that the court orders made shall be rendered nugatory and that it shall be prejudiced as a consequence.

6. The Tenant/Applicant further argued that unless the orders prayed for are granted, its property would be wasted away given that the lodge has since been flooded and its property therein risks being wasted hence, it was contended that it is in the best interest of justice that the orders sought are granted.

7. The Respondents opposed the application by filing a replying affidavit and a Notice of Preliminary Objection. In their Notice of Preliminary Objection, the Landlords/Respondents disputed service of the court orders contending that service was not effected on them pursuant to the provisions of Rule 81.1(1) of the English Civil Procedure Rules, and that the Attorney General had not been served as well. It was also contended that the Notice of Motion was not accompanied by the statement of facts setting out the grounds in support of the application.

8. Having considered the Notice of Preliminary Objection as well as the submissions in support thereof, and the Tenant/Applicant's response thereto, this court (Hon. Mohamed N. Kullow, J) dismissed the Notice of Preliminary Objection by the Landlords/Respondents having found that the same lacked merit.

9. In further response to the application, the 3rd Landlord/Respondent, Stanley K. Koriata, swore a Replying Affidavit on 28th July, 2020 wherein he disputed service of the court orders alleged to have been disobeyed. According to the Landlords/Respondents, there was no personal service of the orders on them as alleged by the Tenant/Applicant.

10. To the Landlords/Respondents, the demand for personal service of the motion and the order alleged to be contemned is a mandatory prerequisite, absent which this Honourable Court stands divested of jurisdiction to inquire into any alleged contempt of court. It was also contended by the Landlords/Respondents that there was no substantive affidavit of service filed to show how, when and on which date process was served on the Landlords/Respondents.

11. It was further contended that on 1st April, 2020 when Dickson Kariuki alleges to have served the court orders on the Landlords/Respondents, there was restriction of movement, as such there was no permitted inter county movement between Narok and Nairobi. The Landlords/Respondents also deposed that they never met Dickson Kariuki on 1st April, 2020, or at all, and that in his affidavit of service he did not indicate the time and where he served the Landlords/Respondents. According to the Landlords/Respondents, the 1st Landlord/Respondent was not in Narok Town on 1st April, 2020 thus question the veracity of the allegation of service by Dickson Kariuki.

12. The Landlords/Respondents further contended that allegation of contempt are grave and serious, and hence the specific individual's alleged contumacious acts must be demonstrated beyond doubt since personal liberty is at stake.

13. In further response to the application, the Landlords/Respondents asserted that the Tenant/Applicant is not their tenant and that they have no tenancy agreement with it. It was their contention that levying distress was effected on Furahia Africa Promotions Ltd whom they have a lease agreement with. The Tenant/Applicant was therefore termed as a stranger to the Landlords/Respondents. The Landlords/Respondents therefore prayed that the application be dismissed with costs to them.

14. Through a Further Affidavit sworn on 25th August, 2020 by Rahim Chatur, the Tenant/Applicant maintained that service of the orders in question was indeed effected and that the 4th Respondent accepted service and even stamped the document to evidence service. According to the Tenant/Applicant, there was no lockdown on 1st April, 2020 as alleged by the Landlords/Respondents which is better illustrated by the fact that the 4th Respondent accepted service.

15. It was also the Tenant/Applicant's case that the affidavit of service was originally filed at the BPRT since that is where the orders which were disobeyed were issued, and as such, it was contended that it was in order to attach a copy thereof in the application now before the court.

16. The Tenant/Applicant did file its submissions in the case which are dated 28th June, 2020. In it, the Tenant/Applicant submitted that the law applicable to contempt of court proceedings is section 5(1) of the Judicature Act, and further contended that the duty to obey the law by all individuals and institutions is cardinal in the maintenance of rule of law and administration of justice.

17. On the issue of service of the court orders alleged to have been disobeyed, the Tenant/Applicant submitted that although courts have held that personal service of orders and penal notice is a requirement in contempt of court proceedings, the courts have also held that personal awareness of the court orders by the alleged contemnors if demonstrated, then the contemnors will be found culpable of contempt. In this case, the Tenant/Applicant contended that the Landlords/Respondents were aware of the court orders and that is the reason they hired

two guards to man the gates of the Game Lodge.

18. In support of its submissions, the Tenant/Applicant relied on a number of cases including Kenya Human Rights Commission vs Attorney General & Another [2018]eKLR, Republic vs Returning Officer of Kamkunji Constituency & the Electoral Commission of Kenya, Carey vs Laiken [2015]SCC17, Hon. Martin Nyaga Wambora & Another vs Justus Kariuki Mate & Another [2014]eKLR, Nyamogo & Another vs Kenya Posts and Telecommunications Corporation (1994) KLR 1, Ochino & Another vs Okombo & 4 Others (1989) KLR 165, Kenya Tea Growers Association vs Francis Atwoli & Others, Husson vs Husson (1962) 3 All E.R. 1056, Ronson Products Ltd vs Ronson Furniture Ltd (1966) RPC 497, Davy International Ltd vs Tazzyman (1997) 1 WLR 1256 and the case of Heaton's Transport (St Helens) Ltd vs Transport and General Workers Union (1973) AC 15.

19. The Landlords/Respondents filed their written submissions on 23rd November, 2020 wherein they submitted that there was no personal service of the orders alleged to have been disobeyed, hence, it was their contention that they cannot be held in contempt of an order which was never served on them.

20. From the submissions filed by the Landlords/Respondents, the court discerned that the main contention revolved around the issue of service of the court orders alleged to have been disobeyed. In support of its submissions, the Landlords/Respondents relied on the following cases Christine Wangari Gachege vs Elizabeth Wanjiru Evans & 11 Others [2014]eKLR, Kenya Human Rights Commission vs Attorney General & Another [2018]eKLR, Molly Wambui Kiragu (suing as Administrator of the Estate of the late Samuel Kiragu Muchuki) vs Governor- Nairobi City County & Another [2018]eKLR, Anne Barongo vs Awliyo Abdi Ahmed & 2 Others [2015]eKLR, Anastacia Wagiengi vs Ezekiel Wafula [2018]eKLR and the case of CFC Financial Services vs Juja Road Fancy Store Limited [2017]eKLR.

21. Having considered the Tenant/Applicant's Notice of Motion application, the affidavits and submissions in support thereof, as well as the response thereto and submissions by the Landlords/Respondents, the following substantive issue arise for determination by the court:

- i) *Whether the Landlords/Respondents are in contempt of court; and*
- ii) *Whether the orders sought by the Tenant/Applicant are merited in the circumstances.*

22. The Contempt of Court Act having been declared unconstitutional by the High Court in Kenya Human Rights Commission vs. Attorney General & Another [2018]eKLR, the applicable law on applications of contempt in Kenya is section 5 of the Judicature Act. Section 5 of the Judicature Act 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 subordinate courts.

(2) An order of the High Court made by way of punishment for contempt of court shall be appealable as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the High Court.

23. With respect to the definition of contempt of court, the **Black's Law Dictionary 10th Edition** defines it as follows:

"Contempt (also termed as contempt of court, judicial contempt) is a disregard of, disobedience to, the rules, or orders of a legislative or judicial body, or an interruption of its proceedings by disorderly behaviour or insolent language, in its presence or so near thereto as to disturb the proceedings or to impair the respect due to such a body."

24. Setting out the basis for the need to respect court orders, Justice S.N. Riechi in the case of Patrick Wanyonyi Munialo -v - County Executive Committee (CEC) Member for Water & Natural Resources Bungoma County & 3 others; Nzoia Water Services Co. Ltd (Interested Party); Kennedy Kilali Wekesa & 2 others (Contemnors) [2019]eKLR stated:

"The rationale for contempt of court proceedings is grounded on the need to protect the authority and dignity of our courts which is essential for the maintenance of rule of law and order in society. Its objective is to uphold the dignity and authority of the court, ensure compliance with orders of the court; ensure observation and respect the due process of law and multiply public confidence in the administration of Justice."

25. Regarding the test or the principles required for an application for contempt to succeed, Justice Mativo in North Tetu Farmers Co. Ltd v Joseph Nderitu Wanjohi [2016]eKLR held in part as follows:

"Writing on proving the elements of civil contempt, learned authors of the book Contempt in Modern New Zealand have authoritatively stated 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) that:-

(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.

Although the proceedings are civil in nature, it is well established that an applicant must prove the elements beyond reasonable doubt, at least higher than the standard in civil cases, the fact that the liberty of the defendant could be affected means that the standard of prove is higher than the standard in civil cases. It is incumbent on the applicant to prove that the defendant's conduct was deliberate in the sense that he or she deliberately or willfully acted in a manner that breached the order”.

26. With the above in mind, the court must then consider whether the Landlords/Respondents are indeed in contempt as alleged by the Tenant/Applicant.

27. Flowing from the foregoing discussion, it is apparent that one of the elements that must be proved for a case on contempt to succeed is that it must be proved that the Defendant had knowledge of or proper notice of the terms of the order. In this case, service of the order and the penal notice is disputed by the Landlords/Respondents who contended that they had not been served with the orders and the penal notice. It is their case that they were not aware of the orders of the court. The Tenant/Applicant on the other hand maintained that they had been served and that they had knowledge of the orders of the court.

28. On the issue of proving service of orders, the Court of Appeal in Mwangi Wang'ondu vs. Nairobi City Council (Appeal No. 95 of 1998) quoted with approval in the case of Wycliffe Sayia Okungu v Joel Kayeri Risamira & 3 others [2016]eKLR had the following to say:

“as a general rule no order of court requiring a person to do or abstain from doing any act may be enforced unless a copy of the order has been served personally on the person required to do or to abstain from doing the act in question. The copy of the order served must be endorsed with a notice informing the person on whom the copy is served that if it is disobeyed, he is liable to the process of execution to compel him to obey it. This requirement is important because the court will only punish for breach of injunction if satisfied that the terms of the injunction are clear and unambiguous, that the Defendant has proper notice of the terms and that a breach of the injunction has been proved beyond reasonable doubt.”

29. Contempt of court being quasi-criminal in nature, the elements must be proved beyond reasonable doubt, at least higher than the standard in civil cases - North Tetu Farmers Co. Ltd (Supra). Further, in the case of Re Breamblevale Limited [1969] 3 ALL ER 1062 Lord Denning MR held in part as follows:

“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 all reasonable doubt. It is not proved by showing that, when the man has asked about (his failure to produce certain books belonging to the company as ordered by the Registrar), he told lies. There must be further evidence to incriminate him. Once some evidence is given, then his lies can be thrown into the scale against him. But there must be some other evidence.”

30. In this case, and looking at the affidavit of service by the Tenant/Applicant, the court is not satisfied that the Landlords/Respondents were duly and properly served with the court orders and the penal notice. The court also notes that when service was disputed by the Landlords/Respondents, the Tenant/Applicant did not address the court and come out clearly on whether and how service was effected. This was curious in light of the fact that in its further affidavit, the Tenant/Applicant only opted to rely on the argument that the Landlords/Respondents had knowledge of the court orders, in effect failing to address the issue of disputed service by the Landlords/Respondents.

31. The upshot of the above is that there is doubt in the mind of the court as to whether service of the court orders and the penal notice were effected on the Landlords/Respondents as alleged by the Tenant/Applicant. Accordingly, the court finds no merit in the Tenant/Applicant's application, as such, the same is dismissed with costs to the Landlords/Respondents.

SIGNED, DATED AND DELIVERED AT NAROK VIA EMAIL THIS 31ST DAY OF JANUARY, 2022.

MBOGO C.G,

JUDGE

31/1/2022

IN THE PRESENCE OF:

CA:TIMOTHY CHUMA