



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MILIMANI

MISCELLANEOUS APPLICATION NO. E 195 OF 2011

VECTOR PROJECTS LIMITED.....1ST TENANT/APPLICANT

ILLUMINE INTERNATIONAL LIMITED.....2ND TENANT/APPLICANT

-VERSUS-

SWEETLAND HOLDINGS LIMITED.....LANDLORD/RESPONDENT

RULING

(In respect of a Preliminary Objection dated the 18th January, 2022)

BACKGROUND

1. This ruling is in respect of a Preliminary Objection raised by the Landlord/ Respondent dated the 18th January, 2022.
2. The Applicants filed an application dated the 5th November, 2021 seeking among other orders that:-

i. The Application be dispensed with in accordance to the Gazette Notice No. 4870 pursuant to Article 165 (1) of the Constitution of Kenya and Section 10(1), (2)(a) of the High Court (Organization and Administration) Act, 2015.

ii. The Honourable Court be pleased to order the Landlord/ Respondent be committed to civil jail for contempt for disobedience of the orders issued on 22nd July, 2021 by Hon. P. May, 2021 sitting in the Business Premises Rent Tribunal at Nairobi in Tribunal Case No. E322 of 2021 which orders were adopted as orders of the Magistrates Court on 27th October 2021 in Misc. Application No. E1378 of 2021.

3. Upon being served with the said Application, the Landlord/ Respondent filed the Preliminary Objection dated the 18th January, 2022 that is now before this Court for consideration and determination.

THE PRELIMINARY OBJECTION

4. The Preliminary Objection is premised on the grounds that:-

a) The Applicants' application is incompetent and a non-starter on the ground that the Respondent being a corporate legal entity cannot be cited in this cause as a Contemptor whatsoever.

b) The Applicant's Application is fatally defective, scandalous, vexatious and is dead on arrival as it violates the mandatory provisions of the law and more in particular the provisions of Section 5 of the Judicature Act and Rules governing Contempt proceedings.

c) The application lacks merit and the same cannot be entertained as it is bad in law, a total abuse of the Court as the Orders sought are untenable.

COURT'S DIRECTIONS

5. The court directed that the Preliminary Objection be heard first by way of written submissions. The Landlord/Objector filed its submissions dated 14th February, 2022 whereas the Tenant/Applicant filed its submissions dated the 28th February, 2022.

THE LANDLORD/OBJECTOR'S SUBMISSION

6. The Landlord/Objector submits that the Preliminary Objection meets the threshold of a Preliminary Objection as set-out in the celebrated case of **Mukisa Biscuits Manufacturing Co. Ltd. –vs- West End Distributors Ltd (1969) EA 696.**

7. That the burden of proof in contempt applications lies with the Applicant who bears the burden of proving the alleged contemptuous acts. The Tenant/Applicants cannot dispense that burden hence the Application is defective and unmerited.

8. Further that contempt applications are quasi-criminal in nature. The standard of proof is higher than balance of probability almost but not exactly beyond reasonable doubt. They relied on the Supreme Court case of **Republic –vs- Ahmad Abolfathi Mohammed & Another (2018) eKLR.**

9. The Landlord contends that the Tenant's application is based on allegations of disobedience of Court Orders. The Respondent is no doubt a corporate entity and cannot be cited as a contemtor. It is incapable of acting on its own as if it was a legal person. Affairs of a company are conducted by its directors. The orders sought by the Applicant are untenable and therefore the present application must fail. The Respondent herein was incapable of doing any act and as such it cannot be cited for contempt. The committal to a civil jail can only apply to a natural person and not a body corporate such as the Respondent herein.

THE TENANT'S WRITTEN SUBMISSIONS

10. The Tenants submit that the Preliminary Objection is without merit and should therefore be dismissed. The Tenants aver that Order 1 Rule 10 of the Civil Procedure Rules allows for substitution and addition of parties. The Applicants state that they intend with the leave of court to amend the pleadings herein to include the Directors of the Respondent and abide by any directions that the court may issue in that respect.

11. The Tenants further submit that the company is considered a legal entity. However, the running of the company's day to day affairs and discharging of its mandate cannot be done by the company itself but by the persons appointed or chosen to be its directors. That the issue of non-joinder or misjoinder of the directors can be remedied by the court on its own motion or by the Applicants' herein seeking leave to amend the present application to include the directors of the Respondent company.

ISSUES FOR DETERMINATION

12. Having considered the application and the rival submissions by the parties herein, the issues for determination in this Court's opinion are as follows;-

a. Whether the objection by the Landlord meets the threshold for a preliminary objection.

b. Whether the application dated 5.11.2021 offends section 5 of the Judicature Act; alternatively, whether the Respondent who is a corporate body can be committed to civil jail.

ANALYSIS AND DETERMINATION

A. Whether the objection meets the threshold for a preliminary objection.

13. The threshold of a valid preliminary objection was set out by the Court of Appeal in the case of, **Mukhisa Biscuits Manufacturing Co. Ltd vs West End Distributors Ltd [1969] EA 696** in the following terms:

“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 pleadings, and which if argued as a preliminary point may dispose of the suit.”

14. Applying the foregoing binding precedent, I am persuaded that the grounds raised in the objection by the Landlord are pure points of law are pure points of law which arises by clear implication out of the pleadings and are capable of disposing of the impugned application *in limine* if successfully argued.

(b) Whether the application dated 5.11.2021 offends section 5 of the Judicature Act; alternatively, whether the Respondent who is a corporate body can be committed to civil jail.

15. Section 5 of the Judicature Act is the law under which to punish 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.**

16. 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.”

17. In the case of **Christine Wangari Gachege vs Elizabeth Wanjiru Evans & 11 others [2014] eKLR**, the Court of Appeal held that, by

dint of section 5 of the Judicature Act, the procedure of instituting contempt of court proceedings in Kenya is set out in PART 81 of the Civil Procedure of the UK which entirely replaced Order 52 of the Rules of the Supreme Court England (RSC) through the Civil Procedure (Amendment No.2) Rules of 2012.

18. The court observed that the repealing of the said Order 52 brought certain changes in the procedure for bringing contempt applications which are relevant to the objection herein.

19. Part **81** of the Civil Procedure (Amendment No.2) Rules of 2012 (Applications and Proceedings in Relation to Contempt of Court) provides different procedure for four different forms of violations.

Rules 81.4 relates to committal for "breach of a judgement, order or undertaking to do or abstain from doing an act."

Rule 81.11- Committal for "interference with the due administration of justice" (applicable only in criminal proceedings

Rule 81.16- Committal for contempt "in the face of the court"), and

Rule 81.17- Committal for "making false statement of truth or disclosure statement."

20. An application under Rule **81.4** (breach of judgement, order or undertaking) now referred to as "application notice" (as opposed to a notice of motion) is the relevant one for making the application now under consideration. The application notice must set out fully the grounds on which the committal application is made and must identify separately and numerically, each alleged act of contempt and be supported by affidavit(s) containing all the evidence relied upon.

21. In **Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 Others** (Supra) the Court of Appeal held that leave, now called "permission" is not required where committal proceedings relate to a breach of a judgement, order, or undertaking.

22. Turning back to the Preliminary Objection at hand, the Objector contends that the Tenants/Applicants' application is a non-starter as the Respondent is a corporate entity which cannot be cited in this case as a contemtor.

23. The prayer sought in the instant application is for committal to civil jail for contempt of court. The director(s) of the Landlord/Respondent are not party to these proceedings in their own personal capacity.

24. Shall we then send to prison the corporate seal of this company?

25. The proper procedure for the Applicants was first to apply to lift the corporate veil then go for the directors in their personal capacities so as to prove the elements of contempt of court against them.

26. The Tenants/Applicants in their submission apparently acknowledge their blunder but argue that under Order 1 Rule 10 of the Civil Procedure Rules allows them an opportunity to remedy the errors by substitution and addition of parties. They plead that they intend to seek leave of court to amend the pleadings herein to include the Directors of the Respondent Company.

27. In the case of **Teachers Service Commission vs Simon P. Kamau & 19 Others (2015) eKLR**, the Supreme Court stated that;

".....by past practice, this Court has not favoured the practice by parties of filing a document improperly, and then seeking ex post facto endorsement by the Court."

28. The request by the Tenants/Applicants is coming a little too late in the day. The horse has already bolted.

29. Accordingly, I uphold the Landlord's Preliminary objection and strike-out the application dated 5.11.2021 with costs to the Landlord/Respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF MARCH 2022.

M.D. MWANGI

JUDGE

In the Virtual Presence of:-

Kaburu for the Respondent

Ms Kavoché h/b for Mr Banda for the Applicant

Court Assistant: Hilda

M.D. MWANGI

JUDGE