



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA**

**ELCC No. 4 OF 2019**

**MARY AWINO KWEYU..... PLAINTIFF**

**VERSUS**

**LAWRENCE MMATA CHORE ..... 1<sup>ST</sup> DEFENDANT**

**MELISA MUHONJA MMATA ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. By Notice of Motion dated 15<sup>th</sup> July 2021, the plaintiff seeks the following orders:

1. *THAT the 1<sup>st</sup> Defendant/Respondent herein be adjudged as being in contempt of court on account of wilful disobedience of the order given by this Honourable Court on 24/3/2021, and be sentenced to serve a term of imprisonment of 6 months and to also pay a fine in the sum of Kshs 200,000 in accordance with section 28(1) of the Contempt of Court Act, 2016.*

2. *THAT an audit be conducted by an auditor to be appointed by the Plaintiff/Applicant to carry out an audit and/or undertake inquiry to determine the estimated or actual aggregate rental income derived by the 1<sup>st</sup> Defendant from apartments erected on the land parcel number BUTSOTSO/SHIKOTI/17938 as from 4/7/2019 to date and to thereafter produce to this Court a report indicating the estimated or actual rental income that has or could have so far been derived from the land parcel number BUTSOTSO/SHIKOTI/17938 and/or collected from the tenants occupying the apartments erected thereon as from 4/7/2019 to date for certification by this Honourable Court.*

3. *THAT the auditor's fees, remuneration and disbursements be paid out of the rent income derived from the land parcel number BUTSOTSO/SHIKOTI/17938 and/or collected from the tenants occupying the apartments erected thereon.*

4. *THAT execution do issue against the 1<sup>st</sup> Defendant for the recovery of the aggregate rental income that shall have been certified by this Honourable Court as having, been derived from the land parcel number BUTSOTSO/SHIKOTI/17938 and/or collected from the tenants occupying the apartments thereon as from 4/7/2019 to date.*

5. *THAT all rent payable by the tenants occupying the apartments erected on land parcel number BUTSOTSO/SHIKOTI/17938 shall henceforth be collected by the law-firm of BALUSI & SMART, ADVOCATES (being the Plaintiff/Applicant's advocates on record) or by an estate agent appointed by the said law-firm and thereafter be deposited/held in the law-firm's bank count at SPIRE BANK LTD being Clients A/C No. 008xxxxxxxxx so as to be held therein pending determination of this suit and further orders of this Honourable Court.*

6. *THAT every tenant occupying an apartment erected on the said land parcel number BUTSOTSO/SHIKOTI/17938 shall henceforth pay his/her monthly rent to the firm of BALUSI & SMART (being the Plaintiff/Applicant's advocates on record).*

7. *THAT the rent collection fees or estate agent's fees chargeable for the rent collection exercise be paid out of the rental income derived from the land parcel number BUTSOTSO/SHIKOTI/17938 and/or collected from the tenants occupying the apartments erected thereon.*

8. *THAT the 1<sup>st</sup> Defendant herein to bear the costs of this application.*

2. The application is supported by an affidavit sworn by Mary Awino Kweyu, the plaintiff/applicant. She deposed that on 24<sup>th</sup> March, 2021 this court made an order which was served upon the first defendant on 8<sup>th</sup> April, 2021. That despite service, the first defendant did not comply as a result of which a demand letter was served upon the first defendant on 7<sup>th</sup> May 2021 and upon his advocate on record on 8<sup>th</sup> May 2021 calling upon the first defendant to purge his contempt of the said order.

3. The first defendant/respondent, Lawrence Mmata Chore, filed a replying affidavit in which he deposed that no rent is being collected from the premises since there are no tenants following service of a demand letter dated 26<sup>th</sup> July 2019 by the applicant's advocate. That since the letter was served, he has no idea what happens at the apartments. He added that the applicant is fond of filing spurious applications aimed at delaying the hearing of the main suit.

4. The application was canvassed through written submissions which both sides duly filed.

5. The applicant submitted that the first defendant's allegations that there are no tenants are contradictory and unsupported by the contents of his statement of defence. That a perusal of the demand letter sent to the tenants to the effect that the tenants stop paying rent to the first defendant are misleading and that the first defendant should be compelled by this court to account for all the rental income collected from the suit premises as from 4<sup>th</sup> July 2019 and have the said rental income secured in the manner prayed for in the application under consideration.

6. The first defendant argued that the application is bad in law and that the court has no jurisdiction to grant prayer 1 of the application since the **Contempt of Court Act, 2016** was declared unconstitutional in Petition no. 87 of 2017 Kenya Human Rights Commission –vs- Hon A.G Law Society of Kenya (reported as **Kenya Human Rights Commission v Attorney General & another [2018] eKLR**). Further relying on Misc. Application No. 443 of 2017 between Samwel M.N Mweru and others –vs- National Land Commission & 2 others (reported as **Samuel M. N. Mweru & Others v National Land Commission & 2 others [2020] eKLR**), the first defendant argued that the applicant has not met principles applicable to contempt applications.

7. I have considered the application, the affidavits and the submissions.

8. I will first deal with the issue of jurisdiction as raised by the first defendant. Whereas it is true, as argued by the first defendant, that the **Contempt of Court Act, 2016** was declared unconstitutional in **Kenya Human Rights Commission v Attorney General & another [2018] eKLR**, there is no void as regards jurisdiction to determine and punish for contempt of court. **Section 5(1) of the Judicature Act** confers on the High Court and the Court of Appeal the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England. See **Christine Wangari Gachege vs. Elizabeth Wanjiru Evans & 11 Others, [2014] eKLR** and **Samuel M. N. Mweru & Others v National Land Commission & 2 others [2020] eKLR**.

9. In the context of **Section 5(1) of the Judicature Act**, the phrase High Court extends to and includes courts of equal status in terms of **Article 162 (2) (b) of the Constitution of Kenya 2010**. In any case, every court has inherent powers to make sure its authority and dignity is upheld at all times. See **Woburn Estate Limited v Margaret Bashforth [2016] eKLR** and **Kiru Tea Factory Company Ltd v Stephen Maina Githiga & 14 others [2019] eKLR**. The objection on jurisdiction therefore fails.

10. The law relating to contempt of court is clear enough. Every person against whom an order is made by court of competent jurisdiction has a duty to obey it unless and until it is discharged. An allegation of contempt of court is a serious matter since if proven, puts the liberty and or property of the contemnor are at grave risk. It is for that reason that the standard of proof in contempt proceedings is higher than the usual one in civil proceedings of proof on a balance of probabilities. See **Mutitika vs. Baharini Farm Limited [1985] KLR 229**. Court orders are not issued in vain and are not suggestions or pleas to the persons at whom they are directed. See **Fred Matiang'i the Cabinet Secretary, Ministry of Interior and Co-ordination of National Government v Miguna Miguna & 4 others [2018] eKLR**.

11. That said, and considering the gravity of both the accusation and the attendant consequences, to succeed in an application for contempt, the applicant must demonstrate wilful disobedience. The order said to have been disobeyed must be clear enough as to leave no doubt as what is to be done or refrained from. The Court of Appeal reiterated those requirements in **Micheal Sistu Mwaure Kamau v Director of Public Prosecutions & 4 others [2018] eKLR**.

12. The order that the first defendant is accused of disobeying was made in a ruling delivered on 24<sup>th</sup> March 2021 and was in the following terms:

*1. That further to order made in the ELC Case No. 81 of 2018 by this honourable court on 4<sup>th</sup> July, 2019, and more specifically the order numbered "5", the 1<sup>st</sup> defendant be ordered to henceforth have all monthly rental income derived from the land parcel number Butso/Shikoti/17938 and/or collected or received from tenants occupying the apartments thereon be deposited into this court's account so as to be held therein pending determination of this suit or further orders of this court.*

*2. That the 1<sup>st</sup> defendant be ordered to produce to this court and also serve upon the applicant herein a full and accurate account of all the rental income that has so far been derived from the land parcel number Butso/Shikoti/17938 and/or collected or received from the tenants occupying the apartments thereon as from the date of issuance of the order given by this honourable court in the ELC Case No. 81 of 2018 on 4<sup>th</sup> July, 2019 up to date for certification by this court.*

*3. That the 1<sup>st</sup> defendant be ordered to have all the total rental income as shall have been certified by this court as having been derived from the land parcel number Butso/Shikoti/17938 and/or as having been received or collected from the tenants occupying the apartments thereon as from the date of issuance of the order given by this honourable court in the ELC Case No. 81 of 2018 on 4<sup>th</sup> July, 2019 upto date be deposited into this court's account so as to be held therein pending determination of this suit or further orders of this court.*

*4. Cost to be in the cause.*

13. The order required deposit of all monthly rental income in court and production of full and accurate account of all the rental income. Another way of looking at it is that upon certification by the court of the accounts, the rental income was to be deposited in court. The first defendant deposed that there are no tenants in the premises. The applicant has not countered that position by any contrary evidence. Instead,

the applicant has cited a statement of defence filed by the first defendant in 2019. I do not think that is helpful at all. The burden of proof, which is higher than the usual one in civil proceedings of proof on a balance of probabilities, is upon the applicant. Tenants by their nature come and go. If the applicant contends that there is rent being collected then she must demonstrate the quantum of the rent, or at least offer evidence that shows inflow of rental income.

14. As noted above, the applicant must demonstrate wilful disobedience and the order said to have been disobeyed must be clear enough as to leave no doubt as what is to be done or refrained from. It seems to me that the efficacy of the order depended on proof rent paying tenants being place. In turn, upon receiving rent, the first defendant was required to produce **full and accurate** accounts for certification by the court. I have not been shown how the court was to certify fullness and accuracy of the accounts in interlocutory proceedings. Upon certification, the rental income was to be deposited in court. It seems to me that the order was conditional on many events and it cannot be said to have been clear enough as to leave no doubt as what was to be done or refrained from. In those circumstances, I am not persuaded that wilful disobedience on the part of the first defendant has been demonstrated. I find no merit in prayer 1 of the application.

15. Regarding prayers 2 to 7 of the application, I am not persuaded that I should grant such orders at this interlocutory stage. I note that the applicant herein has prayed in her plaint *inter alia* for mesne profits at the rate of KShs 250,000 per month from December 2018 until vacant possession is given. I suppose that prayer will be pursued at trial.

16. The parties in this matter are overly focusing on interlocutory applications at the expense of hearing and determination of the suits which were filed as far back as 2018. The real dispute between the parties must now be determined on the merits, upon a full hearing of the suits. Parties file suits so as to obtain a final judgment as opposed to a galaxy of rulings on interlocutory issues. I will give directions to ensure an expeditious hearing and determination of the suits upon delivery of this ruling.

17. In view of the foregoing discourse, I find no merit in Notice of Motion dated 15<sup>th</sup> July 2021 and I therefore dismiss it. Costs shall be in the cause.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 15TH DAY OF MARCH 2022.**

**D. O. OHUNGO**

**JUDGE**

Delivered in open court in the presence of:

Mr Balusi for the plaintiff

Mr Manyoni holding brief for Mr Munyendo for the first defendant

No appearance for the second defendant

Court Assistant: E. Juma