



**Restitution Chambers Kenya Limited v Gitao (Miscellaneous Application
50B of 2021) [2022] KEELC 3575 (KLR) (18 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 3575 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
MISCELLANEOUS APPLICATION 50B OF 2021**

BM EBOSO, J

MAY 18, 2022

BETWEEN

RESTITUTION CHAMBERS KENYA LIMITED APPLICANT

AND

WINFRED WANGARI KARANI GITAO RESPONDENT

RULING

1. Through a notice of motion dated August 13, 2021, the applicant, Restitution Chambers Kenya Limited, moved the High Court at Nairobi in Miscellaneous Application no E389 of 2021 for, among other orders, an order that the respondent, Winifred Wangari Karani Gitao, is in contempt of court for, willfully and with impunity, disobeying the order of the Business Premises Rent Tribunal (the tribunal) issued on February 1, 2021. The applicant invited the High Court to commit the respondent to civil jail for a period of six (6) months or, in the alternative, fine her kshs Ten Million (kshs 10,000,000). On November 24, 2021, Meoli J transferred the suit to Thika Environment and Land Court. The transfer order reads as follows:

“By consent, respondent’s PO dated September 22, 2021 is hereby compromised in terms that the matter is hereby transferred to ELC Thika, without prejudice to the respondent’s PO dated November 17, 2021. Costs IRO PO dated September 22, 21 awarded to the respondents, to be agreed upon or taxed. Mention before the Hon Judge ELC Thika on 20/ December 12, 2021 for further directions.

MEOLI

Judge.”

2. Upon the suit being registered at Thika Environment and Land Court, parties invited the court to make a determination on the respondent’s preliminary objection dated September 22, 2021, in which



the respondent challenged the applicant's motion dated August 13, 2021 on the following verbatim grounds:

- “ 1. The application is incompetent and fatally defective.
 2. This court is not the right forum to deal with the issue of contempt of the orders of the Business Premises and Rent Tribunal (the BPRT).”
3. The preliminary objection was canvassed through two sets of written submissions dated September 22, 2021 and March 9, 2022, filed through the firm of Kitoo & Associates Advocates. The gist of the respondent's submissions was that this court is not the right forum to deal with the issue of contempt of orders of the tribunal. Counsel made reference to the Court of Appeal decision in *Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 other* [2014]eKLR and submitted that our courts should endeavor to ascertain the prevailing law in England on contempt at any one given time and apply that law. Counsel argued that the prevailing state of the law of contempt in England is contained in Part 81 of the Civil Procedure (Amendment No 2) Rules 2012 and requires that applications for contempt orders be made in the proceedings in which the breached judgment or order was made. Counsel cited the decision of J L Onguto J in *Eliud Nyauma Omwoyo v Kenyatta University and 3 others* [2016] eKLR to support the above contention.
 4. Counsel for the respondent added that notwithstanding the transfer of the suit to this court, the issue of jurisdiction remains, contending that transfer by the High Court was done administratively and did not confer jurisdiction on this court. Counsel cited the provisions of section 14(1) of the *Landlord and Tenant (Shops, Hotels and Catering Establishment) Act*, cap 302 [the Act], and submitted that the preliminary objection raised a serious jurisdictional issue. Counsel argued that section 14(1) of the Act provides the mode of execution of orders of the tribunal. Counsel submitted that the applicant should have filed an application in the magistrate court for an adoption order. Counsel urged the court to strike out the miscellaneous application.
 5. On its part, the applicant filed written submissions dated February 21, 2022, through the firm of Kamunda Njue & Co Advocates. Counsel for the applicant argued that if the preliminary objection is allowed at this point, it may dispose the entire suit without giving the parties the opportunity to be heard. Counsel urged the court to exercise caution because the court has a duty to hear all parties and determine the case on merit.
 6. Counsel for the applicant argued that this court is mandated to deal with “matters of the Business Premises and Rent Tribunal.” Further, counsel for the applicant submitted that the transfer of this suit by the High Court was done in exercise of the High Court's inherent/residual power to act in a fair and equitable manner in the interest of justice, adding that case law has established that courts have inherent powers to transfer cases to courts that have jurisdictions, to ensure fairness between the parties. Citing article 159(2)(d) of the *Constitution*, counsel for the applicant urged the court to administer substantive justice and disregard procedural technicalities. Counsel urged the court to reject the preliminary objection.
 7. I have considered the preliminary objection together with the parties' rival submissions. I have also considered the relevant constitutional, statutory and regulatory frameworks. Further, I have considered the prevailing jurisprudence on the key issue falling for determination in the preliminary objection. The key issue raised for determination in the preliminary objection is the question as to the judicial forum for redress by a party who is aggrieved by contempt committed by another party against an order of the Business Premises and Rent Tribunal [the tribunal].



8. The tribunal was established in 1965 by the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*, cap 305. The Act is a pre-2010 statute. Prior to 2010, tribunals were not regarded as subordinate courts. The *Constitution* of Kenya 2010 changed the status of tribunals and expressly defined them as subordinate courts. Article 169 of the *Constitution* provides thus:
- (1) The subordinate courts are—
 - a. the magistrates courts;
 - b. the Kadhis’ courts;
 - c. the Courts Martial; and
 - d. any other court or local tribunal as may be established by an Act of Parliament, other than the courts established as required by article 162(2).
 2. Parliament shall enact legislation conferring jurisdiction, functions and powers on the courts established under clause (1).”
9. The *Constitution* having redesigned the architecture of the Judiciary and having designed the tribunals as subordinate courts, it was expected that parliament would discharge its obligation under article 169(1) by relooking at the establishing statutes that created the pre-2010 tribunals to align them to article 169(2) of the *Constitution* by ensuring that the legislations provide for their jurisdiction, functions and powers. This has not happened in relation to a number of tribunals that exercise judicial jurisdiction.
10. Among the tribunals whose establishing statutes have not been aligned to article 169 is the Business Premises and Rent Tribunal Established under the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*. For instance, whereas the tribunal is a subordinate court within the meaning of article 169(1) of the *Constitution*, section 14 of the establishing Act requires that enforcement of the orders and determinations of the tribunal be done by filing adoption and enforcement applications in other subordinate courts. This, in my view, is legally illogical.
11. Not too long ago, under circumstances not too different from the circumstances of the present litigation, the Court of Appeal outlined the law on contempt in *Woburn Estate Limited v Margaret Bashforth* [2016] eKLR as follows:
- “ Apart from section 5(1) of the Act that vests in the High Court the power, like those of the High Court of Justice in England, to punish any party who violates its orders, the court, by virtue only of being a court, has inherent powers to make sure its process is not abused and its authority and dignity is upheld at all times.”
12. In my view, given that the Business Premises and Rent Tribunal is a court within the meaning of article 169(1) of the *Constitution*, it has inherent powers to make sure that its processes are not abused and its authority and dignity is upheld at all times. Put differently, it has inherent powers to punish a party for contempt.
13. Counsel for respondent relied on section 14 of the Act and contended that for the applicant to obtain contempt orders, they ought to initiate fresh adoption and enforcement proceedings in a magistrate court and thereafter initiate contempt proceedings in a court other than the Tribunal. I do not agree with that view. Section 14 of the Act is a pre-2010 legislation. The *Constitution* of Kenya 2010 elevated judicial tribunals to subordinate courts. As a subordinate court, every tribunal exercising judicial



authority has inherent powers to punish for contempt by virtue of it being a subordinate court within the meaning of article 169 of the Constitution.

14. Consequently, whereas I entirely agree with the objector that this miscellaneous application was inappropriately initiated in one of the superior courts and is erroneously before this court, I do not agree with the contention that the applicant should have initiated fresh enforcement proceedings in the magistrate court in order to obtain redress for contempt committed against the orders of the tribunal. The platform where the application for contempt orders should be filed is the cause in which the breached orders were made. The adjudicatory organ to hear and determine the application for contempt orders is the judicial tribunal which issued the orders that were breached. That is my finding on the single issue falling for determination in the preliminary objection dated September 22, 2021.
15. This position of the law has not been clear in the past. There has been genuine confusion arising from parliament's failure to amend various legislations establishing judicial tribunals to align them to the Constitution. For this reason, there will be no order as to costs of this suit.
16. In the end, I make the following disposal orders in relation to the respondent's preliminary objection dated September 22, 2021:
 - a. The suit herein is struck out.
 - b. The applicant shall be at liberty to seek redress for contempt in the tribunal which made the orders which are alleged to have been breached.
 - c. Parties shall bear their respective costs of this suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 18TH DAY OF MAY 2022

B M EBOSO

JUDGE

In the Presence of: -

Mr Kamunda for the applicant

Mr Mugambi holding brief for Ms Kitoo for the respondent

Court assistant: Lucy Muthoni

