



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)**

**Misc Civil Appli 838 of 2007**

**TRAVEL PLANNERS LTD.....PLAINTIFF**

**VERSUS**

**THE MANAGING DIRECTOR,**

**KENYA RAILWAYS CORPORATION.....1<sup>ST</sup> DEFENDANT**

**KENYA RAILWAYS CORPORATION.....2<sup>ND</sup> DEFENDANT**

**RULING**

The documentation on record attached to the first application by way of ex parte chamber summons dated 23<sup>rd</sup> October 2007 and filed the same date vide which the applicant, Travel Planners Ltd sought leave to institute contempt of court proceedings against the first respondents namely, the Managing Director of Kenya Railways Corporation, and the substantive notice of motion dated 12<sup>th</sup> November 2007 filed on 13<sup>th</sup> November 2007 reveals existence of an order issued by N. A. Owino in Tribunal case No. 18 of 2006. The parties to the said case are Travel Planners Ltd. as the applicant/Tenant and Kenya Railways as the respondent/Land lord. The content of the order reads “*This suit coming up for ruling on 9.2.2006 before Mrs. N. A. Owino (Chairman) in the presence of Okech for Munyalo for applicant. And upon ruling it is hereby ordered that:-*

“(1) *The land lord to stop illegal acts of harassing and threatening the tenant with eviction.*

(2) *Costs to go to the tenant*

*Given under my hand and seal of Tribunal Court this 9.2.2006 and issued this 17<sup>th</sup> day of February 2006.*

***Mrs. N.A. Owino (Chairman)***

***Business Premises,***

***Rent Tribunal***

***9.2.2006”***

There is also annexed to the order, a penal notice which reads:-

“Attached herewith is copy of order issued on 17.2.2006. In event of breach the tenant shall apply for committal orders. Dated at Nairobi this 20<sup>th</sup> day of February 2006. It is marked annexure BPO3.”

Apparently the order from the Tribunal was not heeded prompting the applicant to move to this court by way of an ex parte chamber summons dated 23<sup>rd</sup> October 2007 and filed the same date, seeking leave of court to institute contempt of court proceedings against the 1<sup>st</sup> respondent namely the Managing Director of Kenya Railways Corporation forthwith.

The said leave was granted on 23.10.07 paving the way for the presentation of the substantive notice of motion dated 12<sup>th</sup> November 2007 and filed on 13<sup>th</sup> November 2007. The same is brought under Section 5 of the Judicature Act Cap 8 of the Laws of Kenya and Order 52 of the Rules of the Supreme Court of England.

The prayers sought are two namely:-

- (1) That respondent be committed to civil jail for six months for breaching the order of the business premises rent tribunal made on 9<sup>th</sup> February 2006.
- (2) That costs of this application be paid by the respondent. This is the application which is subject to this ruling.

The major points relied upon by the applicant in summary form as follows:-

- (1) That the court which granted leave to apply for contempt of court proceedings was satisfied that the matter was a proper case for such a relief.
- (2) The orders made in tribunal case number 18/06 were clear that the respondent was to stop harassing the applicant or threatening him with eviction.
- (3) The said order was extracted and served on the respondent alongside the penal notice were served on to the Managing Director of the respondent in accordance with the rules, which deponements have not been controverted by a replying affidavit from the respondent. As such the court is invited to hold that the deponements on service are true.
- (4) They contend the respondent has not complied with the said orders as they have locked the premises since July 2007. This was in defiance with the said court order.
- (5) Their case is fortified by the deponemnt of the respondent who has simply explained why the premises are locked up - allegedly due to non- payment of rent which the applicant denies that there are no rent arrears.
- (6) The court is urged not to listen to the respondents until they purge the contempt.

The respondents on the other hand put in a replying affidavit. The main grounds relied on by them are that:-

- (1) There was no proper service.
- (2) Application is improperly before court, as the premises were gutted by fire and were locked for purposes of investigations and certification by the city Planning Department who have filed a letter stating that the premises are not fit for habitation until certified fit for habitation, the respondent cannot risk prosecution by letting in the applicant.
- (3) They also contend that the applicant has not come to court with clean hands as they owe the respondent rent arrears of Kshs.1,039,565.20. It therefore follows that if the applicant is seeking justice,

he must be prepared to do justice by paying rent arrears before the building was gutted down by fire.

(4) The interests of the respondent should also be protected because if the goods are removed from the premises then the respondent will have nothing to distrain for rent.

(5) They maintain they are not in contempt of the tribunals' orders because the applicant was just told to pay rent and collect the goods which he has failed to do.

(6) Lastly that it is doubtful if the tribunal has power to rule upon matters touching on a state corporation.

In reply counsel reiterated the earlier submissions and stressed that:-

1. They complied with the requirement that the order be served personally and that is why counsel was appointed to represent them in these proceedings.
2. The issue of rent owing cannot be raised here as this is a wrong forum more so when no proceedings have been initiated by them for the recovery of the same in the relevant tribunal.
3. The duty of this court is to determine breach and punish the same if established.

On the courts assessment of the facts herein, there is no dispute that there is an order from the business premises tribunal sought to be vindicated by the applicant. The proceedings leading to the issuance of the said orders had been commenced and finalized in the said tribunal as upto the point the order was issued.

This being the case it is necessary for those orders to pass the test of technicality and merit as envisaged by Section 5 of the Judicature Act under which the substantive relief in the notice of motion is sought. Section 5 of the Judicature Act Cap 8, Laws of Kenya provides:-

*"5(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 the High Court of Justice in England, and that power shall extend to upholding the authorities and dignity of subordinate courts.*

*5(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".*

In this courts', view the operative word in that section is the word "court". It therefore follows that in order to succeed the applicant has to demonstrate that the contempt sought to be punished must be stemming from the authority of a "court" and that the said order must have been issued in the proper exercise of that "courts'" jurisdiction and authority. There has to be a demonstration either on the facts and or the law showing that the business premises tribunal which issued the orders sought to be vindicated in a "court" envisaged under Section 5 of the Judicature Act. It is therefore necessary to determine what a court is.

The interpretation and General Provisions Act Cap 2 Laws of Kenya defines a "court" as "means any court of Kenya of competent jurisdiction" courts of competent jurisdiction within Kenya are established by the same Judicature Act Cap 8 L.O.K. under which the relief is sought . Section 3 of the said Act makes provision for the establishment of the Court of Appeal, High Court and subordinate courts. The officers manning these courts are Court of Appeal Judges, High Court Judges and magistrates of various ranks. A tribunal is therefore not established as such and it is to be noted that is manned by a chairman.

Section 2 of Cap 301 defines a 'Tribunal' as "means a tribunal appointed under Section 11 of this Act". Section 11 (1) Cap 301 provides "a tribunal shall consist of a person or persons appointed as such by the Minister, and shall exercise such jurisdiction as is conferred on it by or under this Act over such area as shall be specified in such appointment".

This courts' construction of these provisions leads this court to the conclusion that the "tribunal" which made the order complained of and as established under Section 11 of the Parent Act Cap 301, L.O.K. is not a "court" envisaged by Section 5 of the Judicature Act and it follows that the said tribunal was not exercising its jurisdiction as a court of competent jurisdiction but as a tribunal of competent jurisdiction.

The question to be determined now is whether the said orders emanating from the "tribunal" have no force of law and can be flouted with impunity. In this courts' own judicial wisdom, opines that it is doubtful whether the legislature could set in motion a procedure for the benefit of litigants which was not meant to be taken seriously. There must be safeguards protecting the tribunal orders from being flouted with impunity. The intention to provide such safeguard has to be traced in the provisions providing for the enforcement of the said orders.

This leads the court to determine whether the said tribunal orders are self -executing or they have any force of law. Section 14 (1) Cap 301 L.O.K. provides:-

*"14 (1) a duly certified copy of any determination or order of tribunal may be filed in a competent subordinate court of the first class by any party to the proceedings before such tribunal or by the tribunal and on such copy being filed and notice thereof being served on the tribunal by the party filing the same, such determination or order may, subject to any right of appeal conferred by or under this Act be enforced as a decree of the court"*

The effect of this section is to rob the tribunal of a right to enforce its orders. That right is vested in the subordinate court of the first class. This means that in order for the tribunals orders to attract penal consequences, for disobedience, they should have been filed in any subordinate court of the first class for enforcement. Failure to comply with this procedural step makes the tribunal orders invalid and incapable of being enforced in raw form as released by the tribunal.

For the reasons given the applicants' application fails on a point of technicality in that before seeking to punish the respondent for disobedience of the same, the said order should have been filed in a subordinate court of the first class, to have it adopted as an order of the court. It is only after adoption that an order can be extracted and served for enforcement. It therefore follows that it is not the tribunal order in its raw form which attracts penal consequences but the order adopting the said tribunal order which gives it the force of law and vests it with the clothe of the right to attract penal consequences.

The net result is that proceedings are premature. Counsel should have the said order filed in court under Section 14 (1) Cap 301. After such adoption he should extract the order, serve, the same for compliance and it is only after such adoption, extraction and service of the adopted order that breach can arise.

The proceedings being premature are found to be incompetent. It matters not that the leave to apply for the same was granted. The court is of the opinion that had the learned judges attention been drawn to Section 3 of the Judicature Act and 14 (1) of Cap 301 Laws of Kenya Leave would have been declined.

The application is struck out for the reasons given with costs to the respondent.

**DATED, READ AND DELIVERED AT NAIROBI THIS 24<sup>TH</sup> DAY OF APRIL 2008.**

**R. N. NAMBUYE**

**JUDGE**