



**Oyatsi v Peony Management Co. Ltd & 3 others (Environment & Land
Petition E033 of 2023) [2024] KEELC 3300 (KLR) (11 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 3300 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND PETITION E033 OF 2023**

MD MWANGI, J

APRIL 11, 2024

**IN THE MATTER OF ALLEGED CONTRAVENTION OF
RIGHTS OF FUNDAMENTAL FREEDOMS UNDER ARTICLE
60(1) (B), 64, 66(1) (40) AND 27(1), (2) OF THE CONSTITUTION**

BETWEEN

DESTERIO OYATSI PETITIONER

AND

PEONY MANAGEMENT CO. LTD 1ST RESPONDENT

GAO YU INTERNATIONAL LTD 2ND RESPONDENT

STANLEY GIBSON KADIRI 3RD RESPONDENT

FURAHA MARWA 4TH RESPONDENT

*(In respect to the Notice of Motion dated 30th November, 2023, Application dated 13th
January, 2024 and the Chamber Summons Application dated 8th December, 2023)*

RULING

Background

1. On 23rd November, 2023, this Court upon considering an Interim Application by the Petitioner dated 11th October, 2023 issued two interlocutory orders as follows:
 - a. A temporary injunction order be and is hereby granted pending the hearing and determination of the case restraining the Respondents from disobeying or usurping the Constitutional mandate of the Court and deciding or prejudging the outcome of the case in their favour to confer Land rights to themselves over LR 330/561, Nairobi being an issue that awaits determination by this Honourable Court in exercise of its jurisdiction.



- b. A temporary injunction order be and is hereby granted pending the hearing and determination of the case, restraining the Respondents jointly and severally, their servants, agents or howsoever 'from invading the petitioner's land, LR No. 330/561, Nairobi, taking possession thereof and or exercising or enjoying any land rights over the said parcel of land including occupying and or using any portion thereof in any manner whatsoever without a valid instrument registered against the title as enacted in mandatory terms under section 43(2) of the [Land Registration Act](#) effecting a disposition of any interest in the said Land in their favour.
2. Consequent to the above orders, the Petitioner filed the Notice of Motion Application dated 30th November, 2023 seeking amongst other orders that:
- i. The Respondents jointly and severally, their servants or agents are guilty of contempt of Court and of the [Constitution](#) of Kenya;
 - ii. The Respondents jointly and severally, their servants or agents, be punished for contempt of Court and the [Constitution](#) of Kenya;
 - iii. The directors, agents or servants of the 1st Respondent including all occupants of the 1st Respondent's apartments in Peony Estate, together with the 3rd and 4th Respondents be committed to Civil Jail in addition to paying a fine or fines as shall be imposed by this Court for contempt of Court;
 - iv. With a view to advancing and realizing the Constitutional rights of the Petitioner/Applicant as protected in the Court Order issued on 28th November 2023, all the structures constructed by the Respondents, their agents or servants on the Petitioner's property LR No. 330/561 Nairobi be demolished forthwith by the Respondents, and in default, by the Applicant and all the expenses incurred by Petitioner/Applicant be recovered from the Respondents;
 - v. With a view to advancing and realizing the Constitutional rights of the Petitioner as protected in the Court Order issued on 28th November 2023, the Petitioner's gate demolished by the Respondents on 30th November 2023 be reinstated or rebuilt and all the expenses incurred by Petitioner/Applicant be recovered from the Respondents;
 - vi. Any other or further relief or reliefs that this Honourable Court shall deem just to grant;
 - vii. The costs of this application be awarded to the Petitioner/Applicant;
3. On his part, the 4th Respondent filed a Chamber Summons Application dated 8th December, 2023 seeking to have his name and all former directors of the 1st Respondent Company struck out from this suit on the basis that they are non-suited parties to the suit. The 4th Respondent averred that he is a former Chairman of the 1st Respondent Company having served for the period 2008 – 2022. He effectively resigned from the position during the Annual General Meeting (AGM) held on 7th May, 2022.
4. The 3rd Respondent too filed a Notice a Notice of Motion Application dated 13th January, 2024. The Application seeks that the suit as against the 3rd Respondent be dismissed for failure to disclose a remarkable cause of action, and further that his name be struck out as a party in the suit. He asserts that he is an employee of a Company known as Lustman & Company (90) Ltd, which was contracted by the 1st Respondent Company to render management services of the Common areas in Peony Estate.



Court's Directions

5. The Court's directions were that the 3 applications be heard contemporaneously. Parties were granted leave to file skeleton submissions that were highlighted before the Court on 25th January, 2024. The proceedings of the day form part of the Court record and I need not replicate them in this ruling. I will deal with the three applications consecutively.

Analysis and Determination:

(A). The Petitioner's application dated 30th November, 2023.

6. The said application is stated to have been made pursuant to the provisions of Article 2(1), 3(1) and 159 of the Constitution, Rule 3 (3)(a), 3(6)(b) and 3(8) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms/Practice and Procedure Rules, 2013, and Sections 5 and 29 of the Contempt of Court Act.
7. As highlighted earlier at the beginning of this ruling, the Petitioner's application is principally an application seeking to have the Defendants/Respondent punished for contempt of Court.
8. What caught my immediate attention from the face of the application is that the application is brought pursuant to the provisions of the Contempt of Court Act. This is an Act that was declared unconstitutional and invalid in the case of Kenya Human Rights Commission –vs- Attorney General & Another [2018] eKLR..
9. Mwita, J in the above cited case declared the entire contempt of Court Act NO. 46 of 2016 as enacted by parliament invalid for lack of Public Participation as required under Articles 10 and 11 (6) of the Constitution and further found that the Act as legislated encroached on the Independence of the Judiciary.
10. This is an issue that was also highlighted by Mr. Chisengo Advocate during his submissions before the Court. It is correct as Learned Counsel put it that the Petitioner's Application is premised on a non-existent Law. The obvious consequence of grounding the application on a non-existent law is that the said application is fatally defective. It cannot stand. The citing of a non-existent Law is a fundamental issue that goes into the core of the application. It is not a mere procedure technicality that the Court may overlook.
11. The Law that is applicable then in Kenya for purposes of contempt of Court Proceedings, after the invalidation of the Contempt of Court Act is the English Law as dictated by the provisions of Section 5 of the Judicature Act.
12. It is therefore my finding that the Petitioner's Application is fatally defective and the only option for me is to strike it out with costs to the Respondents.
13. There is however another prayer in the Petitioner's application that I find necessary to comment on. In his 4th prayer the Petitioner seeks to commit to Civil Jail the directors, agents or servants of the 1st Respondent including all occupants of the 1st Respondent's apartments in Peony Estate. An estate comprises of many people including children. The alleged contemnors have not been specifically named. How then would the Court wholesomely condemn them without affording them a right of a fair hearing?
14. Contempt proceedings cannot be against 'all and sundry'. They can only be against specific identifiable persons, who must, additionally be afforded the right to a fair hearing.



15. I now proceed to the other two applications that seek to strike out the Petitioner's case as against the Applicants.
16. Striking out of pleadings is a draconian act which may be resorted to only in plain and obvious cases. In the case of *Cooperative Merchant Bank Ltd v George Fredrick Wekesa* – C.A No. 54 of 1999 the Court held that whether or not a case is plain or obvious is a matter of fact.
17. In *Yaya Towers Ltd v Trade Bank Ltd* - Civil Appeal No. 35 of 2020, the Court expressed the view that the Plaintiff/Defendant is entitled to pursue a claim in 'our Courts' however implausible and however improbable his chances of success are unless the Defendant/Plaintiff can demonstrate shortly and conclusively that the Plaintiff's claim is bound to fail or is otherwise objectionable as an abuse of the process of Court otherwise, it must be allowed to proceed to trial.
18. The jurisdiction to strike out a case ought to be sparingly exercised and only in exceptional cases.
19. In the case of *DT. Dobie & Co. v Joseph Mbaria Muchina & Ano.* [1980] eKLR, Madan J (as he then was) was categorical that no suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment.
20. Having carefully considered the application dated 8th December 2023 and the one dated 13th January 2024, I am not persuaded that the Applicants have demonstrated that the Petitioner's case against them is so hopeless that it plainly and obviously discloses no reasonable cause of action that cannot be cured by an amendment(s). I decline the invitation to strike out the Petitioner's case against the two Applicants.
21. Consequently, the three applications before me fail. There shall be no orders as to costs in respect of the applications.

It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 11TH DAY OF APRIL 2024.

M. D. MWANGI

JUDGE

In the virtual presence of:

Mr. Chisengo for the 4th Respondent

N/A for the Petitioner, 1st, 2nd and 3rd Respondents

Yvette: Court Assistant

