



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT ELDORET**

**ELC. NO.56 OF 2019**

**ESTHER NYAGUTHII MAINA.....PLAINTIFF**

**VERSUS**

**RACHEL WANJIKU KAMARA.....1<sup>ST</sup> DEFENDANT**

**JAMES GITHINJI KAMARA.....2<sup>ND</sup> DEFENDANT**

**RULING**

**Background**

1. This is a Ruling in respect of a Notice of Motion dated 7<sup>th</sup> December, 2020 which seeks review of the Ruling dated 23<sup>rd</sup> April, 2020 and stay of taxation of the bill of costs dated 5<sup>th</sup> June, 2020. The Plaintiff/Applicants had filed a suit against the Defendants/Respondents in Eldoret CMCC.NO.87 OF 2019. The trial magistrate issued an injunction against the Respondents on 29<sup>th</sup> May, 2019. An order was extracted and served upon the Respondents who despite the injunction went back to the suit property and continued using it in contravention of the court order.
2. The Applicants then moved to this court and filed an Application seeking to cite the Respondents for contempt. The Respondents then filed a Notice of Preliminary Objection on the ground that this court had no jurisdiction to handle the Application for contempt as the magistrates court had expressly allowed the trial magistrate power to punish for contempt.
3. In a Ruling delivered on 23<sup>rd</sup> April, 2020, the court upheld the Preliminary Objection and proceeded to dismiss the Application for contempt. The respondents then filed a bill of costs which was set down for taxation. This is what prompted the Applicants to file the current Application.

**The Application**

4. The Applicants contend that there is an error apparent on the face of the record in that the trial judge dismissed the suit before the lower court through the impugned Ruling yet the case had not been heard. The Applicants argue that this court has both original and appellate jurisdiction to punish for contempt and that they were therefore not wrong in filing their Application for contempt before this court.
5. The Applicants further argue that the trial judge ought to have ordered that the Application for contempt be filed in the lower court instead of dismissing it.
6. The Applicants argue that as a result of the court's Ruling, they had been condemned to pay costs as if they had made a mistake in filing the Application for contempt before this court. It is on this basis that they sought stay of the taxation of the bill of costs.
7. The Applicants' Application was opposed through a replying affidavit sworn on 7<sup>th</sup> April, 2021. The Respondents contend that the Applicants have misapprehended the Ruling of this court and that the Applicants are merely out to stall the taxation of the bill of costs. They contend that what was dismissed is the Application for contempt which was before the court and that the suit in the lower court was not addressed in the Ruling made.
8. The Respondents further contend that the Applicants have not met the threshold for grant of a review.
9. The parties were directed to file written submissions. The Applicants filed their submissions dated 15<sup>th</sup> November, 2021. The Respondents filed submissions dated 21<sup>st</sup> April, 2021. I have considered the Applicants' Application as well as the opposition to the same by

the Respondents. I have also considered the submissions by the parties. The only issue for determination is whether the applicants have met the threshold for grant of a review. The issue of whether there should be a stay of taxation of the bill of costs will become clear in the preceding paragraphs.

10. The Applicants have moved the court for review on the ground that there is an error apparent on the face of the record. The error which the Applicants claim to exist is that the court dismissed the lower court case through its Ruling of 23<sup>rd</sup> April, 2020. The Applicants also argue in their submissions that there was an error in that the court awarded costs to the Applicant/Respondent which should not have been the case as costs cannot be awarded to the Applicant and Respondent at the same time.

11. I have gone through the Ruling which was delivered on 23<sup>rd</sup> April, 2020. From the opening sentence, it is clear that the trial judge was dealing with the Application which was before her. There is nowhere in the Ruling that the trial judge mentioned about the case before the lower court. The judge stated that the lower court had jurisdiction to punish for contempt and the Application should have been filed before that court. The Applicants may have misapprehended the import of the Ruling. The lower court case was not dismissed as alleged. What was dismissed was the Application which had been filed in a court without jurisdiction. Where a lower court has jurisdiction to handle a matter, it will be absurd for this court to hear the same matter even if it has original jurisdiction to deal with the matter.

12. The Applicants are complaining that the trial judge should have ordered that the Application be filed before the lower court instead of dismissing it. The law is clear that where a matter is filed before a court without jurisdiction, that court has no power to transfer or direct that it be filed in a proper court. The only option is to dismiss or strike it out.

13. The Applicants seem to argue that the trial judge was wrong in dismissing the Application when she had original jurisdiction to hear it or transfer it. Even if this was to be the case, then that would amount to an erroneous finding which will not form a ground for review but will be a good ground of appeal.

14. The argument by the Applicant that the judge gave costs to both the Applicant and the Respondents is fallacious. The Ruling is clear that costs were meant for the successful parties and the successful parties were the Respondents. I therefore find no merit in this Application which is dismissed with costs to the Respondents.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 3<sup>RD</sup> DAY OF FEBRUARY, 2022**

**E. OBAGA**

**JUDGE**

In the virtual presence of;

Mr. Miyianda for Applicant

Mr. Mokai for Respondents

Court Assistant: Mercy

**E. OBAGA**

**JUDGE**

**03.02.2022**