



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT SIAYA**

**ELC JUDICIAL REVIEW NO. 5 OF 2021**

**BARACK WELLINGTON ODHIAMBO.....APPLICANT**

**VERSUS**

**GERSHOM OTACHI (CHAIRMAN OF THE NATIONAL LAND COMMISSION OF THE REPUBLIC**

**OF KENYA OR ANY OTHER PERSON HOLDING THAT POSITION)..... RESPONDENT**

**RULING**

**Applicant's case**

1. Within the provisions of **Section 5** of the **Judicature Act, Rule 81.4** of the **Civil Procedure Rules (Amendment No.2) 2012 of England, Section 14** of the **Environment and Land Court Act** and all other enabling provisions of law, the applicant filed a chamber summons dated 18/11/2021 seeking the following reliefs:

**a. THAT the applicant be granted leave to apply for an order committing Mr Gershom Otachi, the Chairman of the National Land Commission or any other person occupying that position, to civil jail for a period not exceeding 6 months for blatantly disobeying the order of Mandamus given on 9/05/2020 compelling the National Land Commission to facilitate the renewal of the lease in respect of the property known as Grant No.L.R. 3628 being Land Reference 12045/95 [hereinafter "suit property"].**

**b. THAT the applicant be awarded costs of the proceedings.**

2. The Chamber summons is supported by a statement of facts and a verifying affidavit dated 18/11/2021 sworn by the applicant's counsel one Livingstone Maina Ombete. The main grounds are that the court vide an order dated 22/05/2020 compelled the respondent to renew the suit property's lease, nevertheless, despite service of the order, the respondent has failed to comply hence, prompting the instant chamber summons.

**The respondent's case**

3. The respondent has neither filed a response to the chamber summons nor filed written submissions.

**The applicant's submissions**

4. The applicant filed written submissions dated 12/01/2022. He contended that before moving the court in the instant application, he served the Registrar, Environment and Land Court and the Attorney General's chambers with a notice of intent to institute the instant proceedings. The applicant placed reliance on the case of **Republic v Joseph Wairagu Irungu, Principal Secretary Ministry of Water and Sanitation & another Ex parte Vincent Alushula [2021] eKLR** which outlined the procedure for contempt of court proceedings.

**Analysis and determination**

5. **Article 162 (2)** of the **Constitution** and **Section 13** of the **Environment and Land Court Act** clothes this court with jurisdiction to preside over contempt proceedings and the legal framework for moving the court in such an application is governed by **Section 5** of the **Judicature Act**.

6. I have carefully considered the applicant's chamber summons, statement of facts and verifying affidavit and the only issue falling for determination is whether the applicant ought to be granted leave to institute contempt of court proceedings. However, before I apply my

mind to the legal and jurisprudential framework on the single issue, I wish to put into perspective the application that is before this court together with its supporting documents.

7. The order issued on 20/12/2021 has typographical errors and this could have misled the parties herein. The typographical errors are rectifiable by the *slip rule* as espoused by the provisions of **Section 99** of the **Civil Procedure Act**.

8. Now back to the issue for determination, by virtue of the case of **Kenya Human Rights Commission v Attorney General & another [2018] eKLR**, the **Contempt of Court Act** was repealed and our regime reverted back to **Section 5 of the Judicature Act** which reads;

**“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 possessed by the High Court of Justice in England and that power shall extend to upholding the authority and dignity of Subordinate Courts.”**

9. The procedure in the High Court of Justice in England was considered in detail by the Court of Appeal in the case of **Christine Wangari Gachege vs. Elizabeth Wanjiru Evans & 11 Others**. In this case the Court recognized that the only statutory basis for contempt of court proceedings in so far as the Court of Appeal and the High Court and by this extend the ELC are concerned was **Section 5** of the **Judicature Act** and held thus:

**“The procedure to be followed in commencing, prosecuting and punishing contempt of court cases was, until 2012, provided for by Order 52 Rules 1 to 4 of the Rules of the Supreme Court RSC, made under the Supreme Court of Judicature Act, 1873 (or simply the Judicature Act, 1873)...Following the implementation of the famous Lord Woolf’s “Access to Justice Report, 1996”, The Rules of the Supreme Court of England are gradually being replaced with the Civil Procedure Rule, 1999. On 1st October, 2012 the Civil Procedure (Amendment No. 2) Rules, 2012 came into force and PART 81 thereof effectively replaced Order 52 RSC in its entirety.**

10. In this case and the case of **Kenya Country Bus Owners’ Association & 8 others v Cabinet Secretary for Transport & Infrastructure & 5 others [2014] eKLR**, the courts have held that as envisaged by the provisions of **Part 81** of the **England Civil Procedure**, the procedure for contempt proceedings in the instance of disobedience of a judgment, order or decree is prosecuted in the following manner; an application for committal proceedings is made in the proceedings in which the judgment or order was made. Such an application has to outline in entirety the grounds upon which the application is made, identify separately and numerically, each alleged act of contempt and have affidavits or an affidavit in support of the application containing all the evidence that the applicant intends to rely upon. The committal application and affidavit or affidavits must be served personally on the respondent or respondents unless the Court dispenses with personal service or authorizes an alternate mode of service.

11. In the case of **Christine Wangari Gachege (Supra)**, the Court of Appeal held that the requirement of leave in contempt proceedings had been dealt away in instances involving breach of a judgment, order or undertaking.

12. In view of this, it is my finding that the application before this Court is incompetent and is hereby struck out with no orders as to costs.

13. Consequently, this court makes the following disposal orders:

**a. The application dated 18/11/2021 is hereby struck out with no orders as to costs.**

14. It is so ordered.

**Ruling delivered virtually.**

**DATED, SIGNED AND DELIVERED THIS 3<sup>RD</sup> DAY OF MARCH, 2022**

**In the Presence of:**

Mr. Ombete for the exparte applicant

N/A for the respondent

Court assistant; Sarah Ooro

**HON. A. Y. KOROSS**

**JUDGE**

**3/3/2022**