



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC MISCELLANEOUS APPLICATION NO E028 OF 2020

TITUS KUNGU T/A

WATFORD PRINT MEDIA & 30 OTHERS.....APPLICANTS/TENANTS

=VERSUS=

SARUKI INVESTMENTS LIMITED.....LANDLORD/RESPONDENT

AND

KENYA POWER AND LIGHTING COMPANY.....1ST INTERESTED PARTY

OCS-CENTRAL POLICE STATION.....2ND INTERESTED PARTY

RULING

1. This is the Notice of Motion dated 13th January 2021 brought under Articles 50(1), 159(2)(b), 159(2)(e) and 165(3)(e) of the Constitution, Section 5 of the Judicature Act, Section 18 of the Environment and Land Act, 2011, Sections 1A, 1B, 3A and 85 of the Civil Procedure Act, Order 40 rule 3 and Order 51 rule 1 of the Civil Procedure Rules, 2010 and the inherent jurisdiction of the Court to control its process.

2. It seeks orders:-

1. *Spent.*

2. *Spent*

3. *Spent.*

4. *That the court be pleased to find that the Respondent has willfully and knowingly violated the orders of this honourable court issued in the present suit on 21st August, 2020 and those of the Business Premises Rent Tribunal at Nairobi issued in Tribunal Case No 627 of 2020 on 6th July, 2020.*

5. *That the court be pleased to grant the Applicants leave to apply for the committal to jail; (i) Benson Kibugi Ruhii, (ii) Esther Nyambura Ruhii, (iii) Racheal Wahito Knaple-Ruhiu and (iv) Gladys Kaburu Ruhii, the directors of the Respondent company and their arrest, detention and imprisonment pending the hearing and determination of the contempt proceedings.*

6. *That if order 5 is granted, the honourable court be pleased to order the Officer Commanding Nairobi Central Police Station to forthwith arrest (i) Benson Kibugi Ruhii, (ii) Esther Nyambura Ruhii, (iii) Racheal Wahito Knaple-Ruhiu and (iv) Gladys Kaburu Ruhii, the directors of the Respondent company and have them presented before the honourable court to show cause why they should not be detained pending the hearing and determination of the contempt proceedings.*

7. *That (i) Benson Kibugi Ruhii, (ii) Esther Nyambura Ruhii, (iii) Racheal Wahito Knaple-Ruhiu and (iv) Gladys Kaburu Ruhii, the directors of the Respondent company, be each committed to civil jail for a period of six (6) months or the court be pleased to issue any alternative punishment it may deem fit in the circumstances.*

8. *That the Officer Commanding Nairobi Central Police Station be ordered to ensure enforcement of the orders issued herein,*

the orders issued by this honourable court on 21st August 2020, and the orders issued by the Business Premises Rent Tribunal at Nairobi in Tribunal Case No 627 of 2020 on 6th July, 2020.

9. That the Court be pleased to issue any other order it deems fit in the circumstances of the case.

3. The grounds are on the face of the application and are set out in paragraphs 1 to 10.

4. The application is supported by the affidavit of Robert Njororo Michuki, a director of Legacy Autospare (K) Ltd sworn on the 13th January 2021 and a supplementary affidavit sworn on the 9th February 2021.

5. The application is opposed. There is a replying affidavit sworn by Racheal Wahito-Knaple Ruhui, one of the directors of the Respondent, sworn on the 21st April 2021.

6. The Respondent also filed a notice of preliminary objection dated 7th February 2021. That the Respondent shall oppose the Notice of Motion dated 13th January 2021 on the grounds that:-

1. It is fatally defective.

2. The applicant has not complied with the relevant mandatory provisions of the contempt of court law applicable.

3. The court lacks jurisdiction to entertain the same.

7. On the 8th February 2021, the court directed that the Notice of Motion dated 13th January 2021 be heard together with the preliminary objection. It also directed that they be canvassed by way of written submissions.

The Applicants' Submissions

8. They are dated 19th February 2021. They raise four issues for determination. They are:-

(i) Whether this court has jurisdiction to entertain an application for contempt of court.

(ii) Whether the application is fatally defective.

(iii) Whether the Respondent directors are in contempt of court orders.

(iv) Whether the Respondent directors should be committed to civil jail.

9. Section 5 of the Judicature Act empowers the Environment and Land Court to deal with issues of contempt. Order 40 rule 3(1) of the Civil Procedure Rules gives this court jurisdiction to punish for contempt where a party acts in total disobedience of its orders. This court is correctly seized of this matter.

10. Following the nullification of the Contempt of Court Act, 2016 by the High Court in **Kenya National Human Rights Commission vs Attorney General [2018] eKLR**, courts have consistently held that the law applicable in contempt of court proceedings is the law that was applicable before the enactment of the Act. They have put forward the case of **R VS Kajiado County & 2 Others Ex parte Kilimanjaro Safari Club Ltd**.

11. The law on contempt of court before the enactment of the Act was correctly interpreted by a strong bench of the Court of Appeal in the Case of **Christine Wangari Gachege vs Elizabeth Wanjiru Evans & 11 Others [2014] eKLR**. The Court of Appeal held that leave is not required where committal proceedings involve breach of a judgment, order or undertaking. Leave is not required to institute contempt proceedings in Kenya. The application is properly before court.

12. This application has been brought by way of Notice of Motion. They have relied on the case of **Clerk, Nairobi City County, Assembly vs Speaker, Nairobi City County Assembly & Another ODM, & 4 Others (Interested Parties) [2019] eKLR**. The court ought to be guided by Article 159(2)(d). The application is properly before court.

13. The Respondent through its directors is in contempt of the court order dated 21st August 2020 and the order of the Business Premises Rent Tribunal in Case No 627 of 2020 issued on 6th July 2020. They have put forward the cases of **Kimanja Kamau (suing as the personal representative of the estate of Gideon Gitundu Kimere (deceased) vs Francis Mwangi Mwaura & Another [2018] eKLR**. **Samuel M. N. Mweru & Others vs National Land Commission & 2 Others [2020] eKLR**.

The court order dated 21st August 2020 is clear and unambiguous.

14. The Respondent had knowledge or notice of the order. The same was served via email as per the express provisions of order 5 rule 22 B of the Civil Procedure Rules 201. An affidavit of service sworn by W. Kevin Michuki on 14th September 2020 is on record as evidence of service of the order in question. They have put forward the case of **Woburn Estate Ltd vs Margaret Bushforth [2016] eKLR** where the

court cited with approval the case of **Refrigeration and Kitchen Utensils Ltd vs Gulab Chand Popatlal Shah & Another Civil Application No 39 of 1990**.

15. The Respondent acted in total disregard of the orders herein. Having been aware of the existence of the court order the Respondent through its director Rachael Wahito Knaple Ruhui, acted in total disregard of the court order. The Court in contempt of court proceedings has defined deliberate disobedience of court orders as an intentional and willful disobedience of the court order. They have put forward the case of **Samuel M. N. Mweru & Others (Supra)**.

16. The Applicants have proved beyond reasonable peradventure that the Respondent disobeyed a court order. The Respondent is in contempt of the court order. They have put forward the case of **Cecil Millar vs Jackson Njeru & Another [2017] eKLR** where the court cited with approval the case of **Econet wireless Kenya Limited vs Minister for Information and Communication of Kenya & Another**.

17. The deliberate conduct of the Respondent company is a real threat to the dignity and authority of this honourable court which has been brought into public ridicule and contempt. They pray that the application be allowed.

The Respondent's Submissions

18. They are dated 21st April 2021. The orders issued on 3rd July 2020, extended on 10th July 2020 having expired on 28th July 2020, the Respondent has the right to access the premises as the applicants had ceased to be tenants then. The applicants have exploring their connections and taking advantage of the absence of the directors of the Respondent to advance a scheme of dispossessing the Respondent of the demised premises.

19. The application as drawn and brought before this honourable court is incompetent and incurably defective for failure to comply with the mandatory legal provisions applicable in the circumstances. It has put forward the case of **Christine Wangari Chege vs Elizabeth Wanjiru Evans & Others [2014] eKLR**. The notice ought to have been served personally against the individuals whose committal is sought but the same has not been done.

20. It must be established that there existed a court order and the said order must not be ambiguous. It has put forward the cases of **Amos Mathenge Kabuthu vs Simon Peter Mwangi [2015] eKLR; Jihan Freighters vs Hardware & General Stores Ltd [2015] eKLR**. There were no orders to claim contempt on 1st August 2020. The Respondent cannot therefore be cited for contempt of expired orders. The orders issued on 21st August 2020 prohibited the Respondent from evicting the applicants from the demised premises without following the provisions of Cap 301 (Laws of Kenya). Since the issuance of the said orders, it has neither written to the applicants demanding their vacation of the premises nor have they attempted to access the applicants' individual shops or the premises.

21. In order for one to be found guilty of contempt of a court order, it must be demonstrated that the said action was committed willingly and targeted in breaching the order. It has put forward the case of **Republic vs Ahmad Abolfathi Mohammed & Another [2018] eKLR**. Willful disobedience has not been demonstrated.

22. In January 2021 Racheal Wahito visited the premises solely for the purposes of inspecting the common areas and the empty shops. She was not in company of either police officers or officers from Kenya Power as alleged. The applicants are still in the premises.

23. The application has not met the required standards to have the alleged contemnors committed to civil jail. It has put forward the cases of **Mutitika vs Baharini Farm Limited [1985] KLR 229, 234. Republic vs Ahmad Abolfathi Mohammed & Another (Supra)**.

24. The applicants are seeking to commit four individuals to civil jail. They have not listed the actions of the other three save for Rachel Wahito who only visited the premises on the view of inspecting the same. There is no shred of evidence against the other three.

25. The accusations labelled against Racheal Wahito are simply based on hearsay and have not been substantiated.

26. The evidence relied upon by the applicants does not meet the threshold for the four alleged contemnors to be committed to civil jail as the applicants have not discharged their burden of proof to the required standard. It prays that the application be dismissed with costs.

27. I have considered the preliminary objection dated 7th February 2021 and the Notice of Motion dated 13th January 2021, the affidavit in support and the annexures. I have considered the written submissions filed on behalf of the parties and the authorities cited. The issues for determination are:-

(i) Whether the application is properly before court.

(ii) Whether the Respondent's directors are in contempt of court orders

(iii) Whether the alleged contemnors are guilty of disobeying the said orders.

(iv) Who should bear costs of this application?

28. It is the Respondent's case that the application herein is fatally defective. Further that this court has no jurisdiction to entertain this application. I agree with the applicants' submissions that this court has jurisdiction to entertain the instant application as per Section 5 of the Judicature Act and Order 40 (3)(1) of the Civil Procedure Rules.

29. I also find that this application is not fatally defective as it is brought by way of a Notice of Motion. I rely on the case of **Kiiru Tea Factory Limited vs Stephen Maina Githiga** where the court accepted an application for contempt brought by way of a Notice of Motion.

30. Article 159(2)(d) of the Constitution implores courts to administer justice without undue regard to technicalities. From the foregoing, I find no merit in the preliminary objection and the same is dismissed.

31. It is the applicants' case that the Respondent has disobeyed orders issued by the Business Rent Premises Rent Tribunal on 6th July 2020 and those issued by this court on 21st August 2020. I have gone through the record of the Business Premises Rent Tribunal. On the 3rd July 2020, the following orders were granted and issued on 6th July 2020:-

“1. Prayers 1, 2, and 6 of the Notice of Motion is granted that is to say:-

(a) The application is certified urgent.

(b) The landlords/Respondents or their agents, servants and/or employees and/or otherwise are hereby prohibited and restrained from threatening, harassing and/or interfering with the tenants' possession of the demised premises and/or trying to effect eviction of the tenants from their respective premises on LR NO 209/136/131 Kirinyaga Road-Nairobi known as Saniki House without following the provisions of a controlled tenancy in accordance with Cap 301 Laws of Kenya pending the hearing and determination of this application interpartes and/or till further orders of this tribunal.

(c) The OCS Central Police Station to ensure that peace and tranquility prevails in compliance with prayer (2) above.

(d) The applicants to serve the landlord with the application for interpartes hearing on 10th July 2020”.

32. On the 10th July 2020, the said orders were extended to 28th July 2020 when the matter was to come up for interpartes hearing. It appears there was no sitting of the Tribunal on 28th July 2020. This therefore means the orders lapsed.

33. The applicants approached this court under the notice of motion dated 17th August 2020. This court granted the following orders:-

“1. That the matter is certified urgent.

2. That an interim order is hereby granted prohibiting/restraining the Respondent or their agents from interfering with the applicants possession of demised premises located on LR NO 209/136/131 Kirinyaga Road Nairobi known as Saruki House without following the provisions of a controlled tenancy in accordance with Cap 301 Laws of Kenya.

3. That the pleadings/application be served on the Respondents.

4. That the Respondent do file a response within twenty (21) days from the date hereof.

5. That the matter be mentioned on 17th September 2020”.

These are the orders which were in force in January 2021.

34. I have gone through the supporting affidavits of Robert Njororo Michuki and I find that he has not enumerated what steps the Respondent has taken in contravening order No. 2 of the said orders. It is not in dispute that one Rachel Wahito visited the premises in January 2021. However, the applicants have failed to satisfy the court of the actions she undertook in disobedience of the said orders.

35. The applicants have failed to place any material before this court to show that the said Rachel Wahito has interfered with their peaceful use and possession of the suit premises. It is also worth noting that the applicants have enumerated acts allegedly committed by the said Rachel Wahito. They have however not stated the acts committed by the other alleged contemnors Benson Kibugi Rihuu, Esther Nyambura Rihuu and Gladys Kabura Rihuu yet they seek that they be cited for contempt.

36. In the case of **Justus Kariuki Mate & Another vs Martin Nyaga Wambora, Civil Appeal No 24 of 2015** the Court of Appeal held that:-

“It is important that the court satisfies itself beyond any shadow of doubt that the person alleged to be in contempt committed the act complained of with full knowledge or notice to the existence of the order of the court forbidding it. The threshold is quite high as it invokes possible deprivation of a person's liberty.”

I find that the applicants have failed to demonstrate that the Respondent's directors have willfully disobeyed the orders of this court issued on 21st August 2020.

37. In conclusion I find no merit in this application and the same is dismissed with no orders as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED IN NAIROBI ON THIS 23RD DAY OF SEPTEMBER 2021.

.....

L. KOMINGOI

JUDGE

In the presence of:-

Mr. Lingiri for Mr. Michuki for the Applicants

No appearance for the Respondent

Steve - Court Assistant