



Wakati Limited v Tiriki Electronic Limited (Miscellaneous Application 75 of 2019) [2021] KEELC 4751 (KLR) (28 October 2021) (Ruling)

Wakati Limited v Tiriki Electronic Limited [2021] eKLR

Neutral citation: [2021] KEELC 4751 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
MISCELLANEOUS APPLICATION 75 OF 2019**

**JO MBOYA, J
OCTOBER 28, 2021**

BETWEEN

WAKATI LIMITED APPLICANT

AND

TIRIKI ELECTRONIC LIMITED RESPONDENT

RULING

Introduction

1. The Applicant herein has filed the Notice of Motion Application dated 2nd May 2019, in respect of which same seeks the following Reliefs;
 - i.(Spent)
 - ii.(Spent)
 - iii. The honourable court be pleased to issue summons compelling Joseph Muchoki Mugo and Robison Mugo Muchoki, who are the Directors of the Respondent, to personally attend court herein to show cause why they and the Respondents should not be punished for contempt of the Business Premises Rent Tribunal Order dated 3rd April 2019.
 - iv. This honourable court be pleased to cite and find that the Respondent and Joseph Muchoki Mugo and Robison Mugo Muchoki and any other Director of the Respondent are in contempt of Business Premises Rent Tribunal Order dated 3rd April 2019.
 - v. This honourable court be pleased to summon and punish for contempt the following, Tiriki Electronics Limited, its directors, namely Joseph Muchoki Mugo and Robison Mugo



Muchoki and any other director of the Respondent for contempt Business Premises Rent Tribunal Order dated 3rd April 2019.

- vi. This honourable court be pleased to commit to civil jail for such period as the court may deem fit the following contemnors, Tiriki Electronics Limited, its directors, namely Joseph Muchoki Mugo and Robison Mugo Muchoki and any other director of the Respondent for contempt Business Premises Rent Tribunal Order dated 3rd April 2019.
 - vii. Costs of the application be borne by the Respondents.
2. The subject application is based and/or founded on various grounds which have been enumerated at the foot thereof and the application is further supported by the affidavit of one George Muinde Mwangangi, sworn on the 2nd May 2019, and to which the deponent has attached a total of four annexures.
 3. Upon service of the subject application, the Respondent herein entered appearance and thereafter filed a Replying affidavit through one Joseph Muchoki Mugo, sworn on the 9th July 2019, wherein the Deponent has disputed the allegations and/or averments of the Applicant.

Deposition by the parties

The Applicant's Case

4. Vide the supporting affidavit, sworn on the 2nd May 2019, the applicant contends that same proceeded to and commenced proceedings before the Business Premises Rent Tribunal, culminating into the issuance of orders, whereby the Respondent was restrained and/or prevented from demolishing, interfering with the lease of the tenant and/or taking over the applicant's sub-tenant in respect of LR No 209/2464, Kenwood House, Kimathi Street, Nairobi.
5. It is the applicant's further position, that upon the issuance of the orders under reference, same were duly extracted signed and sealed and besides same were served upon the Respondents.
6. On the other hand, it is also the applicant's case that the orders in question, which were issued on the 2nd April 2019, were issued in the presence of the Respondents. In this regard, the applicant thus avers that the Respondent was duly aware of the terms of the court order.
7. The applicants further avers that despite being aware of and having been served with the orders of the tribunal, the Respondents by itself and her directors, proceeded to and indeed demolished the suit premises.
8. Owing to the foregoing, the Applicant has thus contended that the actions of the Respondent herein, amounts to Contempt of court and consequently the Respondents and her directors ought to be punished.

The Respondent's Case

9. On her part, the Respondents through one Joseph Muchoki Mugo has sworn a Replying affidavit, sworn on the 9th July 2019, in respect of which the Deponent avers that the Applicant herein was never an occupant and/or a tenant in respect of the property otherwise known as LR No. 209/2462, Kenwood House, Nairobi.
10. On the other hand, the Respondent has further contended that the structures which are complained of and which found the basis of the subject application were actually constructed on the pavement



and thus were standing on the public space belonging to and under the control of the City County Government of Nairobi and not the Respondent.

11. It is the Respondent further averment, that the structures complained of and which in any event did not fall within LR No. 209/2462, were actually pulled down by the City county Government of Nairobi and not otherwise.
12. Besides, the Respondent has also averred that the Applicant herein is lying on oath by saying that the orders of Business Premises Rent Tribunal were issued in the presence of the Respondent, yet it is clear on the face of the orders, that same were issued ex-parte and during the presence of the Applicant only.
13. Finally, the Respondent has also averred that the orders which have been alluded to by the Applicant, were never served on either the Respondent or any of the Directors of the Respondent.
14. In a nutshell, the Respondent has thus implored the court to find and hold that the contempt application is mischievous and does not Disclose any reasonable cause of action.

Submissions by the Parties

15. The subject Application came up for hearing on the 14th May 2019, whereupon the honourable court issued directions pertaining to and/or concerning the hearing and disposal of the Application. For clarity, it was ordered and/or directed that the same shall be heard and disposed of by way of written submissions.
16. Pursuant to and in line with the directions of the court, the Applicant proceeded to and filed written submissions on the 3rd July 2019. Besides, the Applicant also referred to and attached various case law in support of the submissions.
17. On the other hand, the Respondent herein filed two sets of written submissions, the first of which was filed on the 31st July 2019, and the latter submissions were filed on the 7th July 2021.
18. I have read and/or perused the written submissions and the authorities attached by the respective parties.

Issues for Determination

19. Arising from the various pleadings, affidavits and submissions filed by the parties herein, the issues that arise for Determination are as hereunder;
 - i. Whether the orders of the tribunal were issued in the presence of the Respondent.
 - ii. Whether the Respondent was duly served with the orders of the Tribunal.
 - iii. Whether the Respondent and her directors have disobeyed the orders of the Business Premises Rent Tribunal and whether the Respondent should be punished for contempt of court.

Issue Number One

Whether the orders of the tribunal were issued in the presence of the Respondent

20. The Applicant herein, at paragraph 9 of the Supporting Affidavit has stated and/or contended that the orders of the Business Premises Rent Tribunal issued on the 3rd April 2019, were made in the presence of the parties and that same were duly re-served upon the Respondent herein.



21. On the other hand, the Respondent through the Replying affidavit have denied and/or disputed the allegations that the said orders were issued and/or otherwise made in the presence of the Respondent and/or the respondents directors.
22. In fact, the Respondent has further contended that the allegation by and/or at the instance of the Applicant herein, which suggest that the orders were made in the presence of the parties, is misleading, false and erroneous. In this regard, the Respondent has contended that the Applicant is thus guilty of perjury.
23. On my own account, I have looked at the order which was issued on the 2nd April 2019, though extracted on the 3rd April 2019, and I have confirmed that the said order was issued in the presence of Mr. Kurauka, Advocate for the Applicant/Tenant only. For clarity, there is no evidence that the Respondent or her directors was present at the time of issuance of the said orders.
24. As pertains to the circumstances under which the said orders were issued and who were present, it is common ground that the Applicant and her counsel were present. In this regard, it is a deliberate lie for the Applicant and in particular the deponent of the supporting affidavit to allege that the order was made in the presence of the Respondent or any of the Respondent's directors.
25. Having found and held, that the orders under reference were only made in the presence of the Applicant, it is thus obvious that the Deponent of the Supporting Affidavit on behalf of the Applicant has therefore lied on oath and on this account only, the entire Application should be declined.
26. Notwithstanding the foregoing, the question then that arises is, if the Applicant can lie on such a basic and elementary issue, which is obvious to the eye, then how much more would the Applicant lie on the complex issues, which include Disobedience.
27. In my humble view, a party who chose to lie on mundane issues cannot be trusted to speak the truth on anything. In this regard, I find and hold that the Applicant herein is devoid of candor and has committed perjury, which in its self is a criminal offense and should attract criminal prosecution as against the Deponent of the supporting affidavit sworn on the 2nd May 2019.
28. In support of the foregoing observation, I take guidance from the Decision in the case of *David Omwenga Maobe v Republic* (2015) eKLR, where the honourable court observed as hereunder;

“The upshot of this evidence therefore is that the petitioner lied under oath to aid him n getting judgment in the suit at the High Court in 2009.

If the perjury proceedings were to proceeding to conclusion and the accused- the petitioner- were convicted but quashed by the order of this court, who is the aggrieved person vis-à-vis the Land Parcel No. Transmara/Osinoni/49. At the centre of this perjury is the proprietary interest in the above parcel of land. Perjury subverts and perverts public justice system and is abhorred. The perpetrator of perjury must be stopped if the public justice system were to retain credibility.”
29. Be that as it may, it is my firm finding and holding that the orders of the Business Premises Rent Tribunal issued on the 2nd April 2019, were not issued in the presence of the Respondent or any of her directors.



Issue Number Two

Whether the Respondent was duly served with the orders of the Tribunal.

30. To the extent, that the orders issued on the 2nd April 2019, were Neither issued in the presence of the Respondents nor her directors, it was therefore incumbent upon the Applicant to serve and/or re-serve the said orders upon the Respondents. For clarity, it is only then that the Respondents would have become aware of the existence of the said orders and thus be bound by the terms and/or tenor of the said orders.
31. According to the Applicant, the said orders were re-served upon the Respondents and in this regard, the Applicant has exhibited an affidavit of service sworn on the 5th April 2019, wherein the Applicant contends that service was effected upon one, Mr. Kamau, who is said to have been the Respondent's caretaker.
32. Before venturing to address the propriety of the affidavit of service and whether service on a caretaker, can constitute service on a company, to warrant contempt proceedings, it is important to take note of who is the Respondent alluded to in the affidavit of service.
33. As pertains to who is the Respondent, who was allegedly being served, it is imperative to reproduce some paragraph of the affidavit of service, namely paragraph 2 & 3 which state as hereunder;

“ Para 2: that on the 4th April 2019, I received copies of an order dated 2nd April 2019, coming up on 21st May 2019, at 9:00 am from M/s Karauka & Company Advocates with instruction to effect service upon Tiriki Electronics Limited, the Respondent landlord herein.

Para 3: that on the same day at around 11:30 am I proceeded to Kenwood House, along Kimathi street where the offices of Tiriki Electronics Limited are situated.”
34. It is also worthy to take cognizance of the fact that the Respondent/landlord whose details appear on the phase of the order of Business Premises Rent tribunal is known as Tiriki Electronics Limited.
35. The question that arises for determination herein, is whether Tiriki Electronics Limited, Tiriki Electronics Limited and Tiriki Electronic Limited, the latter who is the Respondent refer to one and the same legal entity.
36. In any event, it is also common knowledge that the three names, which I have alluded to, could very well refer to three different and distinct companies. However, on this account it would have required the requisite search from the registrar of companies to either confirm as much or otherwise.
37. I must also point out, that the court orders of the Business Premises Rent Tribunal appear to have been sought for and obtained against M/s Tiriki Electronics Limited, yet the current Respondent Tiriki Electronic Limited.
38. In my humble view, my attention has not been drawn to any court order, which was obtained and/or issued against the Respondents herein, and which order could thus be served upon the current Respondent.
39. Notwithstanding the foregoing, it is common knowledge that service on a body corporate, namely a limited company, can only be effected by serving the directors, company secretary and/or such other principal officers of the companies. In this regard, service on a caretaker, whatever the terminology means, whether sweeper, messenger and/or store man cannot amount to service, whatsoever.



40. In my humble view, even assuming that alleged Mr. Kamau, upon whom service was effected, was a caretaker of the Respondent herein, which I am afraid he was not, (given that the Respondent alluded to in the body of the affidavit of service is Tiriki Electronics Limited), such service would be a nullity.
41. For purposes of discerning on how a company can be served, a reproduction of the provisions of Order 5 rule 3 of the *Civil Procedure Rules*, 2010, would suffice and/or go along way in underlining the recommended scheme of service.
42. For the avoidance of doubt, the said provision states as hereunder;
- “Subject to any other written law, where the suit is against a corporation the summons may be served—
- (a) on the secretary, director or other principal officer of the corporation; or
- (b) if the process server is unable to find any of the officers of the corporation mentioned in rule 3(a)—
- (i) by leaving it at the registered office of the corporation;
- (ii) by sending it by prepaid registered post or by a licensed courier service provider approved by the court to the registered postal address of the corporation; or
- (iii) if there is no registered office and no registered postal address of the corporation, by leaving it at the place where the corporation carries on business; or
- (iv) by sending it by registered post to the last known postal address of the corporation.”
43. In my humble view, if the Applicant herein was seriously keen to effect service of the court process, including the court order upon the Respondent or any of the organizations bearing the other titles referred to, it was incumbent upon the Applicant and the nominated process server to abide by the provisions of the law.
44. Unfortunately, the Applicants Advocates and the nominated process server, throw caution to the wind and adopted an approach, which is not known to law, including serving a person that is not authorized to receive such process.
45. From the foregoing paragraph, it must have become evident that no service was effected upon the Respondent herein and/or her directors to warrant the summons, citation and/or punishment, in the manner sought by the Applicant.

Issue Number Three

Whether the Respondent and her directors have disobeyed the orders of the Business Premises Rent Tribunal and whether the Respondent should be punished for contempt of court.

46. As pertains to whether or not the Respondent herein, has disobeyed the orders of the Business Premises Rent tribunal issued on the 2nd April 2019, it is worthy to take into account, the nature of the action which is stated to constitute and/ or amounts to contempt.



47. Before addressing the issues as to whether there has been contempt, it is worthy to Reproduce the text of the orders that were issued and same is reproduced as hereunder;

“The landlord is prevented from demolishing, interfering with lease of the tenant and/or taking over the Applicant/sub-tenant in respect of LR No. 209/2464, Kenwood House, Kimathi Street, Nairobi, pending the hearing and determination of this case”

48. On the other hand, when the Respondent herein was served with the subject Application same filed a Replying affidavit in respect of which paragraph 2 and 3 thereof are pertinent. Suffice it to Reproduce the said paragraphs as hereunder;

“Para 2: that in answer to contempt to the court application, I wish to state that the applicant herein, were cuty Ltd, was not an occupant and/or a tenant in respect of any space on LR No. 209/2462- Kenwood House, Nairobi when Tiriki Electronics Limited bought the property.

Para 3: that the Applicant structures were not within LR No. 209/2462. As a matter of fact, those structure were on the pavement which is a public space which falls under the control of Nairobi County Government and same were pulled down by Nairobi County Government.”

49. From the foregoing paragraphs, what comes out is that there exists two separate and distinct separate parcels of land, namely LR No. 209/2462 captured in the court order and LR No. 209/2462, alluded to in the Replying Affidavit.

50. The question then is, were the offensive activities, if at all carried out and/or undertaken in respect of the property alluded to in the court order or were they taken out in the property alluded to in the Replying affidavit, but which appears to be a separate and distinct parcel.

51. Assuming, that the demolitions were carried out in respect of LR No. 209/2462, which was not the subject of the court proceedings, would the actions, if any, amount to contempt of court.

52. Surely, there is a serious doubt as to the premises to which the Applicant herein alleges contempt. In my humble view, it was incumbent upon the Applicant to get her facts right, which is not the case.

53. Notwithstanding the foregoing, there is also the averment that the structures which the Applicant is complaining against, were actually sitting on a pavement and that same were removed and/or demolished by the City County of Nairobi officers and not the Respondent.

54. This averment, is contained in the Replying affidavit and ought to have been controverted. However, there is no supplementary affidavit to impeach and/or to controvert the said averments. Consequently, the said averments stands out and must be taken as the truth.

55. In the premises, if the action complained of was taken by the City County of Nairobi, pursuant to and in line with its mandate under the *physical and land use Act*, 2019, can the Respondent be held answerable?.

56. I am afraid that the answer is in the negative. At any rate, if the Applicant has any claim and/or complaint, such a complaint can only be directed against City County of Nairobi.

57. In my humble view, a court of law shall be prepared to punish for contempt, but before the court can exercise such a mandate, the Applicant must prove contempt to the requisite standards, which has been



stated to be the intermediate standards, that is the standards above balance of probability, but below beyond reasonable doubt.

58. In support of the foregoing observation, I reiterate the position of the law as aptly captured in the Decision in the case of *Katsuri Limited v Kapurchand Depar Shah* [2016] eKLR, where the Honourable Court had this to say;

“Contempt proceedings are quasi-criminal in nature and since the liberty of a person is at stake, the standard of proof is higher than in civil cases.”

59. If further emphasis was necessary as pertains on the standards of proof applicable in contempt proceedings, it would be necessary to fall back to the Decision in the case of *Gatharia K. Mutikika v Baharini Farm Ltd* (1985) eKLR 227, where it was held as follows:-

“The Courts take the view that where the liberty of the subject is, or might be involved, the breach for which the alleged contemnor is cited must be precisely defined. A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be satisfactorily proved... I must be higher than proof on a balance of probabilities, almost, but not exactly, beyond reasonable doubt. The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to offence, which can be said to be quasi-criminal in nature. However, the guilt has to be proved with such strictness of proof as is consistent with the gravity of the charge... Recourse ought not be had to process of contempt of court in aid of a civil remedy where there is any other method of doing justice. The jurisdiction of committing for contempt being practically arbitrary and unlimited, should be most jealously and carefully watched and exercised with the greatest reluctance and the greatest anxiety on the part of judges to see whether there is no other mode which is not open to the objection of arbitrariness, and which can be brought to bear upon the subject. A judge must be careful to see that the cause cannot be mode of dealing with persons brought before him. Necessary though the jurisdiction may be, it is necessary only in the sense in which extreme measures are sometimes necessary to preserve men's rights, that is, if no other pertinent remedy can be found... Applying the test that the standard of proof should be consistent with the gravity of the alleged contempt..... it is competent for the court where a contempt is threatened or has been committed, and on an application to commit, to take the lenient course of granting an injunction instead of making an order for committal or sequestration, whether the offender is a party to the proceedings or not.”

60. Before I depart from the issue of proof of whether or not contempt was committed by the Respondents, it is worthy to take note of the photographs, which have been exhibited by the Applicant herein as the basis of the offensive demolition, which were carried out by the Respondent.
61. I must confess that looking at the photographs, it is not possible to discern where, when and by whom the same were taken. In any event, the date when same was taken has also not been shown.
62. In my humble view, the photographs which have been annexed to the supporting affidavit and upon which the court called upon to find that the Respondent was guilty of contempt, are clearly devoid of any probative value.
63. As if that was not enough, the Applicant and/or her counsel was obliged to avail and/or exhibit an Electronic certificate in accordance with Section 106 (A) and 106 (B) of the *Evidence Act* Cap 80 laws



of Kenya, but no such certificate was supplied and/or availed. In this regard, the photographs, which are no doubt electronic records, have no legal standing for purposes of sustaining the Applicants case.

64. In support of the foregoing observation, I take guidance from the Decision in the case of *Republic v Barisa Wayu Matuguda* [2011] eKLR, where the Honourable Court held as hereunder;

“ . . . any information stored in a computer. . . which is then printed or copied. . . shall be treated just like documentary evidence and will be admissible as evidence without the production of the original. However, section 106B also provides that such electronic evidence will only be admissible if the conditions laid out in that provision are satisfied.

The court went on that:

This provision makes it abundantly clear that for electronic evidence to be deemed admissible it must be accompanied by a certificate in terms of section 106B (4). Such certificate must in terms of S.106B (4) (d) be signed by a person holding a responsible position with respect to the management of the device.... Without the required certificate this CD is inadmissible as evidence.”

65. In the premises, I must say that there is no credible evidence that has been placed before the court to find and hold that acts complained of, were carried out by the Respondents, either in the manner alleged or at all.

Final Disposition

66. The Burden of proving that contempt was committed on behalf of the Respondents laid on the shoulders of the Applicant.

67. In any event, the Proof was to be carried out to the standard that is established and it is now trite. For clarity, the standard is beyond the balance of probability.

68. However, in respect of the subject matter, the Applicant has failed to Discharge the Burden of proof and in this regard the Notice of Motion Application dated the 2nd May 2019, cannot succeed.

69. In the end, the Notice of Motion Application dated 2nd May 2019, be is and is hereby Dismissed with costs to the Respondents.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF OCTOBER 2021.

HON. JUSTICE OGUTTU MBOYA

JUDGE

ENVIROMENT AND LAND COURT.

MILIMANI

In the presence of;

June Nafula Court Assistant

Mr.Karauka for the Applicant.

Mr. Kan'gata for the Respondent

