



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CIVIL CASE NO. 576 of 2016

SOPHINAH KALONDU MBITI.....PLAINTIFF

VERSUS

ARUN MAHENDRA ADALJA.....1ST DEFENDANT

KIRAN HIRJI SHAH.....2ND DEFENDANT

HIRJI LALJI SHAH.....3RD DEFENDANT

RAJNI SHAH.....4TH DEFENDANT

RULING

1. Coming up for ruling is a Notice of Motion application dated 23rd April 2021 by the 1st Defendant which seeks the following orders:

i. Spent

ii. That this Honourable Court do find Sophinah Kalondu Mbiti herein in contempt of this Hon. Court for wilful and deliberate disobedience of the orders made by the Honourable Justice E. O. Obaga on 1st February 2018.

iii. That this Honourable Court do find Sophinah Kalondu Mbiti herein in contempt of this Hon. Court for wilful and deliberate obstruction and failure to obey and give effect to the order made by the Hon. Justice B. M. Eboso on 31st day of October 2019.

iv. That Sophinah Kalondu Mbiti be committed to civil jail until such time as she purges and abates her contempt of the orders made by this Hon. Environment and Land Court of the 1st February 2018 and 31st October 2019.

v. That Sophinah Kalondu Mbiti do forthwith by herself and /or agent(s) and /or manager(s) stop and desist from receiving rent, income or any payment on account of any one or other of the properties that is to say (i) house number 22 Jambo Prestige Villas (ii) house number 6 Marble Valley (iii) House number 10 Clifton Villas and (iv) house number 19 Rosslyn Garden Estate.

vi. That Sophinah Kalondu Mbiti do by the date fixed by this Hon. Court deposit all rents received between 1st February 2018 and the date hereof to the Land and Environment Court Milimani Law courts Nairobi by interbank transfer to a bank account nominated by the Hon. Registrar of the Environment and Land Court.

vii. That Sophinah Kalondu Mbiti do forthwith and not later than the date fixed by this Hon. Court provide M/S Lloyd Masika Limited with a schedule containing the complete name, address and phone numbers of each and every one of the tenants now in occupation of the four properties hereinabove and file a copy thereof in this suit.

viii. That Sophinah Kalondu Mbiti do forthwith and within the time fixed by this Hon. Court file in court and serve on the applicant herein complete true and accurate accounts in respect of each (i) house number 22 Jambo Prestige Villas (ii) house number 6 Marble Valley (iii) House number 10 Clifton Villas and (iv) house number 19 Rosslyn Garden Estate the subjects of the orders made on the 1st February 2018 and 31st October 2019 from the 16th January 2016 to the date hereof hereinafter the said accounts to include inter-alia the following documents:

a) Copies of the lease made in respect of each of the properties and a schedule stating the dates of the commencement and termination of each lease covering the said period whether made orally or in writing;

- b) The names, addresses, phone numbers, mobile phone numbers and emails of each and every tenant over the said period;***
- c) A schedule containing a statement of all the rents and other income received for each of the properties over the said period;***
- d) A schedule of the rents received in each and every month over the said period;***
- e) A list of the bank and/ or banks including the branch of the bank and account number(s) receiving deposits/ payments of the rents and other income over the said period;***
- f) Each and every one of the bank statements issued by bank and /or their respective branches where the respondent maintains an account or accounts including fixed deposits for the said period;***
- g) A list of the Commercial Bank and / or banks or other financial institution(s) where accounts have been maintained by the Respondent for the receipt and / or deposit of rents and income and for the purpose of making out payments in respect of the said four properties over the said period;***
- h) Evidence of payment of land rents and rates and other outgoings and disbursements or payment made out in respect of each of the properties for the years 2016, 2017, 2018, 2019, 2020 and 2021.***
- i) Evidence of the payment of income tax in respect of the income from the four properties in each of the years 2016, 2017, 2018, 2019, 2020 and 2021.***
- j) Any further or other orders the Hon. Court deems appropriate to ensure compliance by the respondent with the orders aforesaid having regard to all the relevant circumstances.***

2. The application supported by the sworn affidavit of Arun Mahendra Adalja (1st Defendant/Applicant) dated 23rd April 2021 is premised on grounds that the plaintiff was in contempt of court for ignoring, refusing and failing to implement the court order dated 1st February 2018 and should be compelled to comply and be committed to civil jail to mitigate loss suffered by him. The Applicant has also sworn further affidavits dated 20th September 2021 and 3rd November 2021. He contends that in year 2020, he learnt that the suit properties were not being managed by the receiver manager Lloyd Masika Ltd as had been agreed and ordered by the court. That the plaintiff had reached out to some tenants and instructed them not to pay rent to the receiver manager. He also indicated that the plaintiff had not been candid on the expenses and tenancy periods of some tenants and after they engaged an auditor to audit the plaintiff's documents, he filed a report which questioned some of the expenses and receipts.

3. The 1st Defendant stated that the excuse given by the Plaintiff that handover was not effected due to the Covid19 pandemic was false since the pandemic hit the country in March 2020 and the court order was issued in October 2019, 5 months prior. He added that he was committed to seeing the suit expedited and would attend hearings should Covid-19 regulations permit. He indicated that should the court not come to aid the situation, then he would suffer great loss should he be successful in the suit adding that the plaintiff was continuing to benefit from rental income of the house at Rosslyn Gardens to his detriment.

4. Robert Mabeya who is a Certified Public Accountant (K), swore an affidavit dated 18th September 2021 averring that from the documents produced by the Plaintiff, he had concluded that some documents might have been falsified for reason that: the accounts had not been audited; documents in support of repairs and maintenance of the properties were not legal documents; legal and audit fees were unsupported by invoices; amount utilised for food, entertainment, fuel, clothing, shelter and miscellaneous was unsupported and unjustified.

5. In another affidavit by Sytanslauce Weche, a Court Process Server, dated 17th September 2021 and 5th November 2021, he stated that on 16th September 2021 accompanied by Mr. Kioko of Lloyd Masika Ltd and Mr. Robert Mabeya, they went to House number 19 Rosslyn Gardens Estate to serve the court orders dated 1st February 2018 and 31st October 2019 but the guards indicated that Ms. Sophinah (the plaintiff) had instructed them not to allow any guests into the compound unless approved by her or the tenant. He averred that he spoke to the plaintiff and she asked him to get in touch with her advocate who after getting in touch with him also referred her to the plaintiff. He indicated that as such, Lloyd Masika had been unable to take over management of that property.

6. The Plaintiff opposed the application vide her affidavits dated 19th July 2021 and 14th October 2021 where she contends that the application is an attempt to delay the hearing of the main suit noting that the interlocutory order was granted more than 3 years ago on 1st February 2018.

7. The Plaintiff further stated that she had complied with all the court orders as directed on 1st February 2018 and 31st October 2019 and that the 1st Defendant was making false accusations in stating that she had failed to comply with order number 8 of the court order dated 1st February 2018. She stated that all the 4 properties were under the management of Lloyd Masika Ltd, highlighting that Lloyd Masika Ltd had sought to enforce payment of rent by way of distress for the Rosslyn Property which would have been impossible to do if they were not managing the said property.

8. She indicated that she had no control over the security guards and considering that the Applicants had averred that they were able to convince the guards manning the three out of four properties to gain access, then they should have done the same for the fourth property.

9. The Plaintiff also stated that she had complied with the order to file a true and complete account of income and expenditure from 2016 and

that the original receipts were available for inspection.

10. The Plaintiff also deponed that Robert Mabeya and Sytanslauce Weche were strangers to the proceedings and their affidavits should be struck off the record.

11. This matter was to be canvassed by way of written submissions. None were however filed in the court's digital platform (CTS) as directed by the court.

Analysis and Determination

12. Having considered the application and affidavits together with the relevant legal framework and the prevailing jurisprudence, I frame the issues for determination as:

a) Whether the Plaintiff is in contempt of court orders dated 1st February 2018 and 31st October 2019.

b) Whether the Plaintiff should stop collecting rent and managing the suit properties.

c) Whether the Plaintiff should give an inventory of the management of the suit properties and deposit the rent collected as outlined in the application.

d) Whether the affidavits sworn by Robert Mabeya and Sytanslauce Weche should be struck out.

13. The 1st defendant claims that the Plaintiff should be held in contempt and committed to civil jail on grounds that she has failed to adhere to the court orders cited below and continues to take rent of House No. 19 Rosslyn Gardens which ought to be among the four houses under the management of Lloyd Masika Ltd. The Plaintiff countered this averment stating that in December 2019 a letter was sent to all the tenants informing them that from January 2020, Lloyd Masika Ltd would be in charge of collecting rent and managing the properties as per the court orders.

14. The court orders being referenced are as follows:

1). The order by Justice E. O. Obaga dated 1st February 2018:

“ORDER

IT'S HEREBY ORDERED

5. That pending the hearing and determination of this suit in respect of the Estate of the late Dr. Mahendra Krishanalal Adalja, the plaintiff and the defendant or their agents are restrained by way of injunction, from alienating, selling, transferring, charging or in any way interfering with the following properties:

a. Horombo Villa Number 19 Rosslyn gardens L.R No. 28431 (Original 18/31)

b. Town House Number 22 Jambo Prestige LR No. 1870/III/550 Westlands.

c. Town House Number 6 LR No. 7158/505 Marble Valley.

d. Clifton Villas (K III) LR 7158/608.

6. That a manager to be identified by the plaintiff and the first defendant is hereby appointed to manage the properties listed in No. 5 hereinabove to receive rent and income and to pay out all outgoing including land rent, rates and service charges, carry out all necessary repairs and maintenance and to render an account to this court until determination of this suit...

8. That the plaintiff do provide to this Court true copies of each and every lease in respect of of each of the properties listed in No. 5 above and a true and complete account of all receipts of rent/ income in respect of each of the aforesaid properties from 14th January 2016 until the date of appointment of manager contemplated in No. 6 hereinabove.

2). The order issued on 31st October 2019 by Justice B. M. Eboso reads:

“AMENDED ORDER

IT IS HEREBY ORDERED BY CONSENT:

1. That pending further orders, M/S Lloyd Masika Limited are hereby appointed receivers and managers of the properties identified in Order 5 and 6 of the Court Order made on 1st February, 2018.

2. ...”

15. It has been stated time and again that court orders are not issued in vain and should be respected. Otherwise, if parties were at liberty to decide which orders to adhere to and which ones to flout, then there would be no need to invoke courts in adjudication of cases. The Court of Appeal in Fred Matiangi the Cabinet Secretary, Ministry of Interior and Co-ordination of National Government v Miguna Miguna & 4 others [2018] eKLR held that:

“When courts issue orders, they do so not as suggestions or please to the persons at whom they are directed. Court orders issue ex cathedra, are compulsive, peremptory and expressly binding... This Court, as must all courts, will deal firmly and decisively with any party who decides to disobey court orders and will do so not only to preserve its own authority and dignity but the more to ensure and demonstrate that the constitutional edicts of equality under the law, and the upholding of the rule of law are not mere platitudes but present realities.”

16. From the documents produced by the Plaintiff, the court notes the following:

i. There is an email communication (to be found on Exhibit Annex 2) from Mr. Gragan Hayer tenant House 6 Marble Valley to the plaintiff's lawyer and Lloyd Masika (among others) dated 14 June 2021 in which he states that he is unsure to whom he should remit his rent to. In another email dated 28th May 2021 to Lloyd Masika he indicated that he had received a call from Sophinah Mbiti instructing him to pay the rent to her directly failure to which, they would be in breach of tenancy agreement and may result to their eviction.

ii. There is a letter dated 17th December 2019 from the plaintiff's lawyer (to be found as Annex A4) addressed to all tenants of the suit properties indicating that from January 2020 the properties are to be managed by Lloyd Masika Ltd and as such rent payable should be paid to them.

iii. Another letter dated 2nd March 2021 from the plaintiff's advocate to Lloyd Masika Ltd (Annex A4) stating, “... needless to state but it is important that any our approach to the tenants does not make them uncomfortable to continue with the tenancies.”

iv. On 7th March 2020 (AnnexA5), the advocate for the 1st defendant wrote a letter to Lloyd Masika asking whether they had taken over management of the properties and also followed up with another letter dated 14th October 2020 (AnnexA6) asking for a response on this inquiry.

v. Vide a letter dated 26th November 2020, (Annex A7) Lloyd Masika Ltd indicated that they had been unable to take over the properties citing that the plaintiff and her advocates did not organise a joint inspection to introduce them to the tenants neither did they give them the tenant's telephone numbers.

vi. On 1st December 2020 (Annex A8) the plaintiff's advocate in response to Lloyd Masika Ltd letter dated 26th November 2020 stated that they had formally introduced the receiver/managers to the tenants adding that 3 tenants had vacated the premises and the other one in occupancy had no lease agreement.

17. From the documents produced by the 1st Defendant, I note the following:

i. There is a letter dated 14.1.2020 (AMA5 found in the affidavit of Arun Mahendra sworn on 20.9.2021) authored by D. K. Machua of Lloyd Masika to E. K. Mutua, Advocates for the Plaintiffs where they state as follows:

“your letter dated 17.12.2019 addressed to all tenants. We need someone to introduce us to the properties so that we can formally introduce ourselves to the tenants. We also need copies of the leases or letters of offer to enable us bill the tenants.”

ii. There is a letter dated 26.11.2020 (AA4 in the replying affidavit of Arun Mahendra sworn on 3.11.2021) where D.K. Machua of Lloyd Masika is writing to A. Rebelo, Advocates for 1st Defendants informing the later that they were unable to take over the properties as both Sophina Kaludu and her advocate did not organize a joint inspection to introduce them to the tenants.

iii. There is a letter dated 1.12.2020 by Eric Mutua Advocates (AA1 in the Affidavit of Aaron Mahdra sworn on 3.11.2021) where they explain that their letter dated 7.12.2019 amounted to a formal introduction to the tenants.

iv. There is the last document found in the affidavit sworn on 3.11.2021 of Arun Mahendra where there is an email communication between Lambert Kioko of Lloyd Masika to D. K.Machua of Llyod Masika where Kioko is explaining that they had managed to visit the properties at Shanzu road with Mr. Mabeya and Mr. Weche where they had instructions to take pictures of the structures and compound. Mr. Kioko further explained that they did not manage to access Rosslyn Garden – united nations house nor take pictures therein and when Mr. Weche called Sophina Kalundu to talk to the guards to allow them access to the premises, Sophina declined saying that her lawyer Eric Mutua was to be consulted. This email communication is dated 16.9.2021.

v. Still on the same affidavit of 3.11.2021, there is the document marked AA3 which is a letter from D.K. Machua of Lloyd Masika addressed to Mr. Kausnik of Clifton Villas House No. 10, where Lloyd Masika is engaging the said tenant on various tenancy issues including rent payment.

18. From the chronology above, I discern that the Plaintiff was reluctant to let go her control of the suit properties. Despite the letter of 17.12.2019 authored by Mr. Eric Mutua, advocate for the Plaintiff indicating that Lloyd Masika would be managing the properties, it is quite clear that the plaintiff remained actively involved one way or the other in managing the suit properties.

19. If the Plaintiff had really set out to comply with the court orders mentioned herein, what was so difficult in stating so in a clear and concise manner. Why bhang in an almost 700 pages of annexure documents which don't speak rationally and coherently to her sworn affidavits. I am not persuaded by the letter of 17.12.2019 by her advocate that this amounted to compliance with the court orders. There are tell tale signs running throughout the take over process which indicate that the Plaintiff did not relinquish the management of the properties in a smooth harmonious manner as envisaged in the court order. For instance in paragraph 15 of her affidavit of 14.10.2021, the plaintiff states that she found it odd and strange that the 1st Defendant's agents would wake up on a certain date without notice to a tenant then decide to visit the premises. That in such a situation, they cannot be heard to complain that they were denied access. That a tenant is entitled to privacy and quiet possession and that in this instance, Mr. Weche and Mr. Mbeya went to the premises with 6 men which was taken with suspicion by the guards. The contents thereof actually buttresses the averments made by Weche to the effect that they were denied access in one of the properties upon instructions by the plaintiff. This also resonates with the email communication between Lambert Kioko and D K Machua both of Lloyd Masika where the issue of denial of access to one of the suit premises, Rosslyn Garden is captured.

20. In paragraph 6 of the Plaintiff's affidavit of 6.7.2021, she avers that Lloyd Masika had taken over 3 out of the 4 suit premises without stating why the take over of that 4th premises was not done. In paragraph 11 of the affidavit of the Plaintiff dated 14.10.2021, she contends that she could not have allowed the premises to go to waste before the take over by Lloyd Masika.

21. In the Plaintiff's own documents captured herein in paragraph 16 i & iii of this ruling it is quite clear that the interference of the suit properties by the Plaintiff was taking place as recent as the months of March and June this year of 2021.

22. This is a situation whereby the Plaintiff and her advocate are blowing hot and cold at the same time. On one hand they want the court to believe that vide the advocate's letter of 17.12.2019, plaintiff had relinquished the management of the suit premises to Lloyd Masika, but on the other hand, the plaintiff kept a hold on the management of the suit premises. She was even carrying out repairs of the suit properties in the year 2020 as discerned from the almost 700-page document!

23. Further, it is noted that there is no evidence that order 8 of 1.2.2018 on submitting a schedule of accounts had been adhered to prior to filing of the application by the 1st Defendant. The documents filed by the Plaintiff are simply a response to the application and in any event, they lack a chronological and rational order, where its difficult to align some documents to a particular issue and property.

24. This far, can the Plaintiff be held in contempt of court orders? Yes and no. Yes because for reasons given above, it becomes clear that the Plaintiff was holding onto some properties even in the course of this year, and she had not complied with the order No. 8 before the filing of the application.

25. The "No answer" comes into sharp focus upon the scrutiny of the orders of 31.10.2019. The said orders were directed upon Lloyd Masika who were to take over the management of the suit properties. If the 1st Defendant believed that Lloyd Masika were prevented in any manner in taking over the suit premises, nothing would have been easier than to request the said firm to swear an affidavit to that effect. After all, some of their personnel like D. K. Machua and Lambert Kioko (of Lloyd Masika) appear to have been intricately involved in the matter at hand. These officers were best suited to give a step by step chronology of the events leading to the take over or failure to take over the suit premises. As the matter stands now, it is evident that Lloyd Masika does have control over some of the suit premises ie see their letter to a Mr. Kausnik of Clifton Villas house no. 10 which is evidence of management control.

26. From the above analysis, it is not possible to discern when Lloyd Masika took over the management of any particular premises. What I discern is that the Plaintiff was still having control over some of the premises particularly the Rosslyn Garden property in the course of year 2021.

27. **Section 5** of the **Judicature Act** provides for the punishment of contempt of court in the following terms:

" (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 the subordinate courts" .

28. Courts have held that for a person to be cited for contempt it must be evident that the court order was deliberately disobeyed. In the Court of Appeal case of **Micheal Sistu Mwaura Kamau v Director of Public Prosecutions & 4 others [2018] eKLR** it was stated that;

"...It is trite that to commit a person for contempt of court, the court must be satisfied that he has wilfully and deliberately disobeyed a court order that he was aware of... Secondly, ... to sustain committal for contempt of court, the order of the court that is alleged to have been deliberately disobeyed must be clear and precise so as to leave no doubt as to what a party was supposed to do or to refrain from doing. Lastly, the standard of proof in committal proceedings is higher than proof on a balance of probabilities, though not as high as proof beyond reasonable doubt..."

29. The courts have on several occasions pronounced that contempt proceedings are quasi criminal in nature due to the committal to civil jail element. As such, for courts to hold persons in contempt, it ought to be crystal clear that court orders were disobeyed.

30. From the analysis herein I discern that, the court orders have been complied partially albeit way after the order dated 31st October 2019 was granted. None of the parties have however been forthright on the process of take over. It is Lloyd Masika who ought to have given a concise and precise account of when they took over, and when they failed to take over the management of each particular property.

31. On whether the Plaintiff should be estopped from collecting rent and managing any of the properties, the answer is in the affirmative since the orders of 31.10.2021 remain in force.

32. On the issue of none compliance with order no. 8 in the orders of 1.2.2018, I have already pronounced that there is no evidence of such compliance prior to the filing of the application and that the documents as filed by the Plaintiff are not helpful for want of order. However it is the finding of this court that the manner in which the Applicant has framed the prayers no. 6-8.9 is bound to create a conundrum which may derail the hearing of the main suit. It is extremely important that the parties remain focused on the substantive issue at hand which is the ownership of the suit premises. Once that issue is resolved, the other matters shall be put to rest. In that regard, it is sufficient to order the Plaintiff to comply with the orders given on 1.2.2018 without intricate elaborations which may give rise to further applications of contempt.

33. On the issue of striking out the affidavits sworn by Robert Mabeya and Sytanclauce Weche who are Certified Public Accountant and Court Process Server respectively on the grounds that they are not parties to the suit, I note that the two have deponed on the issue of accounts filed by the Plaintiff and service of the court orders to the tenants in the properties under the management of Lloyd Masika.

34. Order 19, rule 3(1) of the Civil Procedure Rules, 2010 provides that:

“Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove...”

35. Rule 6 further indicates:

“ The court may order to be struck out from any affidavit any matter which is scandalous, irrelevant or oppressive”.

36. It has not been shown how the aforementioned affidavits of Robert and Weche offend the above provisions since what is deponed in the said affidavits are issues within their knowledge. In the Court of Appeal case of Kamlesh Mansukhlal Damji Pattni v Nasir Ibrahim Ali & 2 others [2005] eKLR, it was held that;

“... In line with those principles we have examined the affidavit sworn by Muite and are satisfied that the bulk of the facts deposed to are derived from personal knowledge acquired by him in the last 7 years of existence of the suit... As we stated earlier he is possessed of the facts stated therein and secondly he has explained... The affidavit in reply in Kenya Horticultural Exporters Ltd case (Supra) was sworn by the advocate. It was however not struck out for that reason, but because the advocate could not prove all the statements of information and belief that he had stated even if he was to be cross-examined on them...” (emphasis own).

37. From the foregoing I find the affidavits in question are competent and properly before the court. However, as pointed out in the body of this ruling, the crux of the matter was the take over the management of the suit premises by Lloyd Masika. Thus at best, the primary affidavits ought to have been sworn by personnel from Lloyd Masika, while the other affidavits (like those of Weche and Robert) could have been complimentary.

38. The disposal orders are:

i. Prayer 2 to 4 in the application are hereby declined. However, the applicant is still at liberty to bring forth a fresh application with Lloyd Masika on board in relation to interference with the management of any of the suit properties.

ii. Prayer No. 5 is allowed as drawn.

iii. Prayers Nos. 6-8 are declined. Instead, the plaintiff is directed to comply with order no.8 given on 1.2.2018 within a period of 14 days. To this end, the plaintiff is to avail the hard copies of the said documents in a sequentially paginated bundle for each of the 4 suit premises.

iv. The affidavits sworn by Robert Mabeya and Sytanclauce Weche are found to be competent and properly on record.

v. The Respondent/Plaintiff is condemned to pay costs of this application.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 15TH DAY OF DECEMBER, 2021 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Mutua for the Plaintiff

Rebello for the 1st Defendant

Adaja Rajesh family member of Arun Mahendra 1st Defendant

