



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. CIVIL APPLICATION NO 646 OF 2019

SHIRIN AMIRALI T/A CEFA ENTERPRISES LTD.....1ST APPLICANT

ABDUL KARIMI T/A MS MELODICA LTD.....2ND APPLICANT

VERSUS

ELIMU INVESTEMENTS LTD..... 1ST RESPONDENT

SALIMIRWA TRADING COMPANY LTD..... 2ND RESPONDENT

RULING

The applicant's Notice of Motion dated 15th January, 2020 seeks the following orders.

I. That pending the hearing and determination of this application an order issues from this honorable court denying the Respondent audience before the Business Premises Rent Tribunal until the application for contempt now pending before this court is heard and determined and the contempt purged.

II. That pending the hearing and determination of the application for contempt now pending before this court an order issues from this honourable court denying the Respondent audience before the Business Premises Rent Tribunal and contempt purged.

III. Cost be awarded to the Tenant/Applicant.

IV. Any other order this honourable deems fit to grant.

The application is supported by the affidavit of Abdulkarim Rashid sworn on even date. The Respondents filed a replying affidavit sworn by Macharia Maina on 14th July, 2020.

The basis of the application is that the respondents are in contempt of the orders of the Tribunal and violence continues to be meted out against the applicants who are the Respondents' tenants. The applicants pray as per paragraph 4 of the supporting affidavit that the respondents be denied audience before the Tribunal until a pending application for contempt which is pending before the court is heard and determined and until the contempt is purged. According to the applicants, the orders being sought will restore the dignity of the court and Tribunals. The respondents have refused to obey court orders issued by the Tribunal yet they continue to litigate at the Tribunal with impunity as the Tribunal has no power to punish for contempt for contemptuous disobedience of its orders.

The respondents oppose the application. It is the Respondents' position that the application herein is a replica of pending application dated 15/1/2020 and the orders being sought are similar. It is further averred that the application is purely based on bare allegations and nothing has been placed before the court to prove disobedience of the court orders. The supporting affidavit does not state what orders were disobeyed. The standard of proof in contempt proceedings is higher than proof on a balance of profitability.

The application basically seeks to bar the respondents from participating in the proceedings before the Business Premises Rent Tribunal. The applicants approached this court by filing a Notice of motion dated 9/10/2019 that was brought under certificate of urgency. That application should be treated independently from the current one. However, it was nothing that the application dated 9th October, 2020 is based on the allegations that the Respondents were ordered not to evict the applicants from the business premises but attempted to destroy the business premises namely Elimu Cooperative House 1989, located along Tom Mboya /Ronald Ngala Street, Nairobi

The application dated 15/1/2020 is supported by an affidavit. The affidavit does not annex anything. It would have been prudent for the applicants to annex the orders of the Tribunal which have been disobeyed so as to enable the court confirm that indeed orders were issued by the Tribunal. The supporting affidavit does not even state when the orders being disobeyed were issued. Were the orders extracted and served

upon the respondents. When were they served and when did the respondents disobey those orders. Further, in my view, it would have been equally prudent for the applicants to have annexed typed proceedings of the Tribunal so that the court can understand the nature of the dispute. Merely alleging that the respondents have disobeyed court orders and therefore should be denied audience is not enough. This court conclude that the Tribunal's orders have been disobeyed without the court knowing the specific orders.

My understanding of the dispute is that the respondents intend to evict the applicants from the business premises. It is my view that the applicants need to prosecute the application dated 9/10/2019 which has unnecessarily been pending for a long time instead A of filing fresh application. The application herein is dated 15/1/2020. It is now over one year and it is not clear whether the proceedings before the Tribunal have proceeded or not.

The constitution under Article 47 provides for the right to fair administrative action. This right includes the right to be heard and have one's dispute determined lawfully. Denying the respondents their right to be heard before the Tribunal is a breach of their constitutional right. Similarly, Article 48 of the Constitution provides for the right of access to justice. The Respondents are entitled to access the Tribunal and hence their dispute determined fairly by being given an opportunity to be heard. The provisions of Article 50 on fair hearing calls for a fair and public hearing. This is a constitutional right and under Article 25 of the constitution, the right to a fair trial cannot be limited. The right to a fair trial is not limited to criminal cases only. Civil disputes qualify to be guaranteed fair hearing under the constitution and this requires that each party be granted an opportunity to be heard. In my view, denying a party the right to be heard is unconstitutional even if such a party is in breach of a court order.

The upshot is that the application dated 15th January 2020 lacks merit and the same is hereby dismissed with costs to the respondents.

DATED AND SIGNED AT NAIROBI THIS 11TH DAY OF MARCH, 2021

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S. CHITEMBWE

JUDGE