



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KISII

CIVIL CASE NO. 37 OF 2015

BENERDETTE MAGOMA NYAKABARI.....PLAINTIFF/APPLICANT

VS

BONARERI ASIAGO.....1ST DEFENDANT/ RESPONDENT

ONDIMU AUTA OARA.....2ND DEFENDANT / RESPONDENT

JEOFRICK N. MUINDI.....3RD DEFENDANT /RESPONDENT

T/A KIMU AUCTIONEERS.....4TH DEFENDANT/RESPONDENT

AND

JARED MUNGEI MASESE.....INTERESTED PARTY

RULING

Background

1. The plaintiff herein, Bernedette Magoma Nyakabaria, was the 2nd respondent's tenant by virtue of a lease agreement that they entered into on 1st September 2013 in which the 2nd respondent agreed to lease to her a portion of his premises situate on LR NO. KISII/MUNICIPALITY/BLOCK 11/53 (hereinafter in this ruling referred to as the "suit premises"). The plaintiff's claim in the main suit was to challenge the legality of the eviction and levy of distress initiated by the 1st and 2nd defendants through the services of the 3rd defendant. Concurrently with the plaint, the plaintiff also filed a Notice of Motion application dated 14th September, 2015 seeking orders of mandatory injunction to compel the 1st and 2nd defendants to forthwith restore / re-instate her back into the suit premises. On 8th June, 2016 this court granted orders mandatory injunction directing the 1st and 2nd defendant to restore the plaintiff into the suit premises pending the hearing and determination of the instant suit. The plaintiff now claims that despite the order of mandatory injunction being served upon the defendants herein, the defendants refused to obey the said orders and have failed to restore the plaintiff into the suit premises. Owing to the said disobedience of the said court order, the plaintiff filed another motion dated 29th July 2016 seeking to have the defendants cited and punished for disobedience. The intended interested party herein, on his part, also filed an application dated 29th July 2015 in which he seeks to be enjoined in this suit and to have the impugned orders of 8th June, 2016 directing the defendant's to reinstate the plaintiff back to the suit premises reviewed, varied and set aside.

The pleadings

2. Before this court for determination therefore, are two applications filed by the plaintiff and an intended interested party on 29th July, 2016. In the plaintiff's motion dated 29th July, 2016 brought under Order 40 rule 3 of the Civil Procedure Rules 2010, and Articles 48,165 & 258 of the Constitution 2010 he seeks the following orders:

1. **Spent.**

2. **Spent**

3. **The Honourable Court be pleased to cite and punish the Defendants for disobeying the lawful court orders issued on the 8th day of June 2016.**

4. **Consequent to prayer (3) hereinabove being granted, the Honourable Court be pleased to issue warrants of arrest, to bring the defendants before this Honourable Court for committal to jail for disobedience.**

5. **Consequent to prayer (4) hereinabove being granted the Honourable Court be pleased to commit the defendants and more particularly the 1st and 2nd Defendants to jail for a duration not exceeding six (6) months /or such shorter period as the court may deem fit and expedient.**

6. **In the alternative, the Honourable Court be pleased to grant an order of sequestration to attach the properties of the defendants , which properties be sold to defray the damages occasioned by the breach of the Lawful Court Orders made on the 8th day of June 2016.**

7. **Costs of this Application be borne by the defendant.**

8. **Such further /other orders be made as the court may deem fit and expedient.**

3. The application is supported by the plaintiff's affidavit in which she states that the courts order of injunction issued on 8th June 2016 was duly extracted and properly served upon all the defendant's as shown in the copies of affidavits of service attached to this application marked as "**BMN2(a) &(b)**". The plaintiff's case is that notwithstanding the personal service of the said order upon the defendants, they have disregarded the said order and instead leased the suit property to a third party. It is therefore the plaintiff's case that the conduct exhibited by the defendants amounts to contempt of court and constitutes a violation of the established rule of law for which the defendants ought to be punished.

4. The defendants opposed the plaintiff's application through the 2nd defendant's affidavit filed 7th October 2016 in which he deposes that he was not served with the said order of 8th June 2016 and only became aware of it through 3rd defendant(auctioneer) after he had already leased the suit property to the interested party. He avers that the suit premises were leased to the interested party herein on 1st January 2016 and therefore it would be impossible to implement the impugned order of 8th June 2016 in view of the fact that the tenancy of the suit premises had already changed hands.

5. In the interested party's application dated 29th July, 2016 brought under **Order 42 rule 1 of the Civil Procedure Rules** he seeks the following orders:

1. **Spent.**

2. **The interested party be enjoined as a party to this proceedings for purposes of this application**

3. **There be stay of execution of the orders of this court given on 8th day of June 2016 pending the hearing and determination of this application inter partes.**

4. The orders of this court given on 8th day of June, 2016 herein by Lady Justice, W.A Okwany be reviewed, varied /set aside.

5. The costs of and incidental to this application be provided for.

6. The application is supported by the interested party's affidavit in which he states that he entered into a lease agreement with the 1st and 2nd respondent on 1st January 2016 after which he started hotel business therein. He attached a copy of the lease agreement marked as **JMM-1**.

7. He avers that on 26th July 2016, he was made aware of the court order of 8th June 2016 directing the 1st and 2nd defendants to restore/reinstate the plaintiff to the suit premises among other orders. He therefore contends that the execution of the said order will lead to his eviction from the suit premises without being given an opportunity to be heard.

8. The interested party also contends that the instant case falls within the jurisdiction of the Environment and Land Court and not the High Court of Kenya and as such there are sufficient reasons for varying or setting aside the orders of 8th day of June 2016.

9. The 2nd defendant filed a replying affidavit on 27th October 2016 in which he supports the interested party's application dated 29th July 2016. He contends that it is only just and fair that the interested party be given a hearing in this case in view of the fact that he is the current occupant of the suit premises.

10. On 10th October 2016 the interested party filed a Notice of Preliminary Objection to this court's jurisdiction to entertain this suit.

11. The plaintiff opposed the interested party's application through her replying affidavit dated 7th November 2016 in which she contends that the instant suit challenges the termination of her tenancy and the unlawful seizure/confiscation of her shop goods which issues do not affect the interested party's rights as he who was not holding any interest on the suit premises when the events that led to the instant suit took place.

12. The plaintiff states that the issue of the interested party's alleged tenancy agreement was not disclosed to this Honourable court by the 1st and 2nd defendants when the said defendants entered appearance and filed their replying affidavit, statement of defence and counter claim on the 8th day of February 2016. It is thus the plaintiff's contention that the interested party is not a necessary party to the instant suit because the cause of action, accrued prior to his alleged tenancy agreement with the 1st and 2nd defendants.

13. The plaintiff also filed the following grounds of opposition to the interested party's application:

1. The instant Notice of Motion Application is pre-mature, misconceived, incompetent and otherwise legally untenable.

2. The intended interested party herein has no stake and or claim over and in respect of the subject suit, which principally touches on and /or concern the illegality in the termination of the Tenancy Agreement between the 1st and 2nd defendants and the plaintiffs.

3. The claims and or issues being ventilated by the interested party cannot be addressed in the subject matter herein, in so far as the said claims only relate to and can only be addressed as against the 1st and 2nd respondents *albeit* in a different forum.

4. The interested party herein has no privity of contract / nexus to he plaintiff and hence the claims being alluded to are foreign and remote . Consequently, the said issues cannot be tried simultaneously in the subject suit.

5. The interested party has not shown or exhibited any sufficient cause and or basis to connect same to the subject suit and thereby warrant the intended joinder.

6. **The instant application is calculated to delay / obstruct the expeditious disposal of the plaintiff's claim and by extension to aid the disobedience of the lawful court order which directed the reinstatement and restoration of the plaintiff into the suit premises.**

7. **Nevertheless, the instant application does not raise and/ capture any reasonable cause of action whatsoever to warrant the intended joinder.**

8. **The instant application constitutes and / amounts to an abuse of the due process of court.**

9. **In any event, the instant application does not meet / satisfy the minimum threshold pursuant to and by dint of the provisions of Order 1 Rule 10 of the Civil Procedure Rules, 2010.**

10. **In the premises the Notice of Motion application herein is Devoid of merits, whatsoever and/ however.**

14. When the case came up before Karanja J. on 15th November 2016, it was agreed that the two applications be argued simultaneously by way of written submissions.

Analysis and determination.

15. After considering the two applications filed by the plaintiff and the interested party, together with the preliminary objection raised by the interested party and the written submissions filed by each party's advocates, I note that the first issue for determination in this case is whether contempt of court proceedings brought by the plaintiff supersede the issue of jurisdiction raised by the interested party and the defendants.

16. In **Albert Kigera Karume & 2 Others v Kung'u Gatabaki & Margaret Nduta Kamithi (Sued as Trustees of the Njenga Karume Trust) & 5 others**[2015] Mabeya J held:

"The question therefore, that arises is, what happens if issues of contempt and jurisdiction are raised in the same proceedings. What takes precedence among the two "Mr. Oraro, Mr. Gatonye and Mr. Kamau were of the view that the issue of jurisdiction takes precedence. Mr. Munge, Mr. Miller and Adera did not address the issue. From precedence, it would seem that when these two issues are raised at the same time, the issue of jurisdiction must take precedence. The basis of that position is that a court of law first acquires jurisdiction before it can deal with any matter before it. If a court exercises a jurisdiction it does not possess its action and decision amounts to nothing. It is a nullity, it is void ab initio. Therefore, a court has to determine that issue first before it can embark in adjudicating any matter."

17. As early as 1904, **Vaughan Willians L.J in Gordan v Gordan (1904-1907) ALL ER 702 at 705** stated that:-

"...But when you come to an order which it is suggested may have been made without jurisdiction, if, upon looking at the order one can see that that is the ground of the appeal, it seems to me that such a case has always been treated as one in which the court will entertain the objection to the order, though the persons making the objection is in contempt."

18. Therefore in the instant suit this court will first deal with the issue of jurisdiction before addressing the issue of contempt should the need arise depending on the outcome of the objection to jurisdiction.

19. In **Re The Matter of the Interim Independent Electoral Commission Constitutional Application No. 2 of 2011 (unreported) at para 29 and 30** the Supreme Court discussed the issue of jurisdiction in the following terms:

"Assumption of jurisdiction by court in Kenya is a subject regulated by the constitution, by

statute law and by principles laid out in judicial precedent."

20. In the celebrated case of **Mukisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Ltd 1969 E.A 696** preliminary objection was discussed as follows,

"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."

21. From the above decision it is clear that the test to be applied in determining whether the respondent's preliminary objection meets the threshold of the standards set out in the **Mukisa case (supra)** is first, that the Preliminary Objection raises a pure point of law, second that there is demonstration that all the facts pleaded by the other party are correct and lastly that there is no fact that needs to be ascertained.

22. The interested party contended that this court lacks jurisdiction to hear the which contention was supported by the defendants. The *locus classicus* on jurisdiction is the celebrated case of **Owners of the Motor Vessel "Lillian S" V Caltex Oil (Kenya) Ltd [1989] KLR 1** in which Justice Nyarangi of the Court of Appeal held as follows:

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right way on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step . Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

23. As correctly submitted by the interested party and the defendants herein, the dispute before me related to the relationship between a landlord and tenant established through a tenancy agreement. **Article 162(1) & (2) (b) of the constitution** provides for the establishment, by Parliament, of *inter alia*, a court with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to land. Sub article (3) of the same Article stipulates that Parliament shall determine the jurisdiction and functions of such a court. In the **Environment and Land Court Act. No. 19 of 2011**, whose commencement date is 30th August 2011, Parliament established the Land and Environment Court. The jurisdiction of that court is set out in **section 13 of Act no. 19 of 2011**. For the purposes of this ruling **subsections (1) and (2)** of that section will suffice. They provide:

"13.(1) The court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other written law relating to environment and land.

(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the court shall have power to hear and determine disputes relating to environment and land, including disputes:

- a. relating to environmental planning and protection, trade, climate issues, land use planning, title, tenure, boundaries, rate, rents, valuations mining, minerals and other natural resources;
- b. relating to compulsory acquisition of land;
- c. relating to public, private and community land and contracts, choices in action or other instruments granting any enforceable interests in land; and
- d. any other dispute relating to environment and land.

24. The above list must be read together with the Practice Directions on Proceedings relating to the Environment, the use and occupation of title to land issued by the Chief Justice vide Gazette Notice No. 16268 dated 9th November, 2012. Paragraph No. 12 of the said rules state as follows:

"12 All new cases relating to environment and the use and occupation of, and title to, land not falling under paragraph 7 above (Magistrates ' Courts...) shall be filed in the nearest Environment and Land Court for hearing and determination by the said Court."

25. It was submitted by counsel for the defendants and the intended interested parties that a tenancy dispute is a dispute involving an interest in land and ought to be heard by the Environment and Land Court and not the High Court which has no jurisdiction in such matters.

26. Section 2 of the Land Registration Act No. 3 of 2012 defines "lease" as follows:

" 'lease' means-

(a) a lease or sublease, whether registered or unregistered, of land; or

(b) a short term lease or agreement to lease."

27. The Land Act, on the other hand, has a more comprehensive definition of "lease." This statute, which commenced operation on 2nd May, 2012, was enacted **" to give effect to Article 68 of the Constitution, to revise, consolidate and rationalize land laws; to provide for the sustainable administration and management of land based resources and for connected purposes."**

28. Under section 2 of Act No, 6 of 2012

" 'lease ' means the grant, with or without consideration, by the proprietor of land of the right to exclusive possession of his or her land and includes the right so granted and the instrument granting it, and also includes a sublease but does not include an agreement for lease.

29. In **James Moses Thamu & Others v Joseph M Muiruri [2013]eKLR** H.P.G Waweru J held in reference to the above section that:

"By this definition a lease, which gives exclusive possession of land or premises to the lessee, is an interest in land. It is not a mere or ordinary contract. It is a grant of an interest in land. A tenancy is by definition a lease."

30. Article 165(5) of the Constitution specifically precludes the High Court from hearing matters that fall within the jurisdiction of the Environment and Land Court. From the above foregoing I find that by dint of the said provisions of the Constitution and the Environment and Land Act, the High Court has no jurisdiction to hear and determine disputes revolving around interest in land.

31. Having found that this court lacks jurisdiction to hear and determine a dispute between a landlord and tenant the question which arises is what will happen to the orders already issued by this court in the ruling delivered on 8th of June 2016. It is apparent that the said order was not complied with thereby precipitating the plaintiff's instant contempt of court proceedings. The question that this court now needs to answer is whether a person who disobeys a court order issued with no jurisdiction is still liable to punishment. The Court of Appeal sitting at Malindi grappled with the same question in the case of **Karisa Chengo & Others vs Rep [2015] eKLR** and observed that parliament enacted the Environment and Land Court Act with the object of giving effect to Article 162(2) (b) of the Constitution and the jurisdiction of the Environment and Land Court is set out at Section 13 of the said Act. The court stated thus:

"...the Constitution has at Article 162(2) provided that; parliament shall establish courts with

the status of the high court to hear and determine disputes relating to....." To our minds, by using the words "with the status of the high court," it is clear that the high court is not higher in hierarchy than the Employment and Labour Relation Court(ELRC)and Environment and Land Court (ELC) ; these courts are of equal rank. By being of equal status, the high court therefore does not have the jurisdiction to superintend, supervise, direct, guide, shepherd and/or review the mistakes , real /or perceived, of the Employment and Labour Relation Court and Environment and Land Court administratively or judiciously as was the case in the past. The converse equally applies. At the end of the day however, Employment and Labour Relation Court and Environment and Land Court are not the high court and vice versa, however, it needs to be emphasized status is not the same thing as jurisdiction. The Constitution though does not define the term "status" . The intentions of the framers of the Constitution in that regards are obvious given the choice of the words they used; that the three courts)High Court, Employment and Labour Relation Court and Environment and Land Court) are of the same juridical hierarchy and therefore are of equal footing and standing. To us it simply means that the Employment and Labour Relation Court and Environment and Land Court exercises the powers as the High Court in performance of its judicial function, in its specialized jurisdiction but they are not the High Court."

32. In reference to **Karisa Chengo** case (supra) Karanja J in **Francis Mbuya Kinyoria v Nyansiongo Tea Factory& another [2015]eKLR** held:

"That being the position, it would follow that the Environment and Land Court would have no jurisdiction to deal with civil matters that do not fall within its prescribed domain. Section 13 of the Environment and Land Court Act gives no jurisdiction to the Environment and Land Court to deal with civil cases which have nothing to do with the environment or land. As was stated by the court of appeal in Karisa Chengo (supra), a judge once appointed as either a High Court, Employment and Labour Relation Court or Environment and Land Court Judge cannot hear and determine matters reserved for any of those courts. Each judge appointed to a particular court possesses the requisite Constitutional or Statutory experience required of one to serve in that court. A judge is appointed to serve in a specific court. It cannot therefore be said that a judge is just a judge any howly."

33. Going by the decisions in the above cited cases, it is clear that the mandatory injunction issued by this court on 8th June 2016 was done without jurisdiction and is therefore null and void. This means that even if the defendants were served with the order they cannot be held to have been in contempt of an order that was for all intents and purposes a nullity for want of jurisdiction.

34. Consequently the order that commends itself to me is to vacate/set aside the impugned orders made by this court on 8th June, 2016, allow the interested party's application dated 29th July 2016 and the preliminary objection raised on this court's jurisdiction. Having held that this court has no jurisdiction to hear and determine landlord and tenant disputes, the proper thing to do is to direct, as I hereby do, that this suit be transferred to the right court which is the Environment and Land Court at Kisii for hearing and determination. (See **Prof. Daniel N. Mugendi vs Kenyatta University, Benson I. Wairegi, Eliud Mathiu & Prof Olive Mugenda, CA No. 6. Of 2012 at page 11**). Costs of the will be in the cause.

35. It is so ordered.

Dated, signed and delivered in open court this 20th day of February 2017

HON. W. OKWANY

JUDGE

In the presence of:

- Mr. Oguttu for the Plaintiff/Applicant

- Mr. Bosire holding brief for Moracha for the 1st and 2nd Defendants/Respondents and for the interested party.
- Omwoyo: court clerk