



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 280 OF 2017

LAKEVIEW INVESTMENTS LIMITED.....PLAINTIFF

VERSUS

PROF. JOHN PAUL ODERO (*Sued as the Chairman,*

NAIROBI KENYA SECONDARY SCHOOLS

HEADS ASSOCIATION).....DEFENDANT

RULING

1. This Ruling is in respect to the Defendant's Notice of Preliminary objection dated 23rd July, 2020 in which the Defendant has averred as follows:

a) That the Plaintiff or its directors lack audience to argue any further application before this court because he is un-discharged contemnor pursuant to conviction for contempt of court vide the reasoned Ruling of this Honourable Court delivered on 15th May, 2020.

b) That the Application raises no grounds for overturning the contempt conviction, and is barred by res judicata as this court has already considered and in its Ruling of 15th May, 2020 rejected the grounds now advanced for a second time. This court lacks jurisdiction to sit in appeal over its own decisions.

c) The Application is frivolous, vexatious and an abuse of the court process, to be struck out forthwith with costs awarded to the Defendant.

2. The Application proceeded by way of written submissions. The Defendant's/Applicant's advocate submitted that the Defendant's Preliminary Objection meets the threshold in *Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd [1969] EA 696* where Sir Charles Newbold P. defined a Preliminary Objection as:

"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 in the exercise of judicial discretion."

3. Counsel submitted that the question of *right of audience of a convicted contemnor* and *res judicata* are pure points of law and that the Plaintiff herein must be denied audience in any further Application until he purges the contempt or is punished. Counsel relied on the case of *Ramesh Popatlal Shah & 2 Others versus National Industrial Credit Bank Limited; Nairobi HCCC 515 of 2003, [2005] eKLR* where Njagi J. held as follows:

"The plaintiff has already filed an application for the punishment of the defendant for contempt of court and the application was filed BEFORE the defendant filed its application for setting aside the orders of which it stands indicted for disobeying. The defendant has obeyed some of the orders but at least one of them has been confined to the dustbin. It is generally not proper for a litigant to choose from the same ruling which orders to obey and which ones to ignore. In total, the preliminary objection is upheld and the defendant is given 14 days from today within which to purge its contempt."

4. The Defendant's counsel submitted that the Plaintiff as an undischarged contemnor has no right of audience before the Court on any other application until the contempt is purged and the contemptuous director Joseph Oduor Okwaro sentenced according to law.

5. According to counsel, no other Application can be heard before the contempt proceedings reach their logical conclusion and the contemnor

sentenced and that all other proceedings should be suspended until the contempt is dealt with. Counsel relied on the case of *Econet Wireless Kenya Ltd vs. Minister for Information & Communication of Kenya & another; Nairobi HC Misc. 1640 of 2003, [2005] eKLR* where Ibrahim J (as he then was) held:

“Where an application for committal for contempt of court orders are made the court will treat the same with a lot of seriousness and urgency and more often will suspend any other proceedings until the matter is dealt with and if the contempt is proven to punish the contemnor or demand that it is purged or both. For instance, the alleged contemnor will not be allowed to prosecute any application to set aside orders or take any other step until the application for contempt is heard. The reasons for this approach are obvious – a contemnor will have no right of audience in any court of law unless he is punished or he purges the contempt. So the court is obliged to hear the application for committal first before any other matter. This is a general rule which must be applied strictly.”

6. It was submitted that this Court found in the reasoned Ruling that the Plaintiff is guilty for contempt of court and that the evidence informing the said Ruling showed that the Plaintiff continued disobeying the order of 25th January 2019 by illegally completing a one-storey building with perimeter wall.

7. Counsel submitted that to permit the Plaintiff to be heard without first purging the contempt by removing the offending structures illegally and contemptuously built on the suit land would impede the course of justice in this case, making it more difficult for the Court to ascertain the truth or enforce orders which it may make.

8. Further, it was submitted, the Plaintiff was an active player in the *inter-partes* hearing of the contempt Application; that the Plaintiff defended himself by stating *inter alia* that third parties were responsible for building on the suit property; that the Plaintiff did not bother to substantiate its allegations by identifying the alleged third parties and that the Plaintiff did not explain why the one-storey building and perimeter wall was built in contempt of the orders of 25th January 2019.

9. The Defendant’s counsel submitted that the Court addressed all the issues that were raised by the Plaintiff – including the issue of the alleged third parties and that no information has been placed before the court to explain why the Plaintiff concealed the identity of the person who was developing the suit property.

10. It was submitted that the issue of the alleged third parties is not new; that the issue was raised, substantially considered and rejected in the Ruling of 15th May 2020 and that the subsequent re-litigation on the same issue is barred by *res judicata*.

11. The Plaintiff’s/Respondent’s advocate submitted that The Plaintiffs Notice of Motion dated 14th July, 2020, seeks to have the Court’s orders of 15th May, 2020, reviewed, principally on the ground of discovery of new evidence which the Plaintiff was not previously able to tender before the Court.

12. The Plaintiff’s advocate submitted that it is very likely that the Court would have arrived at a different decision if the fact of the real owner of the building erected on the suit property had been brought to its attention and that the Civil Procedure Rules give latitude to a party aggrieved by an order of the Court to either appeal against such an order or apply for its review and setting aside premised on the grounds provided for under Order 45 of the Civil Procedure Rules.

13. It was submitted that the issues which the Court is being asked to consider in the Application dated 14th July, 2020 are not caught up by the principle of *res judicata* as alleged by the Defendant and that the Plaintiff is seeking to bring on board one Shilla Ishiundu to answer to issues of ownership of the building erected on the suit property.

14. Counsel submitted that the issue as to the ownership of the building erected on the suit property was not conclusively determined on merit since the Plaintiff had denied in its pleadings of being the owner of the same.

15. It was submitted that the Plaintiff/Contemnor has a right to be heard especially when it becomes difficult to purge the contempt as is the case in this matter. Counsel relied on the case of *Rose Detho vs. Ratilal Automobiles Ltd & 6 other [2007] eKLR* in which the Court of Appeal dismissed a Notice of Preliminary Objection which had argued that the Applicant should not be heard on her Notice of Motion Application before she could purge her contempt of the order of the Superior Court.

16. It was submitted that the fact that the Plaintiff’s Director was found guilty of having disobeyed a lawful court order is not a bar to his being heard; that in any case, it is not stated as to how the Plaintiff ought to purge its contempt and that the Plaintiff has not willfully refused to purge the contempt.

17. Counsel submitted that the decision as to whether a contemnor should be heard by the court or not is a matter within the discretion of the relevant court. Counsel relied on the case of *Joseph Schilling and 2 others vs. Stardust Investments Ltd & Another [Civil Appeal No. 134 of 1997]* cited in the Ruling of Onyango Otieno J.A. in the case of *Rose Detho vs. Ratilal Automobiles Ltd & 6 others [2007] eKLR* in which the Court stated that it was in the discretion of the court whether or not to refuse to hear a party who is in defiance of a court order until such a party has purged his contempt.

18. Counsel submitted that the court should exercise its discretion by giving the Plaintiff an opportunity to be heard; that the door of justice should not be closed on a party who has not willfully disobeyed a Court order and that purging contempt is not composed of merely appearing in court and apologizing to the Court, but putting right what the court had ordered to be done.

19. The record shows that on 15th May, 2020, this court delivered a Ruling in respect to the Defendant’s Application dated 1st March, 2019.

In the said Ruling, this court found that the Plaintiff's Director, one Joseph Oduor Okwaro, was in contempt of the orders of this court of 25th January, 2019. In the same Ruling, this court directed the contemnor to appear before it, on a date to be fixed in the registry, for mitigation and sentencing.

20. However, before the contemnor could mitigate and sentenced, he filed an Application dated 14th July, 2020 in which he sought for the following orders:

a) That the Honourable court be pleased to review, vary and/or set aside its order given on 15th May, 2020 which found the Plaintiff's Director, Joseph Oduor Okwaro in contempt of the orders of this Honourable court of 25th January, 2019.

b) That the Honourable court be pleased to issue summons to one Shilla Ishiundu, the owner of the one storey building erected on the suit property to appear personally in court to confirm ownership of the said property.

c) That the Honourable court be pleased to order the Officer Commanding Mavoko Police Station to enforce the order in (b) above and ensure compliance thereof.

d) That the costs of this Application be provided for.

21. The Plaintiff's Application has been filed pursuant to the provisions of Section 80 of the Civil Procedure Act and Order 45 Rule 1 (a) and 2 (1) of the Civil Procedure Rules. Section 80 of the Civil Procedure Act provides as follows:

"Any person who considers himself aggrieved— (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit."

22. Order 45 Rules 1 (1) and (2) of the Civil Procedure Rules provides as follows:

"(1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review."

23. The Defendant has argued that having been found guilty for disobeying the order of the court of 25th January, 2019, the Plaintiff has no right of being heard on his Application dated 14th July, 2020. According to the Defendant, having found the Plaintiff's Director in contempt of the court, this court became *functus officio*, and that the Plaintiff's Application is *res judicata*.

24. Section 80 of the Civil Procedure Act as read together with Order 45 of the Civil Procedure Rules allows an aggrieved party to challenge the Judgment or Ruling of the court by way of review. Indeed, the said provisions of the law do not provide that where the Ruling in question is in respect to contempt proceedings, then the same cannot be challenged by way of review.

25. Considering that the law allows the Plaintiff to file an Application for review of the Ruling of the court, it is the constitutional and statutory duty of this court to hear the Plaintiff on his Application for review. Indeed, the issue of whether the Application for review meets the requirements of Order 45 of the Civil Procedure Rules can only be ascertained after the court has heard both parties.

26. That being the case, it cannot be said that the Application for review of the decision of this court is *res judicata*, or that the court would be sitting on its own appeal if it hears the Application. In fact, if the issues raised in the Application amount to an appeal, then the Respondent should raise that argument in opposition to the Application, whereafter this court will make an appropriate finding.

27. For those reasons, I find the Defendant's Notice of Preliminary Objection dated 23rd July, 2020 to be unmeritorious. The Notice of Preliminary Objection dated 23rd July, 2020 is dismissed with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 25TH DAY OF SEPTEMBER, 2020

O.A. ANGOTE

JUDGE