



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MALINDI

MISC APP NO. 32 OF 2019

MICHAEL JEFWA TINGA

JOSEPHINE MARIE GOMMANS.....PLAINTIFFS

VERSUS

1. MELO TWENTY-SEVEN HOLDINGS COMPANY LIMITED

2. ROSE ACHIENG WILLIAM

3. RODGERS KAIBUNGA.....DEFENDANTS

RULING

1. By their Notice of Motion dated and filed herein on 4th September 2019, Michael Jefwa Tinga and Josephine Marie Gommans pray for orders framed as follows: -

2. That the 2nd and 3rd Respondents are liable to punishment by this Honourable Court by being committed to serve a jail term of not more than six months together with their agents, servants and or employees (and) as such be punished for contempt of Court for disobeying orders of a lawful tribunal at Mombasa in BPRT Case No. 80 of 2013 and BPRT Case No. 148 of 2010.

3. That costs be borne by the Respondents (in) Tribunal Case No. BPRT No. 148 of 2010 and by an order dated 6th October 2010.

2. The application which is supported by an Affidavit sworn by Michael Jefwa Tinga is based on the grounds inter alia;

i) That the Applicants filed a rent dispute at Mombasa against the 1st and 2nd Respondents through BPRT Case No. 80 of 2013 and by an order dated 10th July 2014, the Tribunal restrained the Respondents from evicting the tenants from the premises situated on Plot CR 29315/4 (Title No. CR 34880) Malindi pending the hearing and determination of the case interpartes which was scheduled for 22nd August 2014;

ii) That the Applicants also filed Mombasa BPRT Case No. 148 of 2010 and got similar orders on 6th October 2010 against the two Respondents;

iii) That the two cases were later consolidated and the orders remain in force to-date as the cases remain pending;

iv) That despite the Respondents knowledge of the same, the Respondents have purported to transfer the title of the property to the 3rd Respondent on 4th July 2019;

v) That the purported transfer is in contempt of the orders issued in the two cases and maliciously done for purposes of removing the Applicant tenants from the premises;

vi) That the 3rd Respondent has now locked the lodging rooms, office, removed office furniture and equipments and placed guards who have denied the Applicants access to the premises;

vii) That in the process the Applicants have lost 7,300 Euros that was in the office as well as property worth more than Kshs 5,000,000/;

viii) *That in the year 2013, the 2nd Respondent was found in contempt of the said orders and was jailed for three months;*

ix) *That orders of Court are not issued in vain and the Respondents should be punished for their contempt.*

3. Messrs Melo Twenty-Seven Holdings Company Ltd, Rose Achieng William and Rodgers Kaibunga (the 1st, 2nd and 3rd Respondents) are opposed to the application. In their joint Grounds of Opposition dated and filed herein on 18th September 2019, they are opposed to the Motion on the grounds that: -

1. The Motion is incompetent, bad in law and scandalous.

2. The Motion lacks merit and is an abuse of the process of the Court.

3. The application contravenes the express provisions of Section 5 of the Judicature Act and Order 52 Rule,2 of the Supreme Court Practice Rules of England in that no leave of the Court has been obtained to commence the proceedings.

4. The application contravenes the express provisions of Section 5 of the Judicature Act and Order 52 of the Supreme Court Practice Rules of England and as the Honourable Attorney General and the High Court Registrar have not been given a Registrar's Notice as mandatorily required by the law, three days preceding the filing of this application.

5. The application is wrongly instituted.

6. There are no orders in existence which have been violated and which gives rise to an application for contempt against the Respondents.

7. The Applicant is guilty of material non-disclosure and concealment of material facts hence disentitled to the juridical discretion of the High Court's discretion in contempt applications.

8. The 3rd Respondent was not a party to any proceedings in the BPRT Court and cannot be cited for contempt of whatsoever nature and has not been served with any orders from the BPRT Court.

9. The Applicants have not demonstrated service and knowledge of the existence of the BPRT orders to the Respondents.

10. The Applicants have as proof of the violation of the alleged orders annexed and attached unreliable and inadmissible annexures in law which contravene the provisions of the Evidence Act Cap 80 Laws of Kenya.

11. The Applicants have not demonstrated and proved any alleged contempt against the Respondents to the required standards as required by the law.

12. The Applicants are not in the tenancy premises.

4. In addition to the said Grounds of Opposition, the Respondents have given Notice of Preliminary Objection dated 22nd September 2019 wherein they object to the application dated 4th September 2019 on account that this Court has no jurisdiction to entertain the same in view of the express provisions of Section 5 of the Judicature Act, the Constitution of Kenya and Order 52 of the Supreme Court Rules of England.

5. By a consent of the parties as recorded herein on 23rd September 2019, the parties agreed to have the Preliminary Objection disposed of first by way of written submission. I have accordingly considered the objection, the written submissions and the authorities placed before me by the Learned Advocates for the parties.

6. Section 5 of the Judicature Act provides as follows; -

“5 (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 subordinate Courts.

(2) An order of the High Court made by way of punishment for contempt of Court shall be applicable as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the High Court.”

7. As I understood the objection, the Respondents herein are asserting that the power to punish for contempt is donated to the two mentioned Courts by virtue of the above provisions and that since the Environment and Land Court is not one of the Courts mentioned, this Court has no jurisdiction to deal with the matter.

8. It is not trite that issues touching on the jurisdiction of a Court of law to determine any matter before it are fundamental issues of law and may be raised at any stage of the proceedings. Once raised, a determination thereon should be made before a Court can proceed further with the final disposal of any matter before it. Where want of jurisdiction is demonstrated, the Court has no option but to down its tools and proceed no further.

9. In this respect, Article 162(2) (b) of the Constitution of Kenya, 2010 mandated Parliament to establish Courts with the status of the High Court to hear and determine disputes relating to among others, the environment, use and occupation of and title to land. Pursuant to this mandate, Parliament enacted the Environment and Land Court Act No. 19 of 2011. The preamble of the Act reads as follows: -

“An Act of Parliament to give effect to Article 162 (2) (b) of the Constitution; to establish a Superior Court to hear and determine disputes relating to the environment and the use and occupation of, and title to land, and to make provision for its jurisdiction, functions and powers and for connected purposes.”

10. Section 13 of the Act sets out the jurisdiction of the Court and provides in part as follows: -

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

(2) In exercise of its jurisdiction under Article 162(2) of the Constitution, the Court shall have power to hear and determine disputes....

a) Relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining and other natural resources;

b) Relating to compulsory acquisition of land;

c) Relating to land administration and management;

d) Relating to public, private and community land and contracts, choses in action or other instruments granting enforceable interests in land; and

e) Any other dispute relating to the environment and land.

(3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.

(4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate Courts or local tribunals in respect of matters falling within the jurisdiction of the Court.

11. That being the case, it was clear that this Court has jurisdiction to deal with matters arising from subordinate Courts and Tribunals exercising jurisdiction on matters falling within its jurisdiction as outlined under Article 162(2) (b) of the Constitution and Section 13 of its Constitutive Act. In this respect and contrary to the Respondents' submissions, Section 15 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act has since been amended by the Statute Law (*Miscellaneous Amendments) Act, No. 25 of 2015* to provide that appeals from decisions of the Business Premises Tribunal shall lie to the Environment and Land Court.

12. While it may be true that previously the only substantive law in respect of power to punish for contempt was Section 5 of the Judicature Act, that position has certainly changed with the promulgation of the Constitution of Kenya 2010 and the creation of two other Superior Courts with equal status to the High Court.

13. Commenting on the prevailing situation *in Woburn Estate Ltd –vs- Margaret Bashforth (2016) eKLR*, The Court of Appeal (Makhandia, Ouko & M'Inoti JJ. A) observed as follows: -

“Today that position has drastically changed, starting with the establishment of the Supreme Court which was not envisaged when Section 5 of the Judicature Act was enacted. By Act No. 7 of 2011, Article 163 (9) of the Constitution was operationalized by the enactment of the Supreme Court Act (Cap 9A) which among other things, makes express provisions for the power of the Supreme Court to punish for contempt.

Under Section 29 of the Environment and Land Court Act, it is an offence punishable upon conviction to a fine not exceeding Kshs 20,000,000/- or to imprisonment for a term not exceeding two years, or to both, if any person refuses, fails or neglects to obey an order or direction of the Court given under the Act. In contrast, under Section 20 (7) and (8) of the Employment and Labour Relations Court Act, 2011, any person who without reasonable cause fails to comply with an order duly given in respect of attendance to Court, furnishing such particulars as may be required, giving of evidence before the Court or producing of any relevant documents, or who when required by an order to furnish information or to make any statement or to furnish any information, knowingly gives the information or makes a statement which is false or misleading in material particular, commits an offence, and upon conviction is liable to a fine not exceeding one million shillings or to imprisonment for a term not exceeding two years or both.....

We have gone to this great length to demonstrate how, before the passage of these legislations the powers of the High Court and this Court to punish for contempt of Court were dynamic and kept shifting depending on the prevailing laws of England. Today each level of Court has been expressly clothed with jurisdiction to punish for contempt of Court. The only missing link is the absence of the rules to be followed in commencing and prosecuting contempt of Court applications....”

14. The Learned Judges of Appeal in *Woburn Estate Ltd (Supra)* went further to hold as follows: -

“The jurisdiction of the High Court (or any other Court for that matter) to punish for the violation of its orders cannot be in question. Apart from Section 5(1) of the Judicature Act that vests in the High Court power, like those of the High Court of justice in England, to punish any party who violates its orders, the Court, by virtue only of being a Court has inherent powers to make sure its process is not abused and its authority and dignity is upheld at all times. See Refrigeration and Kitchen Utensils Ltd –vs- Gulabchand Popatlal Shah & Another, Civil Application No. 39 of 1990, where it was observed: -

“A party who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it...It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid-whether it was regular or irregular. That they should come to the Court and not take upon themselves to determine such a question.....he should apply to the Court that it might be discharged. As long as it exists, it must not be disobeyed.”

15. The long and short of this is that I did not find any merit in the Notice of Preliminary Objection as filed herein dated 22nd September 2019. It is dismissed with costs to the Plaintiffs.

Dated, signed and delivered at Malindi this 15th day of October, 2020.

J.O. OLOLA

JUDGE