



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MILIMANI LAW COURTS

ELC NO. 344 OF 2010

GARUN INVESTMENT LTD.....PLAINTIFF

VERSUS

CITY COUNCIL OF NAIROBI.....DEFENDANT

RULING

1. On 5th December 2018 when the amended notice of motion dated 30th November 2018 came up for hearing, a preliminary objection was raised on behalf of the defendant/respondent on the ground that the plaintiff/applicant had not followed the procedure laid down under Section 5 of the Judicature Act.
2. The plaintiff/applicant had filed a notice of motion dated 30th August 2018 in which it sought to have the officers of the defendant/respondent punished for contempt of court. The application of 30th August 2018 had been filed pursuant to the provision of the Contempt of Court Act No.46 of 2016 which has since been invalidated by the Constitutional Court vide **Petition No.87 of 2017 Kenya Human Rights Commission Vs Attorney General & Another (2018) eKLR.**
3. The amended notice of motion was necessitated by the developments in the petition by Kenya Human Rights Commission (Supra). The Defendant /Respondent therefore contends that the application ought to have been brought by way of application notice as opposed to notice of motion and that no leave was sought before bringing the application for contempt. In support of the preliminary objection, Mr Kinyanjui cited the Court of Appeal decision in **Christine Wangari Gachege Vs Elizabeth Wanjiru & 11 Others (2014) eKLR.** Mr Kinyanjui further argued that as the Contempt of Court Act No.64 of 2016 had been invalidated, section 5 of the judicature Act remained intact and that the applicant ought to have first sought leave before bringing the application for contempt. Mr Kinyanjui further argued that the applicant should not have invoked the inherent jurisdiction of the Court as there was Section 5 of the Judicature Act.
4. The preliminary objection was opposed by Mr Muturi for the applicant who contended that the issues which were raised by Mr Kinyanjui were technical in nature and that the court ought to invoke Article 159 of the Constitution and overlook the technicalities. Mr Muturi also argued that the Contempt of Court Act No.46 of 2016 which was invalidated had repealed Section 5 of the Judicature Act and therefore the applicant invoked the inherent power of the court.
5. I have considered the preliminary objection as well as the opposition to the same by the defendant/respondent. In determining whether the same should be upheld or rejected, I refer to the background given in the preceding paragraphs. Following the invalidation of the Contempt of Court Act No. 46 of 2016, it meant that the procedure to be followed in contempt proceedings is that which was before the repeal of section 5 of the Judicature Act. The procedure provided that the practice which was to be followed is the practice in the Supreme Court of England.
6. The applicant herein was seeking to have the respondent's officials punished for contempt of court. The contempt arose from failure to comply with a consent judgement and an undertaking given that the respondent was to move out of the property which was the subject of the consent. This being the case, the applicable procedure was that under the Civil Procedure rules 1999 of England which had replaced the practice in the Supreme Court of England. Rules 81.4 of the Civil Procedure relates to Committal for breach of a judgement, order of undertaking to do or abstain from doing an act. Under this rule, there is no requirement for leave before an application for contempt could be brought. This was precisely what the court of Appeal found in the case of *Christine Wangari Gachege* (supra) .
7. The argument by Mr Kinyanjui that the application ought to have been brought by application notice as opposed to Notice of Motion, motion cannot be allowed to defeat the application herein. This is an objection which is purely of a technical nature which cannot be entertained. Article 159 of the Constitution is clear that courts should not give undue regard to technicalities.
8. There was another issue raised though not contained in the preliminary objection, that the amended notice of motion, was not accompanied by a supporting affidavit. The law is clear that an affidavit cannot be amended. It was unnecessary for the applicant to retype the supporting

affidavit to the original motion and annex it to the amended motion. I therefore find that the preliminary objection has no merit. The same is hereby dismissed with costs to the defendant/ respondent.

It is so ordered.

Dated, Signed and delivered at **Nairobi** on this **7th** day of **February 2019**.

E.O.OBAGA

JUDGE

In the presence of;-

Mr Kinyanjui for Defendant

Mr Muturi for Plaintiff

Court Assistant: Hilda

E.O.OBAGA

JUDGE