



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC NO. 257 OF 2016

GERALD KIBOCHA WAMBUGU.....1st RESPONDENT/PLAINTIFF

DANIEL GATUGUTA KINGORI.....2nd RESPONDENT/PLAINTIFF

BENSON NDUNGU KINGORI.....3rd RESPONDENT/PLAINTIFF

-VERSUS-

ERASTUS KIAMA GICHUKI.....1st APPLICANT/DEFENDANT

NANCY KEZIA MUGURE.....2nd APPLICANT/DEFENDANT

FLORENCE WANJIRU MARINE.....3rd APPLICANT/DEFENDANT

UMPLOSH. COMPANY LIMITED.....4th APPLICANT/DEFENDANT

RULING

1. The matter before court is an application through a Notice of Motion dated the 20th March, 2019 and brought under the provisions of Section 5 of the Judicature Act, Section 6(c), 27(b), 28(1) and 29 of the contempt of court Act, 2016, Order 51 Rule 1 of the Civil Procedure Rules, 2010 and all enabling provisions of the Law where the Applicant/ Defendants herein seek that the court reviews its orders made on the 23rd March 2017 by directing that all rents be payable to the Applicant/Defendants, for reason that the Plaintiff/Respondents have deliberately defaulted in making the rent payments as directed hence are clearly in contempt of the Courts express orders.

2. The said application was supported by the grounds set on the face of it as well as on the sworn affidavit of Erastus Kiama Gichuki the Trustee of the Defendant Company herein.

3. The said Application was argued orally wherein Counsel for the Applicant submitted that the reason to which they had filed the present application seeking the orders as above stated was because the Plaintiff/Respondents had failed to pay the rent in court as directed by the court via its orders of 23rd March 2017. That through a tabulation of how the Respondents had been paying rent from the record of the court the Applicants had discovered that as at March, the year 2019 the Respondents had only paid a sum total Kshs.996,660/- as compared to what they were expected to have paid which was Kshs.2,024,600/- thereby defaulting with a sum of more than Ksh1,000,000/=

4. That the Respondent/Plaintiff had taken advantage of the lapse there being no checks and balances to ensure that the court orders were being complied with. That the Respondents had flouted orders that had been granted by the court after they themselves sought for it orders which the 4th Defendant could not ensure that they were complied with. The Applicant thus sought for the court to find the Respondents in contempt and thus nullify the order of 23rd March 2017 so that the money is paid back to the company.

5. That the replying affidavit by one Kiboche Wambugu did not controvert the issues deponed by the Defendant/Applicant or exonerate the Respondent/Plaintiff from the act of contempt, and neither did it state that the tabulation was wrong, fictitious or exaggerated. In essence therefore the replying affidavit did not rebut in substance the Applicant's application, but just sought for a different person be appointed to manage the suit premises which prayer ought to have been sought for through a formal application.

6. The application was opposed by counsel for the Respondents who while relying on their replying affidavit submitted that the Applicants' application sought for the Respondent/Plaintiffs to be found in contempt of the court orders so that the rent could be paid to the Defendant/Applicant which was the same mischief that the said order of 22nd March, 2017 had sought to cure. That the Applicant/

Defendants had wanted to continue enjoying the rental proceeds of the suit property when in fact the dispute before court was on the ownership of the suit property.

7. That by seeking to review the orders of the 22nd March 2017, the Applicant/Defendant was bent at defeating the issue of ownership.
8. That on the face of the application, the three (3) Respondent /Plaintiffs whom the Applicant sought that they be found in contempt of the court orders were not and have never been tenants in the suit premises but rather, members and former members of the United Social Club which was the initial owner of the suit property before it got registered in the name of the 4th Defendant/Applicant who sought orders from the court so as to protect the property of the United members Social Club.
9. That there was no claim by the Applicant/Defendant that the rent was paid to the Respondent/Plaintiffs, and that although it could be true that some default was occurring, if there was rent arrears, it could be recovered in a different forum once ownership was determined by the court.
10. That it was not true that the 3 named Respondent/Plaintiffs had taken advantage of the court orders and that if there were persons who were to be blamed for the delay in the hearing of the suit, it was the Applicant/Defendants and some of the interested parties who have filed multiple applications.
11. That the Respondents herein had only filed the suit for determination of ownership and for the rent to be paid to court. That the application herein lacked merit and the same ought to be dismissed and the matter proceeds for hearing. I shall rely also on my replying affidavit.
12. Both Counsel for the 4th to the 22nd interested parties associated themselves with the submissions of the Counsel for the Respondents wherein counsel for the 19th and 22nd interested parties added that the Applicant's application on the face of it was misconceived and intended to delay the hearing of the case. That the said application concerned itself with the 3 Plaintiffs and 4 Defendants only and not the 4th – 22nd interested parties.
13. That indeed, the 3 Respondent/ Plaintiffs were the members of United Social Club who were claiming ownership of the club from the Applicant/Defendants, who had converted the ownership and property of the club illegally.
14. That on the basis of law, although the tenants were the ones who were to pay the rent, they had not been mentioned anywhere. That if they have defaulted, they ought to remedy the defect.
15. Counsel opposed prayer No. 2 of the Application that sought for orders that the rent be paid to the Applicant/Defendant contrary to the court order. That in the same breath, the 2nd prayer in the application could not be granted because the Respondent/ Plaintiffs had not defaulted since they were not obliged to pay any rent to court. He sought that the application be dismissed with costs to all Respondent/Plaintiffs and interested parties.
16. In rejoinder, it was the applicant's submission that Counsel seem to have an issue with the heading on the face of the application in that all parties were not mentioned. That the failure to name them did not exonerate them from the orders. That the court record was clear on the identity of the parties, and so was their annexure marked as EKG1 which listed who the offenders were. The reading of the proceedings show the date of the order. There was no rebuttal on what they had deponed and/or submitted and that indeed there had been a default and since their application had not been opposed, the same be granted and the court remedies the situation as it is.

Determination.

17. I have considered the Affidavits on record, the annexures, and the submissions of Counsel. Without going into the merit of the suit herein, I shall confine myself to the impugned order of the court which is the subject matter of the present Application.
18. On the 22nd March 2017, parties entered a consent to the application dated the 21st February 2017 to the effect that
“By consent prayer 1 of the application dated 21st February, 2017 be allowed pending the hearing and determination of the application. The respondents to file and serve their replying affidavit as relates to prayer 2 within 7 days with corresponding leave to the applicants”.
19. The said consent was allowed wherein the court suo motto found a need to preserve the rent collected from the suit property being Nyeri/Mun/Block 111/99 pending the hearing and determination of the application to which it further ordered that the rent collected from the month of April, 2017, be deposited in court pending the hearing and determination of the application.
20. It is against this backdrop that the present application was filed wherein the Applicants sought that the Respondents be found in contempt and the order issued on the 23rd be reviewed so that that the rent is paid to them
21. The Respondents and interested parties on the other hand while not denying the fact that indeed there may have been some default in the payment of the rent into the court, yet they have opined that by reviewing the orders of 22nd March 2017, and directing that the rent be deposited with the Applicant, the same would be defeating the purpose of the suit wherein ownership of the suit premises is disputed.
22. I have gained sight of the further orders that were issued on the 23rd March 2017 to which the court noted that”

Counsel for the defendants has and verified that the 4th defendant has indeed been collecting rent. He has however not offered a convincing explanation why whatever monies collected have not been deposited as per the court order issued on 22nd March, 2017.

The court can only assume that the 4th defendant is not willing to comply with the order and the applicants/plaintiffs are free to file contempt proceedings.

23. The court then proceeded to make the following order:

To avoid a scenario where there is confusion as to how the rent will reach the court, I now order that every tenant occupying Nyeri/Mun/Block/III/99 to deposit their rent in court pending the hearing and determination of the application dated 21st February, 2017 effective immediately.

24. Clearly from the above captioned order, it was clear to the effect that every tenant occupying Nyeri/Mun/Block/III/99 to deposit their rent in court effective immediately.

25. I also note that vide a ruling delivered on the 14th December 2017, in relation to two application dated the 15th May 2017 and 12th June 2017, 18 interested parties were enjoined to the suit as Plaintiffs herein, it goes without saying that since they knew that they had been enjoined to the suit, they cannot turn around to state that the said application concerned itself with only the 3 Plaintiffs and 4 Defendants and not the 4th – 22nd interested parties.

26. Indeed the omission by the Applicant to indicate their names in the application can only **be said to be an error apparent on the face of the record as it was not something which can be established by a long drawn process of reading on points on which may be conceivably be two opinions.** I am alive to the provisions of Article 159 (2) (d) of the Constitution which provides that justice shall be administered without undue regard to technicalities.

27. My view is that although counsel did not list all parties to the suit on his application, such allowances ought not to be stretched so as to permit Counsel to develop a habit of drawing their pleadings in this manner instead of including all parties and argue that proceedings can be drawn in whichever way.

28. That having been said, I come back to the issue of persons who were to pay rent to the court but failed to do so and whether they were in contempt.

29. Black's Law Dictionary (Ninth Edition) defines contempt of court as:-

“Conduct that defies the authority or dignity of a court. Because such conduct interferes with the administration of justice, it is punishable usually by fine or imprisonment.”

30. In **Johnson Vs Grant (1923) SC 789 at 790** Clyde L J noted:-

“The phrase ‘contempt of court’ does not in the least describe the true nature of the class of offence with which we are here concerned.... The offence consists in interfering with the administration of the law; in impeding and perverting the course of justice..... it is not the dignity of court which is offended – a petty and misleading view of the issues involved, it is the fundamental supremacy of the law which is challenged.” (Emphasis mine).

31 In the case of **Woburn Estate Limited v Margaret Bashforth [2016] eKLR the court of Appeal held as follows:**

*For many years in the history of the Judiciary of Kenya the courts have, pursuant to **section 5 (1)** of the Judicature Act, resorted to the prevailing law of England in the exercise of the power to punish for contempt of court.....*

*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 provision 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 of 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....*

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 in 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

31. Section 29 of the Environment and Land Court is clear to the effect that;

Any person who refuses, fails or neglects to obey an order or direction of the Court given under this Act, commits an offence, and shall, on conviction, be liable to a fine not exceeding twenty million shillings or to imprisonment for a term not exceeding two years,

or to both

32. The court having directed that every tenant occupying Nyeri/Mun/Block/III/99 to deposit their rent in court effective from the 23rd March 2017, and the said orders having been flaunted by the tenants herein as per the Applicant's tabulation in his annexure marked as EKG1, which tabulation was not controverted by either of the Respondents I find that the 4th -10th Respondent/Plaintiffs as well as the 12th to 18th Respondent/Plaintiffs, defied the authority and/or dignity of the court and therefore are in contempt of the court orders of 22nd March 2017 and 23rd March 2017 respectively and I shall proceed to punish them for contempt. The 4th -10th Respondent/Plaintiffs as well as the 12th to 18th Respondent/Plaintiffs, are herein condemned to pay a fine of Ksh. 10,000/- each in default to serve a term of 1 month in civil jail effective immediately.

33. The application dated the 19th March 2019 is allowed to this extent.

34. Costs to the Applicant.

Dated and delivered at Nyeri this 25th day of July 2019

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE