



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC MISC. APPL. NO. 12 OF 2019

TRUPHENA MENA

BEDAN MWANGI

GEORGE NJOROGI

DANIEL GITHINJI

CAROLYNE CHEROTICH

PHOEBE ANYANGO.....APPLICANTS

VERSUS

BONVENTURE A. OMUSE.....DEFENDANT

RULING

1. The application dated **20/5/2019** and filed in court on **21/5/2019** has been brought by the applicants seeking the following orders:
 - (a) **That this matter be certified urgent and the same be heard forthwith.**
 - (b) **That the respondent be punished by this court for willful disobedience of a valid court order made on 10/5/2019 duly served with penal consequences.**
 - (c) **That the respondent be ordered to appear in person during the hearing of this application.**
 - (d) **Any other orders the court shall deem fit to grant.**
 - (e) **Costs be provided for.**
2. The application is premised on the grounds set out in the notice of motion and is supported by a sworn affidavit, also dated **20/5/2019**. It is brought under **Section 3, 4 (1) and 5 of the Contempt of Court Act, 2016 and Order 40 Rule 3 of the Civil Procedure Rules.**
3. The grounds on the face of the application upon which the application is made are that on **10/5/2019** the court ordered the respondent to stop interfering with the tenancy of the applicants in any manner and the defendant was duly served with the order on **11/5/2019 at 11.56 am** through his wife, which order contained penal consequences; that the respondent upon receiving the order went ahead and fenced off the premises completely and informed the applicants that they were no longer required in the said building; that the respondent placed guards at the entrance of the premises who have been instructed not to allow the applicants access thereto and that it is of prime importance that the dignity of the court be preserved.
4. In the supporting affidavit of the 2nd applicant who swears it on his own behalf and on behalf of other applicants, he depones that the applicants have occupied the respondent's premises for a period between **5 - 10 years**; that the respondent purported to renovate the premises and thereafter sought to steeply increase the rent thus prompting the case before the Business Premises Rent Tribunal that is **BPRT No. 6, 7, 8, 9, 10 and 11 of 2018** at Eldoret. The Tribunal made an order of valuation. Later they were served with notice of termination of tenancy dated **25/2/2019** on the basis that the premises had been condemned by the Public Health Department and they went before the Business Premises Rent Tribunal and filed **BPRT No. 6, 7, 8, 9, 10 and 11 of 2019** at Eldoret in opposition to the termination notice. The said Tribunal cases were due for hearing on **4/6/2019** however during their pendency the respondent caused acts of provocation and annoyance thus disrupting the smooth running of the applicants' businesses. The electricity supply was disconnected; workers were brought who dug

holes around the building, the building was fenced off and sand deposited inside the building thus blocking the entrance. It is deponed that the intention of the respondent is to block access to the applicants' businesses yet they had continued paying rent as ordered by the Tribunal. It is deponed that unless checked the acts of the respondent shall constructively evict the applicants from the premises. They aver that they have no alternative premises to relocate to and their customers are adapted to the location.

5. The respondent filed notice of intention to raise a preliminary objection dated **21/6/2019** on the following grounds:

(1) That Section 3, 4(1) and 5 of the Contempt of Court Act, 2016, the basis for the application dated 20/5/2019 are not applicable and have no place in this suit and/or in Kenyan legal sphere since the Contempt of Court Act of 2016 was declared unconstitutional and was repealed.

(2) That the applicants contravened Section 24 of the general provisions and interpretation Act.

(3) That the applicants lack the capacity to bring this application against the respondent.

(4) That therefore there is no issue properly before court for determination.

6. In addition, the respondent also filed a replying affidavit dated 2/7/2019. He deponed that the application dated 20/5/2019 has no basis as the Contempt of Court Act has been declared unconstitutional; that the application contravenes **Section 24** of the General Provisions and Interpretation Act; that there is no tenancy relationship between the applicants and the respondent following orders of the Tribunal; that the applicants had voluntarily vacated the premises by **11/5/2019**; that **12/2/2019** the premises were condemned by the County Government of Trans-Nzoia, State Department of Health on grounds of nuisance hence notices of termination of the tenancy; that there were no orders in place in the reference proceedings which would have stopped the respondent from complying with the public health office's statutory notice which required that the premises be closed; that renovation began on **7/5/2019** after construction materials were brought in on **4/5/2019**; that the renovation had nothing to do with the tenants and that it was in compliance with the public health department's statutory notice; that the orders made on **10/5/2019** were made in vain as the applicants had already vacated and carried away their belongings and therefore the respondent is not in contempt; that the Business Premises Rent Tribunal later confirmed from both parties that there is no longer any existing tenancy relationship between them; that the statutory notice and the public health report cannot be challenged in this court; that the application is made in bad faith and that it lacks form and should be struck out with costs.

7. I have examined the grounds in the notice of preliminary objection dated 21/6/2019 and I find that they have been covered by the replying affidavit.

8. No submissions were filed by the parties.

9. This court must determine whether the applicants have by the application and affidavit evidence established that the respondent is guilty of contempt of court. The following questions arise for determination:

(a) Do the applicants have locus standi?

(b) Is the application defective by reason of reliance on the Contempt of Court Act 2016?

(c) Was there a valid court order made on 10/5/2019 and extended on 23/5/2019?

(d) Was the respondent aware of the existence and contents of the said court order?

(e) Did the respondent act in contravention of that order?

10. I have examined orders of the Tribunal, copies of which had been annexed and marked "**BOA004a**" to "**BOA004f**". They were issued between **3/6/2019** and **4/6/2019**. That was long after the date in question, that is, **11/5/2019** which is the date of the order said to have been disobeyed. The ground that the orders by the Tribunal were issued long after the orders of this court had been issued renders ineffective the respondent's defence that the applicants lack *locus standi* to bring these proceedings.

11. The second issue is whether the application is defective for having been brought under **Section 3 (4) (1)** and 5 of the **Contempt of Court Act 2016**.

12. It is correct that the entire **Contempt of Court Act 2016** was declared unconstitutional in **Nairobi Const. Pet. No. 87 of 2017 - Kenya Human Rights Commission -vs- Attorney General & Another [2018] eKLR** before the filing of the instant application. However I do note that the application is also brought under **Order 40 rule 3** of the Civil Procedure Rules which entitles the applicants to similar orders. Besides, this court's power under the common law to mete out punishment to a contemnor is still available even in the absence of the citation of the proper statute law. Lastly **Order 50 rule 10 (1)** and **(2)** of the **Civil Procedure Act** provides that no objection shall be made to any application and no application shall be refused merely by reason of a failure to comply with the requirement that the order, that is, failure to state the rule or statutory provisions under which an application is made. No application shall therefore be defeated on the basis of form that does not affect the substance thereof. In addition **Article 159 (2) (d)** of the Constitution provides that justice shall be administered without undue regard to procedural technicalities. I believe that it was sufficient for the applicants to rely on **Order 40 rule 3**.

13. Further, **Section 5(1)** 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.”

14. While analyzing the provisions of **Section 5(1)** set out above, Lenaola J (as he then was) observed as follows in the case of **Basil Criticos v Attorney General & 8 others & 4 others [2012] eKLR**:

“16. Two issues arise from the above provisions. Firstly, only the High Court and the Court of Appeal can entertain an application for contempt. Secondly, while the substantive law and power to punish for contempt are granted by the Judicature Act, the procedural law is to be found in the contemporary English law of civil contempt as it changes from time to time. Presently, this law is retained in the Rules of the Supreme Court in Schedule 1 of the Civil Procedure Rules.”

15. This court being a court of equal status as the High Court therefore has power to punish for contempt.

16. The foregoing affords sufficient grounds for rejecting the preliminary ground raised by the respondent to the effect that the application is defective for the reason that the Contempt of Court Act is no longer in force.

17. Having established that the applicants’ possess *locus standi* as above, I must deal with the subsequent questions.

18. Regarding the second question, contempt of court arises where a party with knowledge of the existence of a court order acts in contravention of that order. Proof of service of the court order on the alleged contemnor is vital. However it is not in all cases that proof of service will be required. Where it can be deciphered from the general circumstances of the case that the alleged contemnor was aware of the orders and that notwithstanding that knowledge he acted in contravention thereof he may be held to be in contempt of court. In the case of **Basil Criticos v Attorney General & 8 others & 4 others [2012] eKLR** where Lenaola J, as he then was observed as follows:-

“However the law has changed and as it stands today knowledge supersedes personal service and for good reason. This has recently been held in Kenya Tea Growers Association vs Francis Atwoli & 5 Others, Petition No.64 of 2010 where I opined as follows;

“In the case before me, I am more than satisfied that even at the higher level of beyond reasonable doubt, when an individual has been served with and/or has knowledge of a court order but not only ignores it but in fact incites others to do the same, the threshold for contempt has been met. Francis Atwoli in fact went further to arrogate himself the decision to determine when the strike should end despite the fact that the Court Order had stopped it. He went further to interpret it as made without jurisdiction and that only the “Workers Court”, (the Industrial Court) had jurisdiction to determine the matter. He did not do so once but on a number of occasions as he flew by helicopter from place to place on 18th October 2012. His contempt was obvious and his conduct and words can attract no other finding.”

The point above is that where a party clearly acts and shows that he had knowledge of a Court order, the strict requirement that personal service must be proved is rendered unnecessary. That should be the correct legal position and I subscribe to it.”

19. In the current case the applicants appeared before this court on **10/5/2019** and secured an order that restrained the respondent from fencing off, digging holes, constructing a hedge, blocking access to, depositing materials, evicting the applicant or in any other manner interfering with the applicants’ quiet possession, enjoyment and use of the suit premises comprised in **Plot No. 2116/IV/26** within Kitale Municipality. It was also ordered that the application be heard on **23/5/2019** at Eldoret. That is the order the respondent is said to have violated. There was therefore a valid court order that the respondent was obliged to comply with.

20. To answer the third question, evidence of service or knowledge of the order and its contents on the part of the respondent is required. In the current application the evidence of Bedan Mwangi the 2nd applicant, in support of the application is relied on. The contents thereof have already been outlined hereinabove. That affidavit annexes two documents; a copy of an order extracted on **10/5/2019** and from the scribbling at the back thereof, evidently served on **11/5/2019**; the affidavit of George Momanyi a process server was also exhibited in the affidavit. The two documents confirm that service was effected on one Dorothy Omuse the wife of the respondent who informed the process server that the respondent had just left for Busia; however she called the respondent on her phone and allowed the process server to speak to the respondent over that phone whereupon the respondent directed the process server to leave the documents with his wife which the process server did. All those facts have not been controverted by the respondent. I am therefore convinced that the respondent was aware of the order in question.

21. The fourth question is whether the order was violated? Firstly, the respondent avers that by **11/5/2019** the applicants were no longer on the premises, having voluntarily vacated therefrom. He also maintains that the Tribunal found that there was no longer a tenancy relationship between him and the applicants. Is this the correct position? Had the applicants left the premises by then? It is averred as follows in the supporting affidavit annexed to the application:-

“12. That the respondent on receiving the order (11/5/2019) told us that our tenancy has expired and he will not allow us access thereto by any means.

13. That in furtherance thereof the respondent has blocked the main entrance by placing guards to deny us any access.”

14. That the respondent further told us point blank that the matter had been overtaken by events.

15. That our advocate wrote a letter dated 11/5/2019 asking the respondent to adhere to the terms of the court order but he refused to heed.”

22. Other than the technical objections which have been addressed in the other issues dealt with above the respondent’s response heavily relies on the notices allegedly issued by the Trans-Nzoia State Department of Health. He avers that his renovations of the premises began on 7/5/2019, the materials for the purpose having been deposited on site on 4/5/2019.

23. The respondent avers that he was complying with the notices issued by the State Department of Health on 12/2/2019. Is this a justifiable reason for failing to comply with this court’s order issued on 10/5/2019? In my view only a setting aside of the order by this court or by an appellate court have entitled the respondent to proceed with the renovation works in the premises after this court’s order was issued on 10/5/2019. It has not been demonstrated that the said orders were so set aside.

24. First, it is noteworthy even if it is assumed that his allegation that the materials had been brought to the site by 4/5/2019 and the renovations had begun by 7/5/2019, it is correct that no specific denial is made of the paragraphs 12, 13, 14, and 15 of the supporting affidavit which have been set out verbatim hereinabove.

25. More importantly it is clear that the applicants were still interested in accessing the premises by 11/5/2019 and that fact is not affected by the subsequent declaration by the Tribunal that there was no landlord tenant relationship between the parties as the declaration made on 3rd and 4th June, 2019 a much later date. Those Tribunal orders do not also give a clue as to when the landlord/tenant relationship ceased.

26. It is clear from the application for injunction that by 7/5/2019 the applicants had not been constructively or otherwise evicted from the premises.

27. Copies of receipts exhibited to the application dated 7/5/2019 demonstrate that rent payments for the premises had been made as late as April 2019 and that notwithstanding, the respondent does not maintain that he responded to the letter dated 11/5/2019 written by the applicants’ counsel seeking to compel him to allow the applicants access to the premises.

28. Instead of ceasing his activities as required by the court order the respondent proceeded with what he calls “renovations”. He does not depone to having stopped the works; to make it worse, he has in this application attempted to justify his renovations by citing the County Government Public Health Department’s Notice. It is doubtful that the said notice could lead to the automatic termination of the applicants’ tenancies.

29. In this court’s view, there would have been no point for the applicants to file the motion for injunction in court if they had already vacated the premises. Besides, the respondent appears to have proceeded with the nuisances that he raised with the intent of constructively evicting the applicants, and he succeeded in doing so despite the instant application and the interim orders given.

30. In view of the foregoing, this court is not convinced that the applicants vacated the premises of their own volition. It is convinced beyond reasonable doubt that the respondent’s activities prompted the abandonment of the premises by the applicants.

31. It must be stated that the County Government Health Department behind whose notice the respondent is attempting to hide is not immune to the orders issued by this court issued on 10/5/2019.

32. In the circumstances the conclusion of this court is that there is sufficient evidence that the respondent was aware of the court order and that he wilfully defied it. The respondent is guilty of the offence of contempt of court and I hereby convict him accordingly for that offence. He shall appear before this court personally for mitigation and sentencing on the **1st October 2019 at 9.00 a.m.**

It is so ordered.

Dated, signed and delivered at Kitale on this 30th day of September, 2019.

MWANGI NJOROGE

JUDGE

30/9/2019

Coram:

Before: Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Nakitare holding brief for Wanyonyi for 2nd plaintiff

N/A for the rest of the parties.

COURT

Ruling read in open.

MWANGI NJOROGE

JUDGE

30/9/2019