



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**CIVIL CASE NO 38 OF 2011**

**BRUNELLA PANINI & 66 OTHERS.....PLAINTIFFS/APPLICANTS**

**BELLUOMINI GIULIANA.....17<sup>TH</sup> PLAINTIFF/DEFENDANT**

**MARIA PETRINO.....68<sup>TH</sup> PLAINTIFF/DEFENDANT**

**GIANNA ELISA RECCOSTA.....69<sup>TH</sup> PLAINTIFF/DEFENDANT**

**VERSUS**

**1. POLICINO OASIS MANAGEMENT LIMITED**

**2. POLICINO OASIS LIMITED**

**3. GIOVANNI DE CARO**

**4. POLICINO COSIMO**

**5. THOMAS HINZANO NGONYO.....DEFENDANTS/RESPONDENTS**

**RULING**

1. By a Notice of Motion Application dated 28<sup>th</sup> August 2017 and filed herein on 31<sup>st</sup> August 2017, the 5<sup>th</sup> to 9<sup>th</sup> Interested Parties pray for Orders that:-

***1. The Honourable court be pleased to direct that all the apartment owners who are in breach of the Orders of 1<sup>st</sup> December 2016 be punished for contempt of Court for willful disobedience of Court Orders.***

***2. All apartment owners who are in default of paying the service Charge as per the Order of 1<sup>st</sup> December 2016 should not be allowed to gain access into the premises and should also not be allowed to lease the premises unless and until they clear all pending Service Charge payments.***

***3. An order be made compelling all the apartment Owners whose names are listed above to pay service Charge within 14 days from the date of hearing of this application.***

***4. In default of payment as may be ordered, the defaulters apartments and/or any other property moveable or immovable be ordered to be sold by way of auction to realise the Service Charge and other attendant costs.***

***5. The Honourable Court do order that all the Service Charge for each and all subsequent years is payable by the 31<sup>st</sup> of January of each year and therefore the Service Charge for 2018 should be paid by 31<sup>st</sup> January 2018 by all apartment owners.***

***6. The Honourable Court be pleased to appoint Alessandro cazanti and Donatella Bosi together with the attendant staff and accountants to manage the affairs of Polcino Oasis Ltd pending the hearing and determination of this application.***

**7. The Honourable Court be pleased to appoint Alessandro Cazanti and Donatella Bosi together with attendant staff and accountants to manage the affairs of Polcino Oasis Ltd until such a date and time that Polcino Oasis Ltd shall be able to run its affairs.**

**8. That the Honourable Court do compel the Coral Property Consultant Ltd, the 10<sup>th</sup> Interested Party herein to prepare and hand over proper accounts to allesandro Cazanti and Donatela Bosi or to any new interim manager and facilitate a smooth transition between Coral Property Consultants Ltd and the new managers.**

**9. Costs of the application be provided.**

2. The said Application is supported by the attached affidavit of Allesandro Cazanti and is premised on the grounds that:-

**a) A Ruling was delivered herein on 9<sup>th</sup> July 2013 wherein Brunella Panini, Maurizio Tuvano and Paola Ippolito were appointed as receiver-Managers of Polcino Oasis Village.**

**b) By another Ruling dated 8<sup>th</sup> November 2013, the Court enjoined the Applicants in that suit and directed that the Receiver-Managers were not to increase the Service Charge which was to be paid to the 2<sup>nd</sup> Respondent herein.**

**c) Again another Ruling delivered on 26<sup>th</sup> June 2015 following an application by the Applicants herein, the Court appointed Coral Properties Limited (the 10<sup>th</sup> Interested Party) to run the suit premises. The said Ruling directed all apartment owners to pay the Service Charge quoted in a report prepared by the 10<sup>th</sup> Interested Party with effect from 1<sup>st</sup> January 2015.**

**d) Despite the said Order, some apartment owners have failed to pay the Service Charge and the Applicants are apprehensive they may as a result be rendered homeless. Accordingly, the Applicants pray that the said defaulters be punished for willful disobedience of Court Orders.**

3. In response to the Application, the 4<sup>th</sup> Interested Party took out a Notice of Preliminary Objection filed herein on 31<sup>st</sup> December 2017 stating that the said application is hopelessly misconceived, unsupported, frivolous, totally devoid of merit and mala fides for the reasons inter alia:-

- 1. That the application contravenes the mandatory provisions of Orders 1 Rule 13 and 19 Rule 5 of the Civil Procedure Rules;**
- 2. That the application is incurably defective for seeking Orders against persons who are not party to the proceedings herein and**
- 3. That the Application is incurably defective because whereas the Supporting Affidavit was commissioned on the 28<sup>th</sup> August 2017, the Annexures attached to the Supporting Affidavit were commissioned on 31<sup>st</sup> August 2017.**

4. On their part, those named as contemnors but who were not yet parties herein, namely, Sapore Enterprises Ltd, Maurizio Turato and Aqese Fraucheschini jointly filed Grounds of Opposition herein opposition the Motion on the grounds:-

**1. That the application is fatally defective and the same ought to be struck out forthwith as:**

**a) The application does not meet the procedural requirements as set out under the Contempt of Court Act No. 46 of 2016, and the same has been brought under the wrong provisions of the law.**

**b) The application is omnibus in nature as it seeks composite Orders of contempt, receivership and for disposal of apartments when the sought prayers are not contingent to each other.**

**2. That the Applicants have come to Court with dirty hands and do not deserve the Orders sought as they have concealed from Court material facts and specifically, that the subject apartments and shops are uninhabitable and have been condemned by the relevant authorities as dangerous and unfit to use; and**

**3. That the Application be dismissed with attendant costs for being an abuse of the due process of Court.**

5. On the date of the application came up for hearing, the 4<sup>th</sup> Interested Party's Preliminary Objection had just been filed and there being no reason for the late filing and service, the same was disregarded.

6. I have considered the application and the Grounds of Opposition filed in response thereto. I have equally considered the oral submissions made before me by the Learned Advocates for the parties as well as the Authorities they referred me to.

7. In *Ecovet Wireless Kenya Ltd –vs- Minister for Information & Communication of Kenya & Another*(2005) 1KLR 828, Ibrahim J.(as he then was) observed as follows:-

**“It is essential for the maintenance of the Rule of Law and Order that the authority and the dignity of our Courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against or in respect of whom, an order**

*is made by a Court of competent jurisdiction, to obey it unless and until that Order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to irregular or void.”*

8. In recognition of the fact that contempt of Court proceedings are quasi-criminal in nature, Courts have consistently held that in such circumstances, the Applicant must prove beyond per adventure that the respondent is guilty of contempt. In this regard, in *Gathara K Mutitika –vs- Baharini Farm Ltd(1985) KLR 227*, it was held as follows:-

*“The Courts take the view that where the liberty of the subject is, or might be involved, the breach for which the alleged contemnor is cited must be precisely defined. A contempt of Court is an offence of a criminal character. A man may be sent to prison. It must be satisfactorily proved...It must be higher than proof on a balance of probabilities, almost, but not exactly, beyond reasonable. The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend to an offence which can be said to be quasi-criminal in nature. However, the guilt has to be proved with such strictness of proof as it consistent with the gravity of the Charge.... Recourse ought not to be had to the process of contempt of Court in aid of a civil remedy where there is any other method of doing justice. The jurisdiction of committing for contempt being practically arbitrary and unlimited, should be most jealously and carefully watched and exercised with the greatest reluctance and the greatest anxiety on the part of Judges to see whether there is no other mode which is not open to the objection of arbitrariness, and which can be brought to bear upon the subject. A Judge must be careful to see that the cause cannot be the mode of dealing with persons brought before him. Necessary though the jurisdiction may be, it is necessary only in the sense in which extreme measures are sometimes necessary to preserve men’s rights, that is, if no other pertinent remedy can be found... Applying the test that the standard of proof should be consistent with the gravity of the alleged contempt...It is competent for the Court where a contempt is threatened or has been committed, and on an application to commit, to take the lenient course of granting an injunction instead of making an Order of committal or sequestration, whether the offender is a party to the proceedings or not.”*

9. In the matter herein, the Applicants applied and were enjoined in these proceedings vide a Ruling dated 8<sup>th</sup> November 2013 in which the Court also directed that Service Charge be paid to the 2<sup>nd</sup> Respondent. By another ruling delivered on 26<sup>th</sup> June 2015, the Court directed all apartments owners at the Polcino Oasis Village to pay Service Charge with effect from 1<sup>st</sup> January 2015. The Applicants state that they have been paying their portion of the Service Charge but are unhappy that the Respondents including apartment owners who are yet to be made parties herein have since disregarded the Order and have continued in their failure to remit the Service Charge as directed.

10. The Applicants further contends that on or about 1<sup>st</sup> December 2016, the Honourable Justice Angote then seized of this matter directed that all apartment owners be served via email. In line with the said Orders the 10<sup>th</sup> Interested Party/Applicant avers that an email was sent to all apartment owners. It is further their case that the named apartment owners have failed and/or refused to comply with the requirement to pay Service Charge hence the need to have them punished as sought herein.

11. I have read and re-read this file, the suit herein and the numerous applications filed by all the parties since the inception of this suit in the year 2011. It is evident that there has been a serious breakdown in the management of all those premises known as Polcino Oasis Village. From the evidence placed before me, it is difficult to ascribe the failure of the alleged contemnors herein to pay Service Charge to willful disobedience of this Court’s Orders.

12. Firstly, I say so because I did not find anything in the Ruling of the Honourable Angote J delivered on 1<sup>st</sup> December 2016 which allowed the occupants of the apartments built at the village to be served by way of emails as indicated in the application before me. Secondly, even if the owners were to be served via email, nothing was placed before me to show that the emails used were the Respondents and/or that they are the ones that had been left at the premises by some of the owners of the apartments who apparently no longer reside therein.

13. It is noteworthy that the Applicants themselves clearly state that Polcino Oasis Ltd is unable to run its affairs and hence their prayer to have themselves appointed to run the affairs thereof until such a time that it shall be able to manage itself.

14. From a perusal of the pleadings and affidavits filed herein, I do not think it would serve the interest of justice to grant any of the prayers sought before me. I think this Court has an obligation to ensure that litigation comes to an end and the Court Process is not used to perpetuate all manner of disputes unrelated to the matters that gave rise to the suit herein.

15. Accordingly, I shall make the following Orders:-

*a) The application dated 28<sup>th</sup> August 2017 is hereby dismissed with no order as to costs.*

*b) Parties to file and exchange Witness Statements and /or List of Documents as they may desire within 30 days from the date hereof.*

*c) The Plaintiff to fix this matter for direction before the Deputy Registrar of this Court within 60 days from the date hereof for purposes of compliance with Order 11 of the Civil Procedure Rules.*

*d) This matter be mentioned before this Court on 24<sup>th</sup> September 2018 to confirm compliance and for purposes of fixing a hearing date.*

**Dated, signed and delivered at Malindi this 28<sup>th</sup> day of June, 2018.**

**J.O. OLOLA**

**JUDGE**