



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

MISCELLANEOUS CIVIL APPLICATION NO. 112 OF 2017

GILBERT OTIENO

RUFUS OCHIENG MIDUMBI.....APPLICANTS

VERSUS

BERNARD MUSHIVOJI

JABADA CONSULTING CO. LTD.....RESPONDENTS

RULING

The application before Court is the Applicants' Notice of Motion dated the 29th November, 2017 brought pursuant to section 5(1) of the Judicature Act, Order 32 of the Rules of the Supreme Court of England 1965, section 1A, 1B and 3A of the Civil Procedure Act, Section 5(b) of the Contempt of Court Act. The Applicants' seeks the Respondents to be committed to civil jail for contempt of the Orders of the Business Premises Rent Tribunal, Nairobi issued on the 16th November, 2016, 12th January, 2017 and 21st April, 2017 respectively. The application is premised on the following grounds which in summary is that the Applicants were complainants in a tribunal suit instituted at the Business Premises Rent Tribunal, Nairobi, vide Tribunal Case No. 69 of 2016, in respect of all that premises known as Shop no. 8, Kemms Apartment in Kitengela, where the Respondents herein were defendants. The Honourable Tribunal issued orders on various dates being 17th November, 2016 and 12th January, 2017 respectively concerning the said suit premises, directed at the Respondents. The said orders have never been reviewed, set aside, varied and or discharged. The orders were extracted by the Advocates for the Applicants herein and served upon the Respondents/ Contemnors. The contemnors have ignored, disrespected and or declined to obey the said orders made on the 16th November, 2016, 12th January, 2017 and 21st April, 2017 respectively despite the fact that the same orders were served upon them. The dignity and authority of this Honourable Court has been brought in to public odium, ridicule and contempt.

The application is supported by the affidavit of GILBERT OTIENO one of the Applicants herein where he reiterates their claim and avers that they were granted ex parte interim orders of injunction on 16th November, 2016 which directed the Respondents not to interfere with the Applicants' quiet possession of the premises, but they breached this order. He contends that on 12th January, 2017 in the absence of the Respondents, the Tribunal granted them orders directing them to break and enter the Premises the Respondents had locked up, which they did under supervision from the OCS Kitengela. He claims the Respondents have refused to obey the Court orders despite being served and they moved to block the entrance of the said Premises by pouring heaps of soil effectively blocking it and closing its entrance to the Applicants' business. Further, despite being requested to remove the same, they have declined to do so and the Applicants have been denied the benefits of the subsisting orders. He avers that on 21st April, 2017, the Honourable Tribunal made orders confirming the earlier orders issued on 16th November, 2016 and 12th January, 2017 and directed the Respondents to pay costs of Kshs. 25,000 to the Applicants, which order was served upon the Respondents, by pinning on the wall of 1st Respondent's office and gate of the suit premises. He states that in direct disregard of the above, the Respondents went ahead to demolish the premises, with the Applicants' goods therein, whose whereabouts are unknown to date. He reiterates that the activities that the contemnors have commenced and continued carrying out on the suit property include demolishing the business premises, forcefully evicting the Applicants and carrying away the Applicants' goods to unknown destination. He confirms that the Tribunal which issued the orders has no power to punish for contempt of its orders, hence the need to approach this Honourable Court for the same.

The Respondents opposed the application and filed a Notice of Preliminary Objection where;

1. That this Honourable Court lacks jurisdiction to determine the application for reasons inter alia, that the jurisdiction in in the first instance reserved for the Tribunal issuing the Orders, that the application is moot, anchored on repealed provisions of law and there is no landlord tenant relationship in existence warranting the intervention of this court to enforce the sought prayers.

2. That Applicants' application is incurably defective, hopelessly misconceived, frivolous, totally devoid of merit and mala fides for the reasons, inter alia, that the application is misdirected, premature, incompetent and bad in law and an abuse of the process of this Honourable Court hence ought to be struck with costs.

3. That the application is an afterthought and no action lies against the Respondents.

4. The application is unlawful, offends various provisions of the Constitution and is therefor an affront to the sanctity of Human Rights and Freedoms guaranteed under the Constitution.

The Respondents further filed a replying affidavit sworn by the 1st Respondent BERNARD MUSHIVOJI where he deposed that the application is incurably defective as no landlord tenant relationship exists between him and the Applicants. He claims that all material time, he transacted everything relating to this matter in his personal capacity as the Director to the 2nd Defendant that is a limited liability company. He contends that he is not personally liable for the debts, actions or omissions of the 2nd Respondent as it is a separate legal entity hence the suit against him is misdirected. He denies blocking, interfering or obstructing the

enforcement of the orders of the court. Further, that the Applicants used the support of the OCS Kitengela to break into the suit premises, hence the orders of the court dated the 16th November, 2016 and 12th January, 2017 respectively have been satisfied. He contends that on 2/2/2017 he was notified of a Notice from had the Kajiado County Department of Public Health services directed to the applicant banning the use of demised premises as a food plant.

He insists the applicant operation was stopped and they could appear intermittently. He denies the various orders have been served upon him personally and avers that the demised premises are intact, with the applicants' goods still therein. He denies receiving complaints for break in, and that applicant obtained orders fraudulently without disclosing material facts to the Tribunal as relates to the letter from the Kajiado Health Department which is beyond the respondents' control. He reiterates that the committal orders sought are immature.

Both parties filed submissions that I have considered.

Analysis and Determination

Upon perusal of the Notice of Motion dated the 29th November, 2017 including the supporting and replying affidavits as well as the Notice of Preliminary Objection filed on the 12th February, 2018 the following are the issues for determination:

- a. Whether the Honourable Court has jurisdiction to entertain the application dated the 29th November, 2017;
- b. Whether the 1st and 2nd Respondents are in contempt of the orders of the court granted on November, 2016; 12th January 2017 and 21st April 2017.

It is the Applicant's contention that the 1st and 2nd Respondents are in contempt of court as they proceeded to evict them and skirt away their goods to unknown destination despite the orders of the Business Premises Tribunal which were served upon them. The Counsel for the Applicants relied on several cases including **Kyoga Hauliers V Long Distance Truck Drivers & Allied Workers Union (2015) eKLR; Attorney General & Another Vs Andrew Maina Githinji & Anor (2016) eKLR; Mukhisa Biscuit Manufacturing Co. Ltd Vs West End Distributors and the Shimmers Plaza Ltd Vs NBK [2015] eKLR**, to support their claim.

The 1st and 2nd Respondents deny being in contempt of court and filed a replying affidavit and Notice of a Preliminary Objection where they claimed the Applicants with the help of the OCS Kitengela broke in to the premises as per the Court Order. They aver that the Court does not have jurisdiction to entertain the instant application and aver that the application is incurably defective as it relied on the provisions of the Judicature Act that were repealed. They relied on the following cases including **Mukhisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Ltd [1969], 696; Leila Kavemba & 2 Others Vs Said Suleiman [2017] eKLR; Travel Planners Ltd Vs Managing Director, Kenya Railways Corporation & Anor (2008) eKLR and Woburn Estate Limited Vs Margaret Bashford, Civil Appeal No. 18 of 2015 (2016) eKLR**.

I note there were various Orders dated the 16th November, 2016, 12th January, 2017 and 21st April, 2017, respectively from the Chairman of the Business Premises Rent Tribunal directing the 1st and 2nd Respondents not to evict or close the suit premises and or interfere with the Applicant's quiet possession as well as enjoyment of the demised premises. I note the Respondents did not participate in the proceedings at the Tribunal but they were served with the said Orders.

Black's Law Dictionary defines contempt as follows: '**Contempt is a disregard of, disobedience to, the rules orders of a legislative or judicial body, or an interruption of its proceedings by disorderly behaviour or insolent language, in its presence or so near thereto as to disturb the proceedings or to impair the respect due to such a body.**'

Section 27(b) of the Contempt of Court Act **provides that a person who willfully and without lawful excuse disobeys an order or directions of a superior or subordinate court in the course of the hearing of a proceeding;**

While **Section 28(1) of the Contempt of Court Act provides that 'save as otherwise expressly provided in this Act or in any other written law, a person who is convicted of contempt of court is liable to a fine not exceeding two hundred thousand shillings or to imprisonment for a term not exceeding six months, or to both.'**

In the case of **North Tetu Farmers Co. Ltd v. Joseph Nderitu Wanjohi (2016) eKLR**, Justice Mativo stated as follows: '**writing on proving the elements of civil contempt, learned authors of the book Contempt in Modern New Zealand have authoritatively stated as follows:-**

' there are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases - (a) the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant; (b) the defendant had knowledge of or proper notice of the terms of the order; (c) the defendant has acted in breach of the terms of the order; and (d) the defendant's conduct was deliberate.'

I note the Applicant proceeded to apply for leave to institute contempt proceedings on the orders of the Tribunal which were granted. I however, note that since it is a decision of the Tribunal, Section 14 (1) of Cap 301 has clearly stipulated as follows:

' A duly certified copy of any determination or order of a Tribunal may be filed in a competent subordinate court of the first class by any party to the proceedings before such Tribunal or by the Tribunal, and on such copy being filed and notice thereof being served on the Tribunal by the party filing the same such determination or order may, subject to any right of appeal conferred by or under this Act, be enforced as a decree of the court.'

I note the applicants are seeking the respondents to be cited for contempt for orders of the Tribunal which are yet to be adopted by the Magistrate's Court as an order of the court.

It is my finding that the respective orders from the Chairman of the Business Premises Tribunal should have been first filed in the Magistrates Court for adoption, a Decree extracted, before the Applicants could apply for its enforcement which in this scenario is citing the Respondents for contempt. At this juncture, and in line with the provisions of section 14 (1) of Cap 301 and being persuaded by the Case of **Travel Planners Limited Vs The Managing Director, Kenya Railway Corporation & Another (2008) KLR**, I find that the proceedings herein are premature and it is immaterial whether leave was granted or not to commence contempt proceedings if leave was granted. I direct the Applicants to first file the three Orders of the Business Premises Rent Tribunal at the Magistrates' Court for adoption and extraction of the Decree, after which they can apply for the Respondents to be cited for contempt.

The application is struck out with no order as to costs.

Dated, Signed and Delivered in Kajiado this 14th June, 2018

CHRISTINE OCHIENG

JUDGE