



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 227 OF 2014

JEDROM BUILDING AND CIVIL ENGINEERING LTD....PLAINTIFF/APPLICANT

VERSUS

COUNTY GOVERNMENT OF UASIN GISHU.....1ST DEFENDANT/RESPONDENT

NELSON MARITIM.....2ND DEFENDANT/RESPONDENT

RULING

The 2nd defendant has filed a preliminary objection on the application dated 5.3.2018 on grounds that the application offends the provision of Articles 47, 48 and 50 (1) of the Constitution of Kenya 2010 and Order 1, Rule 1 and 2 and 10 of the Civil Procedure Act, 2010, Cap. 21, Laws of Kenya and is an abuse of the process of court. Moreover, that the application is vexatious scandalous, misconceived, bad in law and should be dismissed with costs.

The defendant filed written submissions that were eloquently amplified by M/S Chesio whose gravamen is that Order 51 of the Civil Procedure Rules does not provide for joinder of parties to the suit. The 1st defendant refers to Order 40(3) of the Civil Procedure Rules and quotes it at length. He submits that Order 40, Rule 3(3) retires parties to Order 51 of the Civil Procedure Rules, 2010.

The 1st defendant refers to Contempt of Court Act No. 46 of 2016 which is subject on the joinder of parties in the contempt application. The 1st defendant submits that Order 1 Rule 10 of the Civil Procedure Rules, 2010 is relevant.

Mr. Kariuki learned counsel for the plaintiff argues that the preliminary objection has no basis in law as the 1st defendant has not demonstrated that his right to a fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair has been violated. The defendants' right to access the justice has not been affected. Mr. Kariuki further argues that the defendants' right to fair hearing has not been affected and that Order 40, Rule 3 provides that any person who is guilty of contempt should be punished. According to Mr. Kariuki, any person means persons other than parties can be cited for contempt.

I have considered the preliminary objection and submissions by parties and do find that on the first issue raised in respect of the provisions of Articles 47, 48 and 50 of the Constitution of Kenya, 2010, the same cannot be raised as a preliminary objection as the 1st defendant ought to demonstrate through facts that the application dated 5.3.2018 offends the 2nd defendant's right to a fair administrative action, access to justice and right to a fair hearing and in any event the 2nd defendant is before a court of law and therefore, it cannot be envisaged that his rights will not be considered. This is a point founded on facts and not a pure point of law.

On the issue, as to the manner in which the 2nd defendant was introduced into the proceedings, I do agree with the defendants that Order 51 of the Civil Procedure Rules, 2010 does not make provisions for joinder of parties. However, I do find that the Order is only relevant in contempt proceedings *in so far* as it deals with generally the procedure of filing motions and applications. It is a misconception to argue that a person who is not a party to the suit cannot be cited for contempt because order 51 does not provide for non-parties.

Order 1 rule 10 provides for Substitution and addition of parties thus: -

(1) Where a suit has been instituted in the name of the wrong persons as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as plaintiff upon such terms as the court thinks fit.

(2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.

(3) No person shall be added as a plaintiff suing without a next friend or as the next friend of a plaintiff under any disability without his consent in writing thereto.

(4) Where a defendant is added or substituted, the plaint shall, unless the court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new defendant and, if the court thinks fit, on the original defendants.

This provision is not relevant at all in this matter as the 2nd respondent is not a party to the suit and does not need to be a party to the suit to be cited for contempt, but he is being cited as an alleged contemnor and therefore, there is no need for the leave of the court for the 2nd defendants to be enjoined as a party.

The relevant provisions in Order 40, Rule 3 that provides for the Consequence of breach of court orders thus: -

(1) In cases of disobedience, or of breach of any such terms, the court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the court directs his release.

(2) No attachment under this rule shall remain in force for more than one year, at the end of which time, if the disobedience or breach continues, the property attached may be sold, and out of the proceeds the court may award such compensation as it thinks fit, and shall pay the balance, if any, to the party entitled thereto.

(3) An application under this rule shall be made by notice of motion in the same suit.

The import of this Order is that any person can be cited for contempt of court whether he is a party to the suit or not. There is no requirement that such person be enjoined as a party. In conclusion, I do find that the preliminary objection is not founded on law, is misconceived and the same is dismissed with costs to the plaintiff.

Dated and delivered at Eldoret this 29th day of October, 2018.

A. OMBWAYO

JUDGE