



**Kariuki v Nderi & another (Environment and Land Miscellaneous Application
201 of 2022) [2024] KEELC 1146 (KLR) (29 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 1146 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 201 OF 2022
OA ANGOTE, J
FEBRUARY 29, 2024**

**IN THE MATTER OF: CONTEMPT AGAINST THE ORDERS AND PROCEEDINGS
IN BUSINESS PREMISES RENT TRIBUNAL CASE NO. E111 OF 2021 & E714 OF
2022 BY THE RESPONDENTS AND THROUGH THEIR AGENTS/ EMPLOYEES**

BETWEEN

ISAAC NJUGUNA KARIUKI APPLICANT

AND

RAHAB MUTHONI NDERI 1ST RESPONDENT

HARIKI AUCTIONEERS 2ND RESPONDENT

RULING

1. Before the Court for determination is the Applicant's Notice of Motion dated 21st September 2022 and brought under Section 5 of the *Judicature Act*, Order 52 Rule 3 of the Rules of the *Supreme Court of England 1965* and Section 3A of the *Civil Procedure Act*. The Applicant is seeking that:
 - a. An order of committal be made against the 1st Respondent/her agents/assigns to prison for such period as the Court may deem fit and just.
2. The application is based on several grounds and supported by an affidavit sworn by the Applicant where he stated that he operates a hardware store known as Warkshap Hardware Shop No. 1 and 2 on premises leased to him by the 1st Respondent.
3. The applicant deponed that sometime in April 2021, the 1st Respondent unlawfully locked and attempted to take over Shop No. 3 which she had agreed to lease to him; that he filed BPRT Case No. E111/2021 and that the Tribunal directed that the 1st Respondent return possession of Shop No. 3 to him and cease from interfering with his possession pending the hearing and determination of the suit.



4. Despite the orders being served on the 1st Respondent through her advocates, it was deponed that the 1st Respondent failed to hand over possession and shop No. 3 remains closed to date and that he continued conducting his business in Shop No. 1 and Shop No. 2 and paying rent for the same.
5. However, it was deponed by the Applicant, on 31st May 2022, the 2nd Respondent went to his shops and purported to proclaim his property; that the 2nd Respondent left after being shown the Tribunal's order dated 26th October 2021 but returned on 26th July 2022 and carted away his property alleging distress for rent instructions from the 1st Respondent and that the 1st Respondent also blocked the front entrance of the shops with corrugated iron sheets.
6. The Applicant deponed that he filed BPRT Case No. E714/2022; that the Tribunal ordered that the Respondents be restrained from selling his property and the barricades in front of the shops be removed and that despite the 1st Respondent being served with the orders personally, she has refused to remove the barricades and has demolished the roofs of the shops.
7. In conclusion, the Applicant urged the Court to declare the Respondents contemptuous and punish them. This, according to the Applicant, will ensure that the ends of justice are served and that orders from subordinate courts are not treated with disdain.
8. The 1st Respondent filed a Replying Affidavit dated 28th October 2022. She deponed that when BPRT No. E714/2022 was filed, there was no landlord-tenant relationship between the parties and that the Applicant was in possession of all the shops and was misusing the tribunal orders by refusing to pay rent.
9. It was deponed that the orders in BPRT No. E111 of 2021 did not authorize the Applicant to evade paying rent and that as per the Applicant's own admission in BPRT No. E714/2022, he was paying rent irregularly, past the due dates and in lesser amounts thus escalating the rent arrears.
10. In view of the foregoing, the 1st Respondent deponed that her advocates instructed the 2nd Respondent to carry out distress for rent and that as per the *Distress for Rent Act*, she had no duty to seek the Tribunal's leave to exercise the right but the same was given via the break-in orders issued to the 2nd Respondent by the Court.
11. The 2nd Respondent filed a Replying Affidavit dated 28th October 2022 and sworn by Harrison Kihara Ngunjiri, who deponed that he was instructed by the 1st Respondent's advocates to levy distress over rent arrears amounting to Kshs. 195,250 as at May 2022.
12. It is the 2nd Respondent's case that on 31st May 2022, he went to the Applicant's shops and undertook proclamation; that the Applicant did not take any steps and after 14 days, the 2nd Respondent obtained an order for police assistance and break in orders so as to levy distress and that the distress took place but the Applicant never followed up on his goods despite being notified that a public auction would take place on 3rd August 2022.
13. The Applicant filed a Further Affidavit dated 14th March 2023 and sworn by Wilfred Njihia Wanguru, an employee of the Applicant, who stated that the 1st Respondent and Applicant entered into a Lease agreement for five years beginning 1st January 2021.
14. The deponent denied that the Applicant was in possession of the three shops stating that the 1st Respondent had taken possession of two of the shops and leased them to third parties (though they remained vacant) after some negotiations with the Applicant.



15. The deponent averred that the Applicant remained in possession of one shop whose rent was revised downwards from the initial Kshs. 50,000 that he was paying for three shops and that he diligently paid the said amount and that the rent payable was one of the issues to be determined in BPRT No. E714/2022 but the same was prematurely halted by the 1st Respondent levying distress.
16. The deponent averred that in addition to levying distress, the 1st Respondent refused to remove the barricades and also demolished the premises despite there being orders to the contrary. Consequently, it was deponed, the Applicant could not access the premises.
17. The 1st Respondent filed a further replying affidavit dated 10th July 2023 in which she deponed that the Applicant's Further Affidavit infringed the mandatory provisions of Order 19 Rule 5 of the Civil Procedure Rules; that the deponent in the Further Affidavit lacked the capacity to allude to the matters in the references filed by the Applicant as he was not a party thereto.
18. Both parties filed submissions which I have considered. I have also considered the authorities.

Analysis and Determination

19. The Respondents have averred that the Further Affidavit sworn by Wilfred Njihia should be expunged from the record because the deponent therein was not a witness to the facts he detailed. The Respondents deponed that the deponent was not a party to the BPRT references and could not swear an affidavit about the ongoing therein.
20. Order 19 Rule 3(1) of the Civil Procedure Rules provides as follows:

“Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove:
Provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof.”
21. Having perused the impugned affidavit, I am convinced that it meets the requirements set out in the above provision of law. The deponent is detailing what happened between the Applicant and the 1st Respondent from his perspective as an employee of the Applicant.
22. Indeed, the deponent in the impugned Further Affidavit is not talking about matters that happened before the BPRT as alleged by the Respondents, but about events ancillary to the BPRT references, and the alleged contempt. In the circumstances, the impugned Affidavit was properly filed before this court.
23. The Applicant has deponed that the 1st Respondent is guilty of contempt for disobeying Court orders in BPRT E111 of 2021 and BPRT E714 of 2022. The 1st Respondent initially averred that all orders were complied with, but later on changed and stated that the orders were not capable of being obeyed because the tribunal did not have jurisdiction to hear the issues that were before it.
24. According to the Applicant, the proceedings in BPRT No. E111 of 2021 related to Shop No. 3. However, as per the Applicant's evidence on record and the Further Affidavit, he willingly surrendered Shop No.1 and Shop No. 3 to the 1st Respondent and only continued to occupy Shop No. 2.
25. In respect of contempt arising from BPRT No. E714 of 2022, the 1st Respondent stated that there was no landlord-tenant relationship subsisting when the said reference was filed. However, one of the annexures in the Applicant's further affidavit is a lease executed by the Applicant and 1st Respondent.



26. The said Lease provides that it is for the period beginning 1st January 2021 and ending on 31st December 2025. As per the evidence on record, the 1st Respondent had sought to terminate it but reneged on that decision. The lease was therefore valid at the time the reference was filed. The Tribunal therefore had authority to give orders in the said reference.
27. The terms of order in the said reference were stated as follows:
- i. The application is certified as urgent.
 - ii. The landlord either by himself, his agents, assigns and/or any other persons acting under his authority and more particularly but not limited to auctioneers/interested party herein is restrained from selling the Tenant's property illegally attached in purported levying of an unlawful and illegal distress for rent against the Tenant's property illegally attached in purported levying of an unlawful and illegal distress for rent against the Tenant's property pending the hearing of the application inter partes.
 - iii. The landlord is ordered to remove the tin sheet barricades installed on the frontage of the shops known as Warkshap Hardware Shop No. 1, 2 and 3 within Membley Estate and unconditionally reopen them for the Tenant's use pending the hearing of the application inter partes.
 - iv. The OCS Membley Police Station to enforce the orders.
 - v. The Tenant to serve for virtual hearing inter partes on 5th October 2022 and pay rent for August and September.
28. Mativo J, as he then was, in the case of *Samuel M. N. Mweru & Others vs National Land Commission & 2 Others* [2020] eKLR stated as follows concerning the authority of the Court in cases of contempt:
- “If courts are to perform their duties and functions effectively and remain true to the spirit which they are sacredly entrusted with, the dignity and authority of the courts has to be respected and protected at all costs. Otherwise the very cornerstone of our constitutional scheme will give way and with it will disappear the Rule of Law and a civilized life in the society. It is for this purpose that courts are entrusted with the extraordinary power of punishing those who indulge in acts whether inside or outside courts which tend to undermine their authority and bring them in disrepute and disrespect by scandalizing them and obstructing them from discharging their duties. When the court exercises this power, it does so to uphold the majesty of the law and of the administration of justice. The foundation of judiciary is the trust and confidence of the people in its ability to deliver fearless and impartial justice. When the foundation itself is shaken by acts which tend to create disaffection and disrespect for the authority of the court by creating distrust in its working the edifice of the judicial system gets eroded.
33. It is essential for the maintenance of the Rule of Law and order that the authority and the dignity of courts is 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 be irregular or void.



34. It is the duty of the court not to condone deliberate disobedience of its orders nor waiver from its responsibility to deal decisively and firmly with contemnors. The court does not, and ought not be seen to make orders in vain; otherwise the court would be exposed to ridicule, and no agency of the constitutional order would then be left in place to serve as a guarantee for legality, and for the rights of all people.”
29. In the same case, the Judge considered what should be considered as the standard of proof of contempt in civil cases. He stated as follows:
- “Perhaps the most comprehensive of the elements of civil contempt was stated by the learned authors of the book *Contempt in Modern New Zealand*[47] who succinctly stated:-
- ”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) that:-
- (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.”
30. The application in which the orders were given is dated 4th August 2022. By this time, the distress had been carried out on 26th July 2022. The public auction was held on 3rd August 2022. Order (ii) above was therefore moot for contempt. It was issued after the event it was supposed to prevent had already occurred. It was therefore an order incapable of being disobeyed.
31. Furthermore, according to the evidence on record, it was agreed between the Applicant and the 1st Respondent that the 1st Respondent would only keep Shop No. 2. However, the order above relates to the three shops. The order is therefore ambiguous.
32. In view of the above, it is the finding of this court that contempt has not been proven to the requisite standards. Consequently, the application is hereby dismissed with costs to the Respondents.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 29TH DAY OF FEBRUARY, 2024.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Kiprotich for the Applicant

No appearance for the Respondent

Court Assistant - Tracy

