



REPUBLIC OF KENYA
ENVIRONMENT AND LAND COURT
AT MALINDI

MISC APP NO. 97 OF 2013

1. MICHAEL JEFWA TINGA

2. JOSEPHINE

**MARIE.....APPLICAN
TS**

=VERSUS=

ROSE ACHIENG

WILLIAM.....RESPONDENT

RULING

Introduction

1. The Application before me is the one dated 28th August 2013 in which the Applicant is seeking for the following orders:
 - a. **That this Honourable court be pleased to vary, discharge, set aside and or stay the orders in favour of the Applicant/Respondent on the 19th August, 2013.**
 - b. **That this Honourable court be pleased to strike out the suit.**
 - c. **The costs of this Application be provided for.**
2. The Application is premised on the grounds that the Applicant is the lawful and legal owner of plot number 7652 (original number 570/3) situated in Malindi (the suit property); that the Respondents have illegally prevented the Applicant from sub-dividing the suit property and that the Respondents have vowed not to respect the rule of law.

The Applicant's case:

3. The Application is supported by the affidavit of Rose Achieng William (The Respondent in the suit) in which she has deponed that the Respondents in this Application are guilty of material non-disclosure in that they did not disclose to the court that there is a pending suit between the same parties and in regard to the same subject matter in CMCC No. Misc. App. No.8 of 2013
4. It is the Applicant's deposition that the alleged orders of the Business Premises Rent Tribunal are non-existent and forged and that even if the said orders existed, they are not perpetual in nature.

5. The Applicant denied in her affidavit that she has evicted the Respondent, a fact which has been pleaded in CMCC Misc. Application No. 8 of 2013; that she is willing to deposit Kshs.117,855 in court for the alleged renovation expenses and that she was never served with the Application for contempt and was therefore condemned unheard.

Respondent's case

6. The Respondent filed his Replying Affidavit on 9th September 2013 and deponed that while it is true that there exists a pending matter being CMCC Misc. Application Number 8 of 2013, the same only relates to the adoption of the Tribunal's determination for enforcement provided under the statute in Section 14 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act Cap 301 and an injunction to restrain the Defendant from further harassment.
7. The Respondent denied that the orders of the Tribunal were forged and that the substantive issues raised in the Applicant's Supporting Affidavit can only be raised in the Tribunal and not in this court.
8. The Respondent admitted that he has not been evicted from the premises although the Applicant forcefully broke into one of the counters and stole drinks.
9. On the issue of service, the Respondent has deponed that the Applicant was served in his presence with the Application for contempt in his presence.

Applicant's Further Supporting Affidavit

10. In her Further Supporting Affidavit, the Applicant deponed that the Respondent is in fact in the suit premises and operating without hindrance; that the Respondent is indeed collecting rent from the sub-tenants and finally that the orders of the Tribunal have lapsed.
11. The parties agreed to dispose of the Application by way of written submissions which I have considered.

Analysis and findings

12. Although the parties have gone into great lengths on the merits and demerits of their cases, the only issue before me is to determine whether I should set aside my Ruling of 19th August 2013 in which I committed the Respondent for contempt of the order of the Business Premises Rent Tribunal in Tribunal Case Number 148/2010 and directed that she should be jailed for a period of three months.
13. In determining the Application, I am only supposed to determine whether, firstly, the Applicant was served with the Application and secondly, whether the Respondent's response to the Application raises triable issues. Where there is evidence that the Applicant was never served with the Application, then the Ruling and orders of this court ought to be set aside *ex debito justitiae*. However, if there is proof that the Respondent was indeed served with the Application, then the court has the discretion to allow or disallow the Application. The court also ought to consider if the Respondent's response to the Application for contempt raises any triable issues.
14. It is true, as argued by the Applicant, that the jurisdiction of this court to deal with contempt proceedings is *sui generis* and it has nothing to do with the matters pending before the Chief Magistrates court and the Tribunal.
15. When the Application for contempt dated 11th June 2013 came before me for hearing on 19th August 2013, Mr. Kenga, counsel for the Applicant therein (the Respondent in the current Application) informed me that the Respondent in that Application had been duly served. Counsel proceeded to argue the Application *ex-parte*.
16. The Applicant in the current Application has deponed that she was never served with the Application for contempt or the hearing notice.
17. I have perused the Affidavit of service of Morris Mwavuo Ngonyo which was filed on 19th August 2013. The process server has deponed that he served the Applicant, who was in the company of James Mutinya and Robert Chanzera who were all known to him at around 2.30 pm. When the Applicant was served with the documents she threw them away and boarded a tuk tuk.
18. The said Process Server was not called for cross-examination by the Applicant. The process

server's affidavit of service is detailed and it has mentioned the people who were present when he served the documents upon the Applicant. I am convinced, from the said affidavit, that indeed the Applicant was served with the Application for contempt dated 11th June 2013 together with the hearing notice of 19th August 2013.

19. The Applicant has stated in her Affidavits that she was never served with the Tribunal's order; that the said order is a forgery and that in any event, she has never evicted the Respondent as claimed.
20. The Respondents have admitted in their affidavit that although they were harassed by the Applicant, they have not been evicted from the shop. It is in light of the depositions by the Applicant that this court should re-look at the order of the Tribunal with a view of determining whether indeed, firstly, the Applicant was properly served and secondly, if the Applicant indeed disobeyed the said order. In view of the fact that the Applicant's liberty is at stake, and considering the issues she has raised in her affidavit, I am of the view that she should be given an opportunity to be heard.
21. For the reasons I have given above, I allow the Applicant's Application dated 28th August 2013. However each party shall bear its own costs.

Dated and Delivered in Malindi this 19th Day of **March 2014**

O. A. Angote

Judge