



REPUBLIC OF KENYA



KENYA LAW
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**Tembo & 12 others v Said (Environment & Land Case
E012 of 2023) [2024] KEELC 3298 (KLR) (23 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 3298 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE E012 OF 2023**

FM NJOROGE, J

APRIL 23, 2024

BETWEEN

KADEEJ KASUKARI TEMBO & 12 OTHERS APPLICANT

AND

MOHAMED ALI SAID RESPONDENT

RULING

1. By an application dated 10/11/2023 the plaintiff sought against the defendant orders of committal to civil jail for disobedience of court orders issued by this court on 25/10/2023 and 6/11/2023. It is sought that the respondent be fined or committed to civil jail or that any other orders be issued as the court deems fit until he purges the alleged contempt or otherwise complies with the court orders.
2. The application is supported by the sworn affidavit of the 7th respondent. The applicants give the background to his application as follows: that they filed a suit together with an application seeking a status quo order against the respondents; the suit sought a declaration that they were the bona fide owners of the suit land - Kilifi Mtwapa/659. They alleged that the same was unprocedurally registered in the respondent's name. They aver that on 25th October 2023 in the presence of all parties save the 2nd defendant a consent was reached and the court issued a status quo order to be maintained until 6/11/2023. A day after the issuance of the status quo order the respondent is said to have procured the services of a caretaker who started patrolling the suit land and who at the instructions of the respondent uprooted their food crops whereupon the applicants reported to the police. The destruction continued unabated despite the report. The status quo order was later extended to 5th December 2023. On 7/11/2023 the caretaker threatened and chased away the 13th applicant while wielding a machete which incident was also reported to the police. The respondent's advocate however has denied that the respondent gave the caretaker such instructions.



The Response.

3. The respondent filed a replying affidavit dated 15th November 2023 in which he denied procuring the services of a caretaker as alleged. According to him, the facts are that he was ejected from the suit plot on 15th July 2023 by goons suspected to have been hired by the applicants and several arrests were made and a case of attempted murder is pending before court; that he is nursing serious injuries arising out of the incident at the moment.
4. The respondent also filed a notice of preliminary objection on 16/11/2023 on the ground that the application is defective as the applicants have come to court on non-existent provisions of the law.
5. The applicants filed a supplementary affidavit sworn by the 7th respondent on 1/12/23. The deponent challenged that veracity of the claims in the respondent's replying affidavit and avers that he has been communicating by phone with the alleged caretaker. A compact disc containing a recording of what was said to be the caretaker's confessions was attached to the application. I have noted the contents of paragraph 15 which certify that the recording is presented in the compact disc as originally taken which issue is controverted by the respondent in his further affidavit analyzed below.
6. The respondent also filed a further affidavit dated 15/1/2023. However, that document was struck out by the court for want of leave and has not been considered in this ruling.

SUBMISSIONS.

7. The application was disposed of by way of written submissions with the respondent and the applicants filing submissions on the preliminary objection on 15th December 2024 and 20th December 2023 respectively and on the motion on 4th December 2023 and 15th January 2024 respectively. I have considered the said submissions.
8. The issue that arises first is on the preliminary objection, whether it has any merit, that is, whether the application is brought upon non-existent law as alleged by the objector/applicant.
9. In the respondent's submissions it is argued that the applicants have moved this court under Section 5 of the *Judicature Act* Cap 8 which was repealed by the *Contempt of Court Act* No 46 Of 2016 rather than Order 40 rule 3(1) of the *Civil Procedure Rules* and that it can not therefore stand.
10. While opposing the preliminary objection the applicants in their submissions urged that by relying on that law the objector was cherry picking and ignoring other provisions of the law cited. They urged that the court should read the application as a whole as the primary duty of the court was to breathe life to deserving matters. They aver that even if the section relied on was repealed, the application is not thus rendered fatally defective as there are other live provisions of the law it is anchored on. They also cite Articles 159(2) (d) and 259(1)(b) of *the constitution* for the proposition that the court is under obligation to dispense substantive justice without undue regard to technicalities. Further the applicants refer to *Hermanus Phillipus Steyn Vs Giovanni Gneccchi Ruscone* (2013) eKLR and *Faustina Njeru Njoka v Kimunye Tea Factory Ltd* 2022 eKLR for the proposition that omitting to cite the proper law in an application is not fatal.
11. I would agree with the applicants that though it is desirable to state the correct law relied on omission thereof is not fatal to an application. Order 51 rule 6 *CPR* provides as follows:

“ 10. Provision under which application is made to be stated [Order 51, rule 10]



- (1) Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule.
- (2) No application shall be defeated on a technicality or for want of form that does not affect the substance of the application.”

12. It is also quite easily discernible that the present application is seeking that the respondent be found in contempt and punished. Contempt of court for breach of orders it has issued is punishable and under the law in Order 40 rule 3 of the *Civil Procedure Rules* a party who thinks that there has been disobedience of court orders may apply for appropriate relief. It is therefore appropriate in the circumstances to invoke the provisions of Article 159(2)(d) of *the constitution* to hold that the omission to state the correct legal provisions is not fatal to the application.
13. The next issue is whether the respondent is guilty of contempt of court for breach of court orders. Central to this inquiry is the argument, whose truth the respondent denies, that the alleged caretaker named Rama Charo Mrabu or Rama Mrabu Charo has been deputed to the land by the respondent to undertake the acts attributed to him which have been the source of considerable aggrievement for the applicants. I find this issue to be dependent on the evidence available against the respondent. The rule is that whoever alleges proves.
14. The applicants have gone to great pains to record and present to this court a clip said to be that of the caretaker addressing one or more of them. The same has been stringently objected to by the respondent. Without any other corroboration I do not find that the clip per se presented to court by the applicants is sufficient to establish that the voice therein recorded belongs to the alleged caretaker. Besides the clip, the applicants lack any other evidence to create a nexus between the respondent and the alleged caretaker. The applicants could have resolved this problem and probably established a breach of the orders against the alleged caretaker and the respondent in one fell swoop as suggested by the respondent by simply joining the alleged caretaker to the application for committal but they never did so. This is a crucial omission given that the applicants do not allege that the respondent was present at the scene, interfering with the suit land contrary to the court order. I can not accept shallow evidence from the applicants as a basis for concluding that the respondent is guilty of contempt of court. contempt is a serious offence and as has been said time and again, crucial evidence of breach of a court order must be presented as a man may go to jail and thus lose his freedom upon him being pronounced as being in contempt.
15. In the circumstances I find that the application dated 10/11/2023 lacks merit for want of evidence against the respondent and the same is hereby dismissed with costs.

Ruling dated, signed and delivered at Malindi via electronic mail on this 23rd day of April, 2024.

MWANGI NJOROGE

JUDGE, ELC, MALINDI

