



**Jihan Freighters Limited v Kenya Railways Corporation Limited (Environment & Land Petition E013 of 2023) [2024] KEELC 4337 (KLR) (29 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 4337 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND PETITION E013 OF 2023  
SM KIBUNJA, J  
MAY 29, 2024**

**BETWEEN**

**JIHAN FREIGHTERS LIMITED ..... PETITIONER**

**AND**

**KENYA RAILWAYS CORPORATION LIMITED ..... RESPONDENT**

**RULING**

1. The petitioner moved the court through the application dated the November 22, 2023, seeking for the respondent's managing director to be committed to civil jail for six (6) months for disobeying the court orders of November 14, 2023. The application is premised on the eight (8) grounds on its face, and supported by the affidavit sworn by Yusuf M. Aboubakar, advocate on November 22, 2023, and that by Abdalla Salim Omar Abubakar, director, sworn on the December 13, 2023. It is the petitioner's case that the conservatory orders restraining the respondent from interfering or preventing the petitioner from accessing and using the suit property, was issued in the presence of counsel for both parties, on the November 14, 2023. That the petitioner's counsel then extracted the order and served it upon Mr. Phillip Mainga, the respondent's managing director through Whatsapp. That however, the respondent has blocked access to the suit property and had the petitioner's property dismantled and removed, in clear breach of the order of November 14, 2023, thereby subjecting him to financial loss and damage. That the respondent used security and police officers to evict the petitioner from the suit premises on November 3, 2023 and subsequently deployed GSU at the main gate thereby denying the petitioner access.
2. The application is opposed by the respondent through the replying affidavit sworn by Phillip Mainga, Managing Director, on the December 5, 2023, *inter alia* deposing that the application was brought in bad faith and is an abuse of the court process aimed at intimidating him. That the petitioner left the suit premises on the October 27, 2023 voluntarily upon the expiry of the termination notice dated the July 14, 2023. That upon the court issuing the order of November 14, 2023, the deponent directed the respondent's staff to allow the applicant access and use of the suit premises. That though on the



November 15, 2023, the respondent's advocate wrote to the petitioner's advocate advising that the petitioner was free to access the suit premises, no response has ever been received. That the petitioner has not tendered any evidence to show it was denied access to the suit property, as the attached photographs do not show when and where they were taken and by whom. That the respondent has not been in breach of the court orders.

3. The learned counsel for the petitioner filed their submissions dated the January 5, 2024 that the court has considered.
4. The following are the issues for the determinations by the court:
  - a. Whether the petitioner has proved disobedience of the court order by the Respondent's Managing Director.
  - b. Who pays the costs of the application?
5. The court has considered the grounds on the application, affidavit evidence, submissions tendered and come to the following conclusions:
  - a. It is not disputed, that the court issued temporary conservatory orders in terms of prayer 2 of the notice of motion dated the November 6, 2023 in the presence of the learned counsel for both parties. Indeed, the respondent has at paragraphs 5 and 6 of the replying affidavit, by Mr. Phillip Mainga, the Managing Director, sworn on the December 5, 2023, in reply to the contempt application dated the November 22, 2023, acknowledged knowing of, and being briefed on the said order.
  - b. That while the petitioner accuses the respondent of disobeying the court order of the November 14, 2023 and evicting and keeping it from the suit premises, the respondent has denied doing so. The respondent claims under paragraphs 4, 8, and 9 of its replying affidavit that the petitioner had voluntarily left the suit premises on the October 27, 2023, upon expiry of the termination notice dated the July 14, 2023, and has not made any attempts of returning.
  - c. From the affidavit evidence availed by the parties, it is clear their relationship was under the lease for BC-Mombasa Goodshed (art)-Mombasa Railway Station, the suit property. The respondent's position is that the petitioner had left or vacated from the said premises pursuant to their termination notice dated the July 14, 2023. The petitioner has disputed that claim *inter alia* stating that it is the respondent who evicted it on November 3, 2023, and used the police to keep it from the premises, in disobedience to the order of November 14, 2024. That the grounds cited in the termination notices were not among the terms in the lease.
  - d. The court has perused the copy of the notice to terminate the lease dated the July 14, 2023, that is attached to the petitioner's and respondent's affidavits and noted the reasons/grounds relied upon are:
    - i. Changing the use of the premises from cargo/storage to car bazaar, and
    - ii. Failing to provide not less than 15,00 metric tonnes of cargo per month for railway haulage.

The notice required the petitioner to *inter alia* to vacate the premises on or before August 13, 2023, failure to which the respondent would take physical possession of the demised premises upon expiry of the one-month notice.



- e. The court has also perused the respondent's letter of offer dated the January 10, 2022 communicating the terms and conditions of the lease that is attached to the petitioner's affidavit, and clauses 3 and 14 provides as follows;

“3. User: Commercial-Cargo/Goods storage.

14. Cargo Volumes Guarantee: To generate a minimum of 15,000 metric tonnes per month. Failure to meet the target will force the Corporation to revert to commercial rent rates i.e 50% increase.”

The petitioner accepted the respondent's terms in the offer through its letter dated the January 13, 2023 that is also attached to the supporting affidavit. The legality or otherwise of the respondent's termination notice is not for determination at this stage, but at the time of deciding the petition. What is for determination herein is the contempt application against the managing director of the respondent.

- f. The respondent has exhibited a copy of their letter dated the November 15, 2023, that is attached to its replying affidavit, as evidence of its preparedness to comply with the court order of November 14, 2023. The letter was written by counsel for the respondent and is addressed to Ms. Mogaka, Omwenga & Mabeya Advocates, then on record for the petitioner, and has as its reference this petition details. The letter starts by complaining about the counsel communicating directly with their clients contrary the professional and ethical standards and at the last paragraph, it states as follows:

“In the meantime, we confirm that the premises have been opened and your client granted full access.”

By all standards and unless the contrary is proved, the said letter contains clear evidence of the respondent's preparedness to give the petitioner possession and or access to the suit premises in compliance with the court edict of November 14, 2023. There appear to have been no written response or acknowledgement of the said letter by the petitioner's advocates, by the time the contempt application dated the November 22, 2023 was filed, and replies tendered.

- g. Noting that the petitioner was not in the suit premises by the time it moved to the court through this proceedings, and there being no response to the respondent's communication through their letter dated the November 15, 2023, and considering the standard of proof in contempt proceedings, the court finds the petitioner has failed to establish disobedience of the court order. The petitioner should proceed to regain possession of the demised premises as the respondents had expressed their preparedness to give it access under their letter dated the November 15, 2023.
- h. In view of the nature of this petition, the court is of the considered view that costs abide the outcome of the petition.

6. In the upshot of the above determinations, the court finds and orders as follows:

- a. That the contempt application vide the notice of motion dated the November 22, 2023 is without merit.
- b. That the said application is dismissed.
- c. The costs to abide the outcome of the petition.



It is so ordered.

**DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 29<sup>TH</sup> DAY OF MAY 2024.**

**S. M. KIBUNJA, J.**

**ELC MOMBASA.**

In the presence of:

Petitioner : Mr. Mbabu for Muturi.

Respondent : Mr. Khamisi for Abubakar

Leakey : Court Assistant.

