



Kenya Railways Corporation v Brecaide Limited & another (Environment & Land Miscellaneous Case E061 of 2024) [2024] KEELC 5794 (KLR) (31 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5794 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND MISCELLANEOUS CASE E061 OF 2024**

OA ANGOTE, J

JULY 31, 2024

BETWEEN

KENYA RAILWAYS CORPORATION APPLICANT

AND

BRECAIDE LIMITED 1ST RESPONDENT

DR. CYRUS NJIRU 2ND RESPONDENT

RULING

1. In the Notice of Motion dated March 25, 2024, the Applicant has sought for the following orders;
 - a. That this Honourable court be pleased to call and place before it the proceedings and record before the subordinate court in Nairobi Chief Magistrate Court Environment and Land Court case number E373 of 2022 – Brecaide Limited and Another vKenya Railways Corporation for purpose of interrogating the correctness/genuiness of the proceedings, orders, and directions issued by Hon. Wendy Micheni.
 - b. To ensure the fair administration of justice, this Honourable Court be pleased to make any appropriate orders/directions pertaining to the Application for review dated 22nd February, 2024 before the subordinate court in Nairobi Chief Magistrate Court Environment and Land Court case number E373 of 2022 – Brecaide Limited and Another vKenya Railways Corporation.
 - c. This Honorable court be pleased to review the Ruling dated 17th March, 2023 Nairobi Chief Magistrate Court Environment and Land Court case number E373 of 2022–Brecaide Limited and Another vKenya Railways Corporation together with its incidental orders, notice to show cause and warrant of arrest.
 - d. Costs of this application to be provided.



2. The application is supported by the Affidavit of the Plaintiff's Managing Director who deponed that in Nairobi MC ELC No. E 3737 of 2002- Bricade Limited and another, the magistrate found him to be guilty of contempt of the ex-parte injunction orders issued on 31st October, 2022.
3. It is the deposition of the Applicant's Managing Director that the matter was slated for notice to show cause why he should not be sentenced and committed to civil jail and that the Ruling by the learned Magistrate is based on a misinterpretation of the Respondent's claim in the suit and the law, thereby mistaken errors apparent on the face of the record tenable for review, variation and setting aside.
4. According to the Applicant's Managing Director, the Ruling of the lower court is based on an oversight and wrong analysis of the material facts because by the time the ex-parte interim injunctive orders were served upon him and his agents on 1st November, 2022, the Respondents had already been evicted and expelled from the suit property on the morning of 31st October, 2022 prior to the institution of the suit, and issuance of the orders.
5. It was deponed that the said Ruling is mistaken, erroneous, based on grave oversight and wrong analysis of the material facts, evidence and the law and that it is also based on facts not proven, or no evidence at all, on controverted facts and against the rule of law.
6. It is the Applicant's case that it filed an application dated 21st February, 2024 for review of the Magistrate's Ruling and that in a manner akin to unfair administrative action contrary to Article 47, 48 and 50 of the *Constitution*, the subordinate court arbitrarily declined to hear the application ex-parte and also declined to issue any directions on the application; or issue interim orders.
7. It is the Applicant's Director's deposition that when the notice to show cause came up for hearing on 22nd February, 2024, the learned Magistrate declined to hear the first application and went on to arbitrarily issue warrants of arrest against him.
8. According to the Applicant's Director, the actions and omissions of the learned Magistrate are akin to unfair administrative action contrary to Article 47, 48 and 50 of the *Constitution* of Kenya and that he was unwell and unable to physically appear in court for the notice to show cause scheduled on 22nd February, 2024.
9. It is the Applicant's Director's deposition that he filed a second application dated 22nd February, 2024 and sought for review of the Ruling once again; that as before, the learned Magistrate ignored the application and declined to issue directions concerning the interim orders sought and that the actions and omissions of the subordinate court are incorrect, ingenuine and unprocedural.
10. Accordingly, it was deponed, vide Article 165 (6) of the *Constitution*, it is only this court that can exercise supervisory jurisdiction to correct the illegalities committed by the subordinate court.
11. In response to the application, the 2nd Respondent deponed that he has been a tenant of the Applicant since 2011; that at the time of the alleged termination notice of the lease, his lease was still in force and was in credit as regards rent payment and that upon receipt of the notice, he filed a suit in the lower court in which he obtained injunctive orders against the Applicant on 31st October, 2022.
12. Despite serving the said injunctive order on the Applicant's servants, the 2nd Respondent deponed that the Applicant's servants or agents breached the orders of the court by breaking into the house and removed all his personal belongings over a period of two days from the night of 31st October, 2022 to 1st November, 2022 and carted them to their go-downs where they continue to detain them to date.



13. The 2nd Respondent deponed that he filed an application dated 4th November, 2022 for enforcement and for the notice to show cause by the Applicant's Managing Director and the officer in charge of Kenya Railways Police Unit who had both ensured non-compliance with the order.
14. According to the 2nd Respondent, the court allowed his application for contempt; that the order and notice to show cause were duly extracted and served upon the Applicant's Managing Director and that when parties appeared in court on 11th April, 2023 as ordered, the contemnors did not appear.
15. It was deponed that to avoid appearing in court, the Applicant filed an application dated 6th April, 2023 and another application dated 14th April, 2023 seeking to stay the orders issued on 31st October, 2022 which applications were later marked abandoned.
16. It is the Respondent's case that when parties appeared in court on 28th April, 2023, it was agreed by consent that the Applicant's Managing Director, one Philip Mainga, appear in court on 9th May, 2023 to purge the contempt and all the applications pending were abandoned.
17. However, it was deponed, on 19th May, 2023, the Managing Director again failed to appear and no reasonable reason was given and even after the court gave Mr. Mainga several other opportunities to appear, he did not do so.
18. It was deponed that the court spent over one year waiting for Mr. Mainga, the Applicant's Managing Director, to appear and purge the contempt and that when the Ruling was delivered on 17th March, 2023, the Applicant had filed multiple applications which were all abandoned at one point or another.
19. The 2nd Respondent deponed that this court is being asked to micro-manage the proceedings in the lower court while the Applicant has various remedies provided under the law and that since 17th March, 2023 when the Applicant's Managing Director was convicted, he has conveniently avoided mentioning to this court the number of times the trial court adjourned the matter at his behest.
20. It was deponed that the Applicant has not appealed against the conviction; that through his advocate, the Applicant's Managing Director offered to appear before the court and purge the contempt several times and that the Applicant has not explained why he has not applied for review or appealed since the Ruling was delivered.
21. The parties filed submissions which I have considered.

Analysis and findings

22. The lower court record shows that on 31st October, 2022, an ex-parte order of injunction was issued restraining the Applicant herein from evicting, levying distress, attaching or in any other way interfering with the Respondents herein with quiet and peaceful enjoyment of the suit premises pending inter-partes hearing on 15th November, 2022.
23. It would appear that the above order was not complied with, at least according to the 2nd Respondent. Vide an application dated 4th November, 2022, the Respondents herein sought for an order committing the Applicant's Managing Director, Philip Mainga and the officer in charge of Kenya Railway Police Unit to jail for contempt.
24. In the Ruling dated 17th March, 2023, the learned Magistrate found the two alleged contemnors guilty and issued the following orders:-
 - i. That a Notice to Show Cause be and is hereby issued to Mr. Philip Mainga, Managing Director Kenya Railways Corporation on why his property should not be attached and/why he should



not be detained in prison for a term not exceeding six months for willful disobedience and breach of the orders issued on 31st October, 2022.

- ii. That a Notice to Show Cause be and is hereby issued to the officer in charge Kenya Railways Police Unit, on why his property should not be attached and/or why he should not be detained in prison for a term not exceeding six months for willful disobedience and breach of the orders issued on 31st October, 2022.
25. According to the Applicant's Managing Director, he filed two applications for review challenging the above orders in the lower court, one dated 21st February, 2024 and the other one dated 22nd February, 2024. However, it is his depositions that the learned Magistrate declined to hear his two applications seeking for stay of the orders and review.
26. On the other hand, it is the Respondents' position that the Applicant's Managing Director was given numerous opportunities to purge the contempt but declined to attend court.
27. The Applicant has annexed the two applications that it filed challenging the learned Magistrate's order for contempt. In both applications, the Applicant sought for an order to set aside the Warrants of Arrest and review the ruling delivered on 17th March, 2023 and 22nd February, 2024. Indeed, there is no denial that the said applications for review were never argued, neither were directions given on them.
28. It is the Applicant's case that the actions and omissions of the subordinate court are incorrect, ingenuine and unprocedural and that pursuant to Article 165 (6) of the *Constitution*, it is only this court that can exercise supervisory jurisdiction to correct illegalities committed and omitted by the subordinate court. The Applicant is also asking this court to review the ruling dated 17th March, 2023, delivered by the lower court.
29. It is true that under Article 165(6) and (7) of the *Constitution*, this court, which has equal status as the High Court, has the supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function in land and environmental disputes.
30. This court dealt with the supervisory jurisdiction of this court at length in the case of *Lariak Properties Limited v Metro Pharmaceuticals Limited* (Environment & Land Miscellaneous Case E19 of 2022) [2022] KEELC 15000 (KLR) (25 November 2022) (Ruling). In the said case, this court held as follows:

“the *Constitution* having granted this court the status of the High Court in matters relating to environment and land, and without resorting to tabulated legalism, it follows that powers of the High Court to supervise subordinate courts under them applies mutatis mutandis to this court, but limited to environment and land disputes.

In conclusion, it is the finding of this court that supervisory jurisdiction refers to the power of superior courts of general superintendence over all subordinate courts. Through supervisory jurisdiction, superior courts aim to keep subordinate courts within their prescribed sphere, and prevent usurpation. The supervisory power over the lower courts by the superior courts is a sui generis jurisdiction accorded to superior courts through which they keep checks on subordinate courts and tribunals.

Considering that the High Court cannot superintend over subordinate courts gazatted under the *Environment and Land Court Act* to handle environment and land disputes, and the Environment and Land Court being of the same status as the High Court, it follows that the Court has supervisory jurisdiction over those courts, notwithstanding that the



Environment and Land Court Act does not expressly state so. In the end, it is the finding of the Court that it is duly vested with supervisory jurisdiction.

31. In view of the above holding, and the provisions of Article 165 (6) and (7) of the *Constitution*, this court has the power to call for the record of any proceedings before any subordinate court or person, body or authority and may make any order or give any direction it considers appropriate to ensure the fair administration of justice. That is what the Applicant has asked this court to do.
32. It is not in dispute that in the Ruling dated 17th March, 2023, the learned Magistrate found the two alleged contemnors guilty and issued a Notice to Show Cause why Mr. Philip Mainga, Managing Director Kenya Railways Corporation, should not be detained in prison for a term not exceeding six months for willful disobedience and breach of the orders issued on 31st October, 2022.
33. It is also not in dispute that the Applicant's Managing Director filed two applications challenging the above orders in the lower court, by way of review, one dated 21st February, 2024 and the other one dated 22nd February, 2024. The learned magistrate, while proceeding to issue warrants of arrest, did not issue directions on the two applications for review, nor set them down for hearing.
34. For the fair administration of justice, and in view of the provisions of Article 50 of the *Constitution* which provides that every person has the right to have any dispute decided in a fair and public hearing, and considering the provisions of section 80 of the *Civil Procedure Act* and Order 45 (1) of the *Civil Procedure Rules* which allows a party to challenge the decree or order of the court by filing an application for review, the trial court ought to have heard the Applicant's application dated 22nd February, 2024 for review before proceeding to issue warrants of arrest.
35. Indeed, the power to review a ruling in a civil matter is reserved for the trial court, and not an appellate court. It is not clear under which provisions of the *Civil Procedure Act* and Rules the Applicant is seeking for an order of review to be made by this court in respect of a ruling that was made by the lower court. This court cannot review the Ruling of 17th March, 2023.
36. Consequently, I shall allow the Applicant's Motion only to the extent that the subordinate court should hear and determine the pending application (s) for review in respect of the Ruling dated 17th March, 2023.
37. For those reasons, the application dated 25th March, 2024 is allowed in the following terms:
 - a. The two pending applications for review in Nairobi MCELC E373 of 2022 Brecade Limited & Another vKenya Railways Corporation dated 21st February, 2024 and 22nd February, 2024 to be heard on priority basis.
 - b. Pending the hearing and determination of the two pending applications for review by the subordinate court, interim orders lifting the warrants of arrest against the Applicant's Managing Director, Mr. Philip Mainga is hereby granted.

DATED, SIGNED AND DELIVERED IN NAIROBI VIRTUALLY THIS 31ST DAY OF JULY, 2024.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Odhiambo for Baka for Applicant

Mr. Kantai for Respondent



Court Assistant: Tracy

