



**Mwangi & 10 others v Registered Trustees of Shree Cutch Satsang Swaminarayan & another
(Civil Appeal E264 of 2023) [2024] KEHC 10336 (KLR) (23 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 10336 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E264 OF 2023
F WANGARI, J
FEBRUARY 23, 2024**

BETWEEN

**ANDREW MWANGI 1ST APPELLANT
ANGELA MUNYAO 2ND APPELLANT
BEVAN I WYNES 3RD APPELLANT
ALICE ADHIAMBO OBUOLA 4TH APPELLANT
DAVID AKOYO OBARE 5TH APPELLANT
FARIDAH K MBALA 6TH APPELLANT
BEATRICE JUMWA KARISA 7TH APPELLANT
JUNE WANGECI MAINA 8TH APPELLANT
FELISTAS W NJOROGE 9TH APPELLANT
NANCY WAKARINDI GACHAGE 10TH APPELLANT
WAKESHO MWAKIO 11TH APPELLANT**

AND

**REGISTERED TRUSTEES OF SHREE CUTCH SATSANG
SWAMINARAYAN 1ST RESPONDENT
ALFAJIRI AUCTIONEERS 2ND RESPONDENT**

RULING

1. This ruling is in respect of two applications preferred by the Appellants herein. The first application is dated 22nd September, 2023. It is brought under the provisions of Article 50 and 159 of the [Constitution](#)



of Kenya, 2010, sections 1A, 1B, 3A and 65 of the [Civil Procedure Act](#), Orders 22 rule 22, 40, 42 rule 6, 50 rule 5, 51 rule 1 of the [Civil Procedure Rules](#) and all other enabling provisions of the law. The orders are as follows: -

- a. Spent;
 - b. That this Honourable Court be pleased to issue temporary preservative orders restraining the Respondents whether by themselves, their agents, servants, employees or anyone acting under their instructions, authority or instance from levying distress against the Appellants on the disputed rent increment and penalty in terms of the orders issued by the rent restriction tribunal dated 24th December, 2019 to 12th April, 2023 and Appellants do continue paying monthly rent in terms of the rent control certificate issued by the tribunal on 12th day of April, 2023 pending the hearing and determination of this application;
 - c. That this Honourable Court be pleased to issue temporary preservative orders restraining the Respondents whether by themselves, their agents, servants, employees or anyone acting under their instructions, authority or instance from levying distress against the Appellants on the disputed rent increment and penalty in terms of the orders issued by the rent restriction tribunal dated 24th December, 2019 to 12th April, 2023 and Appellants do continue paying monthly rent in terms of the rent control certificate issued by the tribunal on 12th day of April, 2023 pending the hearing and determination of this appeal;
 - d. Costs of this application be in the cause.
2. The application is supported by the affidavit sworn by the 1st Appellant on behalf of himself and the other Appellants. The averments therein restate the grounds in support of the application albeit in detail.
3. The second application is dated 3rd October, 2023. It is brought under the provisions of sections 4 (i) (a), 5, 27, 28 and 34 of the [Contempt of Court Act](#), No. 46 of 2016, sections 1A, 1B and 3A of the [Civil Procedure Act](#), Orders 40 rule 10, 51 rule 1 of the [Civil Procedure Rules](#) and all other enabling provisions of the law. It sought for the following orders: -
- a. Spent;
 - b. That this Honourable Court be pleased to compel the Defendants whether by themselves, their agents, servants, employees or anyone acting under their instructions to allow Felistas W. Njoroge and Beatrice Jumwa Karisa access their rental premises in accordance with the court order issued on 15th June and 25th September, 2023 in respect of the suit property unconditionally and under the supervision of Officer Commanding Nyali Police Station (OCS) pending the hearing and determination of the application;
 - c. That the notices issued for levying distress be treated as illegal notices and stay be issued pending hearing and determination of the application;
 - d. That this Honourable Court be pleased to order the arrest and committal to civil jail for a period not exceeding six (6) months or fine and or both to Morris Mrema Ndurya, Keitan Patel and Urbanus Kioko T/A Alfajiri Auctioneers for breaching, disobeying and/or disrespectful of the orders of this court issued on 25th September, 2023 and on 15th June, 2023 in RMCC No. 545 of 2023;
 - e. That costs of this application be borne by the Respondents.



4. The application was equally supported by the affidavit sworn by the 1st Appellant. It restated the earlier averments in the application dated 22nd September, 2023 save for the issue of contempt which was alleged to have arisen as a result of this court's order of 25th September, 2023.
5. Both applications were opposed. On the first application, the Respondents filed a replying affidavit dated 9th October, 2023 sworn by one Morris Mrema Ndurya, the 1st Respondent's caretaker. The deponent set out the facts leading to the dispute primarily being the rent increase on all units by Kshs. 2,000/= . The deponent averred that the rent restriction tribunal had no jurisdiction to issue a rent control certificate in the matter since none of the units had rent of below Kshs. 2,500/= . He thus sought for the application to be dismissed with costs.
6. On the 2nd application, a replying affidavit dated 9th October, 2023 sworn by Morris Mrema Ndurya was filed. It was more or less a restatement of the response to the application dated 22nd September, 2023. The Appellants filed a further affidavit dated 29th September, 2023 which annexed a copy of a court order dated 16th June, 2023.
7. Directions were taken to have the two applications be heard by way of written submissions. Both parties duly complied by filing submissions and cited various authorities in support of their rival positions. To the application dated 22nd September, 2023, the Appellants filed their submissions dated 25th October, 2023 while the Respondents filed theirs dated 9th November, 2023. On the application dated 3rd October, 2023, the Appellants filed their submissions dated 11th December, 2023 while the Respondents filed theirs dated 7th February, 2024.

Analysis and Determination

8. I have considered the applications, the responses, submissions for and against, the authorities cited as well as the law and I discern the following issues for determination: -
 - a. Whether this court has jurisdiction to issue the orders sought;
 - b. If the answer to (a) is in the affirmative, whether the applications are merited;
 - c. What is the order as to costs?
9. At the onset, none of the parties addressed themselves to the issue of jurisdiction though there was an attempt by the Respondents in their response to the application dated 3rd October, 2023. In *Republic v Magistrates Court, Mombasa; Absin Synegy Limited (Interested Party)* (Judicial Review E033 of 2021) [2022] KEHC 10 (KLR) (24 January 2022) (Judgment), the court addressing itself to the issue of jurisdiction had the following to say: -

“...In common parlance, the term jurisdiction means the power of the courts to decide and try a case or issue...By jurisdiction is meant the authority, which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision...”
10. It is trite that jurisdiction is everything and without it, a court must down its tools. The locus classicus decision in Kenya on jurisdiction is the celebrated case of *Owners of Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] KLR 1. There is no contention that when the Respondents issued notices increasing rent, the Appellants sought refuge from the Rent Restriction Tribunal (RRT). This was notwithstanding that none of the Applicants fell in the category provided for in section 2 (1) of the



Rent Restriction Act. In respect to this case, section 2 (1) (c) of the Act clearly ousted RRT’s jurisdiction from the onset. Section 2 (1) provides as follows: -

2 (1) This Act shall apply to all dwelling houses other than: -

- a.
- b.
- c. Dwelling houses which have a standard rent exceeding two thousand five hundred shillings per month, furnished or unfurnished.

11. From the affidavits, none of the Appellants were paying rent of less than Kshs. 2,500/= when they sought redress from RRT. Therefore, the RRT’s order of 23rd December, 2019 was a nullity from the onset. It is this order that gave the Appellants reprieve as RRT went ahead to ascertain standard rent. Having found that the rent was more than Kshs. 2,500/=, RRT had no jurisdiction to ahead to ascertain standard rent. I find succor in the decision of Joakim Abayo v Mokuu Damacline Nyamoita [2021] eKLR where the court held as follows: -

“...Unless and until standard rent is ascertained, the Tribunal has no jurisdiction to entertain or issue orders in a dispute where the agreed or prevailing rent is more than Kshs. 2,500 per month...”

12. At the time the Appellants moved the RRT, rent was more than Kshs. 2,500/=. As such, the ascertainment of standard rent was not necessary. Therefore, the RRT assumed jurisdiction when it had none and what found the Appellants claim was the ascertainment of standard rent. Having found that the RRT had no jurisdiction, whatever orders it issued therein amounted to a nullity. In Macfoy v United Africa Company Limited [1961] 3 All ER 1169, it was held as follows: -

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse...”

13. The Appellants had a second bite of the cherry and they got temporary relief before the Magistrates’ Court. However, the said orders were discharged when the court delivered its ruling on 19th September, 2023. I note that the orders the Appellants had been granted were conditional. In its ruling, the Lower Court found that the Appellants had not complied with the conditions and as such, dismissed the application dated 7th June, 2023. Whether the said dismissal was correct or not is the crux of this appeal and I cannot express myself on the merits at an interlocutory stage. I thus find that the court has jurisdiction. I shall now delve on the merits of the applications before the court.

14. The applications before court are as a result of the Magistrates’ Court’s decision dismissing the Appellants’ application dated 7th June, 2023. The Appellants’ contention is that the Respondents ought to be barred from collecting any increased rent. Without delving into the merits of the appeal, the issue of rent is contractual in nature and as was held by the Court of Appeal in National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & Another [2001] eKLR, a court of law cannot re-write a contract between the parties. I shall refrain from interfering with what the parties agreed.



15. The Appellants sought for temporary preservative orders. It is important to point out that preservative orders are not the same as the ordinary orders of injunction. In *Cheparwasi Ibrahim & 8 others v Christopher Laptia & Another* [2022] eKLR, the court had the following to say: -
- “...From the outset it is proper for me to state that there is a difference between preservative orders and orders of injunction or even inhibition orders. These should not be confused... To be clear, on the one hand, preservative orders relate to or are ordinarily directed to properties of a historical nature a natural habit that need to be maintained in the state they are until the end of the case or at the inter parties stage. Brian A. Garner, in *Black’s Law Dictionary*, 11 Edition Thompson Reuters, St. Paul MN, 2019 p. 1434 defines a preservative order as follows, “An order prohibiting a property owner from taking action that would alter a historic building or natural habits before the Court makes a final order.”
16. Having reviewed the affidavit evidence, nowhere in their application did the Appellants aver that the Respondents were about to destroy or demolish a historical building, site or natural habitat. Be that as it may, what is discernible is that the Appellants were seeking injunctive orders. Authorities on grant of injunction are now legion. The locus classicus in this area is the case of *Giella v Cassman Brown and Another* (1973) EA 358. A party ought to establish a prima facie case, show that he will suffer irreparable harm if the order sought is not granted and that the balance of convenience tilts in his favour.
17. What is in dispute is rent and as such, it is quantifiable. If the Appellants succeed, they can always claim that which they believe was paid over and above the correct rent. This is not a proper case for grant on injunctive orders. I thus discern no prima facie case and as such, the court need not to consider the other limbs since there is no room for leapfrogging (See *Nguruman Limited v Jan Bonde Nielson & 2 Others* [2014] eKLR). Having arrived at the above conclusion, I find no merit in the application dated 22nd September, 2023 and the same is disallowed with costs.
18. On the second application, it principally seeks to have the Respondents cited for contempt. At the onset, I am in agreement with the Respondents’ submissions that the *Contempt of Court Act*, 2016 is inapplicable as it was declared unconstitutional in *Kenya Human Rights Commission v Attorney General & Another* [2018] eKLR. Thus any reference to any provision of that Act was misplaced. The same having been declared unconstitutional, the provisions of section 5 of the *Judicature Act* reverted (See *Jimi Wanjigi & Another v Inspector General of Police & 3 Others* [2021] eKLR). As decreed by section 5 of the *Judicature Act*, a party seeking to have another cited for contempt ought to confirm the English law applicable in England at the time of the alleged contempt.
19. Technically, the application is not competent considering the above. However, courts ought not to dismiss applications in limine unless they are so hopeless. Notwithstanding the above, can the Respondents be said to be in contempt of court orders? First, the orders issued on 7th June, 2023 lapsed upon delivery of the ruling on 19th September, 2023. As such, the Respondents cannot be said to be in contempt of what was no longer existing.
20. On the order said to have been issued on 25th September, 2023, the record shows that the order issued was for maintenance of status quo. Unluckily, none of the parties sought to have the said status quo defined. It is only upon filing of the application dated 3rd October, 2023 that the Respondents sought to have the court define what status quo was. This was clarified on 25th October, 2023. For a party to be held in contempt, he/she must have had knowledge of the order, the terms of the order must have been clear and unambiguous, the concerned party acted in breach of the terms of the order and his or her conduct was deliberate (See Contempt in Modern New Zealand).



21. A review of the orders issued on 25th September, 2023 clearly confirm that it did not order anyone to do or refrain from doing something. This was what necessitated the clarification. I cannot see how the Respondents could be said to be in contempt prior to the clarification. I think I have said enough to show that the application dated 3rd October, 2023 must fail.
22. On the issue of costs, a careful reading of Section 27 indicates that they follow the cause or event as described by Sir Dinshah Fardunji Mulla in his book *The Code of Civil Procedure*, 18th Edition, 2011 reprint 2012 at 540. It is, that costs must follow the event unless the court, for some good reasons, orders otherwise. The import is that a successful party is entitled to costs unless he or she is guilty of any misconduct or there exists some other good reasons and or cause for not awarding costs to the successful party. Being discretionary and considering that this is an interlocutory application, I direct that each party to bear own costs.
23. Having found as above, the following orders flow therefrom: -
- a. The application dated 22nd September, 2023 is devoid of merit and the same is hereby dismissed with costs;
 - b. The application dated 3rd October, 2023 fails and the same is dismissed with an order that each party shall bear own costs;
 - c. The matter shall now be fixed for directions on the Main Appeal.
- Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA ON THIS 23RD DAY OF FEBRUARY, 2024.

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F. WANGARI

JUDGE

In the presence of:

Ms. Nyaga Advocate h/b for Mr. Bunde Mangaro for the Appellants/Applicants

Ms. Mwakizozo Advocate for the Respondents.

Mr. Barille, Court Assistant

