



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT SIAYA**  
**HIGH COURT CIVIL APPEAL NO. 50 OF 2015**  
**(CORAM: J. A. MAKAU – J.)**

**DANIEL OOKO OCHOGO ..... APPELLANT**

**VERSUS**

**JAMES MIGOYE OTIENO ..... RESPONDENT**

**RULING**

1. The Applicant **Daniel Ooko Ochogo** through an application dated 7th March, 2016, sought court to give him leave to cite **JAMES MIGOYE OTIENO** for contempt of Court's order dated 10th December, 2015, that **JAMES MIGOYE OTIENO** show cause why he could not be jailed for six (6) months for contempt for disobeying Court's order dated 10th December, 2015, by forcefully evicting the Applicant from the business premises and destroying the applicant's business merchants, that the Respondent do pay the applicant herein for the loss of business and loss of property and goodwill taken over by the new tenant and costs of the application.

2. The application is premised on the ground on the face of the application interlia; that the respondent has disobeyed the Court's order dated 10th December, 2015, that the respondent has forcefully evicted the applicant from the suit property, removed his properties, and destroyed them in the process of forceful eviction and that the respondent must be punished for contempt of court's order:

3. The application in supported by the Applicant's affidavit dated 2nd March 2016 in which the applicant briefly deponed that on 10th December 2015, this Court granted an order for stay of execution of the judgment of Business Premises Rent Tribunal case No. 57 of 2015 pending interpartes hearing of the Applicant's application dated 9th December 2015, before the honourable court. On 10th March 2016, that the court's order was served on 11th December, 2015, upon the respondent as per annexure DOO1, however the Respondent disregarded the Court order by going ahead and forcefully removing the Applicant from the suit premises without court's order to the contrary, that this is not the first time that the respondent

with impunity has descended on applicant's premises, that on 6th February 2016, the Respondent descended on the suit premises, broke the door and removed out the Applicant's properties in the rental premises, destroying some while other got lost. That the Respondent acts were in contempt of Court's orders and must be punished and that the Court will restore obedience of the Court's order if the respondent is punished.

4. The Applicant obtained the Court's order on 10th December 2015, staying the execution of the

judgment of Business Premises Rent Tribunal Cases No. 57 of 2015 (Kisumu Pending interpartes hearing of the application). The Tribunal order required the tenant to vacate or deliver vacant possession of the suit premises on or before 1.12.2015 in default, an eviction order to issue amongst other orders which are not relevant to the current application. The O.C.S. Siaya Police Station was mandated to enforce compliance of the Tribunal's orders.

5. That the instant application was served upon the respondent on 14th March 2016 and he accepted service and signed the same. The applicant at the hearing of the application appeared in person while the Respondent appeared in person. That both partes indicated they were ready with the application notwithstanding several reminders being made to the Respondent, that he had not filed any a replying affidavit and that it was not prudent to proceed with the same. The Respondent insisted he was ready even without having filed a Replying affidavit. He was orally advised on the nature of the application and the consequences if court finds that he was in contempt of court's order and in reply he insisted that the matter should go on. I then allowed the application to proceed to hearing.

6. I have very carefully considered the application, the annexures thereto, considered the applicant's oral submissions and response by the Respondent. The issue for consideration are:-

***(a) Whether the Court's order was extracted and served upon the Respondent?***

***(b) Whether the Respondent is in breach of the Court's order and whether he can be punished?***

***(c) What punishment if any?***

7. At hearing the Applicant submitted that upon Court issuing the order on 10th December 2015 staying execution of the BPR Tribunal in No. 57 of 2015 he had the extracted Court's order served upon the Respondent on 11.12.2015. A copy of the extracted order duly served is in the Court file showing the Respondent was indeed served on 11.12.2015 at 10.20 a.m. and he signed at the back of the extracted order acknowledging receipt thereof. The Applicant reiterated the contents of his affidavit in his arguments, which contents I have already quoted in this ruling which I need not repeat. He also stated he was not able to move the Court earlier on as the Court was on vocation followed by judge's leave upto 1.3.2016.

8. The Respondent in his response stated that what the Applicant stated before Court was true and that they had made an agreement with the Applicant to operate his business within his premises till his death (Applicant's death) He concluded by asking Court to do what it wants or deems fit in this matter.

9. I find in the instant case the Court's order was extracted and served upon the Respondent that though the extracted order does not have Penal Notice, the Respondent, was aware that he was supposed to obey Court's order. He did not in his response state that he did not know it was wrong to disobey Court's order but rudely asked the Court to do what it wants, which is an indication that he was and is out to disobey Court's order with impunity. He showed that he has no respect for Court's orders.

10. That from the affidavit of the Applicant which is not controverted by the Respondent, and the Respondent's admission that what the Applicant submitted was all true, thus he removed the applicant from the suit premises in executions of the Tribunal's decision which this court had stayed. I am satisfied that the Respondent knew of the Court's order and is in breach of the Court's order and should be punished.

11. **Order 40 Rule 3(1) of the Civil Procedure Rules** provides:-

***“In cases of disobedience, or of breach of any such terms the court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the court directs his release.”***

12. In view of the above-mentioned provision the Court which issued the orders can be moved to punish the person who has disobeyed the Court's order. One needs not seek leave to be granted to in order to cite the offender if the matter is before the Judicial Officer who issued the order. This Court can therefore punish the offender notwithstanding no leave was sought to cite the person sought to be punished.

13. What punishment if any? **Order 40 Rule 3(1) of the Civil Procedure Rules** clearly spells out the kind of punishment that the Court can impose. The punishment include ordering the property of the person guilty of such disobedience or breach to be attached and the court may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the the meantime the Court directs his release.

14. In the instant application I am satisfied that the Respondent is in breach of the Court's order and should be punished. The Respondent did not show any cause why he could not be punished but asked this Court to do what it wants with him. The parties are supposed to to know Court's orders must be obeyed by all, whether they think they are right or wrong anyone who feels the orders are wrong should challenge the order in Court but not for parties to take the law into their own hands and do as they please. That if such behaviour are allowed this country will go to the dogs and we shall have anarchy. This kind of behaviour cannot be allowed in a civil Society and in this country. I therefore find the Respondent guilty of disobeying Court's order and fine the Respondent Kshs.40,000/= in default the Respondent to be detained in prison for a period of six (6) months.

As regard the Applicant's prayer for Respondent to pay the applicant for loss of business and loss of property and goodwill, I am of the view that the claim is misplaced and the applicant should pursue the same by filing a Civil suit in the appropriate Court.

The Applicant is awarded costs of this application

**DATED AT SIAYA THIS 31ST DAY OF MARCH, 2016.**

**J. A. MAKAU**

**JUDGE**

**DELIVERED IN OPEN COURT**

In the presence of:

Applicant in person present

Respondent in person present

Court Clerk – Kevin Odhiambo

Court Clerk – Mohammed Akideh

**J. A. MAKAU**

**JUDGE**