



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT KISII**

**MISC.APPL. NO.221 OF 2013**

**SHEM OTIENO.....APPLICANT**

**VERSUS**

**RICHARD NGOMA ORERO.....1<sup>ST</sup> RESPONDENT**

**BENARD OYUGI OKETCH OKENDO.....2<sup>ND</sup> RESPONDENT**

**RULING**

What is before me is the applicant's application by of Notice of Motion dated 25<sup>th</sup> November 2013 in which the applicant is seeking an order to commit the respondents to civil jail for disobeying this court's order of 26<sup>th</sup> August 2013 vide Kisii HCC Misc.Application No.191 of 2013. Alternatively the applicant was also seeking that this court grants an order of sequestration to attach the properties of the respondents which properties be sold to defray, the damages occasioned by the breach and or disobedience of lawful court orders issued in the 26<sup>th</sup> August 2013 vide Kisii HCC Misc. Application No.191 of 2013. The applicant's application is supported by the affidavit of the applicant sworn on 25<sup>th</sup> November 2013. In his affidavit, the applicant has deposed that on 26<sup>th</sup> August 2013 Hon. Lucy Kaitany – DR while presiding over Kisii HC. Misc. Application No.191 of 2013 made an order of stay of Execution of the orders issued on the 20<sup>th</sup> August 2013. That the aforesaid order was extracted and endorsed with a Penal Notice and were served upon the Respondents and a copy of the same was equally served upon Mr. Nyatundo advocate for the 1<sup>st</sup> respondent for compliance. However, the plaintiff has further deposed that upon service of the aforesaid order, the respondents without due respect to the rule of law and order disobeyed the aforesaid orders by moving into the suit property and damaged all the properties of the applicant and also fenced of the suit land.

As a result of the above said disobedience by the respondents' agents, servants and employees made the applicant to suffered substantial loss and damage and in the process he has lost goods and/or items of sentimental value and others of unique value.

Therefore, the applicant has contended that the conduct of the respondents subjects this Honourable court's orders to disrepute and disregard, the respondents have since disobeyed the aforesaid order which action amounts to contempt of orders of this court and it will be in the interestsof justice that the integrity and the intent of the orders issued by any court to be obeyed no matter its contents.

The applicant has contended that the acts complained of were carried out by the 1<sup>st</sup> defendant with the full knowledge of the court order referred to hereinabove and were intended to disparage the dignity of the

court. It is for this reason that the applicant is seeking the respondents to be appropriately reprimanded by way of punishment.

The applicant's application is opposed by the respondents. Through grounds of opposition dated 26<sup>th</sup> May 2015 the respondents have contended that the applicant's application is misconceived and lacking in merit, is defective, frivolous and vexatious and it is an abuse of the process of this court.

When the matter came before me for hearing on 11<sup>th</sup> March 2015, it was agreed that the above application be argued by filing and exchanging written submissions. By the 5<sup>th</sup> of June 2015 advocates representing parties had already duly filed their written submissions.

In their submissions the respondents have contended as follows:-

- 1. That the 1<sup>st</sup> respondent was the defendant in Kisii HCCC No.157 of 2008 wherein his counterclaim was upheld and allowed leading to decree and orders of evidence against the applicant.**
- 2. Following the applicant's failure to show cause in response to the Notice to Show Cause dated 10<sup>th</sup> October 2011 in said Kisii HCCC No.157 of 2008, the court ordered the applicant's eviction by order of 18<sup>th</sup> January 2012.**
- 3. Subsequently, Noco Auctioneers, seized of the evicted order above lodged Kisii HC Misc. Civil Application No.191 of 2013 for police assistance pursuant to, inter alia, Rule 9 of the Auctioneers Rules in force and the said prayer was granted on 20<sup>th</sup> August 2013.**
- 4. On the same date of 20<sup>th</sup> August 2013, the Auctioneers executed the decree and order of eviction made and issued in Kisii HCCC No.157 of 2008.**
- 5. Prompted by, and as a reaction to said execution, the applicant herein lodged his application dated 26<sup>th</sup> August 2013 seeking stay of the court orders of 20<sup>th</sup> August 2013 in Kisii HC. Misc. Civil Application No.191 of 2013 which was merely for police assistance to an Auctioneer as executed 6 days earlier.**
- 6. The present application essentially seeks orders citing the respondent's for alleged contempt, disobedience in lieu of the stay orders of 26<sup>th</sup> August 2013 by way of having duly executed the orders for police assistance.**
- 7. There is no reason why the present application could not be filed, heard and determined in Kisii HC. Misc. Civil Application No.191 of 2013 making the present application an abuse of the process of the court.**
- 8. It is not shown or even suggested how the respondents, or any of them breached, disobeyed, disregarded/or ignored the orders of 26<sup>th</sup> August 2013 staying orders for police assistance given and spent on 20<sup>th</sup> August 2013 (6 days earlier).**

The applicant's written submissions on the other hand contend that the respondents disregarded and disobeyed the order, proceeded to fence and evict the applicant from the suit property and went further to destroy the said property contrary to clear and unequivocal terms of the court order.

Furthermore, that the respondents and their advocates were all duly and properly served as required by with the court's order and receipt was acknowledged by the respondent signatures thus according to the applicant, the respondents were fully aware of the orders of 26<sup>th</sup> august 2013 but nevertheless went ahead to disobey them as the said order was equally endorsed with a Penal Notice as mandated by the law.

## **DETERMINATION**

The law on contempt of court is now fairly settled. The onus is upon the applicant to prove the elements of contempt complained of. The proof must be above a balance of probability but not beyond any reasonable doubt. See the holding in the court of appeal of **Mititika vs Baharini Farm Ltd [1985] KLR 227**, where the court stated that the standard of proof in contempt proceedings must be higher than proof on a balance of probabilities, and almost but not exactly beyond reasonable doubt. The applicant in this case had a duty to prove that the court did issue an order of stay of execution of the orders issued on 20<sup>th</sup> August 2013, pending the hearing and determination of this suit. The said order was extracted and served upon the respondents, the order had a Penal Notice warning the defendants that if they disobey the same they would be liable to be punished by the court and that the respondents did in fact disobey the said order after such service. This principle finds support in the case of **Awadh v. Mahimbili (No.2) [2004] 1 KLR 458**.

The applicant annexed to his affidavit a copy of the court order that was made on 26<sup>th</sup> August 2013 which the respondents are accused of disobeying. The said order had a Penal Notice. The applicant also annexed a copy of the affidavit of the process server who is said to have served the said order upon the respondents. According to the said affidavit, the process server received copies of the said order from the applicant's advocate for service upon the respondents on 26<sup>th</sup> August 2013 and that he served the same upon the respondent on the same day. The respondents on the other hand are not denying the fact that they were served with the above stay of execution but contend that by the time they were served with the stay on 26<sup>th</sup> August 2013 the execution had already been carried out by the 2<sup>nd</sup> respondent on 20<sup>th</sup> August 2013. As I have indicated above, the respondents in his case chose to file grounds of opposition it is actually in their written submissions the respondents have actually submitted that by the time they were served with the order of stay of execution on 26<sup>th</sup> August 2013 they had already executed the decree and order of execution made and issued on 20<sup>th</sup> August 2013.

With all due respect to counsel for the respondent, written submissions are not evidence as was held in **Bake & Bite Limited v. Daniel MutisyaMwalonzi [2015] eKLR**- Aburili J, held:

**‘It is trite law that he who alleges must prove (see Sections 107, 108, 109 of the Evidence Act). Real and agent evidence must be tendered by way of affidavit not by way of submissions by counsel for the respondent....’**

Similar sentiments were expressed by the Court of Appeal in **Douglas Odhiambo & Another v. Telkom Kenya Limited** where the Court of Appeal cited Kihara Kariuki J (*as he was then was*) stated:-

**‘So as things stand, there is no evidence on record upon which I, as a court of law can undertake an assessment of damages. These are averments in the plaint that the plaintiff's suffered loss and damage the plaintiffs must place before the court evidence to sustain those averments, pleadings and written submissions are not evidence.’**

Therefore written submissions in my humble view are of persuasive value supporting the evidence tendered on oath by the parties through supporting or replying affidavit in a case. Furthermore, even if this court was to consider the respondents written submissions, he has not tendered evidence in any way to show that indeed by the time they were served with the order of stay of execution dated 26<sup>th</sup> August 2013, the said stay had been overtaken by events as they had already executed the decree dated 20<sup>th</sup> August 2013. It was upon the respondents on alleging that they had executed the said decree to tender in evidence to prove their allegation.

Therefore, since the applicant has proved that the court issued an order, which was served upon the respondents, the respondents have not rebutted the fact that the said order was served upon them and have not presented any evidence before this court to show that by the time the order of stay of execution was issued the same has already been overtaken by events, this court holds the respondents in contempt of the stay of execution order issued on 26<sup>th</sup> August 2013. The said respondents are to appear before this court

on 12<sup>th</sup> October 2015 to mitigate reasons as to why they should not be thrown to civil jail punishing them for the contempt.

**Dated, signed and delivered at Kisii this 31<sup>st</sup> day of July 2015.**

**HON. C. B. NAGILLAH**

**JUDGE**

**In the presence of:**

- M/S Sagwe holding brief for Nyambati for the Applicant
- M/S Nyatundo (absent) for the Respondent
- Samuel Omuga: Court clerk