



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 507 OF 2013

DORIC INDUSTRIES LIMITED.....PLAINTIFF/APPLICANT

VERSUS

AKSHRAP REAL ESTATE LIMITED.....DEFENDANT/RESPONDENT

AND

**1. NATHAN M. PALA T/A MUHATIA PALA AUCTIONEERS.....1ST ALLEGED
CONTEMNOR**

**2. RAMESH SHAMJI PATEL.....2ND
ALLEGED CONTEMNOR**

JUDGMENT

1. The Plaintiff DORIC INDUSTRIES LIMITED filed an application dated 20th August, 2015 seeking a mandatory injunction against the Defendant and the 1st alleged contemnor to unconditionally reinstate, restore or put back the Plaintiff as well as the goods carted away into the premises situated on L.R. No. 209/12042, Go-down No. 17 &18 Alpha Center, Mombasa Road; a temporary injunction restraining the Defendant from further terminating, altering the terms of the tenancy and/or in any other manner dealing or interfering with the Plaintiff's occupation and/or possession of L.R. No. 209/12042, Go-down No. 17 &18 Alpha Center, Mombasa Road and that pending the hearing and determination of the application and further of the suit, the Defendant be restrained from distressing for rent, proclaiming, attaching, evicting or in any other manner from interfering with the Plaintiff's quiet enjoyment and peaceful occupation of L.R. No. 209/12042, Go-down No. 17 &18 Alpha Center, Mombasa Road.
2. Hon Justice Onyancha considered the said application *ex parte* in chambers and gave orders as follows on 20th August, 2015, thus:-
 - i. *That the cited distress for rent ordered by the lower court in Misc. Cause No. 613 of 2015 be and is hereby ordered stopped without conditions.*
 - ii. *That all goods, machines, apparatus seized by the 1st alleged Contemnor be returned to the Plaintiff without conditions forthwith.*
 - iii. *That the matter be mentioned during vacation before the duty Judge on 24th August, 2015 for further orders.*
 - iv. *That the orders to last until further orders and to be served immediately.*
3. When the above application came up for hearing before the duty Judge Hon Mabeya J on 24th August, 2015, it emerged that the Defendant's advocates were served with the orders of 20th

- August, 2015. Parties were given time to mitigate their positions and the orders of 20th August 2015 were extended pending further orders of this court.
4. The Plaintiff on that same morning of 24th August, 2015 filed a notice of motion dated 24th August, 2015 seeking that the alleged contemnors be committed to civil jail for six months or that their assets be attached to compensate the Plaintiff for the loss suffered as a result of the contempt or in the alternative; that the defendant's director Ramesh Shamji Patel and its agent Nathan M. Pala T/A Muhatia Pala Auctioneers be committed to civil jail for a term of six months for contempt of court having deliberately disobeyed orders of this court issued on 20th August 2015; that this honourable court do issue any other or further orders geared towards protecting the dignity and authority of the court; and that the respondents be condemned to pay costs of the application. The application was premised on the grounds on the face of the application, which ground are also echoed in the supporting affidavit of the plaintiff/applicant's Director Francis J. Ngigi.
 5. In the supporting affidavit to the application, Francis J. Ngigi who is the Plaintiff's Director deposed and annexed documentation to that effect that the Defendant, its advocate and the 1st alleged contemnor were served with the court order of 20th August, 2015 on the same day and that the Defendant's advocate Mr. Wamahu Kimeria admitted to the said contempt of the court orders on 24th August, 2015 in court. Further, that the goods have never been returned to the premises.
 6. The application was opposed, with Mr. Wamahu Kimeria advocate for the defendant in his replying affidavit sworn on 27th August, 2015 denying that he made an admission to the alleged contempt. Mr Kimeria contended that his firm received the orders at 4.30 pm on 20th August 2015 by which time the distress for rent exercise had already been completed. That in a case requiring an individual to do or abstain from doing an act, the requisite document must be served on that person personally.
 7. Mr Kimeria contended that the affidavits of service of Richard K. Wachira are false and he prayed that the said process server be brought to court for cross-examination. That the 2nd alleged contemnor has no personal assistant at all and it is not true that the said 2nd alleged contemnor knew of the court order as he was out of the country attending a wedding.
 8. Counsel for the defendant further contended that the orders of 20th August, 2015 were not executable since it was addressed to the 1st alleged contemnor who is not the auctioneer who effected the distress as the instructed auctioneer was Elam N. Lumwaji t/a Domicile Auctioneer Services. That the Plaintiff's advocates were informed to avail the Plaintiff's director Francis Ngigi so that the goods could be released to him to give directions as to where the goods could be transported so that the Defendant could comply with the orders but that the Plaintiff's director had ignored to avail himself.
 9. The 1st alleged contemnor Mr Nathan Muhatia Pala also opposed the application by his replying affidavit filed on 28th August, 2015. He deposed that on 15th June, 2015 he received instructions from his senior colleague Mr Elam Lumwaji who had the conduct of this matter, to secure a breaking order on his behalf since Mr Lumwaji was held up upcountry. That he made an application for the same which orders were granted on 20th August, 2015 in the subordinate court and he handed over the file to Elam Lumwaji and that the goods were released to the Plaintiff but that the plaintiff never picked them.
 10. The Plaintiff's director filed a supplementary affidavit on 31st August, 2015 and maintained that the impugned orders were served on the Defendant, its advocates as well as the 1st contemnor on 20th August, 2015. That the Defendant's counsel admitted in his own documents in court that he had knowledge of the said orders i.e. the letters dated 24th and 27th August, 2015. That since it is the 1st alleged contemnor who obtained orders for distress in Misc. Cause no.613 of 2015 and supervised the eviction, he should be liable for the alleged illegal distress. That it is not true that the Defendant has purged the contempt as alleged since they admitted in their letter dated 24th August, 2015 having illegally evicted the Plaintiff. That in the morning of 28th August, 2015, the Defendant's agent returned a dismantled conveyor belt and left it outside go-down No. 17 and that the alleged contemnors continue to illegally detain the Plaintiff's heavy machines apparatus and goods. He **further contended that Mr. Kimeria's affidavit is defective for having deponed on very contentious matters in contempt proceedings and therefore it ought to be struck out.**

11. Elam Ngase Lumwaji swore an affidavit on 31st August, 2015. He deposed that upon receiving instructions from M/s Wamahiu Kimeria & Co. Advocates on 21st August, 2015, regarding the court order of 20th August, 2015 his attempt to return the Plaintiff's goods were futile since Go-down No. 17 had been leased out and No. 18 had been burnt.
12. The parties' advocates filed written submissions but they opted to argue them orally on 11th September, 2015. The submissions were a reiteration of the depositions in the affidavits on record and the written submissions.
13. Mr. Karigi learned Counsel for the Plaintiff relied on the Court of Appeal decision in **Shimmers Plaza Limited v. National Bank of Kenya Limited CA No. 33 of 2012** and the case of **African Management Communication Ltd v. Joseph Mathenge Mugo and Others (2013) eKLR** wherein it was held that knowledge of the order was sufficient.
14. On the issue of the defectiveness of Mr. Kimeria's affidavit, the Plaintiff cited **Nicholas Kipchirchir Kimaiyo v. Wilson Kibet Kimutai & Another (2012) eKLR**. Wherein Hon Ochieng J struck out an affidavit sworn by the advocate in contempt proceedings against his client.
15. Mr. Kimeria on the other hand submitted that the Plaintiff is estopped from denying receipt of his goods under Section 20 of the Evidence Act since he in his supplementary affidavit acknowledged receipt of the goods.
16. The genesis of the dispute giving rise to these contempt of court proceedings is that the plaintiff is a tenant to the defendant on premises on LR 209/12042 Go down No. 17 and 18 ALPHA Centre, Mombasa Road. On 19th August, 2015, the landlord/defendant caused an auctioneer to levy distress for recovery of alleged rent arrears of shs 10,786,015.34. The record shows that an auctioneer by the name Nathan Muhatia Pala obtained a break in order from Milimani CM Misc. Cause No. 613 of 2015. He also obtained leave to get security from OCPD Embakasi Police Station/AP in charge of Embakasi AP Camp to assist in keeping peace and witness the said distress, to enable the landlord recover the outstanding rent. That order was made on 13th August, 2015 by Hon L.Kassan Mr, SPM in **favour of the applicant auctioneer in the name of Nathan Muhatia Pala t/a. Muhatia Pala Auctioneers.**
17. The plaintiff therefore, on learning of the distress, came before this court on 20th August under the vacation rules and was issued with an ex parte order in the first instance by Hon Onyancha J as reproduced hereinabove.
18. The said order was also endorsed with a penal notice commanding full obedience and warning of the consequences of disobedience.
19. The defendant's counsel contends that the plaintiff had persistently refused to pay rent arrears despite orders of this court made by Hon Ougo J in 2014 and that it had also refused to vacate the premises and continued to use the court process to frustrate the defendant from realizing any rent from it for now over one year hence the distress for rent that was carried out, which was lawful.
20. The plaintiff denied that it was in any rent arrears at the time of alleged distress. He stated that at the material time of the alleged distress, there was an order issued by Hon Ougo J on 28th March, 2014 restraining the defendant, their servants or agents from distressing for rent, proclaiming, attaching, evicting or in any way howsoever interfering with the plaintiff's quiet enjoyment and peaceful occupation of plot LR. 209/12042 Godowns 17 and 18 at Alpha Centre along Mombasa Road and that the said orders had not been vacated or appealed against.
21. The alleged distress involved carting away heavy machinery for production from the premises. The premises-Go-down 17 was then allegedly immediately leased out to someone else whereas Go-down 18 had allegedly been burnt down earlier.
22. The record shows that on 24th August 2015 when the parties' advocates appeared before Hon Justice Mabeya for further orders as initially directed ex parte on 20th August by Hon Onyancha J, the plaintiff's advocate indicated to court that they had served the orders on the defendants as well as the auctioneers but that the orders had not been complied with. Mr Kimeria counsel for the defendant on the other hand informed the court that his firm had been served with the order on 20th August, 2015 at 4.30 pm and that the order gave them only 21st August 2015. That he was forced to prepare a replying affidavit before 12 noon and serve. That the defendant had not refused to comply with court orders made ex parte but that because of logistics, they could not comply with the same within one day. That because of the logistics as the distress involved the removal of

- heavy machinery and the heavy cost involved; they needed 2 weeks to comply with court order.
23. The Hon Mabeya J then remarked that there was admission that the court orders had not been obeyed and therefore the administration of justice was in jeopardy. He stood over the matter and directed parties to take steps to mitigate their position.
24. Following those sentiments of the Hon Judge, the plaintiff came to court with this contempt application seeking to cite the defendant and the auctioneers for contempt of court. On 2/9/2015 Hon Justice Serگون made an order that the Go-down No. 17 should not be leased or occupied by any party until this matter is heard and finalized.
25. In brief, that is how this court came to be seized of this matter of contempt of court.
26. This court also observes that this suit was filed in 2013 and to-date, there have been applications after applications which in essence have never resolved the dispute between landlord and tenant. In addition, the defendant did on 14th January, 2015 file an amended statement of defence and counterclaim against the plaintiff for Kshs. 7,070,899.14 together with interest at 24% p.a from June 2013 until payment in full; aggravated damages for breach of contract and unlawfully occupying the premises without paying rent; mesne profits and breaching court consent orders made in HCC 684 of 2011 on 19th June, 2012.
27. By an application dated 11th March, 2015, the defendant herein sought for summary judgment in terms of their counterclaim above and. Before that application for summary judgment could be heard inter partes as parties had appeared before me on 25th May, 2015 and agreed to file and exchange submissions, and as the matter was due for mention on 19th September, 2015 to fix a date for ruling after the Deputy Registrar confirmed compliance with the filing of written submissions as at 11th August, 2015, the defendant put in motion the process of levying distress for rent and therefore necessitating the filing of an application to stop the distress process and hence this application for contempt of court.
28. From Annexure FJ1, the order of Hon Onyancha J was served upon the following people: - Wamahu Kimeria & Co. Advocates on 20th August, 2015 at 4.17 pm, Muhatia Pala Auctioneer on 19th (sic) August, 2015 and a Mr. John Kimani on 20th August, 2015 at 4.00pm, as per the affidavits of Morris M. Karigi sworn on 21st August, 2015 and of Richard K. Wachira sworn on the same day. Mr. John Kimani was deposed to have identified himself as the personal assistant to Mr Ramesh Shamji Patel, a Director of the defendant Company and who was said to be in a meeting.
29. I must mention that the main application for injunction seeking to restrain the defendant for alleged illegal distress for rent as well as for restoration of the plaintiff back into the premises following its alleged illegal eviction camouflaged as distress for rent is still pending hearing and determination. It has been interrupted by these contempt of court proceeding after it was alleged that the orders issued by Hon Onyancha J ex parte on 20th August, 2015 were flouted. The law requires that where there is an alleged contempt of court orders, the application for contempt precedes all other applications or proceedings.

Determination

30. I have carefully considered the application for contempt as filed, the grounds, affidavits and annexures and the opposition thereto coupled with the parties' advocates' submissions and authorities relied on. The power to punish for contempt is donated by section 5 of the Judicature Act which provides that the High Court shall have the same power to punish for contempt of Court as the High Court of Justice in England. Consequently, the Supreme Court Practice Rules applied by virtue of section 5 of the Judicature Act are the ones applicable with regard to contempt proceedings.
31. In **Central Bank of Kenya & Another vs. Ratalil Automobiles Limited & Others Civil Application No. Nai. 247 of 2006**, the Court of Appeal held that Judicial power in Kenya vests in the Courts and other tribunals established under the Constitution and that it is a fundamental tenet of the rule of law that court orders must be obeyed and it is not open to any person or persons to choose whether or not to comply with or to ignore such orders as directed to him or them by a Court of law. The consequences of failure to obey Court orders are that any action taken in breach of the court order is a nullity and of no effect. See **Commercial Bank of Africa Ltd. vs. Isaac**

- Kamau Ndirangu Civil Appeal No. 157 of 1995 [1990-1994] EA 69.
32. In Macfoy vs. United Africa Co. Ltd [1961] 2 ALL ER 1169 at 1172 & Omega Enterprises (Kenya) Ltd. vs. KTDC & 2 Others Civil Appeal No. 59 of 1993 it was observed that:

"where an act is a nullity it is trite that it is void and if an act is void, then it is in law a nullity as it is not only bad but incurably bad and there is no need for an order of the Court to set it aside, though sometimes it is convenient to have the Court declare it to be so. Where the Court finds this to be the case, then the actions taken in pursuance of a Court order must therefore break-down once the superstructure upon which it is based is removed since you cannot put something on nothing and expect it to stay there as it will collapse...."

33. Over time, courts have also held that it does not matter that the person alleged to have acted in contempt of court was unaware of the existence of the order. Whereas he may not be committed for contempt of a court order which he was not aware of, his unawareness does not sanitise the illegal action which would still be null and void.

Black's Law Dictionary (Ninth Edition) defines contempt of court as:-

"Conduct that defies the authority or dignity of a court. Because such conduct interferes with the administration of justice, it is punishable usually by fine or imprisonment."

34. In 1778, Chief Justice McKean of the United States, when dealing with a case of a party in Civil litigation who refused to answer interrogatories is noted to have stated:-

"Since however, the question seems to resolve itself into this, whether you shall bend to the law, or the law shall bend to you, it is our duty to determine that the former shall be the case." (The History of contempt of Court (1927) P 47)."

35. In Johnson Vs Grant (1923) SC 789 at 790 Clyde L J noted:-

"The phrase 'contempt of court' does not in the least describe the true nature of the class of offences with which we are here concerned.... The offence consists in interfering with the administration of the law; in impeding and perverting the course of justice..... it is not the dignity of court which is offended – a petty and misleading view of the issues involved, it is the fundamental supremacy of the law which is challenged." (Emphasis mine)."

36. Back home, in the case of TEACHERS SERVICE COMMISSION v KENYA NATIONAL UNION OF TEACHERS & 2 others [2013] eKLR Ndolo J observed that:-

"38. The reason why courts will punish for contempt of court then is to safeguard the rule of law which is fundamental in the administration of justice. It has nothing to do with the integrity of the judiciary or the court or even the personal ego of the presiding judge. Neither is it about placating the applicant who moves the court by taking out contempt proceedings. It is about preserving and safeguarding the rule of law."

37. I am of the same persuasion. The reason why power is vested in courts to punish for contempt of court is but to safeguard the rule of law which is fundamental in the administration of justice. The law of contempt has evolved over time in order to maintain the supremacy of the law and the respect for law and order. As it was in the time of Chief Justice McKean in 1778, so it is today that courts have a duty to ensure that citizens bend to the law and not vice versa. Indeed, if respect for law and order never existed, life in society would be but short, brutish and nasty.

38. It is the supremacy of the law and the ultimate administration of justice that is usually under challenge when contempt of court is committed. This is so because, a party who obtains an order from Court must be certain that the order will be obeyed by those to whom it is directed. As such, the obedience of a court order is fundamental to the administration of justice and rule of law.

39. A court order once issued binds all and sundry, the mighty and the lowly equally without

exception. An order is meant to be obeyed and not otherwise. In **Attorney General v. Times Newspapers Ltd and Another (1991) 2 All ER 398** it was stated that it was immaterial whether one was a party to a suit or not. That anyone who knowingly impedes or interferes with the administration of justice is guilty of contempt irrespective of whether they are named in the order or not. The court held that the Plaintiffs had knowledge of the order thereby the Plaintiffs could not escape liability.

40. Contempt proceedings affect the liberty of a person. Its standard of proof is therefore higher than a balance of probabilities. This position is fortified by the Court of Appeal's holding in **Mutitika v. Baharini Farm Ltd [1985] KLR 227** where it was held that the guilt of a contemnor must be proved strictly as is consistent with the gravity of the charge.
41. This court has powers to commit a person for contempt of court for disobeying court orders. The general rule governing the obligation of persons to obey court orders was stated in the case of **Hadkinson v Hadkinson [1952] ALL ER 567**, in which Romer LJ stated at page 569-

“It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made against by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void.”

42. Existence of a court order is necessary before one can complain that the order was disobeyed. The order must also be clear and unambiguous. The order must have either been served upon the alleged contemnors or that they were aware of the said court order and there should be evidence of brazen disobedience of the said court order. In this case, the court order was indeed issued by Hon Onyancha J on 20th August, 2015. The said order was served on the Defendant's advocates, the alleged 1st contemnor and to one John Kimani at the defendant's business premises where the alleged 2nd contemnor is a Director who is said to have been out of the country attending a wedding. The said order was simultaneously served with the application for injunction as filed under certificate of urgency on the defendant's advocate Mr Kimeria and when the matter came up for further orders on 24th August, 2015 as directed by Hon Onyancha, J, and the said advocate had filed a replying affidavit thereto.
43. When this application for contempt was served on the defendant's advocate, the said advocate also filed a replying affidavit. The alleged 2nd contemnor did not file any affidavit denying the contempt allegations. To my mind, it is incumbent upon a party faced with such an application to defend themselves. It is not the advocate who is cited for contempt of court but the client and its agents, the auctioneer. Nonetheless, the burden of proving such disobedience of court order lies on the applicant who alleges. The standard of proof in matters of contempt as discussed in **Mutitika v. Baharini Farm Limited (1985) KLR 229** is higher than proof on a balance of probabilities. It is almost but not exactly beyond reasonable doubt. This is because the charge of contempt of court is akin to a criminal offence and a party is likely to lose his liberty. In **Africa Management Communication International Ltd v. Joseph Mathenge Mugo & anor (2013) eKLR** it was held: -

“The law of contempt has evolved over time in order to maintain the supremacy of the law and the respect for law and order. As it was in the time of Chief Justice Mckean in 1778, so it is today that courts have a duty to ensure that citizens bend to the law and not vice versa. Indeed, if respect for law and order never existed, life in society would be short, brutish and nasty. It is the supremacy of the law and the ultimate administration of justice that is usually under challenge when contempt of court is committed. This is because, a party who obtains an order from court must be certain that the order will be obeyed by those to whom it is directed. As such, the obedience of court orders is fundamental to the administration of justice and rule of law.”

44. In the case of **Teachers Service Commission v. Kenya National Union of Teachers & 2 Others (2013) eKLR** the court held that:-

“The reason why courts will punish for contempt of court then is to safeguard the rule of law which is fundamental in the administration of justice it has nothing to do with the integrity of the judiciary or the court or even the personal ego of the presiding judge. Neither is it about placating the applicant..... It is about preserving and safeguarding the rule of law.”

45. The question that must be answered is whether the alleged contemnors are in contempt of the said court order. The applicant’s counsel insisted that there was contempt of court order and that the said contempt was admitted by the defendant’s own counsel Mr Kimeria when he appeared in court on 24th August 2015 for mention before Hon Mabeya J who directed that the parties mitigate their positions in view of that admission that there was contempt of court. The question is, was the advocate’s address to the court an admission of contempt by his clients? That question will be answered shortly.
46. It is not in dispute that the defendants were distressing for rent arrears and that in the process, as is the practice; they had to engage the services of a licenced auctioneer. That process was done on 19th August, 2015 even when there were orders made on 26th March 2014 by Hon Ougo J stopping any distress for rent. In addition, and from the affidavit evidence on record as well as the photographs taken of the items distressed, the distress was conducted in a manner that appeared like an eviction and not a distress. Where there is distress, then the tenant is not dispossessed of the tenanted premises since, albeit the tenant may be disabled from carrying on with the normal business, he/she nonetheless remains in possession of the premises. In this case, I reiterate that there were no orders for eviction of the plaintiff from the premises. the Auctioneer only sought for breaking in order and security to distress for rent and the letter of instruction from Mr Kimeria Advocate too was clear that the plaintiff was to be distressed for rent outstanding not an eviction from the premises.
47. Further, as I have stated before, the defendant had filed a counterclaim herein seeking for unpaid rent, mesne profits and general damages. It had even applied for summary judgement in terms of the counterclaim which application was pending determination after parties had appeared in court and agreed to dispose of that application by way of written submissions.
48. The issue therefore that begs answers is- was the distress for rent and therefore dispossession of the premises from the plaintiff necessary at this stage when proceedings were pending in court regarding the alleged rent arrears as well as the application for summary judgment, and when Hon Ougo J had clearly restrained any distress for rent vide her ruling of 26th March, 2014? A comprehensive answer to that question can only be answered in the main application whose exparte orders have given rise to these contempt of court proceedings. I however must mention that aspect of dispossession since by Mr Kimeria, the defendant’s counsel’s admission, the Go down No. 17 had already been leased out to someone else, immediately after the alleged distress for rent. That could have been the reason why the defendant kept asking the plaintiff to collect its property removed from the premises and which were stored/bailed at Leakey’s Storage after their removal from the premises. The goods which included heavy machinery and equipments for production could not be taken by the plaintiff because he did not have an alternative place to keep them. He expected the defendant to return them to the premises wherein they had been removed. It is also for that reason that Mr Kimeria requested the Court to give his clients 2 weeks to comply with the court order, due to the heavy machinery, labour cost and logistics involved in restoring the machinery to the premises, noting that Go down 18 had been burnt down and the other No. 17 had been leased out.
49. Mr Kimeria advocate then made an about turn and alleged, after seeking for two weeks to comply with the said court order, and alleged that the court orders were mandatory in nature which should not have been given exparte, thus faulting the trial judge for considering the urgent application exparte. He also alleged that the court orders were unexecutable as they were directed at Nathan Muhatia Pala yet the defendant had instructed Domicile Auctioneer to effect the distress for rent; and that the said orders were ambiguous for stating that the distressed goods be returned to the plaintiff.
50. It must be remembered that there is no application seeking to discharge those exparte mandatory orders issued by Hon Onyancha J. Court orders are not made in vain and are meant to be complied with and therefore a party cannot take upon himself on the validity of court orders whether erroneously made exparte or otherwise. Once issued and sealed by the court, the orders of the

court are valid unless reviewed, vacated or on appeal, varied or set aside. Any other explanation why a clear and valid court order issued by a court of competent jurisdiction can only be for purposes of purging the contempt or in mitigation and not a passport for disregarding an order of the court. The obligation to obey court orders is so uncompromising that it extends to situations where the person affected by the order believes that the order was irregular or void ab initio. See **Econet Wireless Kenya Ltd v Minister for Information and Communication of Kenya and another (2005)1 KLR 828**. In **Refrigerator & Kitchen utensils Ltd v Gulabchand Popatlal Shah & others Civ. Appl Nai. 39 of 1990** where the Court of Appeal stated that it is essential for the maintenance of the rule of law and good order that the authority and dignity of the court be upheld at all times and that the court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. In other words, a court order, whether made *ex parte* or *inter partes* must be obeyed. In **Wildlife Lodges Ltd v County Council of Narok and another [2005] 2 EA 344** it was held that:

“ it was a plain and unqualified obligation of every person against or in respect of whom an order was made by the court of competent jurisdiction to obey it until that order was discharged and that where a party considers an ex parte order to cause him undue hardship, simple application will create an opportunity for an appropriate variation to be effected thereto; and therefore there will be no excuse for a party to disobey a court order merely on the grounds that it had been made ex parte and this argument will not avail...”

51. Contempt of court is an affront to judicial authority and therefore is not a remedy chosen by a party but is invoked to uphold the supremacy of the rule of law. It is not the party offended by the disobedience that floats to the court what mode of punishment should be meted out to the contemnor. The court acts in accordance with the law once the power to punish for contempt is invoked and the alleged contemnor is found to be in contempt of court orders. In this case, the orders alleged to have been disobeyed were mandatory in nature. They required the defendant to return all the machinery distressed to the plaintiff. It also ordered for a stop to the cited distress. Distress for rent in my view, does not amount to eviction of a tenant from the premises and dispossessing him of the occupation thereof. It could therefore not have been expected that by 24th August, 2015 the defendant after distressing for rent, on 20th August 2015, it had already leased the premises to another tenant. Since the order commanded obedience without conditions, the equipment removed from the premises were expected to be returned to the plaintiff where they had been taken from since it had not been shown at the time of service of the order that the plaintiff had voluntarily moved out of the demised premises after being distressed for rent.
52. Mr Kimeria, the defendant's learned counsel submitted that the defendant was not aware of the order which was not served on its director who was out of the country attending a wedding. However, the record shows that the suit herein has been ongoing and there is even an application for summary judgment sought by the defendant. The defendant's counsel was served with the order and one John Kimani who introduced himself to the process server as personal assistant to the defendant's director also received the order. The director of the 2nd contemnor may have been out of the country as shown by the travel documents availed to court by Mr Kimeria's affidavit. But the question is, was the entire company staff and directorship out of the country? If so, who instructed the 1st alleged contemnor to distress for rent and who leased out to another tenant the subject premises immediately after “evicting the plaintiff” thereby making it impossible for the auctioneer to restore the equipments into Go down No 17? Those questions have not been answered by the defendant and this court did reject the assertion by the defendant's advocate that the process server be cross examined to demonstrate how he could have served the 1st alleged contemnor who was out of the country at the material time for a simple reason that it was never deposed that the process server upon the man who was allegedly out of the country, and more so, the person denying service through an affidavit was not the person who it was alleged had been served with the court order.
53. Mr Kimeria deposed that the 2nd contemnor had no personal assistant called John Kimani. That may be so but it was never by the defendant through any of its directors or the 1st alleged contemnor denied that a Mr John Kimani was to be found at the defendant's premises at the time of service of the order and that he accepted service of the court order. The process server did not

state that he knew with precision the designation of the person of John Kimani, who introduced himself as the director's personal assistant and there is nothing to suggest that he had the means of detecting that the information he was being given by the said John Kimani was not true, including allegations that the alleged 2nd contemnor was held up in a meeting, when, according to Mr Kimeria, he was out of the country attending a wedding.

54. The alleged 2nd contemnor never swore an affidavit denying that he knew the person of John Kimani or that John Kimani worked for the defendant. He also never swore an affidavit denying knowledge of the court order and what it required him as the director of the defendant company to do or refrain from doing. Since the defendant was served with the impugned court order through their advocates, the issue of personal service does not arise as the advocate was expected to advise his client of the implications of failing to obey a court order. There can therefore be no issue regarding knowledge of the order. The advocate who received the travel documents from his client's director who had travelled out of the country had the means to advise his client that there was an order for compliance. That order could still be challenged at an appropriate time. The said advocate too could have in this digital age advised his client who was out of the country to swear an affidavit rebutting the allegations by the plaintiff. The defendant and its advocates chose to take risks. The advocate having received the court order, he was under a legal duty to bring to his client's attention the contents of the order and advise him of the consequences of non compliance as was done by his letter to the plaintiff's advocate on 24th August, 2015. It should be noted that the defendant through its director has not filed any affidavit denying that the advocate Mr Kimeria notified him of the order and its implications. The Supreme Court of Canada in the case of **Bhatnager Vs Canada (Minister of Employment and Immigration) [1990] 2 S.C.R 217 at p. 226** put the principle as follows: -

“... a finding of knowledge on the part of the client may in some circumstances be inferred from the fact that the solicitor was informed. Indeed, in the ordinary case in which a party is involved in isolated pieces of litigation, the inference may readily be drawn On other cases there can be no doubt that the common law has always required personal service or actual personal knowledge of a court order as a precondition to liability in contempt. ... Knowledge is in most cases (including criminal cases) proved circumstantially, and in contempt cases, inference of knowledge will always be available where facts capable of supporting the inference are proved.”

55. In James H Gitau Mwara v Attorney General & another [2015] eKLR, Onyancha J observed:

“Reverting now to the facts of this case before me, Ms Muthoni Kimani did not at any time claim that she did not know of or was not personally or through her counsel served with the order of the 3rd May, 2013. On the other hand, the Applicant/Decree-Holder deposed (and the court believed him since Ms Muthoni Kimani did not deny it) that he properly served her personally, apart from serving Ms. Muthoni Kimani's clerk, Eric, with the said order of 3rd May, 2013.”

56. The Court of Appeal in **Christine Wangari Gachege (Civil Application No. 233 of 2007)**, put the position concerning personal service, thus: -

“The dispensation of service under Rule 81.8 (1) is subject to whether the person can be said to have had notice of the terms of the judgment or order. The notice of the order is satisfied if the person or his agent can be said to either have been present when the judgment or order was given or made; or was notified of its terms by telephone, email or otherwise. In our view, ‘otherwise’ would mean any other action that can be proved to have facilitated the person having come into knowledge of the terms of the judgment and/or order. This would definitely include a situation where a person is represented in court by counsel. Once the applicant has proved notice, the respondent bears an evidential burden in relation to wilfulness and mala fide disobedience.”

57. Later in **Justus Kariuki Mate & another Vs Hon. Martin Nyaga Wambora & another, Civil Appeal No. 24 of 2014**, the pronouncements above were affirmed. I am inclined to believe that the defendant and its director the alleged 2nd contemnor were served with the order in question and secondly, were aware of the order made on 20th August, 2015 and what it commanded them to do or refrain from doing.
58. The first contemnor on the other hand contends that he was assisting his friend and old colleague Mr Lumwaji and that therefore he was not expected to obey the court order. Regrettably, Mr Nathan Pala of Muhatia Pala Auctioneers is the one who filed an application in the lower court seeking for a break in order and security to keep peace and witness the distress for rent against the plaintiff. He did not file that application or obtain the order in the name of Mr Lumwaji of Domicile Auctioneer. The applicant auctioneer in that miscellaneous cause and who swore an affidavit in support of the application and in whose favour the order annexed was made was Nathan M. Pala t/a Muhatia Pala Auctioneers. Mr Nathan Pala takes personal responsibility for any acts or omissions as the person who carried out the distress in his own name. Even if someone else had been instructed to distress, that person never distressed for rent. It was the 1st contemnor who distressed for rent. Furthermore, the court order was clearly addressed to Nathan Pala. In addition, Mr Nathan Pala had sworn an affidavit of 10th July 2015 indicating that he had received instruction from Lumwaji to levy distress for rent against the plaintiff and he did proceed to issue proclamation to the tenant. He made several attempts to take possession of the goods without success as the guards prevented him and that is when he sought court orders for break in and police security. See FWK 4 annexed to replying affidavit of Wamahiu Kimeria. The 1st alleged contemnor cannot be allowed to obtain orders of distress in his own name and proceed to distress then when comes to answering for contempt of court he produces a proclamation allegedly prepared by Domicile Auctioneers. In any event, it was not shown that Domicile Auctioneers were in control of the distress process the same way Mr Nathan Muhatia Pala was, including being served with the court order and attempting to comply with the court order by way of restoring the plaintiff into the premise without success.
59. This court has not lost sight of the undisputed fact that is apparent on record that Hon Ougo J had on 26th March, 2014 restrained the defendants from distressing for rent or evicting or in any other manner interfering with the plaintiff's peaceful occupation of the demised premises. In flagrant brazen disobedience of that particular order which had not been vacated, varied or appealed from, the defendants proceeded to distress and in the process, evict the plaintiff from the premises. The defendant cannot have its cake and eat it. It must be prepared to face the undesirable consequences of its conduct which it must have foreseen. Having submitted itself to the jurisdiction of this court in this matter by even filing a cross suit for unpaid rent, and having sought for summary judgment on the same, what was the motivating factor for distressing for rent which dispute was pending in this court and wherein there was a clear injunction barring such distress?
60. This court finds that the conduct of the defendant with its agents was to say the least barbaric and unacceptable. It is an affront to the fair administration of justice and the rule of law and good order. It must be dealt with as by law provided.
61. The defence put forward by the defendant's counsel does not help matters either. It only shows that there was outstanding rent. It does not mention that there was an order in force restraining any distress for rent, which orders had not been vacated or appealed against. Annexure FWK4 also goes further to show that the defendant's advocate was purporting to issue one month notice to terminate tenancy just a month after the court issued orders of 26th March, 2014 in these proceedings. It is the same advocate who on 16th June 2015 instructed Domicile Auctioneers attn. Mr Elam Ngase Lumwaji Esq to levy distress-see annex FWK 5. Annexure FWK6 shows a complaint by the defendants' advocate that the plaintiff had breached or disobeyed the orders of Ougo J dated 26th March, 2014. If the plaintiff was the one in breach of the orders of this court, nothing prevented the defendant from approaching the seat of justice to ensure compliance with the said court orders. Instead, finds unacceptable and describes it as uncouth.
62. The pretentious letter of 20th August 2015 written by Mr Kimeria, in my view, does not help either. This was one day after the purported distress for rent and yet the advocate was still demanding for payment of rent without mentioning anything about the distress that his client had authorised him to instruct an auctioneer to carry out. As correctly put by Mr Kimeria in his letters

to the plaintiff's advocate: **"It's the duty of an advocate to advise his client on legal implications of its actions and the perils thereto."** So was Mr Kimeria, in my humble view, expected to advise his client on legal implications of its actions of disobeying the order of this court by failing to restore the distressed goods to the plaintiff and the perils thereto?

63. From the contents of the said letter of 24th August 2015 by Mr Kimeria advocate, the defendant and the auctioneer were making attempts to obey the order. If there was no contempt, or if the order was not clear, the court asks, what contempt were Mr Kimeria's clients trying to purge? Or seeking 2 weeks to purge? and what were the defendants purging by their letter of 28th August, 2015 when they stated that:

"We hereby confirm that as promised we have managed to purge our client's defendant's contempt and the goods returned to Alpha Centre. The delay was occasioned by the fact that our client's director was out of the country and funds could not be released by the bank without his signature. Kindly advise Mr Francis Ngigi to go and collect these goods."

64. It is alleged that the director of the defendant company had travelled out of the country. Thus the defence by the defendant through Mr Kimeria advocate would be that since the director alleged 2nd contemnor herein was not personally served with the order, and then he was not aware of the order. I have already found that the 2nd contemnor was aware of the court order. The defendant did instruct their advocate Mr Kimeria whose incessant letters to the plaintiff's counsel show that he at all times asked the plaintiff to settle outstanding rent and he is the same advocate who instructed the auctioneers to distress for rent. He is also the same advocate who undertook to ensure that the court order was obeyed. The stage at which this matter had reached, bearing in mind the fact that there were earlier valid court orders on record restraining any distress and the advocate had his client's instructions to instruct an auctioneer to levy distress, it was not necessary that a director who was out of the country be present during distress and therefore be personally involved in the obedience of the court order which required the return of the distressed goods to the plaintiff. He was, I believe, only a phone call away. He could also send a mail the same way he send to Mr Kimeria his passport dully scanned to show that he had genuinely travelled out of the country. It is for the same reasons that this court finds the arguments by Mr Kimeria frivolous and hopeless since if the defendant's director was out of the country, then who leased out the premises within 2 days of the distress and eviction of the plaintiff to another person thereby making it impossible to restore the plaintiff's goods into the Go down 17? The excuse that Go down 18 was burnt does not hold since the goods were distressed from Go down 17, as No 18 had allegedly burnt down much earlier and therefore nothing could have been restored therein.

65. Furthermore, Mr Kimeria by his replying affidavit alleged that the said orders issued on 20th August, 2015 and were in place on 24th August 2015 when he appeared in court to plead his client's case and seek more time to comply with the said court orders in view of the logistical challenges involved due to the heavy machinery and expenses.

66. Even if the defendant's director had travelled out of the country, it was not demonstrated that the defendant company remained closed or without any other person managing its affairs and that it had no agents or servants or officers capable of being served with an order. One such very important agent was the advocate Mr Kimeria and he admits receiving the order, and making concerted efforts to ensure that the order was obeyed including swearing affidavits on behalf of his client. **The order directed the return of goods to the plaintiff and if the defendant's director was out of the country then the agent-auctioneer who was expected to sell the goods and recover not only rent arrears but also his costs was the person in possession of the goods bailed at Leakey's Storage. He could therefore have complied with the court order by returning them into the same premises expeditiously and wait for his instructing principal to come then brief him. An Auctioneer is an officer of the court and knows only too well what it means to obey court orders such that he does not require seeking an opinion as to whether or not to obey court orders. The auctioneer Mr Nathan Muhatia Pala was personally served with the court order the same day it was issued on 20th August 2015. The said Mr Pala has not claimed that his principals obstructed him from obeying the court order.**

67. If Mr Patel was out of the country, as per paragraph 10 of his advocate Mr Kimeria's affidavit, and was therefore not aware of the order, the fact that his travel documents could be availed by

27th August 2015 is a clear indication that he was made aware of the court order which was served upon his advocate Mr Kimeria while he was away and there is no contrary view since personal service is not mandatory. **See Lenaola J in Basil Criticos v AG and 8 others [2012]eKLR that:**

“...the law has changed and as it stands today knowledge supersedes personal service...where a party clearly acts and shows that he had knowledge of a court order; the strict requirement that personal service must be proved is rendered unnecessary.”

68. In addition, if the orders were not executable by 27th August, 2015 because Mr Nathan Pala was not instructed to levy distress then how was the advocate undertaking to comply with the orders and writing to say that Mr Pala had gone to collect the goods from Leakey Storage but was told to let the plaintiff go and collect them. What about Mr Pala's own affidavit and order in the CMS court wherein he personally sought orders to break in and be accompanied by police to keep peace. How was the defendant going to release the goods to Mr Ngigi to show where they should be transported if the order was not clear? All those are questions that this court finds relevant in determining whether or not there was a clear court order capable of being obeyed by the alleged contemnors hereto.
69. Mr Nathan Pala was not a stranger to the process giving rise to these proceedings as he wishes this court to believe. He conducted the exercise and by Mr Kimeria's own letter, it is Mr Pala who took the goods to Leakey Storage and when he went to collect them in obedience to this court's order he was told that the plaintiff should go and collect the goods personally.
70. From the detailed exposition that I have given above, it would be absolutely irrational to conclude that Mr Pala had no conduct of the distress for rent arrears. And as I have stated, the goods had been distressed from the business premises which were tenanted to the plaintiff and there was no order for eviction of the plaintiff from the said premises. It therefore cannot be true that the alleged contemnors did not know where the goods were to be returned simply because the order stated that the goods be returned to the plaintiff. The plaintiff was not a natural person with any other fixed abode other than the business premises from whence the goods were distressed. If the order was not clear as to which plaintiff the order referred to which is not the case here, and or where the goods should be returned, nothing prevented the defendant and 1st alleged contemnor on the first appearance in court on 24th August, 2015 after the court order had been served on Mr Kimeria, and the Auctioneer, to seek clarification from the court on that issue which in my view was as clear as crystal and that is why Mr Kimeria all the time indicated to court quite remorsefully that they had purged the contempt. How did they purge the contempt without knowing how to purge that contempt yet they did not seek any further clarification from the court and neither did they swear any affidavit indicating that the order which was issued *exparte* was incapable of being complied with, until these contempt proceedings were commenced and argued? Albeit the defence counsel feigns ignorance of where the goods were to be returned, and in which Go down, it is clear to the defendant and its agents as to which Go down the goods were distressed from.
71. This is one case where this court finds that the defendant and its agents were not only served with the court order but were also aware of the order and the order was very clear as to what it required them to do.
72. So did the contemnors have the opportunity to obey the court order? Mr Kimeria's letters and submissions in court show that there were concerted efforts to obey the court order but that due to some logistical issues since the goods were heavy machinery and production equipment, it required more time and funds to restore the goods back into the premises. That in itself explains that there had been no deliberate and intentional attempt to disobey the court orders and could therefore serve as a mitigating factor. However, the defendant has maintained that the orders were not deserved in the first place because they were mandatory orders that should not have been issued *exparte*. Further, it is contended by the defendant that the Defendant's Director swore an affidavit on 2nd February 2015 which affidavit does not explain whether or not the orders of Hon Onyancha J were disobeyed. The law is clear that court orders must be obeyed whether they were issued *exparte* or irregularly or whether they were deserved in the first instance or not. Court orders issued by a court or tribunal of competent jurisdiction are court orders and they remain so until they are discharged or varied.

73. The defendant did not swear the affidavit to defend the alleged contempt or explain that either they were unaware of the order or that their actions did not amount to breach of the order. The plaintiff urged this court to strike out Mr Kimeria's affidavit on the grounds that it bore contentious matters which only his client could have deposed to but this court, in view of the seriousness of this matter and the disclosures made by Mr Kimeria has not considered expunging that affidavit by counsel or any part of thereof since the rules do not mandatorily bar an advocate from swearing an advocate on behalf of his client especially on matters which he is conversant with by virtue of his engagement. In this case, since it is clear that Mr Kimeria was also served with court order and he was the person who was instructed to instruct the auctioneer to levy distress for rent due to the defendant, I find most of the depositions he made could only have been made by him and not his client, albeit I am in agreement that the matter of obedience or disobedience of court order and or knowledge of a court order can only be rebutted by the client.

74. The 1st contemnor swore an affidavit in rebuttal of allegations of contempt of court order but he sought to exonerate himself from any actions saying he was not instructed to levy distress so he could not obey the order which rebuttal is very contradictory and frivolous since he is the same person who alleged that he tried to obey the court order but Leakey's Storage told him that the plaintiff should go to collect the goods. I have stated that Mr Nathan Pala was an active participant in the distress for rent and obtained the orders for break-in in his own name and in his auctioneering firm name, not in Mr Lumwaji's name; in as much it is Lumwaji who was initially instructed to distress for rent and his letter head used for proclamation. In my view, the plaintiff did not make any mistake when they enjoined the 1st Contemnor to these proceedings. And as I stated earlier, it matters not that he was not a party as long as the order was directed at him urging him to do or refrain from doing anything in this matter, and that he was a key player trying to get goods from Leakey Storage. Nathan Pala was served with the order and he was aware of the order which specifically required him to

1. ***Stop the cited distress for rent ordered by the lower court in Misc Cause No. 613 of 2015 without conditions***
2. ***Return to the plaintiff without conditions all goods, machines, apparatus seized.***

75. The stage at which the distress had reached required compliance by the auctioneer who was in charge of the process at that time, including storage and intended sale. The defendant was then no doubt required to give access to the same premises from which the goods were distressed, for their return pending the matter before the court. Instead, the defendant purported to lease out the said premises to a third party as soon as the plaintiff was ejected from therein.

76. Accordingly, I am satisfied that the applicant has satisfied this court that the alleged contemnors were in contempt of court orders issued by the court on 20th August, 2015 and accordingly I find them guilty of contempt of court and convict them jointly and severally for contempt of court order issued on 20th August 2015.

77. As the issue of illegal distress shall be canvassed in the pending application, I would not make any definitive finding on that issue.

78. The cited contemnors shall bear the costs of these contempt proceedings payable to the plaintiff applicant, to be assessed by the court or agreed upon.

79. Sentence shall be pronounced after the contemnors have mitigated.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this 17th day of December, 2015.

R.E ABURILI

JUDGE