



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL APPEAL NO.30 OF 2013

BETWEEN

COSMAS NYAMBANE APPELLANT

AND

MOCO AUCTIONEERS RESPONDENT

(Being an appeal from Kisii CMC Misc. Civil Application

No. 43 of 2012 by Hon. Maloba Ag. Principal Magistrate)

RULING

1. What is before me is the Notice of Motion dated 30th October 2013 by which the applicant/appellant seeks two substantive orders as per prayers 2 and 3 thereof, namely:-
 - a) *THAT pending the hearing of this application, the sum of Kshs.130,000/= deposited in this court by the appellant/applicant pursuant to a court order as a condition for release of the appellant/applicant's properties be released to the applicant/appellant.*
 - b) *THAT the respondent herein be cited and punished for contempt and/or disobedience of a court order and in particular for disobeying and/or disregarding the lawful court orders herein issued on the 2nd day of August 2013.*
 - c) *THAT the costs of this application be provided for.*
2. The application is premised on 11 grounds set out on its face the gist of which is that despite the explicit court order issued on 2nd August 2013, and which order together with a penal notice was served upon the respondent, the respondent has refused and/or neglected to obey the said order; that the respondent's conduct in disobeying the court order is a violation of the rule of law and if left unchecked, such conduct will set a bad and dangerous precedent.
3. The application is also supported by the affidavit sworn by Cosmas Nyambane, the applicant herein, on 30th October 2013. The deponent reiterates the averments appearing on the face of the application and urges this court to allow the application.
4. The Respondents did not file any replying papers to the application inspite of being duly served. When the application came up for hearing on 14th November 2013, counsel for the applicant relied on the grounds on the face of the application and in the supporting affidavit. He asked for orders in terms of prayers 3 and 4 of the application.
5. After carefully considering the application, as filed together with the supporting affidavit and the

- annextures thereto, the issue that arises for determination is whether the applicant has demonstrated that the respondents are in contempt of the court orders issued on 2nd August 2013.
6. Briefly the facts giving rise to this application are that on 27th February 2013, Hon. R. Maloba, Ag. P.M. gave a ruling in Kisii CM Misc. Application No.43 of 2012. The applicant had been distained by the Respondents for alleged rent arrears on instructions from the applicant's landlord. The applicant's property had been removed from his business premises to the Respondent's yard. Upon application by the applicant to set aside the orders issued by the court in Kisii CM Misc. Civil Application No.43 of 2012, specific orders were made to have the goods returned to the applicant and for restitution. Later, on the application of the respondent, those orders were reviewed and set aside by Hon. Maloba Ag PM on 27th February 2013. The applicant felt aggrieved by the orders of 27th February 2013 and filed an appeal. Contemporaneously with the appeal, the applicant filed an application dated 14th March 2013 brought pursuant to **Order 42 Rule 6** of the **Civil Procedure Rules** and **Sections 3, 3A and 63 (c)** of the **Civil Procedure Act**, seeking a stay of the sale of the applicant's property taken to the Respondent's premises.
 7. The application dated 14th March 2013 was heard by Hon. Mr. Justice Muriithi who granted orders as follows:-
 - a. *There shall be stay of the sale of the appellant's distrained properties;*
 - b. *As a condition for the stay of sale of the properties and release of the distrained properties, the appellant shall within 30 days from the date of this ruling deposit into court the sum of Kshs.130,000/= as security for due performance;*
 - c. *The appellant's properties distrained by the Respondent shall be returned to the appellant upon compliance with (b) above.*
 - d. *Costs in the cause.*
 8. The applicant extracted the above orders on 6th August 2013 and served the same upon the Respondent in person and also upon his advocates. On the 27th August 2013, the respondent made the deposit of Kshs.130,000/= vide receipt number 0228512. The Respondent's advocates were duly informed of the deposit vide a letter dated 28th August 2013 as the applicant's counsel also sought to know when the goods belonging to the applicant would be released. By a letter dated 10th September 2013 from Ben K. Gichana & Co. Advocates, to Minda & Co. Advocates, the Respondent's counsel sought to know whether the applicant had complied with the court order issued on 2nd August 2013 to enable the said advocates advise the Respondent to release the distrained goods. The Respondent's advocates asked for a copy of the payment receipt for the deposit.
 9. The applicant avers in the affidavit dated 30th October 2013 in support of the application that the respondent was yet to release the distrained goods hence the instant application.
 10. After considering all the above facts and in the absence of any response by the respondent, I am satisfied beyond doubt that the respondent herein should be cited for contempt of the court orders issued on 2nd August 2013. The Notice of Motion dated 30th October 2013 is therefore allowed in terms of prayer 3 thereof. The application for contempt shall be filed and served within the next 21 days from the date of this ruling. Costs of the application to the applicant.
 11. Orders accordingly.

Dated and delivered at Kisii this 30th day of January, 2014

R.N. SITATI

JUDGE.

In the presence of:

Mr. Minda (present) for Appellant/Applicant

M/s B.K. Gichana (absent) for Respondent

Mr. Bibu - Court Clerk