



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Miscellaneous Application 292 of 2012**

**KIHOTO MUNYAKA BUILDING COMPANY.....APPLICANT**

**VERSUS**

**DAVID MWANGI GITAU**

**STEPHEN MWANGI WANJOHI**

**JOHN SIRONOK**

**RAPHAEL GICHURU**

**KINYANJUI MWATHI**

**WANGUNYU MWATHI**

**WAHU KABOI**

**A NDUNGU MWANIKI**

**NDIRANGU GAKUO**

**GABRIEL GATHECA.....RESPONDENTS**

**RULING**

Before me is a Motion on Notice dated 30<sup>th</sup> May 2012 expressed to be brought under the provisions of Order 52 of the Rules of the Supreme Court of England and section 5(1) of the Judicature Act (Cap 8) Laws of Kenya and sections 1A, 1B and 3A of the Civil Procedure Act the applicant seeks the following orders:

- 1. That this application be certified urgent and be heard ex-parte in the first instance for reasons of urgency.**
- 2. That this Honourable court be pleased to cite the respondents for contempt of the court order issued on the 4<sup>th</sup> May 2012 in MISC APPL. No. 302 of 2012 by the Milimani Commercial courts, and do proceed to order that the respondents be detained in prison for a period not exceeding six (6) months for disobeying the order in issue.**

### **3. That costs be provided for.**

The application is based on the following grounds:

- a) That despite the fact that the respondents were duly served with the relevant court process at the time when the order herein issue was entered, and despite having been duly served with the same, they have continued to disobey the said order with absolute impunity.**
- b) That the said act by the respondents, clearly shows that they have absolutely no respect at all for this republic's system of justice and specifically the competent court mentioned herein above as having entered, the order in issue.**
- c) That such acts of non – compliance and the continued disobedience of the said order have, and continue to visit gross injustice and colossal damage upon the applicant.**
- d) That it is in the interest of justice, the very sacred rules of fair play, and more particularly the best interests and welfare of the applicant, for whose prime benefit the said order was issued, that this Honourable court finds in the applicants favour and proceeds to grant the prayers sought.**

The same application is supported by an affidavit sworn by **Stephen Marigi Gathigi**, one of registered partners of the applicant herein on 30<sup>th</sup> May 2012. According to the deponent, on 4<sup>th</sup> May 2012, the **Honourable Mr D Ole Keiwua PM**, granted an order that there be a recovery of possession by the applicant herein from **David Mwangi Gitau**, the 1<sup>st</sup> respondent of the premises known as Ngong/Block 2/80 and that the said orders be enforced by the OCS Ngong Police Station. The said order, according to the deponent, was duly executed on 22<sup>nd</sup> May 2012 with the assistance of the local police by the taking of possession of the subject matter. However, the respondents violently moved in on 23<sup>rd</sup> May 2012, took over the subject matter by breaking the applicant's padlocks, gaining wrongful entry and placing their padlocks on the doors and brutally manhandling any party for whose benefit the order in issue was made. In the deponent's view the respondent's; activity is not only of a continuing nature, but exhibits gross impunity and absolute disrespect for the Republic's justice system. Despite the applicant reporting the matter to Ngong Police Station, the respondents have not relinquished the possession of the subject matter. Therefore the deponent avers that in the very sacrosanct spirit of our system of justice, the Honourable court ought to be pleased to grant the applicant its orders as prayed in the motion.

In opposition to the application the following grounds of objection dated 12<sup>th</sup> June 2012 were filed the same day:

- 1. The application is bad in law and an abuse of the court process.**
- 2. The application is malicious and an after thought meant to confuse this court.**
- 3. The Applicant is on a fishing expedition to unlawfully exploit the 2<sup>nd</sup> Respondent and is using this court as a channel to achieve their goal.**
- 4. The Applicant is in fact attempting to unlawfully deprive the 2<sup>nd</sup> respondent from enjoying his rights over his business.**
- 5. If the application is allowed, then the 2<sup>nd</sup> Respondent will be denied access to the 2<sup>nd</sup> Respondent's premises and will hence cause great and irreparable loss to him therein.**
- 6. The 2<sup>nd</sup> Respondent's Lease was issued on 2<sup>nd</sup> January 2012 and it was between him (the 2<sup>nd</sup> Respondent) and Kihoto Munyaka Building Company after the eviction of David Mwangi Gitau where a monthly rent of Kenya Shillings ten Thousand (Kshs. 10,000/=) is paid and receipts are being issued by the treasurer one A. M. Ndungu Mwaniki per month.**

**7. The Court has no jurisdiction to entertain a summary process against the 2<sup>nd</sup> Respondent.**

**8. The 2<sup>nd</sup> Respondent shall request the court to dismiss the application in the first instance.**

The respondents also filed on 19<sup>th</sup> June 2012 the following preliminary objections:

**1. That the Application is procedurally defective for want of procedure liable to be struck out in limine.**

**2. That the application is incompetent and non compliant with Section 5 of Judicature Act and fails to abide by provisions of Supreme court rules.**

**3. That the application as filed is bad in Law and does not have legs to stand on in the eyes of the law and should be struck out with costs to the Respondents.**

In opposition to the application, **Stephen Mwangi Wanjohi**, the 2<sup>nd</sup> respondent swore an affidavit on 12<sup>th</sup> June 2012 in which he deposed that the application is bad in law and malicious on the face and ought to be dismissed with the contempt it deserves. According to him, he always pays rent to the plaintiff and was given a new lease on 2<sup>nd</sup> January 2012 after the eviction of **David Mwangi Gitau**. The said lease according to him was for Six (6) years duration starting from 12<sup>th</sup> January 2012 in which lease it was agreed that the rent payment be Kshs 10,000.00 per month which according to him he was always paying from January 2012 up to June 2012. In his view this Court has no jurisdiction to entertain this application. He contends that he is not a party to the suit or previous orders of eviction since he only became a tenant on 2<sup>nd</sup> January 2012 on the execution of the said lease with the applicant and on 29<sup>th</sup> February 2012 the applicant did an inventory and handed over the premises. It is therefore his view that he cannot be evicted summarily without any reasons without the applicant instituting a suit against him to enable him respond thereto. His co-respondents are, according to him members of the applicant company including the chairman, secretary and treasurer while **Stephen Marigi Gathigi** who instigated the suit was a signatory to the aforesaid inventory. Since the Court has no jurisdiction to entertain the summary procedure, it is the deponent's position that he should be allowed to trade in peace since his premises cannot be recovered unless the said lease is legally terminated. The deponent further avers that **Stephen Marigi Gathigi** and **Njeru Mwaura** not being officials of the applicant cannot issue a notice of termination and since **David Mwangi Gitau** left the notice and the application were overtaken by events.

Apart from the said affidavit there was also an affidavit sworn by **Ndungu Mwaniki**, the 8<sup>th</sup> respondent herein on 11<sup>th</sup> June 2012 in which he deposed that the supporting affidavit sworn by **Stephen Marigi Gathigi** is steeped in lies and material non-disclosure. According to him it is not true that the 3<sup>rd</sup> to 10<sup>th</sup> respondents were served with the said Court order since the proceedings in the lower court were between the applicant and the 1<sup>st</sup> respondent herein and hence the 3<sup>rd</sup> to 10<sup>th</sup> respondents cannot be cited for contempt when the order was not directed at them. In the deponent's view, the applicant has failed to make full disclosure since the applicant (sic) though contending to be a registered partner in **Kihoto Munyaka Building Company** has been charged with forgery and uttering false documents to wit a Change in Business Name in 2007 before the Registrar of Companies in Criminal Case No. 1373 of 2009 between the **Republic vs. Stephen Marigi Gathigi** which matter is pending further hearing on 9<sup>th</sup> August 2012; that the applicant instituted HCCC No. 203 of 2008 between **Stephen Gathigi Marigi vs. Gabriel Gatheca and 2 Others being** the 10<sup>th</sup> and 8<sup>th</sup> respondents herein from transacting any business in **Kihoto Munyaka Building Company** which suit is still pending after an application for injunction was dismissed on 22<sup>nd</sup> October 2008. In the deponent's view the applicant's actions are malicious and are meant to drag the respondents into another civil proceedings while **HCCC No. 203 of 2008** touching on the same subject matter is pending and according to the deponent the orders sought herein cannot be granted since they are not only directed to wrong persons but the application is also fatally defective for want of procedure. In the proceedings in the Chief Magistrate's Court, according to the deponent, the applicant's advocate swore on the matters that were not within his personal knowledge. Further, the order for vacant possession was obtained through Miscellaneous Application, a procedure unknown to law as

opposed to a suit for vacant possession. He further deposes that the applicant **Kihoto Munyaka Building Company** was a partnership formed in 1961 by some of the respondent's parents but the applicant's father inserted his name in the partnership certificate to include himself as a partner and the matter is the subject of Criminal Case No. 1373 of 2009 aforesaid. The deponent states that himself and the other respondents were appointed and nominated by their parents to represent them in the said partnership. Therefore as **Stephen Marigi Gathigi** has not come to court with clean hands, the Court ought not to rubberstamp his actions but dismiss the application with costs.

The application was prosecuted by way of written submissions. According to the applicant the order was granted by a competent Court and was served and the respondents evicted in execution thereof only for them to return the following day and the said order has not been set aside. According to the applicant, the respondents fall well within section 2 of the landlord and Tenants (Shops, Hotels and Catering Establishments) Act Cap 301 and hence cannot claim to be strangers to the order in issue. In the applicant's view this Court has jurisdiction to compel compliance leave having been granted by **Waweru, J.**

The only other submissions were filed on behalf of the second respondent who incorrectly described himself therein as the 2<sup>nd</sup> defendant. Apart from reiterating the contents of the 2<sup>nd</sup> respondent's replying affidavit, it is submitted that the 2<sup>nd</sup> respondent is an innocent party and the application is an abuse of the Court based on non-disclosure and meant to intimidate the 2<sup>nd</sup> Defendant and cannot succeed.

In my considered view, Court orders are not made in vain and are meant to be complied with and therefore a party should not take it upon himself to decide on the validity or otherwise of Court orders. Once a Court order is made in a suit the same is valid unless set aside on review or on appeal. The validity or otherwise of the suit may constitute a ground for purging the contempt but cannot, in my view, constitute a passport for disobeying an order made by a Court of competent jurisdiction. If parties and their counsel were given a blank cheque to decide on the validity of court orders, the dignity of the courts would be severely eroded. It must always be remembered that contempt of court proceedings are meant to or his legal adviser. In **Econet Wireless Kenya Ltd vs. Minister for Information & Communication of Kenya & Another [2005] 1 KLR 828 Ibrahim, J** (as he then was) stated:

**“It is essential for the maintenance of the rule of law and order that the authority and the dignity of our Courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made 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 void”.**

This position was confirmed by the Court of Appeal in **Refrigerator & Kitchen Utensils Ltd. vs. Gulabchand Popatlal Shah & Others Civil Application No. Nai. 39 of 1990.**

In **Wildlife Lodges Ltd vs. County Council of Narok and Another [2005] 2 EA 344 (HCK)** the Court expressed itself thus:

**“It was the plain and unqualified obligation of every person against or in respect of whom an order was made by a Court of competent jurisdiction to obey it until that order was discharged, and disobedience of such an order would, as a general rule, result in the person disobeying it being in contempt and punishable by committal or attachment and in an application to the court by him not being entertained until he had purged his contempt. A party who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it...It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid – whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question. That the course of a party knowing of an order which was null or irregular, and who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it existed it must not be disobeyed...If there is a misapprehension**

in the minds of the defendants as to the reasonable meaning of the order, then the expectation of them is that they would have made an application to the court for the resolution of any misunderstanding and this would have been the lawful course...In cases of alleged contempt, the breach for which the alleged contemnor is cited must not only be precisely defined but also proved to the standard which is higher than proof on a balance of probabilities but not as high as proof beyond reasonable doubt...The inherent social limitations afflicting most people in a developing country such as Kenya have the tendency to restrict access to the modern institutions of governance, and more particularly to the judiciary which is professionally run, on the basis of complex procedures and rules of law. Yet, this same Judiciary is generally viewed as the impartial purveyor of justice, and the guarantor of an even playing ground for all, a perception which ought to be strengthened, through genuine respect for the courts of justice, and through compliance with their orders. Consistent obedience to court orders is required, and parties should not take it upon themselves to decide on their own which court orders are to be obeyed and which ones overlooked, in the supposition that this oversight will not impede the process of justice...Justice dictates even-handedness between the claims of parties; and if it be the case that the plaintiff/applicant has not been accorded a level playing ground for the realisation of its economic activities, a matter that of course can only be established through evidence in the main suit, then the court ought to provide relief, by applying the established principles of law, one of these being the law of contempt...An *ex parte* order by the court is a valid order like any other and to obey orders of the court is to obey orders made both *ex parte* and *inter partes* since the Court by section 60 of the Constitution is the repository of unlimited first instance jurisdiction, and in this capacity it may make *ex parte* orders where, after a careful and impartial consideration, it is convinced that issuance of such an order is just and equitable. There is nothing potentially oppressive in an *ex parte* order, since such an order stands open to be set aside by simple application, before the very same court... 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 either the first or the second defendant”.

Accordingly, the issues raised by the respondents in respect of the competency or otherwise of the proceedings in which the order giving rise to these contempt proceedings was given cannot be the subject of the attack in these proceedings unless what is in issue is the jurisdiction of the Court that issued the said order. Where the question revolves around the jurisdiction of the Court that issued the order, whereas it is not for the parties to decide with finality which decisions are granted within the jurisdiction, it would be unjust to punish for contempt in respect of orders which are made without jurisdiction and which are null and void and which may not require a Court to set aside though it is always prudent to have them set aside. See Association of Member Episcopal Conference in East Africa (Amecea) vs. Alfred Roman T/A Romani Architects & Others Civil Appeal (Application) No. 22 of 2001 and Macfoy vs. United Africa Co. Ltd [1961] 2 All ER 1169 at 1172.

However, the issues raised by the respondents apart from the issue of service of the order on them are irrelevant at this stage of the proceedings and are issues which may be relevant in an application for setting aside the order that gave rise to the committal proceedings.

In Moses P N Njoroge & Others vs. Reverend Musa Njuguna & Another Nakuru HCCC No. 247 “A” of 2004 Musinga, J (as he then was) while recognizing that the rule of law requires that orders of the Court be respected and obeyed and that duty equally applies even where a party is dissatisfied with an order and has appealed to an appellate court against the order, ruling or judgement; that contemnors undermine the authority and dignity of the Courts and must be dealt with firmly so that the Court’s authority is not brought into disrepute; was, however of the view, which view I respectfully share, that recourse ought not to be to a process of contempt in aid of a civil remedy where there is any other method of doing justice, and the jurisdiction of committing for contempt should be most jealously and carefully watched, and exercised with greatest reluctance and greatest anxiety on the part of the Judges to see whether there is no other mode which is open to the objection of arbitrariness, and which can be brought to bear upon the subject.

The conditions necessary for an order of committal for contempt are now well established. It is trite law that where committal is sought for breach of an injunction, it must be made clear what the defendant is alleged to have done and that it is breached. The notice of motion must state exactly what the alleged contemnor has done or omitted to do which constitutes a contempt of court with sufficient particularity to enable him to meet the charge. The necessary information must be given in the notice itself. The slightest ambiguity to the order can invalidate an application for committal as ambiguity can in turn lead to the standard of proof, which is the criminal standard, not being attained especially on affidavit evidence. Therefore the law is that no order requiring a person to do or abstain from doing any act may be enforced by contempt unless a copy of the order has been served personally and endorsed with a notice informing him that if he disobeys the order he is liable to the process of execution. In other words the Court will only punish for contempt of injunction if satisfied that the terms of the injunction are clear and unambiguous and that the defendant has a proper notice of the terms and the breach of the injunction has been proved beyond reasonable doubt. See **Republic vs. Commissioner of Lands & 12 Others Ex Parte James Kiniya Gachira Alias James Kiniya Gachiri Nairobi HCMA No 149 of 2002** and **Jacob Zedekiah Ochino & Another vs. George Aura Okombo & 4 Others Civil Appeal No. 36 of 1989 [1989] KLR 165.**

I have set out the substantive law on contempt of court. However, the procedural law is not as easy. This country is yet, and regrettably so, to enact its own procedural law relating to contempt of court proceedings. According to section 5 of the Judicature Act, the High Court and the Court of Appeal in Kenya exercise the same power to punish for contempt of court as that exercised (for the time being) by the High Court of Justice in England and that power shall extend to upholding the authority and dignity of the subordinate courts. Therefore the procedural law that governs contempt of court proceedings is the English law applicable in England at the time the contempt was committed. Order 52 rule 2 of the Rules of the Supreme Court of England provides an elaborate procedure for the institution and prosecution of contempt of court applications. Under rule 2 subrule (3) of the Order 52 of the Rules of the Supreme Court, it is stated, in mandatory language, that the notice of the application for leave is to be given to the Crown Office not later than the preceding day and the applicant must at the same time lodge in that office copies of the statement and affidavit. It is settled that the equivalent of the Crown Office in Kenya is the Office of the Attorney General. Order 52 rule 2(1) of the Rules of the Supreme Court of England provides that no application to a Divisional Court for an order of committal against any person may be made unless permission to make such an application has been granted in accordance with the rule. Subrule (2) provides that an application for such permission must be made *ex parte* to a Divisional Court and must be supported by a statement setting out the name and description of the applicant, the name, description and address of the person sought to be committed and the grounds on which his committal is sought and by an affidavit to be filed before the application is made verifying the facts relied on.

As the applicant's application has invoked both Section 5 of the Judicature Act and Order 52 of the Rules of the Supreme Court of England, it bound itself to the procedure provided for contempt proceedings both under section 5 of the Judicature Act and Order 52 of the Rules of the Supreme Court of England and that means the applicant must first seek leave to institute the proceedings, which the applicant did and the said leave was granted on 29<sup>th</sup> May 2012 and the Motion was filed on 30<sup>th</sup> May 2012. Once leave is granted under rule 2, the substantive application is thereby made and it is required under Order 52 rule 3(3) that it should be served personally on the person sought to be committed. Under Order 52 Rule 3(2) of the Rules of the Supreme Court of England, an application for contempt of court must be filed within 14 days from the date when permission to apply for the same was granted and any application filed outside the prescribed time without any extension being sought renders the order made pursuant to the said application a nullity having been made without jurisdiction since the subrule states that "unless within 14 days after such permission was granted the claim form is issued, the permission shall lapse". See **Andrew Kamau Mucuha vs. The Ripples Limited Civil Appeal No. 19 of 1998 [2001] KLR 75.**

From the foregoing it is clear that a party who intends to institute contempt of court proceedings ought to prepare a notice of intention to institute contempt of court proceedings. That notice is to be accompanied by copies of the statement and affidavit the setting out the name and description of the applicant, the name, description and address of the person sought to be committed and the grounds on which his committal is sought and an affidavit verifying the facts relied on. Those documents are required to be

served on the Attorney General at least one day before the application for leave is made. In other words the documents being served on the Attorney General are to be so served before the same are filed in Court to notify the Attorney General of the processes that the applicant intends to institute.

Having gone through the record of these proceedings whereas there is no evidence that the Attorney General was duly served before leave to institute these proceedings was sought and granted as the same was in due course granted and as no issue has been taken with respect to the said service, it is not for this court to take up an issue and base its decision on it without the parties having addressed the Court thereon.

However, an issue has been raised with respect to service of the order on the respondents. From the copies of proceedings in Nairobi Resident Magistrate's Court Miscellaneous Civil Application No. 302 of 2012, it is manifest that the parties to those proceedings were **Kihoto Munyaka Building Company**, the applicant herein (as the applicant) and **David Mwangi Gitau**, the 1<sup>st</sup> respondent (as the respondent). The 2<sup>nd</sup> to the 10<sup>th</sup> respondents herein were not parties to the said proceedings. There is no evidence at all that they were served with the order that gave rise to these proceedings. Nowhere in the affidavits filed in these proceedings is it alluded that the said order was served on the respondents. What is deposed is that the application that gave rise to the order was duly served and that subsequent thereto police assistance was sought in execution thereof and that the order was duly executed. Whereas, the respondents' alleged action of hooliganism, abject anarchy and violence may be subject of criminal proceedings, without service of the order alleged to have been disobeyed, contempt of Court proceedings may not be sustained. The law is that a charge of contempt against the respondents has to be established beyond a peradventure. As was held by the Court of Appeal in **Gatharia K Mutitika & 2 Others vs. Baharini Farm Ltd. [1985] KLR 227**, the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost, but not exactly, beyond reasonable doubt. The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to offence, which can be said to be quasi-criminal in nature. The guilt has to be proved with such strictness of proof as is consistent with the gravity of the charge. See **Re Breamblevale [1969] 3 All R 1062, 1064**.

In the foregoing premises without evidence of service I am not satisfied that the applicant has proved beyond peradventure that the respondents herein have committed contempt of Court.

In the result the Notice of Motion dated 30<sup>th</sup> May 2012 fails and is dismissed with costs to the respondents.

**Dated at Nairobi this 23<sup>rd</sup> day of January 2013**

**G.V. ODUNGA**

**JUDGE**

In the presence of Mr Mwaura for Mr Njogi for the applicant