



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL CASE NO. 160 OF 2011**  
**MILIMANI LAW COURTS**

**JOHN NDUNG’U MBACHIO.....APPLICANT**

**VERSUS**

**MUSA NJUNGUNA & NJERI MWIKAMBA.....RESPONDENT**

**RULING**

The application before me is dated 14/6/12. It is a Notice of Motion brought under section 5(1) of the Judicature Act Cap 8 Laws of Kenya Order 40 rules 2(3) and (4) of the Civil Procedure Rules, through court Vacation Rule 3 & section 312 of the Civil Procedure Act Cap 21 Laws of Kenya. The applicant is seeking orders that:-

This court do order committal to Civil Jail of Musa Njuguna & Njeri Mwikamba. The respondents/defendants for such a Period as this court may deem fit and just for contempt of court in that the respondent being aware of the orders of this court made on the 12/1/11 and having been served with the same together with a panel notice have jointly and severally violated the said orders by refusing to open the plaintiff’s business premises and return the proclaimed goods. The applicant also seeks that costs of the application be provided for.

The application is supported by the affidavit of John Ndungu Mbachio and 2 grounds as follows; (i) that the respondents have continued to contempt the orders of this court duly served which has made the applicant continue suffering damages and (ii) that there is a real apprehensible danger of a continued contemning this Hon.Court which has made the applicant incur continued loss and damage.

In the supporting affidavit Mr. John Ndungu Mbachio depones as follows; that on the 12/1/11 he filed an application before the Senior Principal Magistrate on an application seeking and adoption of the Business

Premises Rent Tribunal (BPRT) and after hearing the application the Court granted and approved and adopted the order as court orders inter alia vide court order dated 12/1/11. That on the same day accompanied by a Court process server they proceeded to Nyiku Banana for service where they served the respondents. They also served the OCS Karuri Police station with the said order. That he has on several occasions tried to seek audience of the OCS Karuri Police Station or compliance of the orders as indicated and he has never given any concrete reasons as to why he (OSC) never ensured compliance of the same. That the respondents have completely refused and or disobeyed the Hon. Magistrate's Court order inter alia that the respondent do return the applicants distained good and also put back the applicant into possession of the suit premises. That he is apprehensive that the failure to abide with orders of Court has caused him irreparable damage and loss and such continuance of doing so will aggravate the extent of the already incurred loss.

The respondents were served with the application. None of them turned up on the 18/3/13 when this Court heard the application.

I have perused the Court file and I note the following: the applicant came before this court on the 31/3/11 with an application to seek leave for order of committal to civil jail of the respondent and leave was granted on the 31/3/11.

The applicant thereafter filed the application under consideration. It is important in an application like this for the applicant to show that the respondents were served with the Court order issued on the 12/1/11 and that the said order had endorsed on it the requisite penal notice. When the applicant filed the application dated 23/3/11 the order of A. R. Ileri Resident Magistrate issued on the 12/1/11 had no penal notice. There is an affidavit of service filed on the 24/2/11 sworn by Michael Ndungu that states on the 12/1/11 he received copies of the originating orders certificate of urgency, chamber summons and supporting affidavit. At paragraph 6 he states that he served the respondent with copies of the orders and they declined to sign the documents. When the application dated 14/6/12 was filed the applicant has attached an order of A. R. Ileri Resident Magistrate with a penal notice endorsed at the bottom of page 2 after the signature of Hon. A.R. Ileri was appended. What is strange is that the order that accompanied the application for leave had no penal notice. I am not persuaded that the order attached to this application was the one served on the applicant. In contempt case Courts have held that it is vital that the order served on the alleged contemnor must have the penal notice. I also note that the fonts of the penal notice are different from that of the main order .I therefore decline to grant the orders sought as I am not persuaded that the respondents were served with an order with a penal notice that informed them of the consequences. I decline to grant the orders sought and dismiss the application dated 14/6/12.No orders as to costs.

Orders accordingly.

Dated, signed and delivered this 21<sup>st</sup> May 2013

**R.E. OUGO**

**JUDGE**

In the presence of:-

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**For the Applicant**

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**For the Respondents**

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**Court Clerk**