



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI LAW COURTS)**  
**CIVIL CASE 87 OF 2011**

**GACHONI ENTERPRISES LIMITED.....PLAINTIFF**

**VERSUS**

**D N NYAGA T/A NJERU, NYAGA & CO. ADVOCATES.....RESPONDENT**

**THE ATTORNEY GENERAL.....AMICUS CURAE**

**R U L I N G**

Before me is a Motion on Notice dated 13<sup>th</sup> June 2011 expressed to be brought under the provisions of Order 51 rule 1 and Order 53 rule 3 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law. As is customary in such cases the said motion was filed pursuant to the leave of the court granted by **Mwera, J** on 23<sup>rd</sup> May 2011.

By the present motion, the applicant herein seeks the following orders:

- 1. That David Njeru Nyaga T/A Njeru Nyaga & Company Advocates do stand committed to Civil Jail for such period of time as this Honourable Court may determine for contempt of court by knowingly and wilfully violating and or disregarding the order issued by this Honourable court on 17<sup>th</sup> December 2010.**
- 2. That David Njeru Nyaga T/A Njeru Nyaga & Company Advocates jointly and severally do purge the contempt by refunding the Applicant the sum of Kshs 5,500,000 with interest at prevailing commercial rates from February, 2010 and costs of the suit for knowingly and wilfully disobeying the order of the court issued on 17<sup>th</sup> December, 2010.**
- 3. That writs of attachment be and is hereby issued against the properties and assets of David Njeru Nyaga & Company Advocates to satisfy the amount of Kshs 5,500,000 together with interest at commercial rates from February 2010 and costs of the suit for disobeying the order of the court issued on 17<sup>th</sup> December, 2010.**
- 4. That costs of the application be paid by the Respondent.**

The Motion is based on the following grounds:

- a) **The High Court on 23<sup>rd</sup> May 2011 granted leave to the Applicant to file contempt of Court proceedings against the Respondents.**
- b) **The Respondents was paid a 10% deposit of Kshs 5,500,000 by the Applicant to hold as stake holder as per the conditions of sale vide agreement dated 19<sup>th</sup> February 2010.**
- c) **The Respondent has misused all the sum of Kshs 5,500,000 belonging to the Applicant.**
- d) **On 17<sup>th</sup> December 2010 in ELC No. 391 of 2010 Hon Mr. Justice Mbogholi Msagha made an order that the Respondent do deposit in Court the sum of Kshs 5,500,000 within Seven (7) days.**
- e) **Despite service of the order and penal code upon the Respondent, he has refused to comply with the court order.**
- f) **The respondent being an Advocate of the High court and an Officer of this Honourable Court should lead by example in obeying court orders.**
- g) **The Respondent is in contempt of court by knowingly and wilfully violating and disregarding the order issued by this Honourable court on 17<sup>th</sup> December, 2010 and should be punished accordingly so that the dignity of this Honourable Court can be maintained in the eyes of law abiding citizens.**
- h) **It is otherwise a waste of precious judicial time if the court can issue orders and yet fail to reprimand those who wilfully disobey the very orders granted.**

The application is supported by statement and verifying affidavit sworn by **Peter G. Mbogua**, on 14<sup>th</sup> March 2011. According to the said documents, apart from reiterating the history of these proceedings, which in my view, is not particularly relevant for the purposes of determination of the present motion, it is averred that on 17<sup>th</sup> December 2010 an order was issued requiring the respondent to deposit the sum of Kshs. 5,500,000.00 in court within seven (7) days of the order. It is important to note that the order was actually made on 15<sup>th</sup> December 2010 and was issued by the registry on the said 17<sup>th</sup> December 2010. Despite being served with the said order, it is contended that the respondent has refused to comply therewith in further frustration of the applicant's attempts to recover its money thus belittling the court.

In opposition to the application the respondent swore a replying affidavit on 22<sup>nd</sup> September 2011 in which he contended that the Motion is incurably defective on the ground that the same is supported by photocopies of statement and verifying affidavit dated/sworn on 24<sup>th</sup> March 2011 and not by any evidence or affidavit. It is further deposed that as there are several matters pending before Court on the same issues which remain undetermined to date such as the Notice of Motion dated 19<sup>th</sup> August 2010, the applicant is a vexatious litigant. Without having the same determined, it is deposed the applicant filed a similar application dated 14<sup>th</sup> December 2010 despite the fact that the Motion dated 19<sup>th</sup> August 2010 was filed under certificate of urgency. On being served with the later application the respondent contends that he filed replying affidavits showing that the sum of Kshs. 5,500,000/- had already been paid out to his client after completion of the sale in line with the terms of the agreement. It is the respondent's case that during the pendency of the application dated 19<sup>th</sup> August 2010 the applicant maliciously filed the application dated 14<sup>th</sup> December 2010 and obtained ex parte orders whose lifespan was 7 days but which orders the applicant never served and when the matter came up for inter partes hearing the applicant failed to attend thus the respondent was denied the opportunity of explaining to the Court the fact that the money had been disbursed. It is the respondent's case that the Motion dated 14<sup>th</sup> December 2010 was self governing as it provided for a remedy for non-compliance therewith - stern disciplinary measure. Accordingly, it is contended that the present application is not only premature but is un-maintainable and an abuse of the process of the Court. In view of the fact that the money had been disbursed and the failure to serve the orders within 7 days or extend the period, the respondent contends that there are no enforceable orders in existent due to the failure by the applicant to attend Court on 24<sup>th</sup> March 2011 and

1<sup>st</sup> March 2011 when the matter came for further orders. Instead of serving the summons to enter appearance and the plaint in ELC Suit No. 391 of 2010, it is deposed that the applicant is instead engaging in sideshows aimed at victimising the respondent with the hope of getting the prayers sought in the plaint through short-cuts by seeking to punish the respondent for executing his client's instructions thus infringing upon the respondent's professional and Constitutional right.

The application was prosecuted by way of written submissions which were highlighted by counsel. In its submissions, the applicant, through its learned counsel **Mr. Wanjohi**, gives the history of the transaction that led to the grant of the orders the subject of the motion under consideration and submits that since the order requesting the respondent to deposit 10% in court was obtained and served on the respondent, the respondent, despite having knowledge of the existence of the order, has failed to comply therewith. Accordingly, it is submitted that the respondent is in contempt of Court and must purge the said contempt by complying therewith. In support of the application the applicant has relied on **Charles Omwata Omwoyo vs. African Highlands & Produce Co. Ltd Nairobi HCMA No. 308 of 2002**; **Menno Travel Services Limited vs. Menno Plaza Limited Nairobi HCCC No. 350 of 2004**; **Refrigeration & Kitchen Utensils Ltd vs. Gulabchand Popatlal Shah & Others Civil Application No. 39 of 1990**; **Commercial Bank of Africa Limited vs. Issac Kamau Ndirangu Civil Appeal No. 157 of 1991** among other cases. It is submitted that since neither has there been an application to set aside the order nor an appeal against the order, the respondent's conduct goes contrary to the overriding objective as provided under section 1A(3) of the Civil Procedure Act. If court orders are disobeyed or violated by advocates, it is submitted, the law is brought into disrepute and the Court should uphold the same without regard to technicalities as provided under Article 159(2)(d) of the Constitution.

On his part the respondent, **Mr. Nyaga**, submitted that ELC No. 391 of 2010 abated by virtue of Order 5 of the Civil Procedure Rules, 2010 due to the fact that since the filing of the suit on 20<sup>th</sup> August 2010, the summons had not been collected within 30 days and served on the Defendant. Accordingly as the said summons were not served between the period 10<sup>th</sup> December 2010 and 10<sup>h</sup> January 2011, the suit which constitute the very foundation of these contempt proceedings abated hence these proceedings have no legal basis and should be struck out on a preliminary objection.

On the merits of the application, after giving its version of the history of these proceedings, the respondent submitted that the applicant has no claim over the sum of Kshs. 5,500,000.00 as the same ceased to be held as a stake hold by the respondent on 16<sup>th</sup> June 2010 when he released the completion documents to its conveyance Advocates. Following the registration of the conveyance, albeit, illegally in the applicant's favour, it is submitted that the entire purchase price became due and owing. Relying on **Black's Law Dictionary 8<sup>th</sup> Edn. Page 336**, it is submitted the contempt of court is defined as "The failure to obey a Court Order that was issued for another's benefit. A civil contempt proceeding is coercive or remedial in nature. The usual sanction is to confine the contemnor until he or she complies with the Court Order. The act/or failure to act complained of must be within the defendant's power to perform and the contempt order must state how the contempt may be purged".

It is submitted that based on the evidence on record, at the time the orders issued on 15<sup>th</sup> December 2010 were made, the act sought to be performed was not within the respondent's power to perform since the monies the subject of these contempt proceedings were not in the respondent's custody but in the vendor's custody a fact that was within the knowledge of the applicant. Since the application was self-governing, these proceedings were thereby rendered a nullity, it is contended since the applicant prescribed remedies in event of non-compliance other than contempt. According to the respondent, the applicant should fix its application for hearing and pursue that remedy.

It is further submitted that the orders issued on 15<sup>th</sup> December 2010 were not only limited in time but were also conditional. The said orders dictated that service thereof be effected within seven (7) days from the date of issue hence the applicant is bound to prove that the same were served before 23<sup>rd</sup> December 2010 and if not so then that an extension was thereby granted. The same were, however, served on 11<sup>th</sup> January 2011, by which time there were no orders capable of being complied with. On the strength of **In Re Bramblevale Ltd [1970] Ch 128**, it is submitted that "a contempt of Court is an offence of criminal

character, a man may be sent to prison for it. It must be satisfactorily proved. To use the time honoured phrase, it must be proved beyond reasonable doubt. It is not proved by showing that when the man was asked about it he told lies. There must be further evidence to incriminate him". Relying on **Victoria Pumps Limited & Another vs. Kenya Ports Authority & 4 Others Misc. Civil Appl. No. 285 of 2002 [2002] KLR** it is submitted that the party sought to be committed or cited for contempt must be personally served with a properly extracted order which must also have a penal notice appended to it. It is the respondent's case that the order was neither personally served on him nor was there a penal notice appended to it.

Since the order required attendance on 24<sup>th</sup> January 2011 the same, it is submitted, were not final. On the said date the applicant failed to attend Court prompting the Court to give directions that it would rule on the applicant's application on 9<sup>th</sup> March 2011, a recognition, according to the respondent that the earlier orders were spent.

In reply to the said submissions **Mr. Wanjohi**, submitted that according to his interpretation, the orders in question should have been complied with within seven days of service. When the Court inquired into the reason why the said orders were not served within the seven days from the date of issue, **Mr. Wanjohi** invited the Court to take notice of the fact that during that period advocates do close their chambers for Christmas holidays.

I have considered the Motion, the affidavits both in support and opposition thereof, the submissions of counsel and the authorities cited. As the preliminary objection was argued within the application, it is necessary to deal with the same first.

The respondent's position is that since the summons to enter appearance was not collected within 30 days the suit is deemed to have abated. It is therefore necessary to understand the rule which the respondent is alluding to. Although the respondent was not specific on the rule in my view, I believe that the provision in question is Order 5 rule 1(6) of the Civil Procedure Rules, 2010 which provides:

***Every summons, except where the court is to effect service, shall be collected for service within thirty days of issue or notification, whichever is later, failing which the suit shall abate.***

The Court has not been told when if at all the said summons were issued by the court and if the same were issued whether the plaintiff was duly notified of the same. In the absence of the said evidence this court is unable to find that the suit abated by virtue of the foregoing provision. However, even if the suit had abated, would that affect the orders made therein? 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 maintain the dignity of the Courts and therefore the validity or otherwise of the suit in which the orders are granted cannot sanitise contemptuous actions by a party 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".**

The learned Judge must have had in mind the case of **Refrigerator & Kitchen Utensils Ltd. vs.**

**Gulabchand Popatlal Shah & Others Civil Application No. Nai. 39 of 1990** when he made the said decision since in the latter case the Court of Appeal similarly stated that it is essential for the maintenance of the rule of law and good order that the authority of 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 **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 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 respondent’s preliminary objection that he was not bound to obey the orders made on 15<sup>th</sup> December 2010 has no merit.

The other issue raised by the respondent is that since the application itself provided for a recourse in event of disobedience it was self-governing and resort should have been to that relief rather than to contempt proceedings. That argument is largely true in cases where there are remedies available to a party. In *Moses P N Njoroge & Others vs. Reverend Musa Njuguna & Another Nakuru HCCC No. 247 “A” of*

2004 Musinga, J 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.

However, it must be noted that the 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 dignity of the court. The mere fact, therefore, that a party offended by disobedience of a Court order has floated his idea on what should be done to the contemnor, does not tie the court's hands as to that mode of punishment although the Court may well take into account the suggested mode of punishment in appropriate cases. Accordingly, I disabuse the respondent of the notion that these proceedings are not properly before the court based on the fact that in the applicant's application it had suggested a different course of action from contempt of court proceedings.

I now wish to consider the issue whether the conditions necessary for committal for contempt have been proved. 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.

In this case the order alleged to have been disobeyed was given on 15<sup>th</sup> December 2010, in which the Court made the following orders:

- 1. That application is hereby certified urgent and same to be served.**
- 2. That pending any other or further hearing in this matter the 1<sup>st</sup> Defendant be and is hereby ordered to deposit the sum of Kshs. 5,500,000/= in Court within the next seven (7) days.**
- 3. That the said Order shall be complied with within seven(7) days from today.**
- 4. That hearing *interpartes* be on 24<sup>th</sup> January 2011.**
- 5. That costs shall be in the cause.**

It is clear from the foregoing that the sum of Kshs. 5,500,000.00 was to be deposited in Court within seven days from 15<sup>th</sup> December 2010. However, it is clear that the said order was not served upon the respondent until 11<sup>th</sup> January 2011 long after the seven days had lapsed. To make matters worse the copy of the order annexed does not indicate that it was endorsed with a penal notice neither does the affidavit of service allege that a penal notice was among the documents served. Obviously by the time the said order was served, the period of compliance had lapsed and the respondent could not be expected to

comply therewith “within the next seven (7) days” or “within seven (7) days from today”. It is not surprising therefore that the respondent alleges that by the time the said order was served the money had been released to his client and was no longer in his possession in order for him to comply with the court order. A similar case arose in the case of **Victoria Pumps Ltd & Another vs. Kenya Ports Authority & 4 Others [2002] 1 KLR 708** in which **Onyango-Otieno, J** (as he then was) stated:

**“The ruling said to have been disobeyed though is dated 31<sup>st</sup> January 2002, was not delivered on that day but was delivered on 8<sup>th</sup> February 2002. This in effect means that as on 31<sup>st</sup> January 2002 before the ruling was delivered there was no ruling capable of being disobeyed or obeyed as the same ruling had not been delivered and no one could be said to have known about it so as to obey it or disobey it. The Ruling could not have taken effect from 8<sup>th</sup> February 2002 and could have only been issued on 8<sup>th</sup> February 2002 or thereafter and not before that date... No orders were issued on 31<sup>st</sup> January 2002. Although the ruling was dated that date it was not delivered until 8<sup>th</sup> February 2002 and the order was extracted and issued or sealed on 11<sup>th</sup> March 2002. By 31<sup>st</sup> January 2002 no order had been delivered and none could be sealed and be disobeyed till the same order was delivered on 8<sup>th</sup> February 2002.... The law in such a case as this where a party is seeking committal to civil jail against the other party on the grounds that the order delivered by the court has been disobeyed, the party sought to be committed or cited for contempt must be personally served with a properly extracted order which must have a Penal Notice appended to it. In the instant case the Penal Notice is not properly appended, as it should have been at the very end of the order and not part of it...From the evidence it is clear that by the time the court gave the order for release of both containers to the applicant one container was no longer available and could not be released to the applicants as it was already out of reach of the applicants. The order was thus not capable of being enforced as it was, having been issued long after the same container had been removed from the possession and control of the alleged contemnors and its contents sold at a public auction advertised in the Kenya Gazette”.**

The applicant, on realising that the time within which the order should have been complied with should have applied to court, with notice to the other side of course, for extension of time for compliance before making the present application. Without time being extended, on 11<sup>th</sup> January 2011 when the orders were served, they were incapable of being complied with. I, however, disagree with the respondent that since the applicant did not attend Court when the matter was fixed for *inter partes* hearing and directions were given with respect to his application, which application was itself dismissed, the orders granted on 15<sup>th</sup> December had been superseded. The non-attendance by the applicant when its application came up for hearing should have been a ground to either apply for dismissal of the same or to have the same set aside but not for non-compliance therewith had there been proper service.

Accordingly, I find that the applicant is the author of its own misfortune for obtaining court orders and failing to serve the same in time for compliance. A party cannot be committed for contempt for failing to comply with an order whose period of compliance expired before he became aware of the order.

It is, accordingly, on this ground that I find that the Notice of Motion dated 13<sup>th</sup> June 2011 lacks merit and the same is dismissed. However, as the respondent himself has never applied to have the said orders set aside on the ground that they are incapable of being complied with I make no order as to costs.

**Ruling read and delivered in court this 23<sup>rd</sup> day of May 2012**

**G.V. ODUNGA**

**JUDGE**

**In the presence of:**

Mr. Wanjohi for the applicant

Mr. Nyaga for the respondent