



SIMON KAHIGI MUNGAI

PETER C. NJUGUNA

JOHNSON MUTURI MUIGAI

all trading as Harlifax Printers and General Supplies.....PLAINTIFF

VERSUS

STEPHEN KORI NG'NG'A

T/A GLADSOM AUCTIONEERS..... DEFENDANT

RULING

By a Motion on Notice dated 30th April 2008 the Plaintiffs herein sought the following orders:

1. That this application be certified urgent and be heard ex-parte in the first instance.
2. That the defendant by himself, servants or agents be restrained by way of the temporary injunction from advertising for sale, selling, disposing of whether by private treaty or by public auction, all the properties, equipment and goods attached by the defendant from the plaintiffs business premises on L.R. 209/3011/17, Kirinyaga and pending the hearing and determination of this suit.
3. That the defendant itself, servants or agents be restrained by way of temporary injunction from attaching any other of the plaintiff's property, goods or equipment pending the hearing and determination of this suit.
4. That the defendant, by itself, servants, or agents and at the defendant's expense, be ordered by way of mandatory injunction to return all attached properties, goods and equipment to the plaintiff's business premises on L.R. 209/3011/17, Kirinyaga Road, Nairobi.

On 22nd September 2009, Ali-Aroni, J granted prayers 2, 3 and 4 in the said motion. Apparently the said orders were not complied with because the plaintiff was back to Court with an application dated 1st March 2010 seeking leave to institute contempt of Court proceedings against the defendant. Such leave was granted by Rawal, J (as she then was) on 19th March 2010. Pursuant to the said leave the plaintiffs filed a Notice of Motion dated 31st March 2010 seeking, in the main, that an order of committal to prison be made against the defendant/respondent for such period as this Court deems fit and just for the blatant disobedience of the Court order dated 22/9/08.(sic) As is usual in such proceedings there was also a prayer for costs.

The said motion is the subject of the present ruling and it is expressed to be brought pursuant to section 5(1) of the Judicature Act Cap 8 of the Laws of Kenya, Order 52 of the Rules of the Supreme Court of England 1999, section 3A and 63E of the Civil Procedure Act and all other enabling provisions of the Law. It was based on the grounds that the defendant had ignored and continued to ignore the said court order dated 22nd September 2008 (sic) by failing to return the plaintiffs' business equipment as ordered; that the plaintiffs/applicants continue to incur immense losses due to the defendant/respondent's blatant disobedience of the court order; and that leave to commence the proceedings was granted on 19th March 2010. The application was further premised on the statement dated 18th March 2010 and the verifying affidavit sworn by Peter C. Njuguna the same day.

In the said statement after describing themselves and the relief sought, the applicants have set out the orders sought in the application that gave rise to the present application. It is further stated that the said orders as well as the Penal Notice were served upon the Respondent on 16th November 2009 and that despite service thereof, the respondent blatantly continues disobeying the said order in regard to him returning the attached goods, properties and equipment of the plaintiffs' business yet the said orders are still in force having not been set aside, nullified and/or vacated. That conduct, it is contended amounts to contempt of Court. In the said verifying affidavit the applicants have annexed a copy of the order in question as well as the penal notice.

In opposition to the application, a replying affidavit was sworn by one Isaac Kariuki Mugo (hereinafter referred to as the third party) on 14th July 2010. In the said affidavit, the deponent deposes that he is a partner in a firm known as Harlifax Enterprises which carries printing business on L.R No. 209/3011/7 Kirinyaga Road, Nairobi. In that partnership they are with Christine Muthoni Kahigi. Due to some difference between the two in 2004, HCCC No. 428 of 2004 was filed seeking, *inter alia*, dissolution of the partnership. Due to this period of turbulence, there was what the deponent calls "an untidy change of ownership" of the premises in which the said business was carried which, culminated into an intention by the new landlords to lease the same premises to another printing firm going by the name of Harlifax printers and General Suppliers, which firm the deponent states that he found through a search belonged to among other persons a Mr. Francis Muigai Kahigi, the said Christine Muthoni Kahigi's husband. These facts, according to the deponent were well within the knowledge of Njagi, J who delivered a ruling in the said HCCC No. 824 of 2004 a copy of which is exhibited. These developments led the deponent to approach his said partner together with the latter's husband with a proposal that the latter two persons hire the machinery and printing equipment a proposal which was found acceptable and an agreement dated 1st May 2005 entered into between the deponent and the new printing firm which agreement is also exhibited. The agreed monthly rental was Kshs. 100,000.00 with effect from June 2005. Due to the default by the firm in paying the agreed charges the deponent instructed his advocates to demand for payment which was done and since the same did not bear fruits, M/s Gladson Auctioneers were instructed to recover the said hire charges by repossessing the said machinery and equipment. The said auctioneers proceeded to repossess the same and in the company of the proprietors of the said firm took them to Pangani Auction Centre. According to the deponent, it was well known that repossession was under the said hire agreement and not in levy for distress for rent. The said goods stayed at the said place for six months and accumulated storage charges of Kshs. 146,160.00 and were advertised for sale by auction on 5th September 2008 but very low bids were received prompting the deponent to remove the said goods to his premises to avoid accumulation of further charges. He later disposed of them at his convenience but still did not recover the entire hire charges although he repaid auctioneers charges, storage and transport charges. According to the deponent, the goods have not been in possession of the auctioneers since September 2008 when he took them.

The application was prosecuted by way of written submissions. In their submissions, the applicants reiterated the contents of their documents in support of the application outlined above and stated that the order on the basis of which the committal is sought is clear and yet the defendant has not sworn and filed a replying affidavit. It is submitted that although the defendant was allowed to join the deponent of the replying affidavit as a third party the third party never swore any affidavit in opposition to the application dated 30th April 2009. It follows that the third party's replying affidavit, according to the applicants is irrelevant at this stage. In any case, it is submitted, the issues raised in the third party's affidavit were raised by the defendant in the replying affidavit to the said application and the defendant should not be permitted to re-argue the same issues through a replying of the third party without appealing or applying for review. The plaintiffs took issue with purported advertisement on the ground that the same is illegible and in any case, the auction could not have taken place on the same day of the advertisement. Again it is submitted that in 2008, the newspaper in which the alleged advertisement appeared, Kenya Times, had ceased to be a daily newspaper. Further, it is submitted that the issue of the advertisement would only have been relevant if the auction actually took place on the said date which is not the position. It is further submitted that the issue of removal of the goods to the third party's premises was never disclosed to the Court at the hearing of the application dated 30th April 2008 an indication that the defendant was still in possession of the goods. It is therefore submitted that the said sale was simply meant to defeat the Court orders.

The defendant, on the other hand submitted that he relied on the affidavit of the third party. It is further submitted that the change of the name of Francis Kahigi Muigai to Peter C. Njuguna after the grant of injunction by Njagi, J in HCCC No. 428 of 2004 was informed by the need to distance himself from the injunction issued against his wife. After rehearsing the contents of the third party's affidavit, it is submitted that the court was misled before it granted the orders sought to be enforced in that the affidavits relied upon had neither been filed in court nor served on the defendant. Eventually the same were served at 1.00 pm and in the afternoon the plaintiffs appeared before the court and secured *ex parte* orders under the wrong impression that the defendant was distressing for rent when the true position was that the defendant's action was that of repossession. On the advertisement in Kenya Times Newspaper it is submitted that that was a daily newspaper and there was no requirement for advertisement in a daily newspaper. As the goods were in possession of the third party it is submitted that there was no collusion between the defendant and the third party. Submitting that the plaintiffs chose to exclude the third party from the proceedings, the defendants state that no order of the court requiring a person to do or abstain from doing any act may be enforced unless a copy of the order has been served personally on the person required to do or abstain from doing the act in question hence there is no way the third party was expected to comply with the order. The case of Omega Enterprises (Kenya) Limited vs. Kenya Tourist Development Corporation & Others Civil Appeal No. 59 of 1993 is cited in support of this line of submission. As an explanation has been given by the third party that the goods were not in possession of the defendant, it is submitted that the standard of proof required in contempt proceedings, that of proof higher than the balance of probabilities, has not been attained. Relying on Mutitika vs. Baharini Farm Ltd Civil Application No. Nai. 24 of 1985, it is submitted that the application should be dismissed.

Having considered the foregoing, it is my considered view that 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 an order may constitute a ground for setting the same aside 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 court orders lawfully granted cannot sanitise contemptuous actions by a party. 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 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”.

It is not disputed that the orders made in this suit on 22nd September 2009 more than two and half years ago have not been complied with. It is also not disputed that the same order was duly served since the defendant has chosen not to file a replying affidavit to controvert service. The defendant's case, as presented through the third party, who has offered to act as his mouthpiece in these proceedings, is that the goods were not in his possession but were in the possession of the third party. That, in my view, if valid would have been a ground for setting aside the orders of 22nd September 2009 *in toto* in light of the fact that the orders were made in the absence of the defendant. Having chosen not to set aside the said orders, the defendant cannot in these proceedings lament inability to comply therewith. As indicated in the above authorities a Court order is binding on the party against whom it is addressed and until set aside remain valid and are to be complied with. I shudder to think of the place of our judicial system if parties are left to freely decide what court orders to obey and which ones to ignore. In this case there has been a blatant and unmitigated disobedience of an order of this Court. Parties must realise that once they are brought to court they are subject to the jurisdiction of the Courts. Under Article 159(1) of the Constitution, Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution. In exercising judicial authority the Courts and Tribunals are, *inter alia*, to be guided by the principle that the purpose and principles of this Constitution shall be protected and promoted. Under Article 10(1) of the Constitution the national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them (a) applies or interprets this Constitution; (b) enacts, applies or interprets any law; or (c) makes or implements public policy decisions. Under clause (2)(a) of the same Article the national values and principles of governance include the rule of law. Musinga, J in Moses P N Njoroge & Others vs. Reverend Musa Njuguna & Another Nakuru HCCC No. 247 “A” of 2004 was of the view, which view I respectfully associate myself with, 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. Contemnors, the learned Judge held, 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. It is therefore my view and I so hold that the Courts are not only empowered to commit for contempt but are under a Constitutional obligation to uphold the rule of law and in doing so to commit for contempt if the conduct of parties invite such course.

In the result I find that the defendant is guilty of contempt of court by blatantly disobeying the orders of this court made on 22nd September 2009. I accordingly order that a warrant of arrest be issued forthwith for arrest of the defendant for the purposes of being brought to Court to show cause why he cannot be committed to serve 6 months imprisonment for such unbecoming and despicable conduct. The plaintiffs will have the costs of this application.

Ruling read and delivered in court this 18th day of July 2012

G.V. ODUNGA
JUDGE

In the presence of:

No appearance for the applicants
Mr. Kamara for the respondents