



**REPUBLIC OF KENYA**

**High Court of Kisii**

**Miscellaneous Application 60 of 2011**

**HEZRON OKEROSI MATONGO ..... 1<sup>ST</sup> APPLICANT**

**CHRISANTUS NYAKONI ..... 2<sup>ND</sup> APPLICANT**

**JACKSON OBIRI ..... 3<sup>RD</sup> APPLICANT**

**SAUL MAKWORO ..... 4<sup>TH</sup> APPLICANT**

**CHARLES OBWOGE ..... 5<sup>TH</sup> APPLICANT**

**JOHN SILAS NYAMWANGE ..... 6<sup>TH</sup> APPLICANT**

**HARON ASIAGO ..... 7<sup>TH</sup> APPLICANT**

**VERSUS**

**ISAAC GITHUI, THE CLERK COUNTY COUNCIL OF GUSII .....1<sup>ST</sup>  
RESPONDENT**

**JAMES OMBESE, THE ADMINISTRATOR COUNTY COUNCIL OF GUSII .... 2<sup>ND</sup>  
RESPONDENT**

**COUNTY COUNCIL OF GUSII ..... 3<sup>RD</sup>  
RESPONDENT**

## RULING

1. The applicants herein were granted leave on 13<sup>th</sup> May 2011 to file the substantive Notice of Motion dated 19<sup>th</sup> May 2011. By that motion the applicants seek orders to cite and punish the respondents herein for contempt of court for breaching, disobeying, disregarding and/or ignoring the terms of the order of this court issued on 13<sup>th</sup> April 2011 vide Kisii HCCA No.249 of 2010. The applicants also pray that the respondents be committed to jail for a period not exceeding Six months or such other period as the court may deem just and expedient in the circumstances. In the alternative, the applicants pray for an order of sequestration to attach the properties of the respondents which properties should be sold to defray the damages occasioned by the breach and/or disobedience of lawful court orders issued on 13<sup>th</sup> April 2011 vide Kisii HCCA No.249 of 2010. The applicants also seek costs and such other orders as this court may deem fit and just to grant.

2. The application is supported by the grounds set out on its face and those set out in the supporting affidavit sworn by Chrisantus Nyakoni the 2<sup>nd</sup> applicant herein on 19<sup>th</sup> May 2011. The gist of the grounds is that the order for status quo issued on 13<sup>th</sup> May 2011 which was duly endorsed with a penal notice was served upon the respondents and that despite all such service, the respondents breached, disobeyed, disregarded and/or ignored the terms of the said order thereby bringing into disrepute the dignity and integrity of this honourable court for which the respondents should be punished.

3. The application is opposed vide the replying affidavit sworn by Isaac Nderitu Githui, on 1<sup>st</sup> July 2011. The deponent is the clerk of the 3<sup>rd</sup> Respondent herein. In his affidavit, the deponent has revisited the history of the events that gave rise to the case that resulted in Kisii HCCA No.249 of 2011. He also depones that since he was not at his place of work on 26<sup>th</sup> April 2011, he could not have been personally served with the impugned court order and therefore the averments in paragraphs 5 and 6 of the supporting affidavit are mere falsehoods. The said paragraphs read as follows:-

**“5. THAT the said order was extracted and endorsed with a Penal**

**Notice and was served upon the Respondents and a copy of the same was equally served upon MR. ELIJAH OKEMWA, the Advocate for the 3<sup>rd</sup> Respondent for compliance.**

**6. THAT upon service of the aforesaid Order, the Respondents**

**without due respect to the Rule of Law and Order, disobeyed the**

**aforesaid orders by breaking into the houses, threw out the**

**personal effects and locked up the premises and left them under**

**the guard of KISII SECURITY GUARDS on the 26<sup>th</sup> April 2011**

**and 9<sup>th</sup> May 2011 respectively.”**

4. The deponent of the Replying Affidavit also avers that the applicants are the authors of their own misfortune for having disregarded the 3<sup>rd</sup> Respondent's orders to vacate the houses even after they lost an application for stay of execution pending hearing and determination of HCCA No. 249 of 2011. In his Supplementary Affidavit in reply dated 1<sup>st</sup> July 2011, James Nyachae Ombese, the 2<sup>nd</sup> Respondent herein contends that the applicants herein were evicted on the morning of 26<sup>th</sup> April 2011, while the order was served upon him on that same day at 11.00 a.m. The deponent does not however say what time of the morning on 26<sup>th</sup> April 2011 the evictions took place. He however says that by the time he was served with the court order, all the applicants except the 4<sup>th</sup> and 6<sup>th</sup>, who are still in occupation of the suit premises had been evicted. The deponent opposes the application for orders to commit the respondents to

jail.

5. By consent of the parties, this application proceeded by way of written submissions. I have carefully read the submissions together with attached authorities. As the facts giving rise to this application are not in dispute, I find it not necessary to set them out here. Suffice it to say that the applicants came before this court after the lower court ordered their eviction upon expiry of three months' notice which was effective from 26<sup>th</sup> February 2009, though at the request of the applicants, the notice period was extended to end of December 2009. It was also alleged by the respondents that the applicants were in fact in arrears of rent to the tune of Kshs.337,800/=. The respondents averred that the applicants did not comply with the notice to vacate, even after the same had been extended and accordingly they (applicants) had to be evicted.

6. It is not in dispute that this court issued an order on the 13<sup>th</sup> April 2011 in the following terms:-

**“By consent:**

- 1) **That parties do file and exchange written submissions together with authorities within 21 days from today [13<sup>th</sup> April 2011];**
- 2) **That highlighting of submissions on 7<sup>th</sup> April 2011 (?) (this latter date could only have been 7<sup>th</sup> May 2011);**
- 3) **That meantime status quo to be maintained.”**

7. The applicants contend that the order duly endorsed with a penal notice was served on the respondents. The affidavit of service to that effect was sworn by Elijah Gekonge Nyangau, on the 11<sup>th</sup> May 2009. It is interesting to note that an affidavit sworn on 11<sup>th</sup> May 2009 is purported to support events that took place in April 2011, unless it can be inferred that there was a typing error. The process server avers that on the 26<sup>th</sup> April 2011, he received an order dated the same day from G.M. Nyambati & Co. Advocates with instructions to serve the same upon counsel for the respondent, the respondent and the in charge of the appellant's premises at Nubia. From the affidavit, counsel for the respondent was served with the said order at 10.30 a.m. on the same day, the service having been effected upon the said counsel within the court premises. The process server also depones at paragraph 5 of his affidavit that he served the Administrative Officer of the Respondent, one Mr. Ombese at about 11.00 a.m. on the same 26<sup>th</sup> April 2011. The order was left with the in charge of security of the respondent at 11.20 a.m. The affidavit of service does not say anything about serving the order upon the Clerk to County Council of Gusii, Mr. Isaac Nderitu Githui.

8. It is on the basis of the above facts that counsel for the applicants argues that the respondents should be punished, especially the 1<sup>st</sup> respondent whom counsel says has previously been punished by the court for contempt and yet it appears to the applicant's counsel that the said 1<sup>st</sup> Respondent still takes court's orders for granted; and therefore he has no respect for the law. No details of the 1<sup>st</sup> Respondent's previous antecedents of disobedience were given. Counsel for the applicants submits that the respondents were each personally served with the order and that since the order had a penal notice, the respondents ought to be punished as prayed.

9. Counsel for the respondents, M/s N.O. Migiro of Migiro & Co. Advocates submitted that the 1<sup>st</sup> Respondent was never personally served with the order as is required by law; and that in the circumstances, the applicant's prayer for committal to jail of the said 1st Respondent is misconceived and unsustainable. Reliance was placed on the Court of Appeal decision in the case of **Mwangi H.C.**

**Wangonde –vs- Nairobi City Council – Civil Appeal NO.95 of 1988** in which their Lordships said the following in part of their judgment dated 29<sup>th</sup> June 1989 (unreported).

**“The procedure for committal for civil contempt in England where an order of sequestration is sought is set out under the Rules of the Supreme Court (R.S.C.), Order 45 and 46 and in Halsbury’s Laws of England, Vol. 9 (4<sup>th</sup> Edition) under the heading “Contempt of Court”. Briefly the effect of these provisions is that as a general rule, no order of 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. The copy of the order served must be endorsed with a notice informing the person on whom the copy is served that if he disobeys the order, he is liable to the process of execution to compel him to obey it. This requirement is important because the court will only punish as a contempt a breach of injunction if satisfied that the terms of the injunction are clear and unambiguous, that the defendant has proper notice of the terms and that breach of the injunction has been proved beyond reasonable doubt. In re Bramblevale Ltd (1970) Ch. 128, was a case where after a property company called Bramblevale Ltd had been put into a creditors’ voluntary winding up and a liquidator appointed, an order was made requiring its managing director a Mr. Hamilton to produce the books and papers of the company. He produced some papers but not all. He then claimed that the rest of the papers had been damaged in a car accident. The liquidator then applied for the committal of Mr. Hamilton for contempt and Megarry J., made the order against which the contemnor appealed to the Court of Appeal. In the course of his judgment allowing the appeal, Lord Denning M.R. said at P. 137 (A):**

**“A contempt of Court is an offence of a 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 some further evidence to incriminate him.”**

10. Counsel for the respondents also contended that the Notice of Motion dated 19<sup>th</sup> May 2011 was not in tandem with the order extracted on 26<sup>th</sup> April 2011; namely that whereas the Notice of Motion spells out the names of the 5 applicants, and the 3 respondents, the order allegedly served upon the 1<sup>st</sup> and 2<sup>nd</sup> Respondents indicates that it was the County Council of Gusii which was the party liable in case of disobedience of the order. Counsel submitted that the only reason why the 1<sup>st</sup> and 2<sup>nd</sup> respondents were specifically mentioned is because the order extracted on 26<sup>th</sup> April 2011 was so extracted after the applicants got wind of the fact that the respondents’ counsel was evicting the applicants that morning, hence the resultant defect in the order which was extracted in a hurry. Counsel therefore submitted that the order as extracted lacked clarity and is full of ambiguities. For this reason, counsel urged me to dismiss the application for contempt.

11. Thirdly, it was submitted that because of the strict procedural requirements of personal service upon alleged contemnors, service upon a party’s advocate is not sufficient to constitute personal service upon an alleged contemnor. Reliance was placed on two cases:-

- **Kariuki & others –vs- Minister for Gender, Sports, Culture & Social Services & others [2004] 1 KLR 588 and**
- **Nyamogo –vs- Kenya Posts & Telecommunications Corporation – Court of Appeal at Nairobi CA Nai. 264 of 1993.**

12. In the **Kariuki case**, Lenaola, Ag. J. followed the Court of Appeal decision in the **Nyamogo case** when he said the following at p. 594:-

**“In the latter case, the court specifically ruled as I have in this matter, that service on the alleged contemnor’s advocate did not constitute personal service and even if the alleged contemnors had knowledge of the order through the advocate, he would not be liable for contempt.”**

13. Finally, counsel for the respondent contended that considering the sequence of events no contempt has been disclosed by the pleadings. It was submitted that upon being served with the court order, the 2<sup>nd</sup> Respondent telephoned the 1<sup>st</sup> Respondent and the 1<sup>st</sup> Respondent instructed the 2<sup>nd</sup> Respondent to

instantly obey the court order without reservations and that the 2<sup>nd</sup> Respondent immediately obeyed the court order. That it was because of the instant obedience of the Court order that the 4<sup>th</sup> and 6<sup>th</sup> applicants were not evicted. It was also submitted that considering the time the 2<sup>nd</sup> Respondent was served with the court order (11.20 a.m. on 26<sup>th</sup> April 2011 according to the affidavit of service) and the action that the said 2<sup>nd</sup> Respondent took, he cannot be blamed at all. That if there is anyone to be blamed for what befell some of the applicants, then it is the applicants themselves who are to be blamed for not extracting and serving the order in time.

14. Further, it was contended that as soon as the 2<sup>nd</sup> Respondent received the order, though he was not a target of committal proceedings he obeyed the same. It was also contended that 2<sup>nd</sup> Respondent should not be punished merely because he received the order on behalf of the 1<sup>st</sup> Respondent. For the above reasons, counsel urged this court to find that the instant application was not brought in good faith and that the same was brought solely for the purpose of denying the 3<sup>rd</sup> Respondent its right to demand the accumulated rent due to the said 3<sup>rd</sup> Respondent.

15. On the question of the underlying principle of contempt proceedings, counsel submitted that what is intended by these proceedings is the maintenance and enhancement of the dignity of the court as an institution without regard to the individual judge or indeed gender. Reliance was placed on the case of **Rodgers Muema Nzioka & 2 others –vs- Tiomin Kenya Limited, Mombasa Civil Appeal NO.97 of 2001** where Hayanga J. put the principle governing contempt of court vis-à-vis the administration of justice in the following words:-

**“The guiding principle is that the rules of contempt are not because judges should be protected, but so that justice should not be interfered with. In the case of Attorney General –vs- Times Newspaper Ltd. [1991] 2 WLR 994 (H.L.), the House of Lords said:-**

**“Contempt of court is based not on any exaggerated notion of the dignity of individuals, be they judges, witnesses or others but on the duty of preventing any attempt to interfere with the administration of justice.”**

16. Counsel for the Respondents cited the above case in an attempt to dispel the motion held by the applicants that the court order was not obeyed because it was issued by the Lady Judge.

17. The above are the principles to be applied in determining the instant application. Applying these principles to the facts of this case, I am not satisfied that the applicants have proved their claims against the respondents beyond any reasonable doubt. The evidence on record, as gleaned from the affidavit of service of Elijah Gekonge Nyangau, if the said affidavit were to be accepted as competent before this court, is that the 1<sup>st</sup> Respondent was never personally served with the order. Further, when the said 1<sup>st</sup> Respondent got information from the 2<sup>nd</sup> Respondent who was served at 11.20 a.m. with the court order, the 1<sup>st</sup> Respondent immediately caused the 2<sup>nd</sup> Respondent to obey the order and not to carry on with any further demolitions and evictions. What I am saying here is that the 1<sup>st</sup> Respondent though not personally served did not disobey or disregard the court order. The 2<sup>nd</sup> Respondent on the other hand was served with the court order after certain evictions and demolitions had already taken place, sparing only the 4<sup>th</sup> and 6<sup>th</sup> Respondents who were yet to be evicted by the time the order was served.

18. I hasten to add here that it is not clear from the affidavits why the applicants did not extract the order issued on 13<sup>th</sup> April 2011 until the morning of 26<sup>th</sup> April 2011. I would therefore tend to agree with counsel for the Respondents that the said order was hastily extracted by the applicants upon learning that the demolitions and evictions were taking place that same morning of 26<sup>th</sup> April 2011. Why did the applicants or their counsel not extract the order earlier? Were the applicants really interested in enforcing the said order? In my humble view, the timing for the extraction of the order, which order was either not served or served after the event, had some undisclosed agenda. The Respondents have opined that the delay in extracting and serving the order was motivated by the applicants' desire to gag the Respondent

from demanding the accumulated rent arrears from the applicants. That explanation in my view does not appear farfetched.

19. On the basis of the above stated principles with which I entirely agree, I hold that the applicants' application is devoid of any merit, and that none of the respondents committed the contempt the applicants have alluded to. I also find that affidavit of service was a defective affidavit, the same having been sworn on 11<sup>th</sup> May 2009, and purporting to support an application dated 19<sup>th</sup> March 2011. The said affidavit has no support in the law. An affidavit will either support a concurrent event or support an event that has already taken place, but not one that is yet to occur.

20. Accordingly the instant application is dismissed with costs.

21. Finally, the delay in delivering this ruling is very much regretted. The same was caused by circumstances beyond my control.

22. It is so ordered.

**Dated and delivered at Kisii this 11<sup>th</sup> day of October, 2012**

**RUTH NEKOYE SITATI**

**JUDGE.**

In the presence of:

Mr. C. Okenye for G.M. Nyambati (present) for Applicants

M/s Nelson Migiro & Co. (absent) for Respondents

Mr. Bibu - Court Clerk

**RUTH NEKOYE SITATI**

**JUDGE.**