



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW MISC. APPLICATION NO. 185 OF 2009

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW AND FOR LEAVE TO
APPLY FOR ORDERS OF CERTIORARI,**

MANDAMUS AND PROHIBITION

AND

**IN THE MATTER OF THE NOTICE NO. 5445 & 5446 AND DATED THE 31ST OCTOBER, 2008
IN RESPECT OF**

L.R. NO. 209/869 – RACE COURSE ROAD

AND

**IN THE MATTER OF ENFORCEMENT OF THE NOTICE – CRIMINAL CASE NO. 520A OF
2009**

AND

THE ORDER MADE ON THE 6TH FEBRUARY 2009

BETWEEN

REPUBLIC
APPLICANT

VERSUS

THE PRINCIPAL MAGISTRATE'S COURT, CITY COURT NAIROBI (HON. L.
NYAMBU).....1ST RESPONDENT

CITY COUNCIL OF NAIROBI2ND
RESPONDENT

VIKTAR NGUNJIRI.....3RD
RESPONDENT

EX PARTE: JACK AND JILL SUPERMARKETS LTD.

RULING

Before me is an application dated 14th May, 2009 by the ex parte applicant, Jack and Jill Supermarket Ltd, seeking the following orders:

“1.

2. **THAT this honourable court be pleased to cite for contempt the Town Clerk, City Council of Nairobi and Mr. Viktar Maina Ngunjiri for their disobedience of the order of this honorable court made on the 27th day of March, 2009 and duly served on each one of them and be committed to civil jail for a term not exceeding six months for the said disobedience of the court order.**

3. **THAT this honorable court do enforce compliance with its own orders in any other way it considers appropriate.**

4. **THAT the costs of these proceedings be provided for.”**

The application was made on grounds that:

“(a) **A valid court order was made by this court on the 27th day of March, 2009 restraining the respondents from evicting, demolishing and or interfering with the applicant's/tenant's occupation of the suit premises comprised in L.R. No. 209/869, Race Course Road/Temple Road.**

(b) **The court order together with a Penal Notice were personally served on the respondents and an affidavit of service duly filed.**

(c) **The respondents have flagrantly disobeyed the aforesaid court order and are gradually demolishing the suit premises.”**

The application was supported by an affidavit sworn by **Tom Onyancha**, the Managing Director of the ex parte applicant. In his earlier affidavit sworn in support of the application seeking leave to commence these contempt proceedings, the said deponent stated on 27th March, 2009 this court made an order

staying the implementation of Notices Nos. 5445 and 5446 and the subsequent order issued by the City Court on 6th February, 2009 relating to premises comprised in **L.R. No. 209/869**, hereinafter referred to as “**the suit premises**”. The order restrained the 2nd and 3rd respondents from demolishing, evicting the tenants and/or interfering with the suit premises. On 30th March, 2009 and 7th April, 2009 the 2nd and 3rd respondents respectively were served with the said court order together with a Penal Notice, Mr. Onyancha stated.

That notwithstanding, he added, on 8th April, 2009 the 3rd respondent, in cahoots with the 2nd respondent, commenced gradual demolition of the suit premises in total disregard of the said court order. Several photographs were attached to the affidavit as evidence of the alleged demolition.

The second respondent swore a replying affidavit through **N.M. Mung’alla**, Assistant Director Legal. He stated, *inter alia*, that the 2nd respondent had never been aware of any other proceedings involving the parties herein except the Notice of Motion in respect of this matter which was served upon the Deputy Director Legal Affairs on 15th May, 2009. He further stated that if at all the court order and the Penal Notice referred to by the ex parte applicant were ever served upon him (Mr. Mung’alla), that was done irregularly as he is not authorized to receive any court documents of personal nature on behalf of the 2nd respondent and the same was not brought to the attention of the Town Clerk.

The 3rd respondent also swore a replying affidavit and denied that he was ever served with the court order dated 27th March, 2009. He sought leave to cross examine the process server who had sworn the affidavit of service claiming to have served him. He further denied that any demolition took place on 8th April, 2009 and said that demolition started on 4th April, 2009 but only in areas where five tenants had vacated some shops. The 3rd respondent further claimed to have known of this suit only after his advocate caused the court file to be perused after reference to it was made in another matter that was before the Business Premises Rent Tribunal.

Maraga J directed that the process server, **Justus David Kilima**, the Town Clerk of the 2nd respondent and the 3rd respondent be cross examined on the service of the said order. Cross examination was done on 30th November, 2010.

Mr. Philip Kisia, the Town Clerk, said that he could not confirm whether the said order was ever served upon his predecessor, Mr. John Gakuo. Mr. Kisia was appointed as the Town Clerk on 29th April, 2009 but reported to the office on 7th May, 2009. He explained how service of court documents is effected. Service is done through the Director of Legal Services and thereafter the Town Clerk is advised accordingly.

Regarding the order of 27th March, 2009 issued by this court, Mr. Kisia said that it had a rubber stamp at the back showing that it was received by the Chief Litigation Counsel on 30th March, 2009.

The process server said that he served the order upon Mr. John Gakuo, the former Town Clerk, on 30th March, 2009. Mr. Gakuo then caused the order to be given to the Director Legal Services.

Regarding service of the order upon the 3rd respondent, the process server stated in his affidavit of service that on 28th March, 2009 he proceeded to Thika Town where the 3rd respondent operates a supermarket by the name Mathai Supermarket. He introduced himself to one Mr. Njoroge who confirmed that he was one of the managers in the said supermarket. The process server explained to him the purpose of his visit but Mr. Njoroge said that he had no instructions to accept court process. Mr. Njoroge however, requested for a copy of the court order and the Penal Notice for onward transmission to the 3rd respondent and he was given. Thereafter, on 7th April, 2009 at around 10.00 a.m. the process server was called on his cell phone by Mr. Tom Onyancha, the Managing Director of the ex parte applicant who requested him to proceed to Intercontinental Hotel where he and the 3rd respondent were having a meeting. He proceeded there and effected service of the court order and the Penal Notice upon the 3rd respondent but he refused to acknowledge service by signing on the original documents. The process server said that he had previously served the 3rd respondent with other court process and therefore he was well known to him. In cross examination by the 3rd respondent's advocate, the process server admitted that in his affidavit of service he had referred to the 3rd defendant by only one name – "Mr. Njoroge". Although the 3rd respondent's advocate challenged the validity of the affidavit of service due to reference to his client by that name only, the process server was emphatic that he had served the 3rd respondent severally and so he knew him well.

The 3rd respondent denied that he was ever served with the said court order as alleged. He however admitted having had a meeting with Mr. Tom Onyancha at Hotel Intercontinental. He said he had gone there because Mr. Onyancha had told him that the proprietor of Jack & Jill Supermarket Limited, the ex parte applicant, wanted to meet him to discuss how he could peacefully vacate the suit premises. He denied having been served with any document during that meeting.

Although the 3rd respondent said that he knew about this case in May 2009 he admitted that in an affidavit sworn by himself on 2nd of April, 2009 in **Business Premises Rent Tribunal Case No. 359 of 2009**, he had made reference to this case. He said that he had merely signed the affidavit on the advise of his former advocate, Mrs. King'oo.

The parties filed their respective submissions which I have carefully perused. The brief chronology of events that preceded these proceedings is well set out in the filed submissions. The events can briefly be stated as follows: The ex parte applicant has been a tenant on the suit premises for many years. In the year 2006 or thereabout the 3rd respondent purchased the suit premises which has several tenants therein. The 3rd respondent issued notices of termination of tenancies to the tenants and as a result the ex parte applicant filed a reference in the Business Premises Rent Tribunal in opposition to the notice. The ex parte applicant obtained orders against the 3rd respondent restraining him from evicting him from the suit premises pending hearing and determination of the reference. The orders of the tribunal were granted on 24th March, 2009.

The 3rd respondent alleged that in the month October, 2008 he was served with a notice by the City Council of Nairobi, Public Health Department, demanding that he carries out certain repairs and renovations to the suit premises. He failed to do so and as a result was charged in **Criminal Case No. 520A of 2008**. He pleaded guilty and was convicted accordingly and was required to carry out the

renovations. The 3rd respondent moved to the suit premises and put hoarding materials and started carrying out renovations to some of the shops in the suit premises. The ex parte applicant alleges that the 3rd respondent also demolished part of the premises occupied by itself. The ex parte applicant further stated that the 3rd respondent intended to evict him completely from the suit premises and he was forced to move to this court on 27th of March, 2009 to seek restraining orders which were granted. Thereafter the orders were served upon the 2nd and 3rd respondents.

The main issues for determination are whether the two respondents were served with the court order issued on 27th March, 2009 and whether there was any disobedience to the same.

With regard to the 2nd respondent, it appears to me that the order together with the Penal Notice was served upon Mr. John Gakuo, the then Town Clerk of the City Council of Nairobi and not Mr. Philip Kisia. Mr. Gakuo then referred the order to the Director Legal Services.

In respect of the 3rd respondent, although he denied that any service of the order was effected upon him, he did not deny that on the day he is alleged to have been served, 7th of April, 2009 at Hotel Intercontinental by Justus David Kilimahe was actually there with Mr. Tom Onyancha. The process server was cross examined by the 3rd respondent's advocate and save for some procedural errors in drawing of the affidavit of service, the process server was emphatic that he duly served the 3rd respondent at the said hotel.

There is also evidence that the 3rd respondent was fully aware of the existence of the said order as at 2nd April, 2009. On that day, he swore an affidavit in **BPRT Case No. 359 of 2009** and in paragraph 7 thereof stated as follows:

“That I need to comply with the said City Court orders and even the High Court Judicial Review Misc. Appl. No. 185 has refused to stay the said orders and City Court wants them complied in full (see annexure VM3)”

The 3rd respondent cannot therefore say that he learnt of these court proceedings in May 2009. The 3rd respondent did not deny having sworn the aforesaid affidavit. He cannot blame his former advocates for the aforesaid deposition, having appended his signature to the affidavit. I am therefore satisfied that the 3rd respondent was duly served with the aforesaid order, a Penal Notice and a Notice of Motion dated 6th April, 2009 as stated in paragraph 6 of the affidavit of service sworn by Justus Kilima. But even if he had not been so served, there is no doubt that he was aware of existence of the order. It is trite law that any person who knows of the existence of any court order but nonetheless decides to disobey the same is guilty of contempt of court and liable to be punished as by law provided. In **CHUCK vs. CREMAR [1846] 1 COOPTEMP COTT 338 at 342**, Lord Cottenham held as follows:

“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 suitors 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 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. Such being the

nature of this obligation two consequences will in general follow from its breach. The first one is that anyone who disobeys an order of the court is in contempt and may be punished by committal or attachment or otherwise. The second one is that no application to the court by such a person will be entertained until he has purged himself of this contempt.”

The next issue for determination is whether there was breach of the said order. I have no reason to doubt the averments made by Tom Onyancha in his affidavit sworn on 8th May, 2009 to the effect that on 8th April, 2009 the 3rd respondent started to demolish the suit premises, having hired several people to assist him in so doing. The photographs that are annexed to the affidavit of Mr. Onyancha reveal that clearly. Although it was alleged that the demolition was done in cahoots with the 2nd respondent, there is no sufficient evidence to connect the 2nd respondent to the acts of breach of the order as aforesaid. The 3rd respondent had obtained approval to repair the premises from the 2nd respondent, he was not given permission to demolish the building. There is no evidence to indicate that by allowing the 3rd respondent to repair the building the 2nd respondent was aiding and abetting violation of a court order by the 3rd respondent.

From the foregoing, I find the 3rd respondent guilty of contempt of court. What then should be the reaction of this court in such an instance? In **SHAH & ANOTHER vs. SHAH [1989] KLR 220**, Simpson J (as then was), quoted the words of Lord Diplock in **A.G. vs. TIMES NEWSPAPERS [1973] 3 All ER 54 at page 71** where the learned judge delivered himself thus:

“In any civilized society it is a function of government to maintain courts of law which its citizens can have access for the impartial decision of disputes as to their legal rights and obligations towards one another individually and towards the state as representing society as a whole. The provisions of such a system for the administration of justice by courts of law and the maintenance of public confidence in it are crucial if citizens are to live together in peaceful association with one another.”

From the facts of this case, it is clear that the 3rd respondent wanted to circumvent the due process of law by unlawfully evicting the ex parte applicant from the suit premises when there were pending matters in court and an order restraining him from evicting the ex parte applicant or interfering with its business. The fact that the suit premises may have been in a state of disrepair and which led to criminal proceedings being preferred against the 3rd respondent by the City Court did not permit the landlord to breach a lawful court order. In the circumstances, he ought to be punished by this court. Before I pass sentence upon the 3rd respondent, I invite him to mitigate if he so wishes.

DATED AT NAIROBI THIS 16TH DAY OF FEBRUARY, 2011.

MITIGATION

MR. ORINA

I have no instructions to offer any mitigation.

D. MUSINGA
JUDGE
COURT

The 3rd respondent is sentenced to a fine of Kshs.200,000/= in default to imprisonment for a term of four (4) months. The 3rd respondent will also bear the applicant's costs of this application.

In the event that the 3rd respondent fails to pay the said fine within the next two days from the date hereof a warrant of his arrest shall issue.

DATED AT NAIROBI THIS 16TH DAY OF FEBRUARY, 2011.

D. MUSINGA

JUDGE

In the presence of

Nazi – court clerk

Mr. Mwangi for the applicant

Mr. Orina for the 2nd respondent and holding brief for Mr. Mutula Kilonzo Jr for the 3rd respondent

2nd and 3rd respondents - absent