



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA**

**AT KITALE.**

**CIVIL APPEAL NO. 1 OF 2004.**

**KOGO MUGANDA VINCENT ::::::::::::::::::::::::::::::: APPELLANT.**

**VERSUS**

**JOHN MBUGWA KUNGU :::::::::::::::::::::::::::::::APPLICANT.**

**RULING.**

1. The Notice of Motion dated 20<sup>th</sup> November, 2009 is taken out by John Mbugua Kungu who was the plaintiff in SPMCC No 85 of 2001. In that case judgment was entered in favor of the applicant and an order was issued to the effect that the respondent be evicted from the suit premises. The respondent was evicted from the suit premises and all the semi permanent structures that were standing on the plot were also demolished. The respondent's application for stay of execution were pending the hearing and determination of the appeal were also dismissed in the lower court and also in this court.

2. On the 15<sup>th</sup> June, 2007 the respondent filed an application seeking for an order of stay of execution. On 25<sup>th</sup> July, 2007 in the presence of the parties the court ordered that there be an order of status quo which meant that there would be no more demolition and the respondent was not supposed to undertake any construction on the suit premises. It is the respondent who extracted the order and served it upon the applicant. It is alleged that notwithstanding the order directing both parties to observe the status quo, the respondent disobeyed the order, he reentered the suit premises and constructed a structure which is called Trees shade Café where he is carrying on business. The applicant has annexed copies of the certificates of lease in which he is the registered proprietor of the plot known as Kitale Municipality Block 6/159 from 1<sup>st</sup> February, 1996. He also annexed photographs of the structures constructed by the respondent and the photographs of the plot after he had effected the demolition pursuant to the order granted in the lower court.

3. The applicant seeks for an order of committal of the respondent to prison for a period of 6 months for deliberately disobeying the order of 25<sup>th</sup> July, 2007. The applicant also seeks for an order that the respondent do punch the contempt by demolition all the structures that he has put up in the suit premises or in the alternative the applicant can demolish the structures at the expense of the respondent. This application is supported by the affidavit of the applicant sworn on 20<sup>th</sup> November, 2009. The statements of particulars filed pursuant to order 52 rule 2 (2) of the Supreme Court Rules. The applicant also filed a verifying affidavit which has details the chronology of the events and several applications that were made culminating with the order to maintain the status quo.

4. The applicant also obtained leave of the court on 10<sup>th</sup> November, 2009 to institute this application for contempt. In further argument in support of the application for contempt, Mr. Kiarie, learned counsel for the applicant submitted that the orders that the respondent has disobeyed were made at his request. It is not open for the respondent to say he was not served with the order because it was the applicant himself who extracted the order and the penal notice and served it upon the applicant. Thus the respondent frivolously disobeyed the order by moving to the suit premises and constructing structures while the order maintaining the status quo was in force. Counsel cited several Court of Appeal decisions where the Court of Appeal emphasized the duty of the court to maintain and protect the dignity of the court by punishing deliberate disobedience of its orders. (See the case of **Refrigerator & Kitchen Utensils Limited vs. Gulabchand Popatlal Shah & Others ( CA No. 39 of 1990)**)

5. The respondent did not file any replying affidavit but Mr. Mooka, learned counsel for the respondent relied on preliminary objection that contains points of law. According to the respondent, although the application was made by the respondent where the order of status quo was issued, the applicant never extracted the order and never served it upon the respondent. Moreover, this application was filed more than one year ago and it was never prosecuted. According to the case of *Awadh vs. Marumbu* (No. 2) This court has been asked to determine whether the respondent committed contempt of court by disobeying a court order. It is common ground that the order directing the status quo be maintained was issued by the court and the court clarified what constituted the status quo. It is also common ground that the respondent is the one who extracted the order as well as the penal notice and served it upon the applicant. The issue to determine is whether the respondent was served with the order. This question answers itself because the facts that the respondent extracted the order and drew the penal notice is clear demonstration that he was aware of the order of status quo. The order was directed to both the applicant and the respondent. The respondent has not filed any replying affidavit in respect of this application. The facts deposed to in the affidavit and the statement of facts have not been controverted. In other words the respondent has not denied that he moved into the suit premises and constructed structures when there was an order barring any party from entering the suit premises. It is trite law that court orders must be obeyed with utmost obedience (see the case of **Mutitika vs. Baharini Farm Ltd (1985) KLR** in addition to setting out what constitutes contempt of court also set out the standard of proof in contempt of court proceedings).

***“A person one, who knowing of an injunction, or an order of stay, willfully does something, or causes others to do something, to break the injunction or interfere with the stay, is liable to be committed for contempt of court as such a person has by his conduct obstructed justice.”***

This is because an act in contempt of court undermines the authority of the court and erodes the rule of law which in effect is replaced by the rule of the jungle that is why courts have always punished persons found to have willfully disobeyed the court order.

6. The absence of any reply from the respondent regarding the construction of the illegal structures clearly confirms that he did so in the face of a court order. The respondent has not apologized for acting against a court order. An act in contempt of court undermines the authority of the court and if allowed to persist erodes the rule of law which in effect is replaced by the rule of the jungle. That is why the court is given powers to punish for contempt. See the English case of *Hadkinson vs. Hadkinson* ALL England Reports Vol. 2 1952 page 569 where it was held:-

***“It was the plaintiff's obligations of every person against, or in respect of, whom an order was made by a court of competent jurisdiction to obey it unless and until it 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 on its due observance, for such an order was made in the interest of the welfare of the child, and the court would not tolerate any interference with or disregard of its decisions on those matters, and least of all would permit disobedience of an order that a child should not be removed outside its jurisdiction; in the present case the mother was not entitled to prosecute or be heard in support of her appeal until she had taken the first and essential step towards purging her contempt of returning the child within the jurisdiction.”***

7. I am satisfied that the respondent defied the court orders and went ahead to construct structures on the suit premises. The respondent was aware of the court orders because he extracted it and served it upon the applicant. For those reasons the respondent is in contempt of the court order. He is ordered to pay a fine of Ksh. 150,000/= and in default the respondent is committed to civil jail for a period of 3 months. The respondent is also ordered to remove the structures on the suit premises being Title No. Kitale Municipality Block 6/159 within 14 days from the date of this order. Failure to do so the applicant or his agent to remove the structures and the respondent will pay the costs. The respondent will also pay the cost of this application.

Ruling read and signed on 8<sup>th</sup> day of April, 2011.

**MARTHA KOOME.  
JUDGE.**