



**REPUBLIC**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL CASE NO. 87 OF 2011**

**GACHONI ENTERPRISES LTD.....PLAINTIFF**

**VERSUS**

**D. N. NYAGA T/A NJERU, NYAGA & COMPANY  
ADVOCATES & ANR..... DEFENDANTS**

**RULING**

Coram: Mwera J.  
Wanjohi for applicant  
In person, the Respondent  
Kariu for Interested party  
Court clerk Njoroge

The applicant limited liability company filed a chamber summons dated 24.3.11 under section 5 (i) of the Judicature Act and Order 53 of the Civil Procedure Rules with 3 prayers:

- i) that leave be granted to apply to cite the respondent, David Njeru Nyaga, t/a Njeru Nyaga & Co. Advocates for contempt for disregarding the court order of 17.12.10;
- ii) that leave be granted to apply for an order that the said David Njeru Nyaga do purge the contempt and be ordered to refund sh. 5.5m to the applicant; and
- iii) that leave be granted to the applicant to apply for writs of attachment against David Njeru Nyaga to satisfy the amount of sh. 5.5m.

There were grounds on which the prayers were predicated as well a statutory statement and a verifying affidavit sworn by Peter Mbogua, the applicant's Managing Director. The details of both these need not be gone into since the court decided to ask the parties to confine themselves to submit on the issue of leave (Prayer 1), even as this application was by its nature, **ex parte**. Suffice it to note that the intended proceedings are based on a sale agreement dated 19.2.10 in which the applicant purchaser of LR No. 7149/115 deposited sh. 5.5m, down payment, in the respondent's lawyer's bank account. He was acting for the vendor. The respondent acknowledged receiving and holding that sum as a stakeholder up to the end of the intended transaction. It was claimed that the respondent and the vendor had withheld material facts in the deal meaning that in the end a clean title could not be passed to the applicant because of some two pending cases Nairobi HCCC No. 167/08 and MKS HCCC 105/01 wherein the vendor had been restrained from disposing of the subject land. So the applicant demanded a refund of its sh. 5.5m. It then filed NRI ELC 391/10 and got orders that the respondent do deposit in court sh. 5.5 million pending contempt proceedings, within 7 days. Served with the order, the respondent willfully refused to obey that

court order. Due documents, proceedings were exhibited. And accordingly the applicant sought leave to cite the respondent for contempt.

On his part the respondent retorted that the sum of sh. 5.5 million had already been paid to his client and indeed the applicant had filed many applications previously and the responses to them had made that clear to it. Payment had been made after the sale had been completed. So the orders of 15/12/10 to deposit the money in 7 days had already been overtaken by events because that sum had since been paid out to the seller. The respondent was thus not in contempt of the orders.

After going over the submissions in the light of the history of the matter, this court is minded to state at this point that leave to cite the respondent for contempt is granted. Whatever that party has put forth at this point may be used in his defence at the hearing of the contempt proceedings. At this stage what the court focused on is whether there was a court order to deposit the sum of sh. 5.5m. There was one directed to the respondent. It was not complied with and that is not denied. Accordingly, there is a basis for the applicant to desire to bring contempt proceedings against him. The success or failure of those proceedings are not the concern of this court now. That decision will be made by the court which will hear both sides and decide whether to find for or against.

Orders accordingly. Leave to cite for contempt granted. Due course to be taken for early action in that regard. Costs in the cause.

Delivered on 23.5.11.

**J. W. MWERA**  
**JUDGE**