



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**CIVIL APPEAL NO. 263 OF 2010**

**ABDULLAHI ABDI NUR ..... APPELLANT/ORIGINAL  
PLALINTIFF**

**VERSUS**

**KHALIF HASSAN ABDULRAHMAN ..... RESPONDENT/ORIGINAL  
DEFENDANT**

*(Being an appeal from the Decision of Hon. M K Kiema Esq, Resident Magistrate delivered in CMCC No. 8809 of 2009 dated 15<sup>th</sup> June 2010 at Milimani Commercial Courts, Nairobi)*

**JUDGMENT**

**I. INTRODUCTION**

1. Seeking the protection of the courts, Abdulahi Abdi Nur, the appellant original plaintiff filed suit in the magistrate's court on 22<sup>nd</sup> December 2009 and prayed for orders of :

***“Injunction ..... restraining the defendant [Khalif Hassan Abdul – Rahman] by himself, servants, employees or agents or otherwise howsoever from entering and/or evicting the plaintiff from all that property known as LR No. 36/11/42 situate along 10<sup>th</sup> street Eastleigh Nairobi.”***

2. This suit had never been heard and is still pending before the trial magistrate's court. What was being heard was an application dated 22<sup>nd</sup> December 2009 seeking the same orders of an injunction till the hearing of the application interparte and till the determination of the suit.

3. The trial magistrate due to pressure of work was unable to hear the application ex-parte but did issue interim orders that were extended till an interparte hearing was heard.

4. Parties submitted written submissions. In its ruling on 29<sup>th</sup> March 2010, the trial magistrate dealt with the second prayer that orders of injunction do issue till the determination of the suit.

5. The appellant original plaintiff's argument had been that he has an equitable right to the property thereby having been granted possession in consideration of monies paid to the defendant for construction whilst the respondent original defendant claim that the appellant/original plaintiff was actually a tenant and was in arrears of rent.

6.It was the view of the Hon. Magistrate that in order for the main suit to be determined, orders of injunction do issue. The applicant's original plaintiff chamber summons of 22<sup>nd</sup> December 2009 was granted.

7.Despite the order that had been issued against the respondent/original defendant, on 18<sup>th</sup> May 2010 at 5.30 am, he "levied distress" against the appellant/original plaintiff. The effect was that the appellant was evicted from the suit premises. He then had his property taken away. The appellant original plaintiff returned to the Hon. Magistrate court and prayed that the respondent original defendant be punished for contempt. He prayed for these orders through his application dated 18<sup>th</sup> May 2010.

8.The Hon Magistrate stated in his brief ruling that:

***"Court orders are not issued in vain. For these reasons, I shall allow orders b and c, OCS Pangani police station to ensure compliance. Other orders to issue after inter-parte hearing on 28<sup>th</sup> May 2010. Contemnor to attend court on that day."***

9.During the interparte hearing, the advocate for the applicant(appellant/original plaintiff) relied on the case law of **Hadkinson – Vs – Hadkinson** (1952) ALL ER 567 and argued the respondent/original defendant to be punished for contempt.

10. Prayers of stay had been attempted to be made for the orders of 29<sup>th</sup> March 2010 but were withdrawn. Then the action took place. This was taking the law into his own hands.

11. He urged the court that under Order 39 rule 2(a) no leave is required to push for contempt. Injunction orders were given, they were disobeyed and can therefore be punished under Section 5 of the Judicature Act. No leave is required to punish for contempt.

12. In reply the respondent/original defendant that whereas there were orders that no eviction would occur it did not preclude the respondent/original defendant from levying distress.

13. He informed the court that only the High court and Court of Appeal may pursue for contempt.

**Attorney General**

**Vs**

**Nguruman Ltd**

2005 eKlr

**Ondiek T/a Stephen high School**

**Vs**

**Atsenze T/a Rosemary Tailoring College**

**(2005)**

eKLR

14. In that magistrate's ruling the trial magistrate considered his original orders made on 21<sup>st</sup> May 2010 that read:

***"1. That the plaintiff be restrained to possession of all that premises known as LR No. 36/11/42 situated along 10<sup>th</sup> street Eastleigh Nairobi forthwith.***

***2. That Khalif Hassan Abdulrahman, the defendant herein, Abdikadir WARSame Ali (the auctioneer) be ordered to return all goods, personal effects, personal documents, personal properties for the guests and to repair the damages to the suit property.***

***3. That the OCS Pangani station to issue compliance***

***4. That the contemnor to attend court on 28<sup>th</sup> day of May 2010 for interparte hearing."***

15. Reflecting on his orders, the trial magistrate was of the opinion that these orders did not include precluding the respondent/defendant from levying distress under the Distress of Rent Act Cap 293. If it is so levying illegally Section 8 of the Act provides for double damages.

16. The trial magistrate had been placed with another application before him dated 26<sup>th</sup> May 2010 that sought orders to review and or set aside the courts orders of 21<sup>st</sup> May 2010 and seeking stay of execution.

17. The trial magistrate came to the conclusion that the respondent/original defendant was not in contempt of court. The magistrate's orders of 21<sup>st</sup> May 2010 were set aside. The orders were originally the ones that granted orders of injunction to restrain the respondent/original defendant from evicting the appellant original plaintiff from the premises.

18. Being dissatisfied with the decision of the Hon.Magistrate delivered on 15<sup>th</sup> June 2010, the original plaintiff appealed to this court on 8<sup>th</sup> July 2010.

## II APPEAL

19. The appellant prayed to this High Court to have the ruling and orders of the resident magistrate's court delivered on 15<sup>th</sup> June 2010 [to] be set aside.

20. That Khalif Hassan Abdirahman (the respondent herein) Abdikadir Warsame (auctioneer) Ahmed Hassan Abdulrahman and Abdi Nassir be committed to jail and detain in person for a term of 6 months or such pursued as the Hon Court would determine for contempt orders issued on 31<sup>st</sup> March 2010.

21. The appellant in his memorandum stated that the Hon. Magistrate erred in failing to penalize the contemnor. It was wrong for the trial magistrate to conclude that no contempt had been committed.

22. In reply, the respondent/original defendant dealt on the relationship of the parties. This was that of landlord and tenant. There was no written agreement but rent was being paid (illustrated in the subordinate court of Ksh. 350,000/= per month.) The appellant is in arrears of rent. There was a notice issued from the Business Premises Rent Tribunal which was never reacted upon by the appellant.

23. The appeal has no merits, stated the respondent. That it be dismissed.

## III OPINION

24. The genesis of this whole matter lies with the original suit yet to be heard. It sought for orders of injunction restricting the defendant from:

***“entering and or evicting the plaintiff from all the property known as LR No. 36/11/42 situate along 10<sup>th</sup> street Eastleigh Nairobi”***

25. It is a plaint that spoke of money forwarded to the respondent to complete construction in the suit premises in exchange of 20 years occupation of the premises by the appellant.

26. Already the issue of jurisdiction (monetary) may have arisen. There would be the issue of the parties relationship that the appellant insisted in the subordinate court required to be determined. So is it one of land/lord; controlled or uncontrolled and licensor/licensee? These are issues that should have been pleaded and be determined.

27. Injunction orders were issued and in place when the distress of rent was exerted by the respondent. The effect being to render the occupation of the appellant of no consequences.

28. Should the trial magistrate who issued orders of injunction set them aside? Did the trial magistrate

have powers to punish for contempt?

29. The appellant came to court for protection. He should have filed the suit in the High Court as the monetary value of the transaction leading to the prayers for injunction may have exceeded the jurisdiction of the subordinate court as stated above.

30. The orders of the court were disobeyed. The trial magistrate began the process to punish for contempt. It is clear that the magistrate's court do not have powers to punish for contempt or the disobedience of the law. A party must seek leave of the court to then file contempt proceedings to be so pushed by the High Court or Court of Appeal.

31. There is therefore two forms of contempt. The first being the one above. The second type the disobedience committed before the court. The court may push for contempt.

32. It is the first form where the contempt occurs away and not in the presence of the court that leave to file contempt proceedings is required for magistrate's court to the High Court.

33. I would in the event point out that the trial magistrate had before him a contempt proceedings. The issue of his jurisdiction should have been raised or otherwise. The trial magistrate would have stated that the High Court would be best to deal with the matter or proceed to punish for contempt and let the matter be dealt in appeal.

34. The appellant argued that the magistrate had the powers to be able to punish in contempt under Order 39 r 2(1) Civil Procedure Rules (former rules) that reads:

***"1. In any suit for restraining the defendant from committing a breach of contract of other injury of any land whether compensation is claimed in the suit or not, the plaintiff may at anytime after the commencement of the suit either before or after judgement, apply to the court for a temporary injunction to restrain the defendant from committing breach of contract or injury of like kind arising out of the same contract or relating to the same property or right.***

***2. the court may by order grant such injunction on such terms as to an injury as to damages, the duration of the injunction, keeping account giving security or otherwise as the court thinks fit.***

***3. In cases of disobedience, or of threat of such items, the court granting an injunction may order the property of the person guilty of such disobedience or threat to be attached and may also order such person to be detained in person for a term not exceeding six months unless in the meantime, the court directs his release.***

***4. no attachment under this rule shall remain in force for more that one year at the end of which time, if the disobedience or threat continues, the property attached may be sold, and all of the proceeds the court may award such compensation as it thinks fit, and shall pay the balance if any to the party entitled thereof."***

35. The trial magistrate took a different turn and being persuaded declared no contempt had been committed by the respondent in his ruling of 15<sup>th</sup> June 2010.

36. There was this situation before the trial court. The first being the orders of injunction. The second, the disobedience of those orders, the third, the distress of rent levied as read with an application to set aside the order or stay the orders of injunction.

37. In declaring there was no contempt that had been breached, the orders of injunction that had been heard interparte should have remained on record. The trial magistrate instead set it aside "*suo moto.*"

38. The Hon. Trial Magistrate should have considered that the relationship between the parties was still to be determined by court as an issue and should have permitted parties deal with these issues in the main

suit.

39. I am of the opinion that the trial magistrate heard the application of 18<sup>th</sup> May 2010 before him made a decision on a second application dated without hearing the parties.

40. The first application 18<sup>th</sup> May 2010 was to punish for contempt. This the magistrate had no jurisdiction to determine. The second application for stay of the injunction orders was allowed because the injunctive orders were duly set aside. There was no application that prayed for the setting aside before the trial magistrate to be determined. It was the application of 18<sup>th</sup> May 2010 on contempt proceedings.

41. I would set aside the ruling of 15<sup>th</sup> June 2010 to the extent that the injunctive orders be put in place till the determination of the main suit.

42. As to the orders of contempt, this was instituted in the court which held that there was no disobedience. Levying distress of rent amounts to that disobedience. This contempt in this circumstances should have been not to have heard the respondents until the contempt was purged.

43. The issue of contempt would not be reinstated as the issue of procedure arises.

44. I would order that the status of the injunction be reinstated. That the status be returned to where the injunction had been issued.

45. There will be costs to the appellant.

**DATED THIS 4<sup>th</sup> DAY OF OCTOBER 2011**

M.A. ANG'AWA  
JUDGE

*Advocates* :

- i) *M/s Lumumba, Mumma & Kaluma & Co Advocates for the appellant/original plaintiff*
- ii) *M/s Hassan, Bulle & Co Advocates for the Respondent/original defendant*