



**REPUBLIC OF KENYA**

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

**MILIMANI COMMERCIAL AND TAX DIVISION**

**HC MISC NO. 309 OF 2010**

**LITWACHI.....MUSA.....PLAINTIFF**

**VERSUS**

**NAIROBI CITY COUNCIL & ANOTHER .....1<sup>ST</sup> DEFENDANT**

**JOHN KAILIKIA M’NAMKIRIA.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. The Notice of Motion dated 6<sup>th</sup> May, 2010 is brought by the 2<sup>nd</sup> defendant who is a decree holder in RMCC No 501/01 at the Chief Magistrate’s court Milimani. According to the decree issued on 2<sup>nd</sup> November, 2007 the respondent was ordered as follows:-

- 1. **THAT** the plaintiff to give a vacant possession of the suit premises.
- 2. **THAT** the 2<sup>nd</sup> defendant to occupy the suit premises and continues trading as he did before this suit was instituted.

3. **THAT** costs to the 2<sup>nd</sup> defendant.

2. According to the applicant, the order was served upon the judgment debtor, he however disobeyed and disregarded the order by failing to give vacant possession as ordered in the above decree. The applicant sought for leave of this court to institute contempt proceedings and leave was granted on 24<sup>th</sup> April, 2010. The applicant filed a notice of Motion in which he is seeking for an order that the plaintiff/judgment debtor be cited for contempt and be committed to civil jail for six months. The application is supported by the affidavit of the applicant. He has also annexed the copy of the order, the penal notice and the ruling in HCC CIVIL APPEAL NO. 646 of 2008 in that ruling, the respondent applied for leave to file an appeal against RMCC No. 501 of 2001 but his application was dismissed. That

notwithstanding, the respondent has continued to construct on the suit premises as per the annexed copies of photographs showing the structures occupied by the respondent. This application was not opposed. The respondent although served with a notice of motion did not attend court.

3. This court has to determine whether the respondent committed contempt of court by disobeying the court order. It is trite 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 this case 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”.**

4. 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.

4. However, before a person can be found to be in contempt, there must be evidence of service of the order together with the penal notice. I have gone through the application I have not seen an affidavit of service by a process server stating how and when the respondent was served with the court order and penal notice. What I see on record are two affidavits attached to the applicants application sworn by Kennedy Okall Aroko sworn on 12<sup>th</sup> May, 2010 where he states that he served a notice of motion dated 6<sup>th</sup> May, 2010. The other affidavit of service by the same process server sworn on 18<sup>th</sup> November, 2009 describes service of a hearing notice dated 12<sup>th</sup> November, 2009. There is no affidavit of service describing how the respondent was served with the order and the penal notice. For that reason, this application would fail.

5. The second reason why this application can not succeed is for reasons that execution can issue pursuant to the decree by the lower court by way of eviction of the respondent from the suit premises. Thirdly in my view, the order is vague because the suit premises is not described. I think I need not say anymore, save that the application is dismissed for lacking in merit with no order as to costs.

RULING DATED THIS 22<sup>ND</sup> DAY OF OCTOBER, 2010

**MARTHA KOOME  
JUDGE**