



REPUBLIC OF KENYA

HIGH COURT AT MOMBASA

MISCELLANEOUS CIVIL APPLICATION 241 OF 2009

- 1. ELISTONE MBELA**
- 2. FRANCIS OLOO ODHIAMBO**
- 3. DAVID MBOGHO**
- 4. NORMAN MGHOSI**
- 5. BERNARD MWALIMU**
- 6. JEMADARI LIBLLAGAN**
- 7. ABUKAR M. ABUKAR**
- 8. ROGER SIMWA**
- 9. BEATRICE OKONJI**
- 10. JOHN KALO**
- 11. STANLEY KAMWERE**
- 12. YUSSUF I. ABDI**
- 13. SAMUEL NGANGA**
- 14. DAMIAN KAMATA**
- 15. DONALD ONZERE**
- 16. FRANCIS M. KIHARA**
- 17. FAITH OUNZA**
- 18. STEPHEN OLANGO**
- 19. SIMON MUNYAKA**
- 20. AGNETA OGONDA**

VERSUS

1. JAMES RUTHA, MANAGING DIRECTOR,
NATIONAL HOUSING CORPORATION

2. DAVID NGUGI, ESTATE OFFICER, NATIONAL HOUSING
CORPORATION ESTATE, CHANGAMWE

3. JOEL TITUS MUSYA T/A MAKURI ENTERPRISESRESPONDENTS

RULING

This is an application by the Applicants for committal of the

Respondents to civil jail for a term not exceeding six (6) months for disobeying and breaching the order of the Mombasa Resident Magistrate’s court in respect of Civil Case No. 2665 of 2008 which order was initially granted ex parte on the 19th November 2008 and subsequently confirmed on the 23rd April 2009 after inter partes hearing thereof.

The Applicants contended that the Order was duly served on the corporation. That by reason of the service of the said order upon them the Respondents became and were aware of the same and of its effect and purport. It is alleged that in utter disobedience of the said order the Respondents have embarked on levying distress and evicting and/or locking out the applicants from the demised premises. The application is supported by an affidavit sworn by two of the Applicants on 18th June 2009.

The Respondents in opposition to the application filed a Notice of Preliminary Objection, grounds of opposition and a replying affidavit. With leave of the court there were further affidavits filed by both sides.

I have considered the application, the replying affidavit and the submissions by counsel. It is my view that the application raises three issues for determination by this court namely:-

1. *Whether the order given by the court and extracted is a valid order.*
2. *Whether the order was duly served on any of the Respondents and if any of them was aware of the contents and existence of the order*
3. *Whether any of the Respondents disobeyed or violated the orders of this court.*

With regard to the first question, the court order in question is that which was given on 19th November 2008 and issued on 24th November 2008 in RMCC Bo. 2665 of 2008. The Order reads as follows:-

“

2. the Defendant do and is hereby restrained by itself, its servants or agents or otherwise howsoever from locking the demised premises or by levying distress in respect of arrears arising from disputed increment of rent in respect of the defendant’s residential premises occupied by the plaintiffs pending the hearing of this application inter partes.

3. The plaintiffs' said application to be heard inter partes on the 3rd day of December 2008.

The applicants contends that the said orders were confirmed on 23rd April 2009 after inter partes hearing of the application. The Respondents do not deny that the said orders were subsequently confirmed after hearing inter partes. I have perused the court order and do find that it is clear, certain and unequivocal in its terms and contents. It is a valid order of a competent Court of Law in Kenya.

-Was it duly served on the Respondents?

The applicants filed an affidavit of service by one Peter Simiyu a duly authorized court process server. He deponed that on the 2nd December 2008 at about 10.17 a.m. he proceeded to National Housing Corporation Estate Office situate at Changamwe which office was personally known to him whereat he found the secretary to whom he introduced himself and explained his purpose of being there. He further stated that she then sought and was granted permission by Mr. David Ngugi (the officer –in – charge) who was said to be away attending a seminar and he accordingly tendered to her copies thereof and for which she accepted service by signing at the back of the return copy.

The process server does not identify the name of the so-called secretary. He does not show that she had authority to accept process and such court orders on behalf of the National Housing corporation. It is not explained how Mr. David Ngugi gave permission to the unnamed secretary to accept service while he was away attending a seminar. It is not proven that David Ngugi himself is authorized to accept legal process as he is not named as a corporation secretary, a director, Chief Executive or other authorized officer.

In any case, it is trite law that for one to seek committal of another for breach of a court order he must prove personal service of the order on the alleged contemnor. This is an essential requirement with a very few exceptions. I hold that there was no personal service on the Respondents to the application.

Be that as it may, the Respondents have not denied that the orders of this court granted ex parte on 19.11.08 were subsequently confirmed by the court on 23rd April 2009 after inter partes hearing of the application dated 14.11.08.

One of the applicants deponed in his further affidavit that on the 30th April 2009 all his household goods were thrown out of the suit premises by the 3rd Respondents on the instructions of the 2nd Respondent and he was forcibly evicted from the suit premises together with his family. That prior to the said eviction the 3rd Respondent had levied distress and attached selected goods in purported recovery of disputed arrears of increment of rent.

The applicants through their counsel stated that while there were levy of distress only 3 of the applicants were ultimately evicted. The three filed further affidavits but two of them withdrew their affidavits leaving that of David Mbogho. The Respondents have not denied that he was evicted from the premises on 30th April 2009 which oddly is on a date after the Interim Orders were confirmed after inter partes hearing. It is my view that if an order is granted against a party after hearing of an application on its merits and after defending it and one is represented by counsel then something is terribly wrong if the said party goes ahead to do the very thing he was barred or restrained from doing by the court.

The Respondents contended that they were not served with the orders of this court. The complaint here is that the Respondents violated the Orders after they were confirmed in court after inter partes hearing.

Was it a requirement that the respondents be served with the confirmed court orders for them to be liable for contempt? It is to be noted that the defendant through counsel participated in the inter partes hearing and the orders made. It is deemed that the Defendant knew of the court's final orders on the interlocutory application. There was no application for revision, stay or appeal.

Instead the defendant through some of its officers, (it is alleged that it was David Njenga Ngugi the officer in charge Mombasa Branch of the Defendant Corporation) proceeded to evict one of the applicants

Mr. David Mbogho. It is to be noted that the said was done in pursuance of distress for rent as I have not been shown any eviction order issued by any court.

Should this court countenance such conduct? Is it mandatory in such a situation that that be personal service of the court order made on 23rd April 2009?

I do hereby hold that the Defendant Corporation knew of the existence of the court orders of 23rd April 2009 which was a confirmation of the earlier interim ex parte orders of 19th November 2008. By evicting or purporting to levy distress on the goods of the applicants, the defendant blatantly violated the terms of the order of the court. I am satisfied that the defendant had notice of the existence and terms of the court order through its participation in the proceedings and presence of its advocates in court.

On a balance of probability I do find that the eviction was ordered by one David Njenga Ngugi. He is the Senior Estate Officer and in charge of Mombasa Branch. The eviction was certainly carried out on his orders.

This court will not allow the due process of the court to be taken advantage of to defeat the course of justice. While personal service is essential yet when it is so open, clear and certain that one knows of the existence of the court orders and the terms therein and despite that disregards the said order, the court will not sit back and demand personal service. The purpose of personal service is to ensure that the intended contemnor was made aware of the court order. In this case the intended contemnor was deemed to be in court when the orders were made.

The law of contempt of court is intended to uphold the dignity of the court and effective administration of justice. It is to be exercised with case and restraint. However, when necessary it must be exercised with decisiveness and firmly. This is to prevent miscarriage of justice, judicial chaos, anarchy and impunity.

It is my duty to ensure that the wrong that has taken place is corrected.

I do hereby order that:

- 1) Defendant through its officers the Managing Director James Ruiitha and the Senior Estates Officer Mr. David Njenga Ngugi to immediately reinstate and put the said **DAVID MBOGHO** back to possession and occupation of his premises at Block 11/2/8 DR No 1.
- 2) In default the said two officers shall personally appear before this court on the date given here in to show cause why they should not be committed to civil jail for contempt of court.
- 3) The third Respondent Joel Titus Musya t/a Makuri Enterprises produce a copy of the court order or authority he had to purportedly evict the said David Mbogho or any other tenant at the suit premises.
- 4) The said third Respondent within 7 days submit an account of all fees received from the Applicant herein for “distraint fees”
- 5) Mention on 14th October 2009. All the 3 Respondents to attend if there is default.

Dated and delivered at Mombasa this 30th day of September 2009.

M. K. IBRAHIM

J U D G E

