



**REPUBLIC OF KENYA**  
**HIGH COURT AT NAIROBI ( MILIMANI LAW COURTS**

**CIVIL SUIT 622 OF 2008**

**JOHN KENNETH MUGAMBI.....PLAINTIFF/APPLICANT**

**VERSUS**

**CITY COUNCIL OF NAIROBI.....DEFENDANT/RESPONDENT**

**RULING**

The plaintiff moved to this court, vide a plaint dated 23<sup>rd</sup> December 2008, and filed the same date. In brief the plaintiff/applicants complaint is that, he was allotted house No. 26 Jevanjee Estate Avary Road Nairobi, on the 16<sup>th</sup> September 2008, for which allotment, the plaintiff paid Kshs. 40,000.00, comprising 30,000.00 towards the deposit of the house, for three months and 10,000.00 towards Rent. This was followed by confirmation of the receipt of the said amount by the defendant, followed by the issuance of a rent card to the plaintiff No. 32333 clearly confirming that the suit premises had been allotted to the plaintiff.

The plaintiffs' grievance arose from the fact that, on the 19<sup>th</sup> December 2008 at about 5.00 p.m. the defendants agents, servants and or employees did enter the suit premises and illegally and unlawfully evicted the plaintiff and his family without just cause leaving the plaintiff to spent the night in the cold, without furnishing him or his family the notice to vacate the said premises.

By reason of the afore said illegal entry, the defendants agents, servants and or employees did damages, waste or destroy and take away the plaintiffs household goods at an estimated cost of Kshs. 180,000.00 personal documents, cash in the sum of Kshs. 129,000/= equipment and a combination of herbal drugs at an estimated cost of Kshs. 1,999,520/= which were in the suit property.

In consequence of the afore said complaint, the plaintiff/applicant sought the following reliefs:-

*(a) A permanent injunction restraining the defendant and/ or agents from evicting, interfering with the plaintiff's quiet enjoyment, occupation and possession or transferring and or allotting or otherwise charging and/or disposing or interfering with the suit premises. More so known as house number 26 Jevanjee estate Quarry Road, Nairobi while the plaintiff continues to pay the reserved rent.*

*(b) A declaration that the intended eviction is illegal, unlawful and a nullity and the reinstatement of the plaintiff in the suit premises.*

*(c) Exemplary damages.*

*(d) Special damages*

*(e) Costs*

*(f) Any other relief that this Honourable court may deem fit to grant.”*

On the basis of that complaint the plaintiff anchored an interim application also dated and filed the same date brought under order XXXIX rules 1(a) and 2,3,(1) and 9 of the CPR, section 63 (c ) and (e) and section 3A of the CPA. 7 prayers were sought namely:-

- 1. Service of this application be dispensed with in the first instance.*
- 2. The present application be certified urgent.*
- 3. Pending the hearing and determination of this suit, the defendant/respondents, its servants and/or agents or otherwise be ordered to reinstate the plaintiff in the suit premises.*
- 4. Pending the hearing and determination of this suit, the defendant/respondent, its servants and/or agents or otherwise howsoever be restrained by way of an injunction from being or, remaining on or evicting and or interfere with the plaintiffs quiet enjoyment, possession and occupation of the suit premises being house number 26, Jevanje Estate avary Road Nairobi.*
- 5. In the Alternative, pending the hearing and determination of this suit, the defendant/respondent, its servants and or agents or otherwise howsoever be restrained by an injunction from alienating, damaging, wasting or in any other manner howsoever degrading the suit property which is a residential home.*
- 6. The court, do direct the O.C.S. Pangani police station and the area chief to enforce the orders issued by this Honourable court.*
- 7. Costs of this application be awarded to the plaintiff/applicant.*

On 23/12/08, the applicants' counsel appeared before the vacation judge who certified the application urgent. On 30<sup>th</sup> 12/2008 counsels of both parties appeared before another duty judge, whereby prayer 3 and 5 of the application dated 23/12/2008 were granted and costs ordered to be in the cause.

The plaintiff/applicant came back to this court, by way of an application presented to this court, by way of notice of motion dated 22<sup>nd</sup> day of January 2009 and filed the same date. It is brought under section 3(1), 5 of the Judicature Act cap 8 laws of Kenya, order 52 rule 2 of the supreme court of England 1965, order LIII rule 12 of the CPR, section 77 (8) of the constitution of Kenya and section 3A of the CPA Act cap 21 of the laws of Kenya. The prayers sought are as follows:-

- 1. That this Honourable court, be pleased to order that John Gakuo, the Town Clerk and Mrs. Margaret Ngethe the Director legal of the city council of Nairobi be detained in prison for a period of six (6) months or for such period this Honourable court shall deem necessary.*
- 2. That such order/further orders as may be just be made to meet the ends of justice and to safe guard and protect the dignity of this Honourable court.*
- 3. That the officer commanding Pangani police station be ordered to supervise and assist in the execution of the court order given on 30<sup>th</sup> December 2008.*
- 4. That costs be provided for.*

The application is grounded on the grounds in the body of the application, grounds in the statement, verifying affidavit, annexures, supporting affidavit and oral submissions in court. The sum total of the same is that:-

-The plaintiff/applicant become aggrieved by the action of the defendants' chief officers in the manner demonstrated in the plaint.

-He duly moved to this court, to seek redress and which redress was given to him by a consent order entered between the parties on the 30<sup>th</sup> day of December 2008.

-Despite the order having been given by consent, the applicants' counsel followed it up by serving the extracted order JKM1 together with a penal notice on to the councils' chief officers as evidenced by the return of service JKM3.

-In addition to the service of the said orders, the applicants counsel followed up the matter by issuing letters reminding the defendants chief officers to comply with the court, orders, they failed to do so thus prompting these proceedings.

-The orders given herein being a consent, they have the effect of a contract and as such one party cannot back out of their performance without having them being set aside.

-The counsel who entered the consent on behalf of the defendant had full instructions and authority from the defendant to enter into the same.

-There has been no allegation of fraud, mistake or misrepresentation. As such the orders are enforceable and they should be obeyed.

-Maintain the order served was endorsed with the penal notice.

-Proof of service is evidenced by the fact that internal Memos were issued from the concerned head of department, urging them to comply with the court orders.

-Despite this knowledge, the plaintiff is still in the cold which is evidence of willful disobedience.

-Maintain that the terms of the order were clear and there was no ambiguity.

-They have demonstrated that there was an act of breach.

-The replying affidavit shows that the defendant intends to continue with the breach.

-The court, is urged to ensure compliance.

The Respondent has opposed the application on the basis of two replying affidavits, and oral highlights in court, as well as case law. The first replying affidavit filed is one of John Gakuo sworn on 9<sup>th</sup> February 2009 and filed the same date. The central theme in it is as follows:-

- Vide paragraph 3 thereof that he has not been made aware of the court orders of 30<sup>th</sup> day of December 2008.

- He has no knowledge of any penal notice served on him.

- He has not been personally served.

- By reason of what is stated above there is denial of allegations of disobedience and circumventing of the court orders.

Whereas the one of Mary Ngethe is deponed on the 9<sup>th</sup> day of February 2009 and filed on the 10<sup>th</sup> day of February 2009. The central theme in it is that, she was not served with the order subject of these proceedings but another proceeding Milimani CMCC 532 of 2009. As such she was not personally served

with the alleged court orders, neither was she aware of the same.

Reliance was also placed on a further replying affidavit deposed by one John Gakuo on 3<sup>rd</sup> day of March 2009 and filed the same date. The salient features of the same are as follows:-

- Reiterates the earlier stand that he was not aware of the orders as he was not personally served, and as such contempt of court proceedings relief is not available to the applicant.

In their oral high lights, counsel for the defendant/respondent reiterated the content of the affidavits and then stressed the following:-

- Still maintain the rule regarding personal service was not complied with.
- The process server made an attempt to serve Mary N. Ngethe but found her on leave and there is no proof that further attempt were made to effect service on to Mary N. Ngethe.
- The R/S relied upon do not state that any attempt were at all made to serve John Gakuo.
- Service on another chief officer cannot be imputed or transferred.
- Maintain that the process server should have made attempts to serve and the court, must be satisfied with those attempts.
- Even if the order was a consent, it does not displace the fact that it has to be served on the person who gave the undertaking. They maintain that herein, it is not clear who gave the undertaking in order to be pinned down for breach.
- The court, has to distinguish between attempts to seek to enforce an order against the council, and to seek to enforce an order a chief officer of the council are two different things.
- Maintain that they never gave instructions for the consent.
- There is nothing to show that those sought to be committed to civil jail were brought to the knowledge of the existence of those orders.
- The memos of an attempt to comply are not attributable to those being cited for contempt. The person who attempted to comply should have been cited for contempt.

In reply counsel for the applicant reiterated the earlier submission and then added that.

- Since the defendant is the city council of Nairobi, the provisions of order V rule 2 CPR apply in that service on any chief officer would be sufficient.
- Maintain that the order was served on the Deputy Director who was a competent officer.
- The proper person to be served was the legal arm of the defendant.
- Although personal service is the rule, this applies mandatorily in cases where the individual person is sued unlike in this case where the city council was involved, service on the chief officer is sufficient.
- The court, has been asked to distinguish between orders issued ex parte in the absence of the other party. In such instances personal service is mandatory. As opposed to those where consent orders are made in the presence of both parties.
- Still maintains that disobedience has been demonstrated and it should be punished.

On the case law the court, was referred to the case of **REFRIGERATOR AND KITCHEN UTENSILS LIMITED VERSUS GULABCHAND POPATLAL SHAH AND OTHERS AND SHANTILAL KHETSI SHAH AND OTHERS NAIROBI CA NO. 30 OF 1990** decided by the CA on the 13<sup>th</sup> day of July 1990. At page 5 of the judgement, the CA quoted with approval its own decision in the case of **MWANGI WANGONDU VERSUS NAIROBI CITY COUNCIL (CA NO 95 OF 1988)** as follows at paragraph 2 line 10 from the top:-

*“.....No order of court, requiring a person to do or abstain from doing an act may be enforced unless a copy of the order has been served personally on the person required to do or abstain from doing the act in question. The copy of the order must be endorsed with a notice informing the person on whom the copy is served, that if he disobeys the order, he is liable to the process of execution to compel him to obey it”*

At page 6 line 2 from the top continued thus:-

*“That in cases of alleged contempt, the breach for which the alleged contemnor is cited must not only be precisely defined but proved to a standard which is higher than proof on a balance of probability, but not as high as proof beyond reasonable doubt..... there was an order made by this court, whose terms were crystal clear, and which these respondents have willfully disobeyed.....It is essential for the maintenance of the rule of law, and good order, that the authority and dignity of our courts’, are upheld at all times. This court, will not condone deliberate disobedience of its orders, and will not shy away from its responsibility to deal firmly with proved contemnors. In relation to these respondents, there are no mitigating factors. They swore no affidavits and tendered no apologies.”*

The case of **MUTITIKA VERSUS BAHARINI FARM LIMITED (1985) KLR 227** a court of appeal, decision where it was held inter alia that:-

- 1. a person 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.*
- 2. The standard of proof in contempt proceedings must be higher than proof on a balance of probabilities, and almost but not exactly beyond reasonable doubt, as it is not safe to extend the latter standard to an offence which is quasi criminal in nature. The guilt of a contemnor has to be proved with such strictness of proof as is consistent with the gravity of the charge.*
- 3. The principle must be borne in mind that the jurisdiction to commit for contempt should be carefully exercised, with the greatest reliance and anxiety on the part of the court, to see whether there is no other mode which can be brought to bear on the contemnor”*

The defence referred the court, to the case of **GOVINDSI DEVSHI SHAH AND ANOTHER VERSUS THE MANAGING DIRECTOR, KENYA RAILWAYS CORPORATION, NAIROBI MISC APPLICATION NO. 462 OF 2004** decided by Wendoh J on the 26<sup>th</sup> day of July 2006. On an application for committal to civil jail of the Managing Director, the Respondents, the learned judge made the following observations at page 5 of the ruling line 4 from the top:-

*“I have seen the order of mandamus that was allegedly served on the managing Director Railways Corporation on 21<sup>st</sup> February 2005. It was received by the corporation secretary one Mr. Maina and even the process server does depone in the affidavit, of service dated 18<sup>th</sup> November 2005 that he served the corporation secretary, one Mr. Maina. There is no evidence in the affidavit of service that the process server ever attempted to serve the managing Director of the corporation personally and failed.....At no time was the managing Director ever served with process or brought to the personal notice of the order.”* Service was found to be defective and the order was disallowed.

The case of **REPUBLIC VERSUS TONY GACHOKA AND THE POST LIMITED NAIROBI CA NO. NAI 4 OF 1999** in the judgement of Lakha JA as he then was, delivered on the 20<sup>th</sup> day of

August 1999, had this to say at page 10, line 9 from the top:-

*“No case was put before me which directly decided that a Director who was otherwise passive in the sense that he neither procured, nor aided, nor abetted nor sought to interfere with the administration of justice was liable for contempt. I am satisfied that there is nothing in the material available before me to show that Mr. Mungai was aware of the making of the offending publications that can make him liable for contempt. Accordingly I have reached the conclusion without any reluctance that in the circumstances of this case, Mungai does not become liable in contempt by virtue of his office if he held one. He could not be liable in the absence of mensrea, or an actusreus”*

The case of **ISAAC J. WANJOHI AND ANOTHER VERSUS ROSALINE MACHARIA NAIROBI HCCC NO. 450 OF 1995**, decided by Mbogholi J on the 14<sup>th</sup> day of July 1998. At page 4 of the ruling, the learned judge revisited with approval the content of section 5 of the judicature Act cap 8 laws of Kenya, and order 39 Rule 2 (3) of the CPR, then at page 5 line 3 from the top, the learned judge made the following observation:-

*“As we have to follow the procedure and practice in England, the effect of the English provisions is that as a general rule, no order of court, requiring a person to do or abstain from doing any act may be enforced unless a copy of the order has been served personally on the person required to do or abstain from doing the act in question. The copy of the order served must be endorsed with a notice informing the person on whom the copy is served that if he disobeys the order he is liable to the process of execution to compel him to obey it. At page 5 line 10 from the top the learned judge went on to review the case law on bringing of the order to the attention of the contemnor and then went on to observe:-*

*“This requirement is important because the court, will only punish as a contempt a breach of injunction if satisfied that the terms of the injunction are clear and an ambiguous, that the defendant has proper notice of the term and that breach of the injunction has been proved beyond reasonable doubt”. Then concluded at page 6 line 6 from the top thus:-*

*“I have related the foregoing principles of law to the material before me. With respect, there is not on record any averment by way of affidavit or otherwise that the defendant was personally served with the order and penal notice endorsed therein. It is not enough to say the defendant was aware of it. If such an averment leads to deprivation of personal liberty, by imprisonment or attachment of property, then that is an obvious miscarriage of justice. This done is enough to dispose off this application.....”*

There is also reference to the content of a text book on contempt, namely Arlidge Eady and Smith on contempt, 3<sup>rd</sup> Edition by Sir David Eady MA LL.D and professor A. J.H. smith LL.D London, sweet and Maxiwell chapter 12. The following principles have been stressed.

Page 93 paragraph 34 *“where committal is sought, although the court, has power to dispense with service of the claim form or notice of the application, as the case may be, personal service will generally be insisted upon unless there is clear evidence of evasion. It has even been said that the attendance of the alleged contemnor at the hearing does not perse waive the need for service. The need for service also applies to the notice of an adjointed hearing”*

At page 904 paragraph 36

*“Where a defendant has voluntarily given an undertaking which has been embodied in an order of the court, it has been recognized as not strictly necessary to serve on him the order containing the terms of the undertaking. In such case, it is his own act which creates the liability, unlike the situation where it is an order of the court, with which he has to comply and which therefore needs to be drawn to his attention....*

1. *The undertaking should be included as a recital or preamble in an order of the court, this should be done even where the substantive part of the order is merely no order.*

2. *The order in incorporating the undertaking, should be issued and served on the person who has given the undertaking.*

3. *The order should be endorsed with a suitably worded notice explaining the consequences of a breach of the undertaking.....paragraph 37, Before enforcing by process of contempt, it is necessary to prove that the judgement or order which is alleged to have been disobeyed has been properly served, subject to the courts', powers to dispense with service or order substituted service in appropriate circumstances.*

Page 905 paragraph 40

*“Although in the case of company service of an order may generally be effected by serving Directors. Special provisions apply where it is sought, to enforce a judgement or order against a corporation by means of an order for committal of an officer or sequestrations of his assets. Before either of these remedies may be obtained it must be proved that personal service has been effected on the officer concerned, and in the case of an order requiring the corporate body to do an act, that the order has been so served before the expiration of the time within which the body was required to do the act. More over a penal notice must be endorsed on the copy served”*

Page 926 paragraph 99:-

*“Where a judgement or order is binding upon an employer or principal and a servant or agent fail to comply with the judgement or breaches, the order, this may lead to a finding of liability on the basis of vicarious liability”*

Paragraph 101:-

*“It is necessary to consider in accordance with general principles in what circumstances liability may arise for a corporation on the other hand and for any relevant employers or agents on the other..... a local authority was undoubtedly in breach of an undertaking given to the court, by reason of systems so defective as to be tantamount to heedless in differences and recklessness.....Therefore it would appear that in order to fix a corporation with liability for contempt, it will be necessary to show that it has been properly served, or that service has been dispensed with. On the basis that an appropriate officer of the company had knowledge of the order, or for some other reasons. It is however no defence for a company to show that its officers were un aware of the terms of the order, or that they failed to realize that the terms were being broken by their action. Nor is it a defence to show that the act of disobedience was done by a servant through carelessness, neglect or even in dereliction of duty. Neither would it surfixe for the corporation to plead that it forbade its employees to act in breach of the order, or that it took reasonable steps to achieve compliance. Because it is not necessary to show any direct intention to disobey the order, a deliberate act by an employee (that is so to say, one that was not casual or accidental, will give rise to liability on the part of a company if objectively judged, it would constitute a breach of the order.”*

Page 928 paragraph 107:-

*“.....the court had the power to require servants or agents of a corporation to provide information or documents in their possession even though not parties to the relevant litigation themselves. If the corporation is a party, and the servant or agent holds the injunction on behalf of the party, then such an order would simply provide a practical means of obtaining the appropriate remedy from the corporation. The information or documents in question would be in possession of the corporation through those individuals. Never the less such persons should normally be given an opportunity of being heard before such an order is made, and an order made without notice would be difficult to justify save in exceptional circumstances. At all events when such an order is made, it binds the servants directly even though not a party and disobedience to the order would constitute contempt on that basis without the need to prove the mensrea required for criminal contempt.*

On the courts', assessment of the facts herein, after going over the deponements and submissions of both sides, the principles in case law cited, which the court, needs to take into consideration. In

resolving the dispute herein, in the court's opinion the following do not seem to be in dispute.

1. That indeed the applicant was allocated the suit premises and prerequisite dues were duly paid and the applicant was installed into the premises. But for unexplained reasons, the plaintiff/applicant was unceremoniously kicked out of the premises thus prompting these proceedings.
2. It is not disputed that the plaintiff/applicant promptly moved to this court, to seek a remedy. The defendant/respondent was duly served and a consent was entered into by both sides whose total effect was that the plaintiff/applicant was to be restored back into the premises pending the hearing and determination of the suit.
3. It is on record that the defendant /Respondent was represented by counsel when the said consent was entered into. It has been submitted from the bar and the deponement of M.N. Ngethe that they never gave instructions to enter into the said consent. However no efforts were made by the defendant/respondent to source an affidavit from the said counsel, then on record to confirm that indeed the said counsel had no instructions to enter into the said consent. In the absence of such a deponement there is nothing to fault the applicant's assertion that the said counsel had authority to enter into the said consent with the applicant. This is further confirmed by the fact that up to the present date, no efforts have been made by the defendant to have the said orders set aside. The court, therefore makes a finding that the consent orders were properly entered into and are valid.
4. Having ruled that the consent orders were properly entered into and valid, this ushers in the operation of the case law cited namely:-
  - (i). That court, orders once made, they have to be observed in obedience by the addressee (s) and not in breach, even if it turns out that the orders were made without jurisdiction. The obedience lasts as long as the orders concerned have not been set aside or discharged.
  - (ii). It is mandatory that the issuance of the said orders be brought to the notice of the addressee either through consent or through service of the same upon such an addressee.
  - (iii). The said notice has to be endorsed with a penal notice warning the addressee that if he disobeys the orders, steps will be taken to compel him to obey or be penalized for disobedience.
  - (iv). There is insistence that the notice has to be personal, save in the case of a consent or orders are made in the presence of the addressee and the court waves the requirement of the personal service.
  - (v). Proper candidates for addressees of court orders are both natural and non natural persons.
  - (vi). Service on non natural persons has to be done in accordance with the provisions of order V rule 2 CPR. It provides:-

*“Order V rule 2 subject to any other written law, where the suit is against a corporation the summons may be served-*

*(a) On the secretary, Director or other principal officer of the corporation or*

*(b) If the process server is unable to find any of the officers of the corporation, mentioned in 2 (a), by leaving it at the registered office of the corporation or sending it by prepaid, registered post to the registered postal address of the corporation or if there is no registered office and no registered postal address of the corporation by leaving it at the place where the corporation carries on business or by sending it by registered post to the last known postal address of the corporation”*

(vii) The defendant is a body corporate and therefore in order for the applicant to succeed, it has to be demonstrated that the service of the order satisfies the provisions of order V rule 2 CPR when considered in the light of the Rival arguments herein, it is clear that the defendants do not dispute service of the

orders upon the defendant/Respondent. Their complaint is that the officers cited were not personally served. There is therefore no dispute that the legal department of the defendant was served. This is in fact confirmed by the existence of an internal memo annexed to the applicants' supplementary affidavit sworn by one John Kenneth Mugambi on 26<sup>th</sup> February 2009 and filed on the same date. A perusal of the same reveals that the memo was emanating from the Deputy Director legal Affairs. It was addressed to the Director social services and housing department. It is evidently clear that it referred to the proceedings in HCCC 622 of 2008 and the same parties namely **JOHN KENNETH MUGAMBI VERSUS CITY COUNCIL OF NAIROBI**. The content of the directive reads:-

*“Herewith please find an order served on us on December 30<sup>th</sup>, ordering the reinstatement of the plaintiff in the suit premises house 26 Jevenje Estate Quarry Road.*

*Please ensure strict compliance of the same by your officer”*

On the basis of the foregoing, the court, is satisfied that indeed the applicants counsel extracted the consent order and had it served. From the impression created by the instructions in the memo, there is no doubt that it contained an endorsement of penal consequences in case of any disobedience.

Further confirmation is found in the Return of service, annexure JKM1 annexed to the same further affidavit. It indicates clearly that when the process server called at the defendant's offices with the purpose of effecting service of the said consent order, he was directed to the Director legal of the city council of Nairobi. Upon so proceeding to the said department he was directed to a Mr. Karisa Iha the Deputy Director legal affairs, on whom the service was effected, which service has been confirmed by annexure JKM2.

Indeed as argued by the respondents counsel, the officer served is not the one who was cited for contempt. The applicants counsel, submitted that the town clerk and the Director legal were cited because they are the chief officers. Section 129 (1) of the Local government Act cap 265 laws of Kenya provides in part that:-

*“Section 129 (1) the town clerk of a municipal council.....shall be the chief executive and administrative officer of the local authority of which he is the town clerk..... and shall have the general responsibility of co-ordinating the whole of the work of the local authority.....*

*(2) .....he shall have the powers and duties assigned to him by and be responsible for the matters specified in part 1 of the 3<sup>rd</sup> schedule.....”*

As per clause 8 and 11 of part 1 of the 3<sup>rd</sup> schedule, the town clerk is mandated to take necessary steps in legal proceedings and where appropriately qualified, give general legal advice.

The office of the Director legal is not provided for in the Act, but in this courts', view, that non provision of the said post does not rule out the powers of the defendant to create such offices as that of the Director legal for purposes of ensuring of proper administration and delivery of services. Such creation are feasible through its by laws. It is therefore the finding of this court, that absence of designation of the Director legal as a chief officer by the LGA cap 265, does not deny them that designation through by laws. More so when the two did not deny in their depositions that they are not chief officers by designation of either the parent Act or by laws made their under.

Having made findings that cited officers are indeed chief officers, by virtue of their being so designated by the parent Act and by laws made their under, and having made findings that infact it is the Deputy Director legal who was served, the question that this court, has to determine is whether by virtue of them not being served personally they are immunune from being proceeded against for contempt of the said orders. In this courts', opinion a perusal and or construction of the provisions of order V rule 2 CPR does not give specification of the chief officers to be served. It therefore means that once a chief officer is served that service is effective and binding on the principal.

Applying that reasoning to the Rival Arguments herein, it means that since the Deputy Director legal was served, that service is effective as against the principal and since the principal is a non natural legal entity, the person who is capable of committing contempt are the designated officers. In the circumstances of this case, the town clerk and the Director legal are the proper officers to be held responsible in the event of any disobedience of any court orders.

This court, is alive to the traditional jurisprudential trend in this jurisdiction displayed in the decisions cited herein, whereby reliance has always been placed on personal service and knowledge of the existence of the order prior to the initiation of the contempt proceedings. This court, has no quarrel with that trend, save that it is now trite that the law is not static, neither is societal behaviour patterns. As societal behavior patterns change, it is imperative for the law to change as well and meet the emerging challenges of new societal behaviour.

The question to be determined now is whether the traditional trend should hold or it should be expanded to cover new horizons whereby if established, that orders were infact entered into either by consent or in the presence of both parties same were extracted and served on authorized officers, of a non natural legal entity, and which orders are subsequently brought to the attention of the authorized officers, either before or after the initiation of the contempt proceedings, and fails to remedy the breach, is liable to be held to be in contempt by reason of their indifference to the said orders when brought to their attention subsequently. Herein it is not disputed that the cited officers have not disputed the facts as put forward by the applicant in so far as they relate to the allocation of the premises, payment of the same, assumption of the occupation by the applicant, and the later forceable eviction by the defendants. Indeed it is on record that the respondents attempted to challenge the authority of counsel then appearing for the defendant to enter into the said consent on its behalf. But as was submitted by the applicants counsel, no affidavit has been sourced from the said counsel to confirm lack of authority and in the absence of any move by the defendant to have the said consent orders set aside, coupled with failure of denial of the facts on the basis of which the applicant seeks redress, and having ruled that mode of service employed satisfies the requirements of order V rule 2 CPR, the cited officers cannot be allowed to shield themselves with the veil of the defendants lack of authority, to the counsels then on record for them to enter into the said consent which still stands, lack of personal service when infact they have not been sued in their personal capacity, and lack of knowledge of the orders prior to the initiation of the contempt proceedings, when infact they have displayed indifference to the said orders after the same had been brought to their notice. No efforts were made with a view to complying with the same and this is nothing but conduct depicting contempt of those orders.

This court, draws inspiration from the CA'S decision in the case of **PATRICK WAMULA T/A PATROS AGENCIES LIMITED AND SALAM SHABID MOHAMED VERSUS ESTHER WAMBUI KIBE NAIROBI CA NO. 87 OF 2009 (UR 53/2009)**. At page 7 of the ruling, the Law Lords of the CA made observation at line 3 from the top 2<sup>nd</sup> paragraph that:-

*“DR Khaminwa’s submissions were really pegged on whether the court, order in relation to the contempt proceedings were served upon the applicant, and if this was not done then the applicant was not aware, hence he could not comply, or that proper procedure in contempt proceedings was not followed as required.”*

At page 8, 2<sup>nd</sup> paragraph the learned Law Lords went on thus:-

*“The 2<sup>nd</sup> applicant is aware that on 18<sup>th</sup> December, 2008 certain orders were made directing him to carry out certain functions relating to his premises which he had leased to the respondent among them*

*(3) .....*

*(4) .....*

*When these orders were made counsel for the applicant then a Mr. Onyango was present. He complied with none but instead he made an application dated 9<sup>th</sup> January 2009 to vary/or review the above stated*

*order of 18<sup>th</sup> December 2008. The notice of motion was mentioned on 15<sup>th</sup> January 2009 at his instance, when he asked that it be fixed for hearing, but was reminded by counsel for the respondent that he had no right of audience because he had not complied with the court, order of 18<sup>th</sup> December, 2008. This is how the order we have quoted above arose. With this back ground information in mind, we doubt, that the grounds raised by the applicants counsel about the need for seeking leave of the court, to institute contempt proceeding and/or serve the court, order, made on the representations by both counsel are arguable. What the superior court, was doing on 15<sup>th</sup> January, 2009 was asserting its authority to have the court orders obeyed with which we entirely agree.....”*

Applying the CA’S Law Lords reasoning to the facts herein, it is clear that the correct position to be taken by this court is that:

- (i).** The orders leading to these contempt proceedings had been made by Nyamu J in the presence of counsels of both parties, as this court, has disallowed the respondents assertion of their alleged counsels lack of authority as no affidavit has been sourced from the said counsel to confirm that he had no authority to so act in the first instance, and in the second instance no move has been made by the respondent to have the said orders set aside.
- (ii).** This court, has already accepted that service of the said orders on the chief officers namely the Deputy Director legal complies with the provisions of order V rule 2.
- (iii).** The said orders were valid and demanded observance in obedience and not in breach.
- (iv).** The respondent failed to observe the same.
- (v).** Service of the order on one chief officer operates for all the other chief officers who in law or by internal administrative arrangement of the defendant, were the ones obligated to execute them. This being the case, the lack of personal service of the said orders on the officers cited for contempt who are thus not shielded from being proceeded against for contempt was sufficient.
- (vi).** By reason of what has been stated in number (i-v) above this court is entitled to assert its authority and tell the respondent that they are in disobedience of the said court, orders and are liable to be proceeded against for contempt of the said orders.
- (vii).** Even if it were to be taken that the traditional view that a party can only be held response for breach of orders that had been brought to his/her attention before the commencement of the contempt proceedings still applies, this courts’, view is that jurisprudential growth and more so in the circumstance of this case, demands that an addressee of a court, order who comes to have knowledge of the existence of valid orders, even after the initiation of the contempt proceedings and does nothing in obedience to the same is liable to be punished for contempt just like the one who had knowledge of the same before the initiation of the contempt proceedings. This is so because there is no rule of procedure which bars a court of law to stretch the operation of the traditional rule.
- (viii).** The circumstance of this case is however, that knowledge of the orders before initiation of the contempt proceedings has been established by reason of demonstration of service of the orders on the Deputy Director legal who issued a memo for compliance .
- (ix).** It is common ground and a matter of public notoriety that this court, has judicial notice of that the Town clerk cited has since retired. But that notwithstanding there exists provision for perpetual succession of the office held. It therefore means that the incoming town clerk stands bound by those orders with the exception that an allowance should be given to the incoming town clerk time within which to comply. As mentioned earlier on, the orders were directed at the municipal council which is a non natural entity, whose functions are executed through natural chief officers. This being the case, the binding effects of the orders does not cease to have effect upon vacation of the office by the relevant chief officer. The binding effect operates and survives the vacation of the office by the outgoing chief officer. The binding effect of the orders on the incoming chief officer is not however automatic. Justice demands

that these be served both with the original breached orders as well as the subsequent compliant orders and a reasonable time frame given within which to comply failing which penal consequences to follow.

For the reasons given in the assessment, the court, is inclined to allow the applicants application dated 22<sup>nd</sup> day of January 2009 and filed the same date for the following reasons:-

1. The counsel who entered into the consent orders alleged to be breached on behalf of the defendant/Respondent had authority to enter into the said consent, proved by the fact that the defendant/respondent has not sourced an affidavit from the said counsel to confirm lack of authority, In the first instance and in the second instance, no move has been made by the defendant/respondent to upset those orders.
2. By reason of what has been stated above, the said orders made on 30<sup>th</sup> December 2008 were legal, valid and enforceable. They demanded obedience in observance and not in breach.
3. The addressee of the said orders was and still is the defendant/respondent a non natural legal entity.
4. Being a non natural legal entity, the execution of the action demanded by those orders are the chief officers of the defendant. These are the entities capable of being served with the orders and cited for disobedience in the event of any subsequent breach.
5. Order V rule 2 CPR prescribes the mode of service of such orders on such a non natural legal entity namely by service upon the chief officers.
6. As demonstrated herein, section 129 and the 3<sup>rd</sup> schedule of the parent Act namely the LGA, the Town clerk is named as one of the chief officers. The Director legal is not named as one of the chief officers. But as reasoned herein, the non naming of the Director legal as a chief officer by the parent Act, did not rule out the ability of creating other chief officers through their by laws and other administrative measures.
7. It is not disputed that the process server called on the office of the Town clerk with a view of effecting service on the town clerk, but was referred to the office of the Director legal, where upon service was effected upon the Deputy Director legal, who acted promptly by issuing directives on compliance.
8. By reason of what has been stated in number 7 above the service effected is proper and in compliance with order V rule 2 CPR, which service on one chief officer on behalf of the non natural entity operates to bind all the other chief officers of the non natural entity. In the circumstances of this case, the office of the Director legal of the defendant/Respondent is an office of a chief officer.
9. The traditional jurisprudential position has always been that in order for liability for one to be proceeded against for contempt of court orders, to hold, the intended contemnor must have knowledge of the order before the initiation of the contempt proceedings. This court, has demonstrated in the assessment, that the applicable rules do not rule out the possibility of the court, moving against a contemnor who having knowledge of the existence of the orders none the less acts in differently towards the same and takes no measures to initiate compliance procedures of the said orders even where such a contemnor only came to have knowledge of the orders after initiation of the contempt proceedings.
10. Herein even if it can be stated that the cited officers had no prior knowledge of the breached orders prior to the initiation of the contempt proceedings, they are still liable to be proceeded against for contempt because they have behave in differently towards the said orders by taking no steps towards compliance with the same. More so when there is no dispute over the facts on the basis of which the applicant moved to this court to seek a remedy. They were therefore rightly cited for contempt of those orders.
11. It is common ground that the Town clerk cited has since retired which is a matter of public

notoriety, that this court, has judicial notice of. As such since he was cited by virtue of him being the then holder of the offices, he cannot be followed after to hold that office. His exit ushers in the liability of the incoming Town clerk. Save that the liability of the incoming Town clerk is not automatic. Justice demands that since the assumption of liability is by virtue of his ascending to the office, it is proper to extract the order alleged to be breached, the compliance orders and have the same served on to the incoming Town clerk with a time frame within which to comply failing which he be committed to civil jail for contempt.

**12.** It is not disputed that the said orders of 30<sup>th</sup> December 2008 required the addressee of the said orders to restore the applicant back into the premises, he had been unlawfully evicted from.

**13.** It is common ground that this was not executed by the defendant/respondent chief officers hence the filing of these proceedings.

**14.** It is common ground that none of the deponement in opposition to the applicants' application have disputed the basis of the grounds on which the applicant has moved to this court, to seek redress for his grievances. Neither is there a move to reverse the state of affairs by tendering what he had paid towards the premises.

**15.** for the reasons given in conclusion 1-14 above the court proceeds to make the following final orders:-

**(a)** An order be and is hereby given that one Mrs. Margaret Ngethe be and is hereby ordered to be arrested and committed to civil jail for a period of 6 months or for such other lesser period, only upon purging of her contempt of the court orders of 30<sup>th</sup> December 2008, which required the defendant/respondent through her the legal Director as a chief officer to reinstate the applicant back into the suit premises.

**(b)** An order be and is hereby given and directed that by reason of the current Town clerk not being the one cited, but one who has stepped into the shoes of the retired Town clerk by virtue of assumption of the functions of that office, justice demands that the incoming Town clerk ,be served with the orders of 30<sup>th</sup> December 2008, together with todays compliance orders and he be required to comply within 15 days from the date of service upon him of the said two orders to comply with the orders of 30/12/2008. Failing which he too be arrested and committed to civil jail for a period of 6 months or for such lesser period upon purging the contempt.

**(c)** The officer commanding the Pangani police station be and is hereby mandated and directed to effect the enforcement of this courts', orders of 30<sup>th</sup> December 2008 and todays compliance orders.

**(d)** There will be liberty to apply to either party.

**(e)** The applicant who had a genuine complaint to seek remedy in a court of law which have costs of the application.

**DATED, READ AND DELIVERED AT NAIROBI THIS 18<sup>TH</sup> DAY OF SEPTEMBER 2009.**

**R.N. NAMBUYE**

**JUDGE**