



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI  
Civil Case 634 of 2008

**EMMANUEL WAWERU LIMA MATHAI..... PLAINTIFF**  
**VERSUS**  
**HOUSING FINANCE CO. OF KENYA LTD...1<sup>ST</sup> DEFENDANT**  
**WARDPA HOLDINGS LIMITED.....2<sup>ND</sup> DEFENDANT**  
**PATRICK KANG'ETHE NJUGUNA.....3<sup>RD</sup> DEFENDANT**  
**EDWARD KANG'ETHE NJUGUNA.....4<sup>TH</sup> DEFENDANT**  
**GEORGE KANG'ETHE NJUGUNA.....5<sup>TH</sup> DEFENDANT**

**RULING**

The plaintiff moved this court by notice of motion made pursuant to the provisions of **Order XXXIX Rules 2A(2)** of the **Civil Procedure Rules**, **Section 5(1)** of the **Judicature Act** and **Order 52** of the **Rules of Supreme Court of England** seeking to commit the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants together with one Michael Njoroge to civil jail for a period of six (6) months on allegation that the said defendants were in breach of orders earlier issued by this court on 28<sup>th</sup> October 2008. The plaintiff further sought an order of the court to secure the assistance of a court bailiff or the police to secure the enforcement of this court's order. The application is supported by the annexed affidavit of Emmanuel Mathai, the plaintiff, and the grounds stated on the face of the application. The defendants filed notice of preliminary objection to the application essentially challenging the plaintiff's *locus standi* to proceed with the application for contempt of court in circumstances where there was no proof that the particular defendants had been served with the court order that

was alleged to have been breached and further that the plaintiff had not issued the requisite notice of penal consequences before he could purport to file the present application.

I have read the pleadings filed by the parties herein in support of their respective opposing positions. I have also considered the oral arguments made by Mr. Otieno for the plaintiff and by Mr. Osundwa for the defendants. I have also considered the written submissions filed by the said defendants in opposition to the application. The 1<sup>st</sup> defendant was earlier excused by the court from participating in these particular proceedings since it was not party to the same. The issue for determination by this court is whether the plaintiff established a case for the citing of the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants for contempt of the aforementioned orders of this court. Before this court gives reasons for its decision, it is imperative that the facts leading up to the filing of the application for contempt by the plaintiff be set out, albeit briefly.

On 27<sup>th</sup> October 2008, Lesiit J issued an *ex parte* order of temporary injunction restraining the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants, either by themselves or through their agents from forcefully evicting tenants or demolishing or damaging, leasing, renting, sub-letting, collecting rent or in any way interfering with the plaintiff's possession and that of the plaintiff's tenants in the parcel of land known as LR No. 209/2489/22 Ngara Nairobi (*hereinafter referred to as suit property*) pending hearing *inter partes* of the application the plaintiff filed challenging the exercise of the statutory power of sale by the 1<sup>st</sup> defendant in purporting to sell the suit property to the 2<sup>nd</sup> defendant. The learned judge fixed the hearing *inter partes* of the application for 5<sup>th</sup> November 2008. The plaintiff extracted the order and obtained a copy of the same from the court on 28<sup>th</sup> October 2008. The advocate of the plaintiff endorsed a notice of penal consequences on the order which stated as follows:

*“Take notice that a party served with a court order who fails to comply with the same or otherwise comply with the order is liable to prosecution for contempt of court and to imprisonment among other orders that the court may deem necessary”.*

According to the plaintiff, the said order together with the notice of the penal consequences was served upon the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants on 30<sup>th</sup> October 2008. I have read the affidavit of service prepared by one Wafula Francis, a duly authorized process server of this court. In the said affidavit, he deponed that he served the 3<sup>rd</sup> and 4<sup>th</sup> defendants with the said court order and notice of penal consequences, among other pleadings, at the 2<sup>nd</sup> defendant’s offices situate on 3<sup>rd</sup> floor, Town House along Kaunda Street within the city of Nairobi. In the said affidavit, the process server deponed that the 3<sup>rd</sup> defendant duly informed that he was authorized to receive the order on behalf of the 5<sup>th</sup> defendant.

In an application subsequently filed by the 2<sup>nd</sup> to 5<sup>th</sup> defendants, the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants described themselves as the directors of the 2<sup>nd</sup> defendant. In the affidavits sworn by the said defendants in support of their application dated 18<sup>th</sup> December 2008 (*which was dismissed by this court on 19<sup>th</sup> March 2009*), the said defendants denied that they were served with the said order or the notice of penal consequences. As stated earlier in this ruling, the said defendants did not deem it necessary to file replying affidavits in response to plaintiff’s application that is the subject of this ruling. Having evaluated the conflicting affidavit evidence of the process server and that of the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants, it was clear to the court that the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants, despite their protestation, were indeed served with a copy of the said order together with the notice of penal consequence. In deed, the 3<sup>rd</sup> defendant acknowledged the receipt of the said order by signing and sealing the reverse of the copy of the order that was subsequently filed in court by the said

process server. I therefore hold that the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants were duly served with the said order together with the notice of penal consequence.

The interpartes hearing of the application was scheduled for 5<sup>th</sup> November 2008. The application was however not fixed for hearing on account of the fact that the court file had gone missing. To date the said court file has not been traced. In light of the events that subsequently occurred, it was clear that the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants had a hand in the disappearance of the said file. This is due to the fact that on 6<sup>th</sup> November 2008, the said defendants invaded the suit premises, forcefully took occupation of the same, evicted the tenants therefrom and demolished the building which had been erected on the suit property. Subsequent to the demolition, the defendants commenced construction of a new building which at the time of the hearing of the application had not been completed. As this court observed in its ruling of 19<sup>th</sup> March 2009, it was clear that the said defendants were aware that an order had been issued by the court restraining them from interfering with the plaintiff's possession of the suit property pending the hearing and determination of the application for injunction.

To preempt the hearing of the application, the said defendant sought and indeed did subvert the course of justice by orchestrating the disappearance of the court file so that the orders which were earlier issued on 27<sup>th</sup> October 2008 could not be extended. It does not require an IQ of a genius or a rocket scientist to discern who benefited from the disappearance of the said court file. It was not a coincidence that the defendants forcefully and unlawfully took occupation of the suit property in the clear but misconceived assumption that there was no court order prohibiting them from putting into effect the illegal action that they had conceptualized. Taking into consideration the surrounding circumstances of the event that took place at the material times, it was clear

that the said defendants, in collusion with unscrupulous members of the judicial staff that man registry, secured the disappearance of the court file with a view to achieving the nefarious objective of unlawful taking occupation of the suit premises.

Has the plaintiff established an appropriate case for the citing of the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants for being in contempt of orders of this court? The plaintiff established that he obtained an order restraining the defendants, either by themselves or through their servants or agents from taking possession of the suit premises. He also established that the extracted order and the notice of penal consequences were served upon the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants. The process server filed an affidavit of service confirming service of the said order upon the said defendants. The court cannot confirm whether the assertion made by the said process server that the 3<sup>rd</sup> defendant had signed on the reverse of the copy of the order and the notice of penal consequences because *(conveniently for the said defendants)*, the court file in which the said copy was filed is no longer within the grasp of the court. The plaintiff sought and was granted leave by this court to institute contempt of court proceedings. The said defendants, again conveniently, chose not to file any papers in response to the plaintiff's application seeking to cite them for being in contempt of the orders of this court.

The said defendants cannot put forward the excuse that by the time they secured forceful occupation of the suit property, there was no order barring them from taking possession. Even if there was no court order barring the said defendants from taking possession of the suit property, they were required to obtain a court order to enable them secure possession. As it were, the said defendants resorted to the rule of the jungle by taking the law into their own hands. They even circumvented the course of justice by influencing the disappearance of the court file in which adverse orders had been issued against

them. The 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants were therefore in contempt of the orders of this court that were issued on 27<sup>th</sup> October 2008. If the said defendants are indeed innocent of the contempt that they are being sought to be cited for, they would have confirmed from the court file whether the said orders had indeed been extended before they made an appropriate application to secure possession of the suit premises. From the evidence on record, this court can surmise that the said defendants did not require to peruse the court file because they were sure at the time that no such court file was in existence.

In the premises therefore, having found that Patrick Kang'ethe Njuguna (3<sup>rd</sup> defendant), Edward Kang'ethe Njuguna (4<sup>th</sup> defendant) and George Kang'ethe Njuguna (5<sup>th</sup> defendant) are in contempt of the orders of this court, this court hereby directs the said defendants to appear before this court on 21<sup>st</sup> January 2010 to show cause why they should not be appropriately punished for being in contempt of the orders of this court. They extracted copy of this order shall be personally served upon said defendants. The plaintiff shall have the costs of the application.

It is so ordered.

**DATED AT NAIROBI THIS 11<sup>TH</sup> DAY OF DECEMBER 2009.**

**L. KIMARU**  
**JUDGE**