



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MOMBASA**  
**MISCELLANEOUS CIVIL SUIT 459 OF 2006**

**SOMOE ABDALLA AMUR.....PLAINTIFF**

**VERSUS**

**MUNICIPAL COUNCIL OF MOMBASA.....DEFENDANT**

**RULING**

Somoe Abdalla Amur (hereinafter “the applicant”) sued the Municipal Council of Mombasa (hereinafter “the respondent”) in the Senior Resident Magistrate’s Court at Mombasa – Civil Case No. 2462 of 1985, claiming restoration of her tenancy in shop No. 12 on plot No. 490 Block XVII, Kshs. 18,000/=, return of a cupboard, sofa set and a television cabinet, general damages, costs and interest. She substantially succeeded but the order that concerns us now is the order against the respondent to forthwith release the cupboard, sofa set and the television cabinet. That order among others was made on 17<sup>th</sup> September 1992. It is that order that the applicant states has been disobeyed by the respondent and therefore the subject of this contempt proceedings.

The application has been brought by way of Notice of Motion under Rule 3 of the High Court Practice and Procedure Rules, Order 52 Rules 2 and 3 of the Rules of the Supreme Court of England, Section 5 of the Judicature Act, Sections 3A and 63 of the Civil Procedure Act, Order XXXVIII and L of the Civil Procedure Rules and all other enabling provisions of the Law. The requisite leave to commence these proceedings was obtained on 24<sup>th</sup> May 2006 and although the applicant should have filed her application within 14 days as contained in the order granting leave that time was extended on 18<sup>th</sup> July 2006 with the result that this application was deemed duly filed in time.

The main orders sought are expressed as follows:-

- (a) That the court do commit the respondent to prison for contempt of court for willfully disobeying and continuing to disobey court orders issued by the Senior Resident Magistrate’s court on 17<sup>th</sup> September 1992.
- (b) That the court do issue a Warrant of Arrest to arrest and commit to prison the respondent herein the Town Clerk, Municipal Council of Mombasa for open and flagrant contempt of court orders given on 17<sup>th</sup> September 1992 and in particular prayer number 3 therein with regard to the release of the applicant’s items.

The applicant is based upon the following grounds as expressed on the face of the application:

- 1) That on 17<sup>th</sup> September 1992 an order from the SRM's Court Mombasa in SRMCCC No. 2462 of 1985 ordering the respondent to *inter alia* forthwith release the applicant's items namely cupboard, sofa set and television cabinet to the applicant which order was issued in the presence of the respondent's advocates and the same was subsequently served.
- 2) That since the orders were issued the applicant has sought release and return of her goods as ordered by the court but to date the respondent has refused to return or release the goods.
- 3) That all pleas of the applicant to have the items released have not been headed.

The applicant is supported by an affidavit sworn by the applicant. The affidavit merely elaborates the above grounds. There is a further affidavit of the applicant filed in response to a replying affidavit sworn by one Karisa the respondent's Deputy Town Clerk. It is deponed in the replying affidavit that on 8<sup>th</sup> February 1996, the respondent's Director of Social Services showed the said deponent the goods in question who in turn by letter dated 14<sup>th</sup> October 1996 asked the applicant to take delivery of the said goods. It is further deponed that the applicant has not been keen to take possession of the goods but has been insisting on replacement of the same or payment of their value when new. It is also deponed that on 21<sup>st</sup> December 1998, counsel for the applicant was requested to ask the applicant to take delivery of the said items but nothing came of the request. As there was inordinate delay to take delivery, the Deputy Town Clerk swears that the respondent sold the said goods by public auction. In the premises the respondent contends that this applicant is frivolous, and/or vexatious and has been lodged too late in the day.

I have considered the application, the affidavits filed both by the applicant and the respondent, the submissions of counsel and the authorities cited to me. Having done so, I take the following view of this matter. Whichever way I consider this application, it is for dismissal. In the first place the applicant is guilty of several procedural lapses that are fatal to her application. The consequence of a finding in favour of the applicant, is penal, the respondent's Town Clerk may be committal to prison. The applicant should have identified the Town Clerk by name. That was not done. The process server who served the decree in SRMCCC No. 2462 of 1985 committed the same error as he did not identify the Town Clerk he served by name. It cannot be overemphasized that the consequences being penal the person who would eventually be committed to prison should have been identified by name. He would be entitled to be served with the application, the affidavit in support and the order he is alleged to have disobeyed. Indeed he would have a constitutional right to be represented by counsel of his choice and make such representations as he would deem fit. The affidavit of service annexed to the applicant's affidavit in fact is a document bearing the SRM's court case number and not the present proceedings. It is clear therefore that the application and the supporting documents in this application may not have been served upon the Town Clerk for him to respond.

Secondly, it is clear from the documents availed to the court that by the time this application was lodged, the applicant was aware that the goods in question were not available. I say so, because on 13<sup>th</sup> April 2005, the applicant's counsel wrote to the respondent and among other complaints she acknowledged that when she visited the respondent's stores, the said items were missing. It is illustrative that the applicant's said letter seems to have been a reaction to the respondent's letter dated 14<sup>th</sup> October 1996 by which the latter advised the applicant to arrange collection of the said goods. It is noteworthy that the applicant sought to collect the goods in 2003 seven years after she had been invited by the respondent to collect the same.

The respondent swears that between the invitation and the visit by the applicant, the respondent auctioned the said items. With the knowledge that the goods were not available it is my view that the option to seek committal of the respondent was not available to the applicant.

Thirdly, I agree with the respondent that to seek to execute a decree given on 17<sup>th</sup> September 1992 by way of committal to prison for contempt of the respondent after 14 years is not only in contravention of Section 4 (4) of the Limitation of Actions Act, it is also tantamount to abuse of the process of the court.

Disobedience of any court order is a matter which calls for urgent dispatch to avoid a situation such as may have arisen herein where the real contemnor may not be traced. The manner of compliance may even become hazy over the time if delay becomes prolonged.

For the above reasons, I dismiss the applicant's Notice of Motion dated 30<sup>th</sup> June 2006 and filed on 10<sup>th</sup> July 2006 with costs to the respondent.

It is so ordered.

**DATED AND DELIVERED AT MOMBASA THIS 30<sup>TH</sup> DAY OF APRIL 2008.**

**F. AZANGALALA**

**JUDGE**

**Read in the presence of:**

**Oguk H/B for Kanyi for the applicant and Kibara for the respondent.**

**F. AZANGALALA**

**JUDGE**

**30<sup>TH</sup> APRIL 2008**