REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Misc. 1623 of 2005

IMAGE APPARELS LTD ……..…..APPLICANT

VERSUS

FREIGHT IN TIME LIMITED ……..……RESPONDENT

RULING

The applicant has come to this Court vide an application which had been brought under certificate of urgency by way of notice of motion under Section 5 of the Judicature Act, Section 3A of the Civil Procedure Act and all other enabling provisions of the law. Prayer 1 thereof which sought the urgency certificate is spent. What remains for disposal are prayers 2, 3 and 4 and these are:-

1) That the Honourable Court do commit MR. KARIM SAYED an officer of the respondent to Civil Jail for a period of six (6) months together with SHANTILAL SHAH, LINAH BHARAT SHAH, HASIT SHANTILAL SHAH AND AMIT SHAH, the general manager of the respondent all of whom are members of the Board of Directors of the Respondent.

2) That the honourable Court be pleased to order the attachment of the Respondents property to the tune of Kshs eight (8) million.

3) That the respondent be condemned to pay the costs of this application.

The grounds in support are found in the body of the application, grounds in the supporting affidavit, annextures, responses to cross examination on the supportive affidavits, oral submissions by the applicants in Court and case law relied upon.

The history of the matter is long as the applicant has apparently been trotting the court corridors for justice since the year 2005.

The background information gleaned from the documentation annexed to the supporting affidavit, reveals that there exists, Nairobi Milimani Commercial Court Chief Magistrates' Civil case No. 8966 of 2004 between Freight In Time Limited as the plaintiffs and Image Apparels Ltd. as the defendant. Proceedings of 8.12.2004 reveals that the defendants therein who are the current applicants had moved to that court and presented an application under certificate of urgency dated 8.12.04. The complaint was that the defendant/applicant's goods had been wrongly attached without a proclamation and the application sought, stay of these orders.

The pleadings of this particular case have not been annexed to enable this Court know exactly what the current respondent claimed from the current applicant which had led to the alleged wrongful attachment. It is indicated in the said record as per copy annexed to the supporting affidavit RSI that interim orders in respect of the said application were granted the same date of 8.12.04.

Further perusal of the lower Courts record reveals that the said application to stay the attachment or to lift the said wrongful attachment was argued inter parties on 22.2.2005. There after the lower Court moved to give a ruling delivered on 9.3.2005. The salient features of the same runs from line 9 from the bottom on page 1 of the ruling up to page 2 thus:-

"*A letter from this Courts' executive officer confirmed that the Court file was missing without trace and that from the Court records, the request for judgment was reflected in September, 2004 due to defective service. Respondent says a subsequent supplementary affidavit of service was filed and judgment thereafter entered. If that is what happened then it was irregular – a Supplementary affidavit was not the solution, the respondent was required to carry out the process of service a fresh and file a fresh affidavit of Service. Mr. Sumba also wonders why there is no warrant and decree because that is what could have assisted the Court and dispel any misgivings as to why the court file disappeared. If there was a judgment in the Court file how is it not reflected. The Court record and the file somehow avoided entry into our records for that and found its way to execution section.*

If proclamation was carried out there must be a copy of course with respondent yet non is displayed/annexed why? Why is not decree annexed? Merely swearing on oath that proclamation was done does not prove it was carried out and indeed Jumbo Airlink should understand clearly the process of Rule 12 C Auctioneers rules on the procedure of showing that a proclamation has been done – what is the catch is not … the proclamation. There is of course no proof that the warrants of attachment …. From this Court but where is the decree.

There certainly seems to be more than meets the ey on this matter and in the absence of proof of proclamation and fresh service, the best opinion is for Respondent to start the whole process a fresh. This means respondent must release the goods to applicant immediately and in this effect means execution is stayed. Let defendant avail to Court all the relevant pleadings. Respondent bears the costs of this application"

This order of 9.3.05 is the one that set off the chain of events culminating in the proceedings subject of the ruling. It is noted from the same record of proceedings, that the respondent sought stay of the said order for 4 working days to enable them make an appropriate formal application for stay, a move opposed by the applicant. The Court after hearing the said oral application made the following observations:-

"*I have considered the application seeking stay. In normal circumstances I would allow stay on an oral approach but in this particular instance there have been far too many irregularities that for me to grant stay now would be vexing the applications so I decline. Let the respondent file a formal application for stay".*

Armed with the refusal to stay the order, the applicant extracted the order which is contained in the bundle of exhibits marked RS.1. It is attached to R/S sworn by one Martin Mwaniki on 21st March 2005. The said Return of Service filed in Court on 10th November, 2005 has the following salient features:-

§ That he received copies of the order and the penal notice from M/s Sumba and Co. Advocates to serve the same on Freight In Time Ltd and Justus Matundura of Jumbo Air Link Auctioneers, that he went to the office of Freight In Time Ltd situated at Cargo carriage Jomo Kenyatta International Airport 2nd floor, 2nd Avenue where the process server sought to serve the Director with the penal notice and order.

§ That him the process server was directed to the Directors Secretary Catherine whom he had served with pleadings before. The said Catherine directed him to the Directors Office and him process server served one Mr. Amit Shah the executive Director of Freight In Time Ltd, who after reading through the penal notice and the order directed the Secretary to accept service. That the said Secretary Catherine

received Service on the instructions of the said Mr. Amit Shah by stamping and signing of the original copy of the order and penal notice. That the said Amit Shah who gave out his mobile number as 0722-742933 became known to the process server after he had been pointed out to the process server by the said Secretary named Catherine.

§ The process server then went on to state that on the same date he proceeded to Commerce House 6th floor rooms 611, Moi Avenue with the aim of serving Justus Mutunduras' of Jumbo Air link Auctioneers but found him out. The Secretary however gave the process server Mr. Matundura mobile number 0733-719232 and upon contacting him on his cellphone, he informed the process server that he would be in the office at 3.00 p.m, where upon the process server went back at 3.17.p.m., found Mr. Matundura and he served him with the order as well as the penal notice.

§ That the parties served stamped on the original on the copy exhibited there is a stamp of Freight In time Limited signed by Catherine on 17.03.05.

The documentation annexed in a bundle as annexture RS 2 contains two rulings in civil appeal number 141 of 2005. The parties indicated are Freight In Time Limited as the appellant and image apparels Ltd as the respondent. There are two rulings given in this appeal file. One given by Justice Mohamed K. Ibrahim on 15th day of July 2005 concerning an auctioneers affidavit. The one relevant to this ruling is the one given by justice Alnasir Visram dated 15th June 2005. The observation of the learned judge is found at page 3 of the ruling thus *"The main reason why the appellant seek to have the order of the lower Courts stayed is because of allegation that there was risk that the Respondent intended to move out of the jurisdiction of this Court. However there was no concrete evidence to show this. The order of the lower Court appealed from only released the attached goods and if the appellant were to succeed in its appeal, there appears to be nothing which would prevent it from attaching those goods again. I do not therefore think that the Appellant risks to incur substantial loss if the order for stay is refused. . . I therefore dismiss the appellants application dated 14th March 2005."*

Upon the dismissal of the respondents application for stay, the applicant's counsel went back to the lower court once again. Proceedings of 14.7.2005 reveals that, the current applicant is recorded to have intimated to the court that there was an application presented to court dated 1.7.2005. Counsel sought to bring to the Court's attention that after the making of the orders of 9.3.05, the respondent had moved to the High Court, on appeal and had sought stay pending appeal which had been declined and when the applicant came to enforce the order which had been granted earlier on the Auctioneer had declined to release the goods on the ground that the Court had not given directions as to who was to meet the storage charges. Their view was that since the attachment was wrongful the persons who gave instruction for the wrongful attachment was the one to meet the Auctioneers charges. On that account Counsel urged the Court to make an order directed to the Auctioneer and the owners of Leakey Storage to the effect that the goods be unconditionally released.

It is noted that the respondents Counsel had argued that an Auctioneer is an officer of the Court and for this reason the Attorney General should be introduced into the proceedings.

This new application and arguments gave rise to the lower Courts ruling of 22nd October, 2005. The salient features of the same are:- *"since the Auctioneers charges has only been glossed over by the respondents Counsel without giving specification of what had been incurred. The best option for the auctioneer is to file his bill of costs under the 4th schedule of the Auctioneers Rules to enable the Court tax the same. As for the goods – they must be released unconditionally"*.

The granting of the said order of 22nd October 2005 gave rise to annexture RS3. The first is a return of service sworn by Maurice Onyango on 5th November 2005. Paragraph 4 thereof depones that the said process server proceeded to the respondents' premises (Freight in Time Ltd) and effected service of the order issued on 22.10.05 along side the penal notice. The penal notice as well as the extracted order attached to the replying affidavit bear Freight in Time receipt stamp and both are signed by one Catherine at 11.05.00 on 12th November, 2005.

There followed exchange of correspondences marked as RS4. They are the building blocks culminating in the proceedings subject of this ruling hence the need to reflect them on record.

(1) There is a letter dated November, 8th 2005 emanating from Leakey's Storage Limited addressed to the applicant and copied to applicants Counsel among others. The central theme in the said letter is that the writer were unable to release motor vehicle KAH 356 N and the goods stored on account of Jumbo Air Link due to outstanding storage charges amounting to Kshs 636,608.00 as per their invoice. That no amount or efforts had been made by Jumbo Air Link to clear the account while Freight In Time was not known to the writer as they had no account with them and are unknown to them. The communication further stated that the presence of the Auctioneer or his agents would also be required.

(2) A letter dated 3rd November, 2005 emanating from Jumbo Air Link Auctioneers under the hand of Justus Matundura. The communication was directed to the Director Freight In Time Ltd Cargo village Airport. The content reads:-

"We have been served with a court order dated 28.10.05 to release the attached goods belonging to image Apparels. A copy is hereby enclosed for your action. The said goods have been stored at Leakeys Storage Ltd for safe custody at a duty fee.

Storage Charges

Leakeys Storage Ltd has issued an invoice of Kshs 636,608/= so as to release the goods. A copy is hereby enclosed for you to forward payment to us so as to pay for storage charges".

Auctioneers fees

Although the order mentions about taxation which is to be paid by your good selves at long last. Our fees before taxation is Kshs.195,000/=.

Kindly forward to us as follows: -

Storage fee Kshs 636,608.00

Auction fee Kshs 195,000.00

Total Kshs.831,608.00"

3. On the same 3rd November 2005 the same Auctioneer addressed a Communication to the general manager Leakeys Storage Ltd. The subject of the communication is release of goods and motor vehicle stored in your go down. The content reads "*please release goods and motor vehicle No. KAH 356N to the directors image Apparels upon identification and charge the account of the plaintiffs M/S Freight In Time Ltd."* The said goods were stored by ourselves (as agents) on behalf of the Plaintiff.

4. There followed two other communications dated 28th October, 2005. One was addressed to the Respondents Counsel and another to the Auctioneer. The central message in both of them is that both were being asked to facilitate the release of the said goods.

Apparently afore set out efforts did not bear fruits forcing the applicant to file this miscellaneous application vide an application by way of notice of motion brought under Section 5 of the Judicature Act, Section 3A of the Civil Procedure Act and all enabling provisions of the law. The application sought four substantive prayers namely:-

(2) That leave be granted to the applicant to cite Mr. Karim Sayed, an officer of the respondent together with Shantial Barmal Shah, Linah Bharatshah, Hasit Shantilal Shah and Amit Shah, the general manager of the respondent, all board of directors of the respondent for contempt, all having disobeyed orders

issued on 9th March 2005 and 27th October, 2005 by the Chief Magistrates Court Milimani in Civil case No. 8966 of 2005 and or in the alternative to attach the respondents property to the tune of Kshs.8 million.

(3) That the Court do commit Mr. Karim Sayed an officer of the Respondent to civil jail for a period of six (6) months together with Shantilal Bermal shah, Linah Bharat Shah, Hasit Shah and Amit Shah, the general manager of the respondent all of whom are members of the Board of Directors of the respondent.

(4) The honourable Court be pleased to order the attachment of the respondent's property to the tune of Kenya Shillings eight (8) million.

(5). The respondent be condemned to pay the costs of the application.

Leave sought was granted by Njagi J. on 14th November, 2005. It is this leave that gave birth to the filing of the application dated 1st December 2005 and filed the same date already set out herein which is the subject of this ruling.

The application is supported by a supporting affidavit sworn by one Ramesh Shah on 1st December, 2005, a further affidavit sworn by the same Ramesh Shah sworn on 12Th day of July 2006 and a supplementary affidavit sworn by the same Ramesh Shah on the 13th February 2007 and filed on 14th February 2007.

Counsel for the respondent sought leave of Court to cross examine the deponent of the applicants supporting affidavits and he was granted that leave. The salient features of the said Ramesh Motichard Shahs responses in cross examination on the affidavits of 1.12.05 are as follows:-

(1) That there are, 3 orders issued on 9.3.2005, 24.6.05 and 27.10.05 all directed at the respondent, though the one of 27.10.05 was directed at Leakey Stores an agent whose principal was the respondent.

(i) It is his stand that the Auctioneer was the one holding the goods and it was up to the principal to instruct the Auctioneer to release the goods and where the agent refuses to release the goods the principal will still be held accountable to the applicant.

(ii) That he could not cite the agent for contempt because he had no connection with them.

(iii) He agrees that it is true that they came to learn that the Auctioneer had stored the goods at Leakey Stores.

(iv) It is his stand that it is his lawyer who knew about personal service.

(v) As for the prayer for the attachment of the Respondents property worth 8 million this has been prayed for because the respondent is still holding the applicants property worth 8 million.

(vi) The value of the goods has not been indicated herein but in the documents that were filed in Milimani Court in the lower Court challenging the attachment.

On the further affidavit sworn on 14.7.06 the said applicants deponent responded thus:-

(3) (i) The affidavit contain a list of goods which had been released to them by Leakeys stores upon the applicants instructions in the absence of the respondent but the inventory used to release the same annexed to the further Affidavit is not legible.

(ii) It is his stand that the orders directed to the respondent were that the said goods were to be released unconditionally. But Leakey Storage who were the agent of the respondent have declined to release the goods unless and until the storage charges had been paid.

(iii) Agreed that the respondent never demanded storage charges from the applicant.

(iv) Agreed that the only proof they have that Leakey Stores were agents of the Respondent were the letters written by the Auctioneers. They maintain the respondent is the principal where as Leakey stores and Jumbo Air Link Auctioneers were its agents. But agrees that it is Jumbo Air link Auctioneers who kept the goods at Leakeys Stores and that it is Leakeys Stores who demanded payment for storage charges before they could release the goods. Added that he did not cite Leakey Stores and Jumbo Air Link Auctioneers for contempt because the respondent was their principal.

On the supplementary affidavit of 14.2.2007 the applicants' deponent responded thus:-

(4) He agreed that although he paid 200,000/= as an additional fees to secure the release of the goods by Leakey Storage, he has not lodged a claim for that amount in this file.

(ii) Concedes 29 items were released to him on 27.9.06 because they were waiting for the respondent to pay storage charges and have the goods released to them.

(iii) That the value of the items that were never released is to the tune of Kshs 1,352,430.00 but have not attached anything to this application to show proof of that value.

(iv) Clarified that it is correct they had demanded 8 million in the first supporting affidavit, but which amount had now come down to 1,351,430.00 because some of the goods whose value added up to 8 million had been released to them after filing that first supporting affidavit.

(v) They still demand that the storage charges paid by them signified by attached receipts should be paid back to them.

Counsel for the applicant reiterated the responses of the applicants deponents and then stressed the following points in support of the application.

(1) They are here in this court because of two orders which had been granted by Milimani Chief Magistrates Court on 9.3.05 and 27.10.2005 requiring that the goods that had been attached leading to these proceedings be released to the applicant unconditionally and the Magistrate just fell short of declaring that there had been fraud.

(2) It is their stand that the plaintiff in the lower Court who is the respondent herein purported to have filed a suit in the lower Court where interlocutory judgment had allegedly been entered against the applicant herein, decree drawn, execution process set in motion by way of attachment of the applicants goods but to date no proof of the existence of the interlocutory judgment and decree have been demonstrated.

(3) On the basis of the aforesaid matters in number 2 above, the applicant moved to court to challenge the attachment and obtained orders for the release of the said goods which had been wrongfully attached. Several orders were made for the release of the said goods unconditionally, which were served severally but were not obeyed by the respondent leading to these proceedings.

(4) It is on record that the respondent sought to appeal against the orders of the lower Court requiring them to release the goods unconditionally and indeed filed an appeal and sought stay of execution. Interim stay was granted but upon inter parties hearing a ruling was given whereby stay of execution was dismissed.

(5) The dismissal of the stay orders as in number 4 above paved the way for the applicant to try again to enforce the orders to release the goods unconditionally. These efforts are proved by exhibition of return of service, sworn on 21.3.05 sworn on 10.11.05, all of which had all the orders made on 9.3.05, 24.6.05 and 27.10.05 together with the penal notices which were duly stamped by the respondents.

(6) They agree that at some point they sought orders against the agents of the respondents because the Respondent refused to give instructions to their agents to release the goods.

(ii) It is their stand that the respondent cannot shift blame on to the agents because the agents were not parties to the proceedings. The agents did not oppose the applications release the goods. It is the respondent who opposed the application to release the goods and even appealed against those orders and lastly and most importantly it is the respondent who attached the said goods.

(7) It is their stand that the respondent cannot deny knowledge of the fact that goods were to be released unconditionally as it is evident from communication from their agent the Auctioneer to the respondent that the goods were to be released unconditionally. The respondent ignored to respond to the said communication forcing the applicant to pay those charges in order to secure the release of the said goods.

(ii) Despite the payment of the charges not all goods were released and even as at the time of the argument of this application the respondent is still in contempt because:-

(a) The goods were not released unconditionally in the first instance.

(b) And in the second instance not all goods were released

(c) In the 3rd instance the attachment was not disputed.

(d) The applicants loss has not been disputed.

(e) The respondents own agent has attached documents showing that goods were not released at ago but in installments and upon payment of the storage charges.

(8) They also contend that the value of the goods they are seeking of 1,351,430.00 is a penalty which this court has a discretion to grant.

In response to the deponents, cross examination and applicants Counsel submissions Counsel for the respondent opposed the application on the basis of grounds set out in replying affidavit of the respondent, supporting affidavit from the Auctioneer, oral submissions in court, annextures as well as case law relied upon. The replying affidavit is sworn by one Arim Kakad on 26th February, 2007. While that of George N. Muiruri was sworn on6th March 2007. The salient features of the same are as follows:-

(a) That the said deponent has been authorized by the respondent company and or its directors cited for contempt by the applicant to depone the affidavit in opposition to the applicants application, which affidavit was deponed in pursuance to this courts order of 12th February, 2007.

(b) That the deponent has information which he verily believes to be true that none of the cited persons have custody of the applicants goods, which goods had been attached by one Justus Matundura of Jumbo Air Link Auctioneers, which Auctioneer had stored the said goods at Leakey's Storage Limited and that is why the Court order of 9.3.05 was varied on 24.6.05 to include Leakeys Storage Limited and Jumbo Air Link Ltd as well.

(ii) That the moment the said order was varied, the respondent was absolved from responsibility and cannot be faulted.

(iii) It is also their stand that the said orders were addressed to officers of the court and if those officers failed to obey the said orders the applicant is at liberty to proceed against them.

(iv) They maintain that the said Leakeys storage limited with allegedly refused to release the goods is not an agent of the respondent neither is it a party to these proceedings.

(c) That none of the cited persons has conspired, abetted or been accessory to the alleged acts of contempt, which acts the applicant has not particularized and or specified.

(ii) They maintain that at no time did they ever advise the said Mr. Matundura of Jumbo Airlink Ltd., Or Leakeys Storage Ltd to continue holding the applicants goods after the said orders had been issued.

(iii) It is their stand that neither Jumbo Airlink Auctioneers nor Leakeys Storage Limited can hold the respondent for contempt.

(iv) That information gathered from a police officer investigating the theft of the applicants goods is that the applicant collected goods in instalment namely July 2006, September 2006, December 2006 and 12th February 2007.

(d) They contend that the application subject of this ruling is incurably defective incompetent and bad in law as it offends the substantive law and structure of the law of contempt as contained in Section 5 of the judicature Act and by extent on Order 52 Supreme Court practice of England.

(e) That the applicants affidavit on record constitute perjury on the face of the averment contained in paragraph 19.

(f) That it is necessary for one George Muiriri to depone an affidavit to prove or disapprove the issues raised by the respondent in this matter.

(g) That the persons cited for the contempt are distinct from the company.

The respondent also relies on the affidavit of George N. Muiruri the Managing Director of Leakeys Storage. In his brief affidavit sworn on 6th day of March 2007, the deponement avers that:-

(i) The goods subject of these proceedings were deposited at Leakeys Storage on 1st December 2004 by Jumbo Airlink Auctioneers under Card No. 1735 as per the contract annexed as annexture GNM 1 & 2.

(ii) These goods were released on instructions from Jumbo Airlink as per annexture 3 upon payment of reasonable charges as per annexture 4 and 5.

(iii) The remaining goods were released as per annexture 6.

Both parties referred the court to case law on the subject. The case of **REPUBLIC VERSUS TONY GACHOKA AND THE POST LIMITED**, **CRIMINAL APPLICATION NUMBER 4 OF 1999** a Court of Appeal decision made on 20th day of August 1999 decided by Owuor JA (as she then was). It concerned an application by way of notice of motion under the provisions of Section 5 of the Judicature Act (Cap 8) of the Laws of Kenya, pursuant to leave of the said court granted on 16th of February 1999.

At page 13 line 7 from the top the learned judge made the following observation:-

"*The procedure for instituting contempt proceedings is now well settled and has been meticulous followed in other cases, in our courts like in the Makali case. Although quasi-criminal proceedings in accordance with Order 52 of the rules of the Supreme Court in England, the proceedings are by way of an application brought after the requisite leave has been obtained. A notice of motion is then filed, grounded on affidavits to prove whether the charge that is laid is in the statement, being an application if the respondent wishes to reply to the allegations he does it in the normal manner of filing replying affidavits. If the respondent wishes to call any witnesses he does so by filing the affidavits of his witnesses subject of course, to the usual procedure of any of the witnesses being called by the opposing side for cross-examination upon satisfying the court that such course is necessary*."

At page 14 line 3 from the bottom continuing to page 15 thus:- "*I did not hear him say that he wanted to*

call anybody to prove that he did not publish the offensive and abusive articles and that they were not meant to bring this court into disrepute nor that the publication were not meant to interfere with the administration of justice."

The net result of the said assessment was that the respondents were convicted of contempt of court, the first respondent was sentenced to 6 months imprisonment while the 2nd respondent was fined Kshs.1,000,000.00.

In the same case in the judgment of R. O Kwach (JA as he then was) at page 4 of the judgment line 15 from the bottom the learned judge set out the law thus:-

"*The power of this court and other courts do deal with cases of contempt of court is given by Section 77 (8) of the constitution of Kenya, the provision to which states that nothing in the subjection shall prevent a court from punishing any person for contempt not withstanding that the act or omission constituting the contempt is not defined in a written law and the penalty therefore is not prescribed. And Section 5 (1) of the judicature Act (Cap 8) provides that the High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate courts.*

It is clear from these statutory provisions that this court has power to deal with contempt committed in relation to it or its business and is not required to refer these to the Superior Court so as to give a contemnor a right of appeal. It is true that under Rules of the Supreme Court, Order 52 Rule 6 (4) (1991) Sections 17 on the hearing of the application, the person sought to be committed expresses a wish to give oral evidence on his own behalf, he shall be entitled to do so. In the present case the court made an order for evidence by affidavit and both Tony Gachoka and Njoroge Noni Mungai field affidavits."

At page 10 line 11 from the bottom, the learned judge as he then was cited with approval the case of **ANDRE PAUL TENRENCE AMBARD VERSUS THE ATTORNEY GENRAL OF TRINIDAD AND TOBAGO [1936] I ALL ER 704** whose holding was stated to be "*the judicial committee of the privy council (JCPC) held that to justify a committal for contempt of court, there must be evidence in the article itself taken as a whole, that the publisher has acted with untruth or malice, or that he imputed improper motives to those taking part in the administration of justice. Taking the material published by the respondents as a whole, it is plain beyond a pera aduentire not only that the authors acted with untruth but also with malice and their intention was plainly to divide and villify the judges*."

At page 13 on punishment the learned Judge, as he then was observed thus at line 6 from the bottom:- "In deciding whether a contempt is serious enough to merit imprisonment, the court is required to take into account the likelihood of interference with the administration of justice and the culpability of the offender of the intention with which the act complained of is done is a material factor in determining what punishment if any is appropriate. In the present case the intention of **TONY GACHOKA AND THE POST LIMITED** was to bring the judges and the court into contempt by scurrilous abuse of the judges. There is no limit to the length of the term which may be imposed but the punishment should be commensurate to the offence.

Although Tony Gachoka did not place before the court any evidence to support his defence of justification, he mentioned through out that the ruling of the court was illegal and had been obtained corruptly. Put another way, he repeated and persisted in the contempt. He struck to his guns. I think Tony Gachoka deserves a stiff custodial sentence with no option of a fine. I would send him to prison for 6 months. I would impose a fine of Kshs.1,000,000,00 on the Post Limited and forthwith stop publication of the post until the fine has been paid in full.

The case of **DINA BHOKE MAKINI ALIAS DR. MARY MAKINI AND JACKSON NGECHU MAKINI t/a MAKINI HERBAL CLINIC VERUS WILLIS WANJALA, MUSA AYUB ALIAS MUSA GATIMAGIGE , ISAAC MAGIGE t/a MAKINI HERBS CLINIC, MILIMANI COMMERCIAL COURTS CILVIL CASE NUMBER 608 OF 2004,** decided by Mutungi J on 21st day of December 2004. At page 5 line 4 from the bottom the learned judge observed thus:-

"*Hence not withstanding lack of personal service, and relying on Halisburys Laws of England 4th Edition volume 4, paragraph 65 and 66, I have no doubt that the defendants should not be allowed to trample this courts orders under the guise of lack of personal service.*

All in all and on the basis of the above findings and conclusion I have no doubt that the defendants herein, by themselves and or their agents especially Ms Gladys Erick, and all those who are operating their clinic are in flagrant violation of this courts orders of 4.11.04 and they have done so and continue to do so despite reminders by this court."

The penalty for disobedience of the court order is found at page 7 of the ruling-two months civil jai without any option of a fine. Each of their agents including Gladys Erude and the company to pay a fine of Kshs.100,000.00 or serve one month civil jail – except for the company which must pay the fine.

The case of **IN THE MATTER OF REPUBLIC VERSUS ATTORNEY GENERAL, THE OCPD, KENYA RAILWAYS POLICE NAIROBI MISC APPLICATION NO. 1445 OF 2003** decided by Nyamu J. on 12th day of march2003. It concerned an application to commit the OCPD Kenya Railways police for a term of 6 months for disobeying a court order dated 24th November 2003 or in the alternative he purges the contempt by permitting the applicant to immediately start operating the canteen the subject matter of these proceedings.

The order was served on the OCPD on 24th November 2003 and this is not denied and on the following day the penal notice was served. This is also not denied.

At page 4 line 1 from the top the learned judge observed:- "*both the order and penal notice having been served and disobeyed the OCPD is clearly in contempt*."

At line 12 from the bottom the learned judge quoted with approval the case of **THUO VERUS NJIRU NAIROBI CA 278 OF 1993 (CA),** whose ruling is indicated as "*the court of appeal held that court orders must be obeyed until set aside. . . . It is improper for him to be seen to be condoning violation of valid court orders*."

The case of **GODFREY KILATYA KITUKU AND 6 OTEHRS VERSUS MALINDI MUNICIPAL COUNCIL MALINDI HCC 45 OF 2005**, decided by W. Ouko J, decided on 22nd day of August 2005. At page 11 line 5 from the top the learned judge observed:-

"*The general power to punish for contempt of court in Kenya is vested only in the High Court and the court of appeal by virtue of Section 5 of the Judicature Act. It follows therefore that whether a breach complained relates to an order of injunction or breach of violation of any other order of the court, it is only the high court or the court of appeal that has jurisdiction to punish for breach or violation.*

In punishing such cases, the High Court, and the court, of appeal, are to exercise those powers similar to those powers exercised by the High Court of Justice in England thus:-

***2 (1)** no application to a divisional court of an order of committal against any person maybe made unless leave to make such an application has been granted in accordance with this rule.*

***(2)** An application for such leave must be made exparte to a divisional court except in vacation when it may be made to a judge in chambers and must be supported by a statement setting out the name and description of the applicant, the name, description and address of the person sought to be committed and the grounds on which his committal is sought, and by an affidavit to be filed before the application is made, verifying the facts relied on.*

***(3)** The applicant must give notice of the application for leave not later than the preceding day to the crown office and must at the same time lodge in that office copies of the statement and affidavit.*

(4) *Where an application for leave under this rule is refused by a judge in chambers the applicant may make a fresh application for such leave to a divisional court.*

(5) *An application made to a divisional court by virtue of paragraph (4) must be made within 8 days after the judges refusal to give or, if a divisional court does not sit within that period; on the first day on which it sits there after*."

Rule 3 of order 52 further provides:-

"***3 – (1)*** *When leave has been granted under rule 2 to apply for an order of committal, the application for the order must be made by motion to a divisional court and, unless the court or judge granting leave has otherwise directed, there must be at least 8 clear days between the service of the notice of motion and the day named therein for the hearing.*

(2) *Unless within 14 days after such leave was granted the motion is entered for hearing the leave shall lapse.*

(3) *Subject to paragraph (4) the notice of motion, accompanied by a copy of the statement and affidavit in support of the application for leave under rule must be served personally on the person sought to be committed.*

(4) *without prejudice to the powers of the court or judge under order 65 rule 4 the court or judge may dispense with service of the notice of motion under this rule if it or he thinks it just to do so*."

At page 15 line 7 from the top the learned judge made remarks that "*the sole reason for setting out the provision of order 52 of the rules of procedure of the supreme court of justice of England as they provide answers to all the issues raised in this application regarding the procedure to be adapted by this court in dealing with cases of contempt of its orders or orders issued by subordinate courts*."

At page 18 line 6 from the top the learned judge went on to state:-

"*It is trite law that breach of an injunction will not be punished unless the party alleged to be in contempt knew that the order had been made. In order words, in all cases of contempt with the exception of contempt on the face of the court, the party in breach can only be punished upon an application made to the court for that purpose after due notice thereof. Rule 3 (3) of order 52 of the rules of the supreme court makes specific provision in mandatory terms that the notice of motion together with a copy of the statement and affidavit in support must be served personally on the person sought to be committed. Not even the evasive or hostile character of the contemnor can excuse the failure to effect personal service.*

By their very nature contempt proceedings are criminal and entails loss of personally liberty if proved. The rules built in the process are intended to provide safeguards to ensure compliance with due process of the law. These rules must be construed strictly. The plaintiffs took only one step which conformed to these requirements, namely they obtained leave. They failed to comply with the rest of the rules rendering the application incompetent. I so find."

What was not complied with is discussed at pages 15 – 18 of the said ruling. These can be summarized as:-

(1) The statements setting out the name and description of the applicant and details of the person to be committed and the grounds were not lodged before the presentation of the substantive applications.

(2) That the office of the Attorney General was not served with notice forewarning it of the impending application a day preceding the presentation of the application for leave that the application is supposed to be cited for hearing within 8 days from the date of presentation for leave.

(3) There was no demonstration of existence of evidence of personal service. For the reasons given for

non-compliance, the learned Judge discussed the application for contempt.

On the courts assessment of the facts herein, there seems to be common ground on certain matters as they seem not to be contested by either party to these proceedings namely:-

(1) That the respondents to this application namely Freight in Time in fact moved to the lower court as plaintiffs and filed Milimani Commercial Court CMCC No. 8966/04 against the applicants herein who were named as defendants. Unfortunately neither party annexed the plaint in order for this court to know the nature of the claim that the respondent was seeking from the applicant in the lower court.

(2) Apparently, interlocutory judgement was allegedly entered in favour of the current respondents in the said lower court case. The reasons and the circumstances under which the said interlocutory judgment was entered against the applicants have not been disclosed. However since the first lower court ruling talks of a defective return of service, instead of repeating the service gives rise to the assumption on the part of this court, that may be the interlocutory judgment was entered in default of entry of appearance and filing of a defence.

(3) It is on record that following that entry of interlocutory judgment the applicants goods were attached, which attachment the applicants' content was wrongful. Which attachments the respondents have not disputed, though there is no express admission on their part that the attachment was wrongful.

(4) Following the said alleged wrongful attachment, the applicant herein became aggrieved of the same, and promptly moved to the lower court and presented an application for stay and the lifting of the said attachment. It is on record that the said applicants' application in the lower court was argued on 8.12.2004 and interim stay was granted on the same date but the goods were not released. The inter parties hearing is recorded to have been heard on 22.2.2005 which gave birth to the lower courts ruling of 9.3.2005 which gave rise to the existence of the orders alleged to have been disobeyed herein.

(5) There is no dispute that the learned lower court magistrate as she then was (now Judge of the High Court) made certain observations concerning the conduct of the proceedings in the lower court which are relevant to this ruling and which are:-

(i) That service of the summons was defective and instead of reserving upon remarks on them being made to the effect that service was not proper, the respondent simply filed a fresh return of service on the basis of which the alleged unlawful interlocutory judgment was entered against the applicant.

(ii) The lower court made observation that no decree, warrant of attachment, nor judgement or proclamation was demonstrated to have been in existence. The court went ahead to reject mere swearing as proof of existence of the same.

(iii) In the courts opinion (lower court) absence of processes mentioned in number (ii) above meant that the entire process had to re start afresh. The order to restart afresh meant that the applicants goods had to be released, which release was meant to be immediate and the execution then progressing was thereby ordered stayed.

(6) It is not disputed that the applicant herein extracted those orders and had them served on to the respondents, demanding compliance accompanied by a notice of penal consequences which the applicant says they were duly served. Issue of the effectiveness of this service will be examined later on in this ruling. It is contended by the applicant which is not denied that since the goods sought to be released were in the custody of the respondents agents, the said orders of 29.3.05 were varied in June 2005 to included the said agents namely Jumbo Air Link and Leakeys Storage.

(7) It is not disputed that the respondent herein became aggrieved by the said orders to release the applicants goods, and sought stay of execution of the release of the goods orally immediately upon pronouncement of the release orders, and when this was declined by the granting court, the respondent then moved to the High Court by way of an appeal and then sought stay pending appeal which was

declined in HCCA No. 141/2005.

(8) It is not disputed that upon the dismissal of the respondents application for stay, the applicant once again moved to secure release of the goods but their efforts were rebuffed by Leakey Stores demanding payment of charges before the goods could be released. This forced the applicant t o back to the lower court to seek an order for the unconditional release of the goods which orders were given by the lower court on 22.10.2005 and extracted on 27.10.2005. The auctioneer was advised to have the bill taxed but the goods to be released. It is on record that the orders of 22.10.2005 were extracted on 27.10.2005 and served on those concerned. The effectives of the said service will be discussed later on in this ruling. However, it has not been disputed that Justus Matundura of Jumbo Air Link, did two letters one addressed to the respondent asking the respondent to release to them, M/s Jumbo Air Link, Kshs.831,608.00 comprising storage charges of Kshs.636,608.00 payable to Leakeys Storage, and Kshs.195,000.00 as auctioneers charges to themselves. The second letter drew the attention of Leakey Stores to the release orders. It is also noted in the said correspondence that they Jumbo Air Link,had stored the said goods at Leakeys Storage as agents of the plaintiffs in the lower court.

(9) There is no dispute that the respondent has not displayed a response to that communication either denying the allegation that they Jumbo Air Link were their agents (respondents).

(ii) Denying the obligation to meet the said charges,

(iii) Proof that the said charges were ever paid,

(iv) Or that they took any steps in the matter to facilitate the quick release of the said goods as ordered by the court.

From this courts' assessment of undisputed facts as set out above a number of questions have arisen for the determination of this court. These are:-

(1) Whether as at the time the applicant moved to this court there were valid court orders in existence which had been issued by a competent court of law?

(2) What were the addressees of those orders expected to do?

(3) Was the applicant genuinely aggrieved as concerns the alleged breach?

(4) If genuinely aggrieved, did the applicant follow the correct procedure in seeking redress as asserted?

(5) If the correct procedure was followed and the application competent, is the respondents opposition to the same competent or incompetent. If competent is it meritorious (opposition)?

(6) If the respondents replying affidavit is faulted. can the respondent fall back on to the auctioneers affidavit to support their case?

(7) If the auctioneer and respondents affidavits are faulted is the applicant assured of a clean bill of success on his application for the relief sought or are they required to nonetheless satisfy the ingredients of the relief sought?

(8) If the applicant is required to satisfy the ingredients for the relief sought then what are these ingredients?

(9) Upon setting out of the pre requisites as in number 8 above is there demonstration that these have been satisfied or not?

(10) After due consideration of matters raised in number 1, 2, 3, 4, 5, 6, 7, 8 and 9 above what are the final orders herein?

In answer to questions as to whether there were valid orders in existence issued by a competent court of law, the same is answered in the affirmative. The reason being that a reading of the afore set out un disputed facts reveals that there is no dispute that the lower court made orders on 9.3.2005 for the release of the attached goods. On 24.6.2005 or there about the lower court upon request from the applicant varied those orders to include Jumbo Air Link, and Leakey Storage, as also addressees. Upon such variation the court has been told that the respondent moved to oppose the said orders and when ruled against, he moved to the High Court on appeal seeking to oppose the said orders. He sought stay which was dismissed. Upon dismissal, the applicant once again met resistance which prompted him to move to the court to seek an un conditional release which was given vide the orders of 22.10.20205. In view of the above the court is satisfied that there were valid orders issued by a competent court which were in place as at the time the applicant came to this court and which orders are still in place to the present day as the court has not been informed that the same have been set aside.

What was expected of the addresses in so far as those orders are concerned has now been settled by case law. This court had occasion to deal with a similar situation in own ruling delivered on 28th day of October 2007. In the case of **NAIROBI LABORATORIES LTD VERSUS SAMUEL GICHURU AND 2 OTHERS NAIROBI HCCC NO. 695 OF 2002**. Case law on the subject is discussed at page 10 line 7 from the top through to page 17 line 1 from the top. Several authorities were cited. The court will only mention 2 namely the case of **HADKINSON VERSUS HADKINSON [1952] 2 A ER 567** whose gist of the holding is that:- "*It is the duty of every one in respect of whom a court order is made to obey such an order, unless and until it is discharged and disobedience of such an order results in the person disobeying it being in contempt*." The case of **GORDON VERSUS GORDON [1940 – 7] ALL ER 707** where it was held inter alia that "*a litigant might also have a reprieve where he demonstrates that the orders alleged to have been disobeyed should not have been made as the court had no jurisdiction to do so*." The case of **RAMESH POPATLAL & SUREISHA SHOBHAG CHANDRA SHAH** suing in their capacity as the administrators of the estate of the **LATE SHOBHAG CHARA RATILALA SHAH T/A LENTO AGENCIES VERSUS NATIONAL INDUSTRIAL CREDIT BANK MILIMANI COMMERCIAL COURT HCCC NO. 515 OF 2003** decided by Njagi J. The learned Judge considerations of case law on the subject drew out the following guiding principles on the subject. These are set out at page 11 of own ruling from line 1 from the top:-

(i) Unless and until a court order is discharged it ought to be obeyed.

(ii) As long as the orders are not discharged they are valid.

(iii) Since they are valid they should be obeyed in obedience and not in breach.

(iv) The only way in which a reprieve from obeying a court order before it is discharged is by applying for and obtaining a temporary stay.

(v) As long as the order is not stayed, and it is not yet discharged, then a litigant who disobeys it does so at the pain of committing a contempt of court.

As regards the question as to whether the applicant was genuinely aggrieved forcing him to move to court to seek redress, it is undisputed that goods subject of these proceedings were not immediately released. From information gathered from the auctioneers supporting affidavit, relied upon by the respondents, the goods were not released immediately and unconditionally, and not as a whole. They were released piece meal on the following dates namely:-

§ July 2006

§ September 2006

§ December 2006

§ And February 2007.

By the time the releases were being made, the applicant had already come to court.

As regards issue of whether the correct procedure was followed when the applicant came to court, the answer is found in Section 5 of the Judicature Act Cap 8 Laws of Kenya as well as case law. This court has already set out this procedure as outlined by Ouko J. in the case of **GODFREY KILTAYA KITUKU AND 6 OTHERS VERSUS MALINDI MUNICIPAL COUNCIL MALINDI HCCC NO. 45 OF 2005** decided on 22nd August 2005. the prerequisites for initiating this process were also set out by this court in the own decided case law of **NAIROBI LABORATORIES LTD. (SUPRA)** at page 16 line 4 from the bottom. These are:-

§ Proof of existence of a valid order.

§ Extraction of the order.

§ Personal service of the said extracted orders on the contemnor.

§ Proof of such service on the contemnor.

The applicant has alleged to have complied with all the above. These are the ones which prompted him to seek leave of court to file the current application. Both the application for leave to apply for contempt of court orders as well as the substantive application for contempt by way of notice of motion are supported by supporting affidavits. The notice to the Registrar and the statement included as part of the prerequisites in the **GODFREY KILATYA KITUKU & 6 OTHERS CASE (SUPRA)** are not included.

The question that has to be decided is whether this omission is fatal to the applicants application. It should be noted that Ouko J's decision is a decision of a court of concurrent jurisdiction and as such it is not binding on this court. This court is entitled to revisit the issue and arrive at its own decision on the matter. Section 5 of the Judicature Act Cap 8 Laws of Kenya provides:-

"***5 (1)*** *The High Court and the court of appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate court.*

(2) *An order of the High Court made byway of punishment for contempt of court shall be appealed as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the High Court.*"

The command to the court seized of such a matter is found in the following words in Section 5 (1) namely "*and that power shall extend to upholding the authority of subordinate courts*." The main if not sole purpose of contempt of court proceedings is to not only "*demand*" but "*command*" obedience to court orders, in order to uphold the dignity of all courts. There is nothing in that section to the effect that the procedure outlined in the Godfrey Kilatya Kituku case (supra) if not followed strictly upto the minute details, the entire process is flawed. Nothing therein, takes away the courts' inherent power and jurisdiction to do all that is necessary to ensure that justice is done to both parties, ensure that the dignity of the court is upheld, ensure that there is no abuse to the due process of the court. Neither does the said section rule out local variation and adaptation of the said supreme court of England rules.

Herein the court which granted leave acted on a supporting affidavit. The defence has not raised any objection to the procedure. In this regard the court is satisfied that local variation and adaptation operates to ensure justice to both parties. Further in the circumstance of this case, if this court were to give a blind eye to what has been outlined above it would be doing disservice to the principle of the upholding of the dignity of the court, and in addition it would be doing nothing but nurturing impunity to flauting of court orders and encourage illegalities. In this regard this court makes a finding that the adapted procedure is proper as it has not occasioned any miscarriage of justice to either party. The applicants application is therefore competent.

As regard the competence of the respondents opposition, it is to be borne in mind that the same is based on the replying affidavit of Arun Kakad sworn on 26th day of February 2007 and filed on the same 26th day of February 2007. Paragraph 2 thereof reads thus:-

"*2 that I am duly authorized by the respondent company and or its Directors cited herein by the applicant for contempt, and wish to oppose the applicants application seeking committal of the company and or the company directors."* The authority to depone therefore comes from the company and or the directors. The question to be asked now is whether that authority surfices. In the case of waithaka versus industrial and commercial development corporation [2007] KLR 374, it was held inter alia that:- "*an affidavit sworn on behalf of a corporation must identify the capacity of the deponent in the corporation. Without identifying the deponent, it is impossible for the court to accept that any matter deponed to is within the deponemetns knowledge*."

Herein the deponent has identified himself in paragraph 1 of the said affidavit as the General Manager of the respondent. Having identified himself as such, the first ingredient in the foregoing authority has been satisfied. What is left to be satisfied is the authority to so depone.

This court in its own decision decided on 3rd day of August 2007 in the case of Superior Homes (K) Ltd. Versus First African (EA) Ltd. and another Nairobi HCCC NO. 381 OF 207. At page 17 of the said rulignlien10 from the bottom the court made the following observation:- "*Being a company it is trite law and a matter of judicial good common sense as well as Judicial notice and notoriety that a Company's authority is given either through a Board of Directors resolution or a company's' share holders resolutions. It was therefore imperative on the part of the deponent to display this authority and annex it to both the verifying affidavit and the replying affidavit in opposition to the application subject of this ruling*."

Authority for the foregoing is the case of **RESEARCH INTERNATIONAL EAST AFRICA LTD VERSUS JULIUS ARISI AND 213 OTHERS NAIROBI CA 32/2003**. At page 9 of the Judgment line 9 from the bottom it is stated that "*in our respectful view learned Judge overlooked rule 12(2) of Order I Civil Procedure Rules which require that authority if granted should be in writing and signed by the person giving it and further that such written authority should be filed in the case.*

In the absence of such a written authority in the case file, the learned Judge erred in holding in effect that Julius Arisi had instantly verified the correctness of the averments in the Plaint with the authority of and on behalf of the 2nd to 214th Plaint."

In this courts opinion, it was imperative upon the said deponent to comply with the provisions of Order 1 Rule 12 (2) Civil Procedure Rule. In the absence of such an authority the Affidavit is defective. This court is alive to the provisions of Order XVIII Rule 7 Civil Procedure Rules which reads:- "*The court may receive any affidavit sworn for the purpose of being urged in any suit notwithstanding any defect by misdescription of the parties or otherwise in the title or other irregularity in the form therefore*." This provisions cures only misdescription of the parties or otherwise in the title or other irregularity in the form of the affidavit. It has nothing to do with failure to comply with requirements for filing the same.

In the **SAME RESEARCH INTERNATIONAL CASE (SUPRA)** the CA went on to fault the subject verifying affidavit. But went ahead to state that there was a cure in order VII rule 1(3) where by the defaulting party could be given leave to comply instead of having the entire pleading struck out. Unfortunately there is no such a cure found in order XVIII rule 7 Civil Procedure Rule. This in effect would mean that this court has no alternative but to strike out the replying affidavit.

The striking out of the replying affidavit leaves no option to the respondent but to fall back onto the Auctioneers Affidavit. This falling back on to the Auctioneers affidavit does not help much because the respondent has stated both in the struck out replying affidavit as well as submission that the Auctioneers were not their agents and they had no control over the Auctioneers activities. Further it aids the applicants case more, as it has demonstrated that goods were not released immediately upon issuance of the court order of 22/10/05. They were thus not released unconditionally, as a whole but piece meal with

the last batch being done as late as 2007 with the applicant still complaining that not all of them had been released as at the time of the inter partes hearing.

The faulting of the respondents and Auctioneers affidavits do not give the applicant a clean bill of success. The general position on the relevant law is that he who alleges proves. The applicant is required to prove his allegations. Order VI Rule 9 (1) Civil Procedure Rules makes provisions that failure to controvert a pleading operates as an admission subject to proof of the said claims by the required standards. In the case of **BACHU VERSUS WAINAINA [1983] KLR 108**, it was held inter alia that at the exparte hearing the plaintiff was under a legal duty to prove his case against both the defendants.

(2) That the burden of formal proof is the same as that required in any civil case.

In the case of **KABUGI AND ANOTHER VERSUS KABIYA & 3 OTHERS [1987] KLR 347** also a court of appeal decision where it was held that the burden on the plaintiff to prove his case remains the same throughout the proceedings even though the burden only becomes easier to discharge where the matter is not validly defended. The burden of proof is in no way less and because the case is heard by way of a formal proof.

The ingredients that the applicant is required to satisfy have already been set out herein namely:-

(1) That, there exists valid orders issued by a competent court of law. This has been satisfied as it is common ground that the said orders were issued by a competent court.

(2) The orders must have been extracted together with a penal notice and served personally. Herein service on the Auctioneers is not disputed as one Justus Matundura the proprietor of Jumbo Air Link, the entity which had attached the applicants' goods and stored them away at Leakeys Storage, the deponent of the supporting affidavit, had done a communication as annexed to the applicants affidavit. Its contend show clearly that the said Auctioneer had been served with the orders. Since the said communication is dated 3/11/2005, this courts presumption is that the same was reacting to the service of the court orders of 22/10/05 and extracted on 27/10/05. In it the Auctioneer requested the respondent to make payment of the storage charges as well as their own charges to facilitate the release of the goods. There is no denial from the respondents of their obligation to meet those charges. Neither was there communication from the respondents to show that the same had been paid. This court is therefore satisfied that the Auctioneer Jumbo Air Link as well as Leakeys Storage had personal service of the said order.

As for service to the respondents, the applicants annextures contain replying affidavits. The gist of them is that on each occasion, the process server went to the respondents premises, he was directed to the office of one Amit Shah, said to be the Managing Director. After introduction of the purpose of the visit, the process server was then directed to the secretary called Catherine who received the processes and then stamped the papers. The paper exhibited bears the stamp of the respondent and the name of one Catherine.

In the wake of that revelation the respondent:

(i) Has not denied that one Amit Shah was not the Managing Director at the time.

(ii) Has not alleged that the affixing of their name stamp on the processes was forgery.

(iii) They have not denied the existence of one Catherine in their establishment.

(iv) If the said Catherine exists in their establishment, she has not deponed to the effect that she did not direct the process server to the Managing Director Amit Shah. Nor that she was not directed by the said Amit Shah to receive the said processes.

(v) There was no application to cross-examine the applicants' process server as regards the contents of the Return of Service. All these point to nothing but proof that service was effected as required. The

stamping and signing of the processes by one Catherine does not water down the effective service as that was an internal arrangement within the respondent, that the applicant had no control over.

For the reasons given above the applicant has satisfied the ingredients for the relief sought. The next question for determination concerns the orders that he is entitled to.

He has claimed two of them namely attachment of the respondents goods valued at Ksh.8 million which has been scaled down to Ksh.1,351,430.00 because the 8 million was alleged to have been the value of the goods which had not been released as at the time the substantive application was filed. The scaling down has taken into account the releases so far made as mentioned earlier on. The question to be determined is whether this claim has been properly presented to this court.

The amount is liquidated. It concerns value of identifiable goods. For this reason they can easily fall into the category of claims known in law as special damages. This court had occasion to consider the presentation of such claims in the own decision cited herein namely **SUPERIOR HOMES (K) LTD VERSUS FIRST AFRICA (EA) LTD AND ANOTHER (SUPRA).** This is discussed from page 8 line 5 from the top. It runs thus:-

"*The nature of presentation of such a claim was explored by Chesoni J as he then was in the case of* ***OUMA VERSUS NAIROBI CITY COUNCIL [1976] KENYA LAW REPORTS 297****. . . A measure of damages is general and special damages . . . special damages on the other hand, means the particular damages beyond the general damages, which results from particular circumstances of the case and of the Plaintiffs claim to be compensated for which he ought to give warning in his pleadings in order that there may be no surprise at the trial. The terms general and special damages are used with different meanings. They refer firstly to liability, secondly to proof, thirdly to pleadings and fourthly to the meaning of special damages only. . . . Here it simply means that for special damages to be awarded they must be pleaded and proved.*

At page 9 line 4 from the top the court continued:- "*general damages as I understand the term, are such as the law will presume to be the direct natural or probable consequences of the act complained of. Special damages on the other hand are such as the law will not infer from the nature of the act. They do not follow an ordinary course. They are exceptional in their character and therefore they must be claimed specially and proved strictly. Thus for a plaintiff to succeed on a claim for special damage he must plead with sufficient particulars, also prove it by evidence. As for the particularity necessary for pleading and the evidence in proof of special damages, the courts view is laid down in the English leading case on pleading and proof of damages* ***RATCLIFF VERSUS EVANS [1892] 2 Q B 524 where Bowen L. J. said at pages 532, 533; the character of the Acts themselves which produce the damage and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on both in pleading and proof of damage, as is reasonable having regard to the circumstance and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry.***"**

Applying those principles to the claims herein, it is clear that, the mere mention of the figure as a relief in an application does not satisfy the ingredient of pleading with particularity. Secondly the requirement of such a claim being proved specifically and specially by evidence cannot be satisfied by a deponment in an affidavit. For this reason no compensation can be awarded to the applicant. Declining to grant the relief does not leave the applicant remediless. He can still pursue them as a counter claim done either in the same case file which gave rise to the pleadings herein or in another case filed if he so wishes.

As for punishment for contempt, this court is alive to the case law already cited. The first step is demonstration of satisfaction of:-

(a) Existence of breach.

(b) Determination of appropriate punishment for that breach.

In this courts opinion breach has been established by proof of presence of the following factors:-

(i) To date there has been no demonstration on the part of the respondents as to there being in existence either as at the time the applicants goods were attached or as at now, the alleged interlocutory judgement, decree and proclamation on the basis of which the faulted attachment was effected.

(ii) At some point the applicant was forced to seek orders against the respondents agents, namely Jumbo Airlink, and Leakeys Storage, because the respondent had refused to give instructions to the said agents to have the goods released.

(iii) Communication mentioned herein emanating from a Mr. Matundura of Jumbo Airlink mentioned herein, shows clearly that Jumbo Airlink was instructed by the respondent to attach the applicants goods. It went ahead and attached the same and stored the same at Leakeys Storage. Though the respondent denies agency with Leakeys Storage, there is no denial of the agency of Jumbo Air link. The only attempt by the respondent to shift blame has been that the entity which refused to release the goods was Leakeys Storage. However, in this courts, opinion, the chain of agency runs from the respondent, through Jumbo Air link, to Leakeys Storage, as there is no denial that attachment was on the respondents orders. Further there is no denial that demand for payment of both storage charges and auctioneers charges was made but not responded to by the respondents. In other words they did not deny the obligation to meet those charges.

(iv) There is no denial that the respondent filed proceedings against the applicant, obtained an alleged interlocutory judgment, and decree as well as proclamation (alleged because no proof of the same has been exhibited) caused the applicants goods carried away, the respondent opposed the orders to have those goods released.

(v) The goods were not released unconditionally as ordered. Neither did the respondent take any steps to facilitate the release of those goods by meeting the payment of charges accrued, by denying that they did not instruct Jumbo Airlink, to attach and store those goods at Leakeys, never gave instructions for the release of the said goods, have not bothered to show justification for the attachment, not bothered to annex proof of interlocutory judgment decree or proclamation.

(vi) There is proof from the affidavit of Leakeys Storage, to the effect that goods were not released at ago, and unconditionally, but piece meal upon payment of the storage charges.

(vii) The respondents defence that they never had custody of the goods, that the orders of 24.6.05 were valued to include Jumbo air link and that the orders were directed at officers of the court, hold no water because although an auctioneer is an officer of the court, he acted so on the instructions of a party to the proceedings and not that of the court. In this respect the respondent could only be absolved if they had applied to the court, to be so absolved upon furnishing reasons. Further nothing prevented them from communicating both to the court, and the named agents that they had nothing to do with the attachment.

(viii) There is proof that the respondents were party to the disobedience of the court orders to release the goods, because they opposed the orders to have them released, and upon losing that opposition, they did not either expressly or impliedly by conduct take any steps to have the goods released. Neither did they meet the storage charges, deny responsibility to meet the same.

(ix) There is no dispute that goods were released piece meal and upon the applicant meeting the costs of storage.

Having established breach, the court has to deal with punishment for contempt. This has to bear in mind the reason as to why contempt of court has to be punished. This was restated by the law lords

of the court of appeal in this jurisdiction in the case of GODFREY NJERU VERSUS REPUBLIC CRIMINAL APPEAL NO. 20 OF 1993 decided by the court of appeal in the same 1993. Case law on the subject is discussed on pages 2 – 3 of the said judgment. The ingredients forming the reasons for punishing for contempt are as follows:-

(i) Contempt of court orders tends to undermine the court system and tends to inhibit citizens from availing themselves of it for the settlement of their disputes.

(ii) The law of contempt of court is a means by which the law vindicates the public interest in the due administration of justice, that is in the resolution of disputes not by force or by private or public influence but by independent adjudication in courts of law according to an objective code.

(iii) Of all places where law and order must be maintained is in the courts. The cause of justice must not be deflected or interfered with. Those who strike at it strike at the very foundations of society.

(iv) The sole purpose of proceedings for contempt is to give our courts the power effectively to protect the rights of the public by ensuring that the administration of justice shall not be obstructed or prevented.

(v) In interfering with the administration of the law, in impending or perverting the course of justice, it is not the dignity of the court which is offended, but it is the fundamental supremacy of the law which is challenged.

(vi) Due administration of justice requires the following:-

(a) That all citizens should have unhindered access to constitutionally established courts of criminal or civil jurisdiction for the determination of disputes as to their legal rights and liabilities.

(b) That they should be able to rely upon obtaining in the courts the arbitrament of a tribunal which is free from bias against any party and whose decision will be based upon those facts, any that have been proved in evidence adduced before it in accordance with the procedure adapted in courts of law.

(c) That once the dispute has been submitted to a court of law, they should be able to rely upon there being no usurpation by any other person of the function of that court to decide it according to law. Conduct which is calculated to prejudice any of these three requirements or to undermine the public confidence that they will be observed is contempt of court.

When the above ingredients are applied to the scenario herein, the court is satisfied that there is violation because:-

(i) The respondent invoked the due process of the court, and when advised that the step taken to realize the fruits of that process to their benefit quickly was irregular, nonetheless went ahead to obtain the alleged interlocutory judgement and caused attachment of the applicants goods.

(ii) When it was brought to their attention that the attachment was flawed and the goods should be released, the respondent strenuously opposed the release and went as far as filing an appeal against the release orders.

(iii) When they lost in their opposition to the orders for the release of the goods, they became indifferent and failed to meet this obligation to have the goods released.

(iv) Their indifference in the wake of the clear orders of court amount to nothing but impunity and flagrant disobedience and flouting of the law and disrespect to the dignity of the court.

On the remedies available, in addition to case law cited to this court, herein, this court had occasion to consider the same in own ruling delivered on 22nd day of August 2007, in the case of ELITE

STUDIOS LIMITED AND ANOTHER VERSUS INTERCONTINENTAL HOTELS CORPORATION LTD. NAIROBI HCC NO. 483 OF 2005. At page 6 line 8 from the top, the court, referred to the case of SATISH KUMAR VERSUS SAMUEL MAGUA NARIBOI, HCCC NO. 188 OF 1994 decided by Olekeiwa J. (as he then was now JA). At the same page at line 2 from the bottom this court quoted the learned Judge as he then was (now JA) as having made observations thus:- " ***I respectively agree with Justice Akiwumi that contempt of court has to be swiftly punished in order to uphold the fundamental tenet of the rule of law that court orders must be obeyed. . . . It is usually said that committal to jail for contempt of court is an act of last resort. But in a deserving case a court will not hesitate to impose such custodial sentence to punish such contempt*****."**

At page 12 of the said ruling line 1 this court borrowed the reasoning of Musinga J. in the case of P. N. NJOROGE J. M. WAMBIE AND ANOTHER, THE REGISTERED TRUSTEES, NEW TESTAMENT CHURCH OF GOD VERSUS REVEREND MUSA NJUGUNA t/a CHARISMATIC REVIVAL NETWORK, THE REGISTERED TRUSTEES AND MUSA NJUGUNA MINISTRIES NAKURU HCC NO. 247 "A" of 2004 thus:- "*The rule of law and order which we all subscribe to requires that orders of our courts be respected and obeyed and that duty equally applies even where a party is dissatisfied with an order and has appealed to an appellate court against the order, ruling or judgment. Contemnors undermine the authority and dignity of our courts and must be dealt with far much so that court authority is not brought into disrepute*****."**

At page 12 line 9 from the top there is quoted the case of REFRIGERATOR AND KITCHEN UTENSILS LTD. VERSUS SULAB CHARND POPAT t/a SHAH AND OTHERS, Nairobi, CA NAIROBI 39 OF 1997. On the same page 12 at line 3 from the bottom this court quoted from the said ruling thus:- "*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 proven contemnors*****."**

At page 32 line 9 from the bottom, this court, made the following observations:- "*on the last question of remedies, essence and ultimate benefit, the finding of the court, is that the court, has a discretion to decide on the appropriate remedy to be given. . . . further since the orders alleged to have been breached were of this court; this same court is the proper machinery for redressing that breach . . . . lastly this court too is the ultimate beneficiary of obedience to court orders and as such it has a duty to ensure that the authority of the court is upheld at all times. It does this employing a very simple but drastic tool of enforcing contempt proceedings to the letter where proven*****." Herein contempt of court orders has been proven, and vindication of that breach is called for from this court.**

For the reasons given the final orders of this court on the applicants application dated 1st December 2005 and filed the same date are as follows:-

(1) Prayer 3 whereof which prayed fro an attachment of the respondents property to the tune of Kenya shillings 8 (eight) million scaled down to Kshs.1,351,430.00 as at the time of argument is disallowed for the reasons given.

(2) Prayer 2 thereof which seeks to commit:-

(i) Mr. Karimsayed,

(ii) Shantilala Barmai Shah,

(iii) Linha Bharat Shah,

(iv) Linah Bharat Shah,

(v) Hasit Shantilal Shah,

(vi) And Amit Shah to civil jail as officers and general managers and or directors of the

respondent company is allowed to the extend that each of the persons named is fined Kshs.350,000.00 each in default each to serve 6 months imprisonment in jail.

(3) The fines in number 2 above to be paid within 14 days from the date of the making of this order.

(4) In default of number 3 above each of the persons named in number 2 above to be arrested immediately and then committed to jail to serve the 6 months jail ordered.

(5) The applicant will have costs of the proceedings.

DATED, READ AND DELIVERED AT NAIROBI THIS 3RD DAY OF OCTOBER 2008

R. N. NAMBUYE

JUDGE