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

**Civil Suit 66 of 1997**

**ALI SOITARA KORIR & OTHERS :::::::::::::::::::::::::: PLAINTIFF**

**VERSUS**

**JOSEPHINE NYAMBURA, KAIGA MACHARIA**

**& OTHERS :::::::::::::::::::::::::::::::::::::::::::: DEFENDANTS**

**RULING**

The court decided to set out the back ground information extensively to explain to the defendants fully what has transpired on the record insofar as the transactions go to affect them, and secondly to try and provide the way forward so that the prolonged litigation can finally be determined.

The background information herein is that vide a plaint dated 14.1.1997 the plaintiffs described as ALI SOITARA KORIR AND 12 OTHERS filed a suit on the same date against JOSEPHINE NYAMBURA, KAIGA MACHARIA and 50 OTHERS ON 26TH FEBRUARY 1997 an amended plaint dated 24th February, 1997 was filed what it did was to bring on board them disclosed parties. The Plaintiffs are indicated as ALI SOITARA, MUIRURI HARU, MWANIKI ATHUMANI, WAMBUGU NDANGA, WA NJIRU MAINA NYAGA ITHERI MWANGI, NYAGA MUNYOROKU, GRACE WANGUI, THIONG'O WANJANGI, NJERI WA THANDE, CHARLES GACHAGU, IDI SAKWA RAMADHANI, FATUMA WANJIKU KAMAU as Plaintiffs; The defendants were listed as JOSEPHINE NYAMBURA, KAIGA MACHARIA, ALEX MWAURA, FESA JOHN, ABUTI OMOMO, KENEY MWEMA, JOHN NGOITA, JULIUS MACHARIA, MUSYOKI, ADIANGA TULA, KARIUKI KAMAMA, KAMANDE, ENOSE PETER WANGUI KAIRU, MUTITU GICHUKI, NGANGA NJOGU, BEATIRCE WANGUI, JOHN MWANGI, KAHURU, PAUL OJWANG, MUTURI NGUGIRE, JUIUS KIBANDA, ESTEHR W. MAINA, ERNEST KARIUKI JOSIAH WANJOI, CHARLES AGALOBA, MACHARIA KAMOTHO, SAMWEL KIMEU, DAVID KITEMBE, WANGUI KIBERENGE, KAZOMBE NGALU, JACKSON MICHUNGA, OLUERO OTIENDE, SERURAYA EARNEST, CLEMENT OMBOTTO, GACHUHI GATHONJO, RICHARD NGARU, JOHN MUGO, WANGARI JACOB, JUMA MBOGA, RUKIA TUBUKOSI, OBATE ARUD, TUKIKO ODUDU, REGINA MUTUNE, IRUNGU MWANGI, JOSEPH MASII, WANJOHI GIKONYO, SAMMY SUSA, MURAGE, MWANZIA KATAMA, MICHAEL OBUDHO, WAHOME MURAGE, AINEA OTIENO, JOSPEH K. MACHARIA.

The cause of action is contained in paragraph 3, 3(a) 4 and 5 of the said amended plaint. It is to the effect that the plaintiffs are head tenants/owners of the premises known as, **SHAURI MOYO ESTATE** to which the defendants are subtenants and more particularly as particularly there under. That on 28th February 1991, the High Court of Kenya in Civil case no.422 of 1980 issued a perpetual injunction restraining the City Council of Nairobi from among other things collecting rent from the sub-tenants of

the plaintiff. That not withstanding the said injunction some of the defendants had stubbornly continued to pay rent to the City Council while others have refused to pay rent to the plaintiffs totally. On that account the Plaintiffs prayed for an eviction order to evict the sub-tenants from the suit premises and costs of the suit.

The amended plaint was accompanied by an amended chamber summons also dated 24th February, 1997 and filed on 26th February, 1997, the same date on which the amended. Plaint was filed. It seeks 4 prayers namely.

(1) An eviction order do issue to evict the defendants from the plaintiffs/applicants premises.

(2) The officer commanding Shauri Moyo Police Stephen (O.C.S.) and the District officer (D.O.) Pumwani Division do assist in the execution of the eviction order.

(3) That the service to the Defendants/Respondents be heard ex parte in the first instance.

(4) That the costs of this application be provided for.

A perusal of the Court Record reveals that the respondents never entered appearance either personally or through an advocate or file a defence or defences to the plaintiffs claim. What this Court has traced on the record is a notice of appointment of Counsel dated 14th February, 1997 and filed on the same date. It was filed on behalf of all the defendants. The said Counsel also filed Grounds of Opposition and an affidavit.

The central theme in those papers are:-

(1) The application was in competent

(2) Eviction cannot issue against persons who had not been named.

(3) That Section 3A of the Civil Procedure Act cannot be invoked and that the whole suit is in competent and it should be struck out. From the tone in the contents it appears that they related to the original plaint and application.

On further scouting thro ugh the court record, it has transpired that there exists a related matter filed vide Civil Suit No.422 of 1980. The Plaintiffs listed were Margaret Nyambura, Grace Wangoi, Saada Ali, Omar Suleiman, Maricus Oburu, Grace Wambui and 112 other persons whose names appear on the list marked annexture A. The suit was against City Council of Nairobi. Orders issued were annexed to one of the affidavits in opposition to the interim application. The orders granted were:-

(1) That the defendant whether acting through its various departments, committees sub-committees, officers, councilors, servants, or agents or otherwise, howsoever be and are hereby restrained by virtue of temporary injunction pending the hearing and determination of the suit subject however to the right of the defendant to terminate any tenancy agreement for non payment of rent subsequent to the date hereof or any of the conditions contained therein:-

(a) from evicting the plaintiffs from the houses allotted to them in Shauri Moyo Estate and described more particularly against their names in the document annexed to the plaint and marked “B”.

(b) from re-allocating the suit houses to persons other than the plaintiffs.

(c) From collecting rent from the sub-tenants of the plaintiffs.

(2) That the costs of this application be reserved. The order was issued on the 12th July, 1982. From the content it is apparent that the action had been brought by the Head/tenants who were moving to block

the City Council from demanding money from the sub-tenants. The judgment decree in HCCC 422 of 1980 are discussed elsewhere in this ruling.

There is another order in the same suit **NAI HCCC NO.422 OF 1980 ISSUED ON 30TH OCTOBER, 1996 TO THE EFFECT THAT:-**

**(1)** Accounts be taken of all the rent paid and remitted by the applicants herein.

**(2)** Accounts be taken of the rent paid since November, 1995 the date of the resolution on the subtenants by the council.

**(3)** Matter be mentioned on 29th July, 1996 for reconciliation of the accounts and final orders.

**(4)** The clerk Mr. Hezron Oluoch undertakes to advise the council to comply with the courts order dated 18th march 1980 retraining the defendant/Respondent from collecting the rent from the sub-tenants of the plaintiff/applicants.

There are second orders made on the same 30th October, 1996 to the effect that:-

(1) Mr.Kamau do enforce this courts order through the Head tenants who are all parties to the suit.

(2) As far as accounts are concerned, council do verify the same and the matter to be mentioned on 18th November, 1996.

(3) That hearing notice be served on Mr Otieno Opiacha advocate to appear on the same date.

The foregoing order was followed by another one issued on 24th April 1997 to the effect that:-

(1) The matter be mentioned together with HCCC No 66 of 1996 on 8th May 1997

(2) In the meantime accounts to be filed in court and Mrs Ochianda to make sure that counter notice be issued by the City Council to the sub-tenants directing them to pay rents direct to the Head Tenants (plaintiff) as ordered on 24/6/96.

(3) That hearing notice to be served by Mr. Kamau to Mr. Ombetta and Mr. Kamore to appear on 8th May, 1997.

Also on the record is traced a letter ref. CCC/FCA/222/E. Misc.1867 dated 14th April 1997.

Also on the record is traced a letter ref. CCC/FCA/222/E. MISC.1867 dated 14th April, 1980 in which the City Council had advised **MR. SATISH GAUTAMA** who was acting for the Plaintiff in **NAI HCCC NO. 422/1980** and Plaintiffs herein that it was upon his clients to enforce their rights albeit according to law and they cannot expect the Council to assist them to collect the rents from the sub-tenants.

Also traced on record is a Court of Appeal order Civil Appeal No.112 of 1987. It was an appeal arising from HCCC NO.171 of 1981. The parties involved were Aluchio Liboi, Joseph Muya Mukabi, Peter Inyangala and Akhony Analo against City Council of Nairobi. At page 1 line 8 from the bottom the court of appeal observed thus "*the court has not been informed that HCCC.NO.422/80 was reinstated and has indeed been determined and a perpetual injunction issued against the Respondent in this appeal. As this Court felt that the outcome of HCCC NO. 422/80 was material to the determination of this appeal we order that this appeal, be adjourned and that the respondent to file a supplementary record to contain the pleadings and judgment in HCCC 422/80 and serve it on the plaintiff in that case*".

It is apparent that Nairobi HCCC 171 of 1981 had similarities with

Nairobi HCCC422/80. This later one had gone up to the Court of Appeal. Its determination in the Court of Appeal was deferred pending the outcome of Nairobi HCCC422/80. This is evidence that the two cases namely HCCC422/80 and HCCC171/81 had similarities as regards the subject matter and since HCCC422/80 had been filed earlier in time its decision would automatically settle issues in Nairobi 171/81 as noted by the Court of Appeal.

These proceedings have a bearing to the proceedings herein because the beneficiaries of the perpetual injunction against the City Council, were the ones who were now moving to enforce the rights accrued to them by virtue of those proceedings against the sub tenants.

Turning back to the proceedings here it is apparent that the interim amended chamber summons was heard exparte on 19.7.99 and the same was allowed on the following terms:-

(1) That an eviction do and is hereby issued to evict the defendants from the plaintiff's premises.

(2). That the officer commanding Shauri Moyo Police Station (O.CS.) and the District Officer (D.O.) do assist in the execution of the eviction order.

(3). That costs be provided for. The said order was issued on 20th July, 1999.

Traced on the record is an application dated 20th January, 2000 filed on the same date by way of notice of motion. It sought the following orders.

(1) That the order given by this hourable court o 19th July, 1999 and issued on 20th July 1999 be and is hereby vacated.

(2) That there be a stay of the said order pending hearing of this application.

(3) That costs be in the cause. It is instructive to note that, as at this point in time the Respondents had neither entered appearance or filed any defence in opposition to the plaintiff/applicants claim. It is also to be noted that the Counsel, then on record appearing for the respondents did not even seek leave of court to regularize the status of the Respondents by seeking leave to have them enter appearance and file their defence. This application had been brought under Section 3A of the Civil Procedure Act order 1XB rule 8, and order 50 rule 1, and all other enabling provisions of the law. Apparently this application was not urged and no orders were made in respect of it. It is however noted that Counsel who presented it to Court failed to agree with his clients, the Respondents, in the way forward on trying to resolve the matter. He applied to Court orally on 14.2.00 in the absence and without the knowledge of his clients, to withdraw from acting in the matter and the court allowed him to do so.

This prompted the filing of the notice of change of advocate on 20th March 2000. The incoming lawyer filed an application dated 20th March 2000 and filed the same date. It sought 4 prayers.

1. That there be stay of execution of this honourable court's orders issued on 19th July 1999 pending hearing and final determination of the present application.`

2. That the ex-parte orders granted by this Honourable Court on the 19th July 1999 be set aside and the said Defendants/Applicant, be granted liberty, to oppose the plaintiff/respondents application dated 14th February, 1997.

3. That the said orders of eviction issued on the 19th July 1999 be vacated forthwith.

4. That the costs of this application be provided for. Once again, it is instructive to note that, the incoming Counsel, too, has not prayed for an order that the respondents be granted leave to enter appearance and file defence out of time. This application was heard ex parte in the first instance and this

gave rise to Aluoch J.'s ruling read and delivered on 20th day of March 2000. The central theme in that ruling, is that, from the court records, the amended interim application in pursuance of which the eviction orders were issued does not seem to have been served on the Counsel, a Mr. Ombete who was then on record for the respondents.

This is correct as the documentation from this Counsel which have already been referred to in this ruling related to the original plaint and the application in respect thereof.

(2). That the hearing of the amended application went on before Mitey J. as he then was on 19.7.99 ex parte. But there was evidence that a hearing notice had been served on Mr. Ombete for that date but he had failed to turn up in court when the order for eviction was made.

(3). That since the tenants were not in court when the eviction orders were made, they might not have known about the eviction.

(4). That the tenants came to know about the eviction through the OCS Shauri Moyo Police Station when he served them with the order. This prompted the tenants to engage a new lawyer after the lawyer then on record withdrew.

(5). It was noted further that the matter was due for mention in court on 22.3.2000 for the purposes of working out the method of eviction because the order appeared to be difficult to work out as the defendant tenants were claiming to have paid rent to the City Council. (6). The learned Judge noted that there was a circular on record emanating from the City Council dated 3.11.95 to the effects that tenants of Shauri Moyo should pay their rents to the City Council, direct and on that account it was not clear to the court then why the plaintiffs were claiming that the tenants should pay the rent to them or be evicted. The court found the circumstances to be unfortunate because rent was being demanded from the tenants by the Plaintiffs who call themselves Head tenants and the City Council of Nairobi, to whom the respondents were actually paying rent. Further the circumstances were not clear as to why the plaintiff calling themselves as the Head tenants were claiming that the respondents pay them rent when they are not the owners of the houses.

(6). Since the matters appeared uncertain the learned judge was inclined to grant an order of stay for the eviction pending further order of the Court.

The record shows that after the ex parte orders were granted, the application was served and the same was agued inter parties on 27.11.2000 when Counsels from both sides filed written submissions on the application. This gave rise to this courts ruling of 7th march 2002. At page 2 of the said ruling the learned Judge made observation that each side had filed submissions setting out the history of the matter. That the Plaintiffs Counsel had annexed to his submissions documents which gave the history of this dispute i.e. the background information, the various court orders, the tenancy agreements, various letters from City Council of Nairobi which the court had gone through and came to the conclusion that the case had been litigated several times before and appropriate orders made. On the basis of the circumstances displayed, the learned judge moved to vacate the orders granted on20th March 2000 of stay of execution.

This Court has had occasion to revisit the Plaintiffs submissions referred to in the learned judges ruling of 7.3.2002 filed in Court on 21.11.00 and I make the following observations:-

(1). There are Exhibited some agreements between the City Council of Nairobi and some Head tenants. For purposes of the record, these include:-

(i) For **ISMAIL MOHAMED FOR HOUSE NO.36 BLOCK A** made on 29.7.38

(ii) **WANJJIRU MAINA HOUSE NO. 10 BLOCK 10** made on 1.6.1979

(iii) **MARGARET NYAMBURA PLOT NO.50** made on 1st June.

Wanjiru Maina is plaintiff No.5 in the amended plaint.

There are two correspondences one dated 28th March 1985 from S.J. Getonga, the Town Clerk, addressed to the City Planning and Architecture. The title of the letter is "*surveying of Shauri Moyo Estate for Subdivision purposes.*" The contents of the letter are to the effect that the Town clerk was directing the Director of City Planning and Architecture to take urgent measures and/or arrangements to survey the area for the purposes of issuing the Head Tenants with separate title deeds in respect of the houses that were allocated to them by the Council. The said Director was called upon to note that the Head tenants had been allocated various houses at the said estate several years ago and they had not been issued with title deeds. The Director was instructed to liase with the Director of Social Services and Culture and the Principal valuer in that connection and then proceed with the survey of the said estate. There is also a letter dated 29th June, 1989 emanating from the Secretary to the Town Clerk addressed to the Secretary Shauri Moyo – Ex- Pangani resident's society inviting him in company of the chairman to present their documents. The subject of the said letter was issuance of title deeds to Shauri Moyo Estate.

Also traced on the record is in headed judgment by J.A. Couldrey J as he then was which is undated but it is attached to the decree in HCCC. NO.422 of 1980 and the presumption of this court is that it is the one which gave birth to that decree. The salient features of the same are:-

(1) The plaintiffs were members of Shauri Moyo Ex-pangani Residents association who each has the tenancy premises from the City Council of Nairobi by virtue of agreements made in September 1979 and entered into pursuant to a resolution of the councils housing and social service committee passed on the 6th June l979.

(2) That in January l980 the committee passed another resolution rescinding that resolution of June the previous year and resolved that the tenancies be terminated, followed by service on all of the plaintiffs purporting to terminate each tenancy and directing that the subtenants pay their rents direct to the City Council.

(3) This action aggrieved the Plaintiffs who instructed their lawyer to write to the town clerk asking him to give and undertaking that he would not interfere with the plaintiff's enjoyment of the suit premises under clause 6 of the sale agreement. It is noted by the learned judge, as he then was, that the Town Clerk, gave an assurance that he would not interfere, by saying that "they are therefore free to continue enjoying quiet possession of their various tenancies until and unless expressly otherwise instructed to the contrary by the council." Two days later the plaintiffs were served with a notice to quit for the second time.

(4) The second notice prompted the plaintiff to file HCCC.No.422/80 seeking the various reliefs set out in the prayers and applied for an injunction to restrain the council from proceeding with its intentions. The interim application was hotly contested but Simpson J., as he then was granted the injunction pending the hearing of the case.

(5) It is noted that at some point in time council, in breach of the injunction did accept rents from sub-tenants but when threatened with contempt proceedings for the breach, apologized and then allowed the Plaintiffs to continue collecting the rents from the sub tenants.

(6) The council had filed a defence, were served with a hearing notice but they never attended the hearing and the matter proceeded by way of formal proof.

(7) As the Court, that dealt with the injunction ruled, the tenancies could only be terminated by the council in accordance with the agreement. On the same footing the learned trial judge J.A. Couldrey J., as he then was went ahead to pronounce judgment for the plaintiffs. None of the pleadings either plaint or defence were annexed. But this Court had the privilege of gleaning these from the first portion of the decree which as usual, usually sets out what the claimant sought from the Court followed by the releifs garnered from the proceedings. The claims were:-

(a) A declaration that the defendants notice of termination of the tenancies of the plaintiffs are invalid and

in effectual and in capable of terminating the interests of the plaintiffs in their respective premises.

(b) A declaration that the defendant has no right to terminate the tenancies of the Plaintiffs and collect rent directly from the sub-tenants of the plaintiffs.

(c) An injunction to retrain the defendant whether by itself or by its servants or agents or otherwise from evicting the plaintiffs from their respective premises and re-locating them to persons other than the plaintiffs and further from collecting the rent directly from the sub-tenants of the plaintiffs.

(d) And order that defendant do refund to the plaintiffs such sum (are) as it has collected so far from the sub-tenants of the plaintiffs.

(e) Costs of the suit and interest there on at Court rates.

The reliefs granted by the Court are:-

(1) That the judgment be and is hereby entered in favour of the plaintiffs as prayed.

(2) That the defendant do refund to the plaintiffs all the rent collected amounting to Kshs 2,705,896.15 which amount was collected by the defendant council from the sub-tenants of the plaintiff.

(3) That if the sum to be paid to each plaintiffs cannot be agreed between the parties or any of them, then the same shall be determined by the Registrar of this Honourable Court or by an arbitrator to be appointed by him.

(4) That the defendants do pay the interest on the said sum of Kshs 2,705,876.15 at 12% p.a. from 11th February, 1980 until payment in full.

(5) That the defendants do pay to the plaintiffs their cost of this suit including any costs which may have been reserved or ordered during any of the application adjudicated upon prior to the hearing of this case.

The judgment was given on 28th day of February, 1991 and the decree issued on 3rd July 1991. The suit herein having been filed in l997 gives rise to the presumption that since the sub-tenants were not party to HCCC. 422/80, it was necessary to institute fresh proceedings to enforce the rights accrued to the plaintiffs in HCCC No.422/80 against the sub-tenants herein hence the description that the Plaintiffs are Head/tenants/owners of the premises known as Shauri Moyo Estate to which the defendants are sub-tenants were particularized as indicated therein. It is also mentioned at paragraph 4 of the plaint that the High Court of Kenya in HCCC NO. 422 of 80 had issued a perpetual injunction restraining the City Council of Nairobi from among other things, collecting rent from the sub-tenants of the plaintiffs and that notwithstanding, the said injunction some of the defendants have stubbornly continued to pay rent to the City Council while others had refused to pay rent to the plaintiffs totally.

As mentioned earlier on in this ruling, the amended plaint was accompanied by an amended chamber summons which was heard exparte and final orders given short circuiting the main suit because the main relief in the plaint is (was similar to the main relief in the interim application. Further as mentioned earlier on, there is no appearance or defence to the plaintiff's claim. The orders stand to the present day and since the time they were made way back in 1999 the plaintiffs have been making efforts to have them enforced as shown by the history outlined herein under. This ruling is also in respect of an effort to enforce the said orders.

The courts vacation of the stay orders on eviction lifted the veil which had scheduled the defendants respondents and exposed them to execution process. The Plaintiff applicant then embarked on a rough, rugged and rocky path and or terrain in a bid to execute its order of eviction and evict the defendants from the suit premises. The process which started on 7.3.2002 has not been accomplished to date. For purposes of the record, this court will endevour to highlight the same briefly the sequence is as follows:-

(1). On 18.2.1991 the plaintiffs among others obtained judgment against the Nairobi City Council Via Nairobi HCCC.No.422/80 which judgment authorized the claimants to collect rent directly from the subtenants among them the defendants.

(2). 3.7.1991 the decree was issued.

(3). There is no appeal against the High Courts decision of 28.2.1991.

(4). On 19.7.1999 the High Court issued the eviction orders against the defendants among others in pursuance to proceedings arising from the interim amended application. These orders were extracted on 20th July 1999 in the following terms:-

(i). The eviction orders be issued to evict the defendants from the plaintiffs premises.

(ii). The officer commanding Shauri Moyo Police Station (O.C.S.) and the District Officer (D.O), Pumwani Division do assist in the execution of the said orders.

5. On 5th day of November, 1999 notice to show cause was issued by the Deputy Registrar of this Court directed to the Officer in Charge Shauri Moyo Police Station. The content of the said notice to show cause was for the Officer In Charge to appear and show cause why he had not complied with the order issued by Mitey J. as he then was on 20th July, l999. As a result the Officer in Charge was required to appear before the Court on 12th November 1999 to show Cause why the court order dated 20th July 1999 has not been complied with.

6. On the same date of 5th November 1999 a notice to show cause was also issued to the District Officer Pumwani, to appear in Court, on the same 12th November 1999 to show cause why he had not complied with the court order of 20.7.1999.

7. The Officer in Charge Shauri Moyo police post replied vide a letter dated 6th December, 1999 ref: (c ) Gen/11/Vol.lll/(32) addressed to the Deputy Registrar High Court Nairobi Box 30041. The contents are "*the eviction of the rent payment defaulters at Shauri Moyo houses which was scheduled for 8th day of December, 1999 a s per the court order issued on 20th July 1999 is not possible for security reasons, because the eviction has to be done in a peaceful manner. It is therefore my pray that the eviction be done another day when the conditions will be conducive as far as security is concerned.*

*Yours faithfully,*

*Tom Omani*

*OCS – SHAURI MOYO"*

The letter was copied amongst others to the Attorney General, KIARIE KAMERE & CO. Advocates, P.P.O. N/A and OCPD Buru Buru.

8. The District Officer Pumwani also responded to the notice to show cause vide his letter dated 10th November, 1999 addressed to the Deputy Registrar, Nairobi Civil Courts Ref.GEN/11/VOL.111/99/99.

The title of the letter was HCCC.66 of 1997 ALI SOITARA KORIR VERSUS JOSEPHINE NYAMBURA, KAIGA MACHARIA AND 50 OTHERS. The letter is lengthy but the salient features are as follows:-

(i) Their understanding of the orders issued on 20.7.1999 was, that they would only be required to provide the court bailiffs with security during the eviction but not to do the physical eviction of the sub-tenants.

(ii) That on 31st July 1999 the court bailiffs came and were provided with security to evict the said sub-tenants from the houses in dispute but the situation turned out to be volatile hence they had to withdraw .

(iii) They then agreed with the Court bailiffs that they liase with them to plan for better logistics to carry out the eviction in a more peaceful manner but they bailiffs did not turn up as agreed but only wrote a letter on 29.10.99 saying that eviction was to take place on 3.11.1999.

(iv) On 3.11.1999 despite them putting security in place to assist the Court bailiffs, they bailiffs did not show up and as at that point in time they had not communicated with the District Officer.

(v) Asserted that they had not willfully and deliberately refused to comply and obey the court orders issued to them and they were ready and willing to assist the court bailiffs on condition that the said bailiffs notify them in time to put in place enough security personnel to maintain law and order during the eviction.

(vi) Indicated that they did not receive any orders requiring them to appear in court for purposes of contempt of court proceedings as they had only received notice to show cause.

(9). On 7th December, 1999 the Advocates then acting on belief of the Plaintiffs issued instructions vide their letter ref. No. KK/rtc/001/97 to Dynasy Auctioneers Limited with instructions to execute the order given by the Court on 19th July 1999.

(10). On 17th December 1999 the Plaintiffs Counsel then on record informed the Court that efforts to enforce the court orders through the Officer in Charge Shauri Moyo and the District Officer Pumwani were fruitless and applied for Notice to Show Cause to issue to the Provincial Police Officer which order was granted. The order was extracted on 20th December, 1999. It was to the effect that:-

(i) the Provincial Police Officer (PPO) Nairobi Area do assist the officer commanding Shauri Moyo Police Station (OCS) in execution of the eviction order herein.

(ii) This order be served upon P.P.O (Provincial Police Officer Nairobi Area. No response is traced on record as having emanated from the P.P.O.

The foregoing not withstanding the Plaintiffs have not given up in their pursuit of the enjoyment of their judgment in HCCC No.422/80 as well as the interim but final orders entered in their favour on 20th July 1999. The journey through Valleys, Swamps, hills, twists, turns, corners, across rivers and ocean, led to the initiation of contempt of Court proceedings application. Among them was the fore runner of the current application being the application dated 5.2.2007 and filed the same date. That application was withdrawn and it paved the way for the filing of the application dated 8th day of March 2007 and filled on 09.3.07. The application is by way of notice of motion, under the Judicature Act Cap 8 Laws of Kenya, the inherent jurisdiction of this honourable court, the Constitution of Kenya, the provisions/practice for the time being prevailing in the supreme Court of England pursuant to leave granted on the 31st day of January, 2007 by Justice Kihara Kariuki and all other enabling provisions of the Law. Among others it sought orders that the defendants/Respondents:

1. Josephine Nyambura

2. Maina Kaiga

3. Musyoki

4. Joseph Kairu

5. Irungu Mwangi

6. Regina Mutune

7. Joseph Masii

8. Wanjohi Gikonyo

9. Sammy Susa

10. Murenge Thomas

11. Enose Peter

12. Wangui Kairu

13. Mutitu Gichuki

14. And Josephine K. Macharia

be contempt of the Court orders of this honourable court issued on 19.7.99.

The grounds in support are set out in the body of the application, the supporting affidavit and oral submissions in Court. The application came up for hearing ex parte on 15.5.2007 when Counsel for the application was heard exparte. The grounds in support was simply a reiteration of the history of the matter, briefly that a orders were made in 19.7.99 in favour of the applicants who have never enjoyed fruits of the said orders as the respondents here refused both to vacate the premises as well as pay the rent and for this reason they should be arrested and committed to civil jail.

In making the order, this court made observation on 15.5.2007 that all efforts to enforce the courts Judgment herein were fruitless and that is why the applicant had turned to committal proceedings as a last resort. The applicants sought and were granted leave of this court on 31.1.2007 to apply to have the respondents to be punished for contempt of Court orders vide the applicant's application dated 8.3.2007. In this application the applicant sought to commit the respondents to civil jail for contempt of court orders. The applicants have turned to contempt of Court orders because eviction orders had been frustrated even when sought with the assistance of the police and provincial administration personnel. That the plaintiffs have even adjudged as owners of the premises indicated since l9.7.99. But since then they have been denied their right to enjoyment of the fruits of their judgment and since eviction process has not yielded any fruits, they apply for committal to civil jail as a mode of enforcing the court orders in their favour.

This Court after hearing the applicant exparte and perusing the deponent in support as well as annextures made observations:-

(i) There are eviction orders in place

(ii) No rent is being paid by the defendant/respondents to the applicants

(iii) Efforts to effect eviction orders have been fruitless and that is why the applicants have turned to committal to civil jail.

(iv) That the application as well as the orders together with the Notice of penal consequences had been served and since there was no objection to the application there was no justification to deny the orders. The application dated 8.3.2007 was allowed and orders made to arrest and commit to civil jail for a period of 6 months or for such other shorter period until the contempt is purged with costs.

The said orders led to the arrest of 7 persons out of the total named and these are:-

(1) Andrew Murigi

(2) Sammy Susa

(3) James Mututa

(4) Mututu Gichuki

(5) Joseph Wambua

(6) Lucy Wangui

(7) Enose Peter.

These were brought to court and each was released on a cash bail of 5,000/= pending the disposal of the matter. The Respondents hired Counsel who was allowed to regularize her position on the record. The application for the incoming lawyer is dated 21.6.2007 and it is brought under orders 111 rule 9A, Order L rule 1 of the Civil Procedure Rules and all other enabling provisions of the law, seeking an order that the firm of M/S N. Kiagayu & Co. Advocates be given leave to come on record for the defendants/respondents. The application was not opposed and orders allowing the same were granted on 22.6.2007 validating the notice of appointment dated 21st June 2007 and filed the same dated.

On 04.07.07 when the matter came up, Counsel for the Respondents sought leave to respond to the applicants application dated 8.03.2007 which gave rise to the arrest orders as well as leave to put in an application to set aside the orders made on 15.5.07 arising from the application of 8.3.07.

On 11.7.07, the Respondents thro ugh their Counsel filed the application dated 11.7.07 and filed the same date by way of Notice of Motion brought under the judicature Act Cap.8 of the laws of Kenya, the inherent jurisdiction of this Honourable Court, the constitution of Kenya, the provisions, practice for the time being prevailing in the supreme court of England Pursuant to orders granted on the 4th day of July 2007 by Justice Nambuye and all other enabling provisions of the Law and under IX .10 of the Civil Procedure Rules. The orders sought are that the orders issued by this court on 15th day of May 2007 and the 7th June 2007 be set aside quashed or varied and that costs be provided for. The application is stated to be grounded on the affidavits of those arrests namely James Mutiga Kaiga, Mutitu Gichuki, Wangui Kairu, Joseph Masii Enos Peter Andrew Murigi, Sammy Susa and James Muchoki Mwangi. Two of the arrested persons did not swear affidavits. These are Same Susan Sila Orieti.

The grounds put for ward by the Counsel are briefly as follows:-

(i) The Respondents applicants are not guilty of the alleged contempt of the court orders as there is no proof that they were served with summons to attend court.

(ii) The mode of service raises suspicion and yet the process server has not been called to confirm the disputed service.

(iii) The area chief is alleged to have personally pointed out the applicants personally but the said Chief has not been called to verify those facts.

(iv) Further suspicion is based on the facts that all the respondents who are working people were served at 11.00 am on the same date.

(v) The proceedings being quasi criminal the suit of each individual has to be proved which has not been proved herein by the blanket service deponenment which is all uniform in nature. The process server should have described what each did when served as it is not possible that different individuals being served individually could behave in similar circumstances.

(vi) The court should not rely on the newspapers cuttings to cover up what each is supposed to have done as that is hearsay, more so when none is said to have uttered the words complained of.

(vii) The eviction orders as drawn were in efficient they did not specify that they, respondents, should leave by a given date failing which they be evicted.

(viii) No relationship has been shown to exist between the 117. Plaintiffs in NAIROBI HCCC 422/80 with the 52 tenants in the current proceedings. It is their stand that the orders in the l980 suit do not effect the current proceedings as no relationship has been shown to exist.

(ix) It is their stand that the respondents continued stay in the suit houses does not amount to contempt of court orders.

(x) Since the judgment was made in l999 intervening factors have taken placed confusing issues. These are that at some point in time City Council of Nairobi was the landlord hence entitled to receive rents r said suit premises. Then at other times the respondents were required to pay rents to the National Housing Corporation during which action the Plaintiffs lost their status as judgment creditors. That two years after the judgment the property reverted back to the City Council are the defendant/respondents and still paying rent to the City Council.

(xi) That the Plaintiffs have falsely sworn to be owners of the suit properties when they are mere tenants of the City Council of Nairobi which was never a party to any of the proceedings. This being the case the defendant/respondents are not guilty of any wrong doing as they were never told not to pay rent to the City Council.

(xii) Lastly that should the court not agree with them it is urged not to take this extreme measure of sending the applicants/respondent to civil jail. Instead it should take an alternative view and award an alternative remedy of may be a fine as opposed to civil jail. Otherwise the court is asked to discharge the respondents.

The Plaintiff's counsel In opposition to the Respondents application to discharge committal orders as well being in support of the sustaining of the committal orders made on 15.5.2007made submissions in reply The major points relied upon by them are.

(1). Since it is the defendants who are alleging that they were never served, it is them who should have applied to have both the process server and the chief to be availed for cross-examination. Their failure to do so shows that they do not have any serious complaint against the said persons and it is evidence that they were served.

(2). The process server was accompanied by the chief both occasions just to make sure that he does not make a mistake.

(3). They maintain that the defendants have come to court with unclean hands as they have not annexed proof that they have been paying rent. They cannot claim that they did not know where to pay rent and then at the same time claim that the City Council was entitled to receive rent and that they have been paying rent to the said City Council.

(4). They maintain that it is on record as well as their own annextures, that there exists documentations showing that the City Council wrote to all sub-tenants informing them that they should be paying rent to the Head tenants hence any failure to do so by any party calls for individual responsibility for such action.

(5). It was not and still it is not the business of the defendants to comment on the ownership of the property as their role in the whole dispute was to ensure that they pay rent as directed.

(6). They maintain, the orders of 19.7.1999 is explicit as it sought eviction and there is no confusion as to who was to be evicted.

(7). They have made out a case because, the court made orders, eviction notices served, eviction process hit a snag forcing the applicant to use an alternative method to execute the judgment. They defendants have not said that they were not aware of the proceedings herein.

(8). If the court is inclined to issue an alternative remedy, it should be one that is going to ensure the respondents compliance with the court orders.

(9). They conclude that the total number of the defendants involved is 52 but only 14 have been cited for contempt. The reason why they have taken piece meal action is because moving against the entire group through the eviction process failed. After they are through with the 14, they will make the next move against the remainder piece meal until the whole exercise is completed.

On the courts assessment of the facts herein, the lengthy outline of the history of this matter reveals that the plaintiffs orders of 15.05.07 are anchored on the following salient features.

1. The proceedings relate to Shauri Moyo estate situate within the City Council of Nairobi. There is no dispute that the City Council as the owner then executed agreements with the Head tenants among them plaintiffs whereby the said Head tenants were to acquire ownership of the said premises, individually as regards the respective units, which ownership would entitle the Head tenants to acquire title deeds and receive rents from sub-tenants for their respective allocated house units. This was done in pursuance to resolutions passed by the City Council already referred to herein.

(2). the matter in number 1 above gave rise to execution of agreements between the Head tenants and the City Council.

(3). At one time the City Council attempted to back out of the said agreements which action led to the filing of Nairobi HCCC 422/80 by the plaintiffs who were described in the body of the resultant judgment as Head tenants against the City Council. The proceedings gave the plaintiffs a perpetual injunction which bars the City Council from demanding and or receiving rents from the sub-tenants. In fact one of the releifs granted was an order directed at the City Council to refund a certain amount of money which it had allegedly received from the sub-tenants. As noted, there is nothing to show that that judgment was appealed against. The Plaintiffs in HCCC NO. 422/80 had quantified the rents allegedly received by the City Council from the sub-tenants. There is on record orders made by Owuor J as she then was (now JA Rtd) made on 17th day of October 1996 and issued on 30th October 1996. From the heading these appear to have been by products of an interlocutory application after the enforcement of the refund relief hit a snag. These read:-

i. That accounts be taken of all the rent paid and remitted by the applicants herein.

ii. That accounts be taken of the rent paid since November 1995, the date of the resolution on the sub-tenants by the Council.

iii. That this matter be mentioned on 29th July 1996 for reconciliation of the accounts and final orders.

iv. That the town clerk Mr. Hezron Oluoch undertakes to advise the Council to comply with the Court order dated 18th March 1980 restraining the defendant/respondent from collecting the rent form the sub-tenants of the plaintiff/applicants.

4. As long as the orders in HCCC NO. 422/80 stand the Plaintiffs herein as the adjudicated victorious Head tenants in that case have an upper hand in demanding rents from the, sub-tenants and ownership of the suit premises. Those proceedings robbed the City Council of Nairobi not only ownership of the suit premises but the right to receive rents from the sub-tenants.

5. Once adjudicated owners and proprietors and the City Council having retracted its move to side track the perpetual injunction, and since the sub-tenants were not parties to the proceedings in HCCC NO.422/80, the successful Head tenants had no alternative but to file separate proceedings in order to

enforce their newly acquired rights in the said judgment against the sub-tenants. In doing so there was no need to join the City Council again as a party to the current proceedings. It is therefore the finding of this court that the filing of these proceedings subject of this ruling was proper. In the said proceedings the plaintiffs described themselves as Head tenants. None of the respondents either in the pleadings, submissions or any deponenment has said that

that the plaintiffs have wrongfully described themselves as such.

6. The suit filed herein as per the amended plaint seeks only one major relief that is, that the defendants who are sub-tenants have failed and or refused to pay rents to the plaintiffs as Head tenants and on that account they should be evicted. It is on record that indeed the plaint was accompanied by an application seeking the same substantive prayer which interim application was granted leading to the on set of the prolonged execution proceedings herein. The main suit was then short-circuited**.**

7. It is the considered opinion of this court that the interim application proceedings which gave rise to the orders of 19.7.1999 should not have short circuited the main suit. It should not have been made as a final order but an interim order for payment of rents to the plaintiffs or to some other neutral party pending determination of the suit by full hearing or by way of formal proof. Be that as it may these orders are in place and still stand. Their legal effects will be turned to later on.

8. It should be noted that there is no entry of appearance by the defendants either individually or through an advocate. Neither is their a defence to the plaintiffs claim on record. It is to be noted that after service of the interim application, the defendants instructed Counsel who filed a notice of appointment for all the defendants. The said Counsel put in an application to set aside those orders. He only filed notice of appointment. He never filed appearance and when he put in an application to set aside the interim orders of eviction, he never sought leave of court to file appearance and defence out of time. That application was not disposed off on merit. The Counsel withdrew. There was an incoming counsel who filed a similar application. Also this counsel never entered appearance or filed a defence. Neither did he ask leave of court to file the same. Stay orders were given temporarily but letter on when challenged they were removed by Aluoch J. Orders of 7.3.02.

9. The removal of the stay orders for the stay of the eviction orders in the absence of an appearance and defence left the defendants defenseless with no locus stand in the matter and exposed them to execution process for eviction.

10. It is on record that indeed these were set in motion. Through the assistance of the court bailiff provincial administration through the Chief Shauri Moyo, and the District Officer Pumwani and the police through the Officer Charge Shauri Moyo and the (Provincial Police Officer) Nairobi Area. It is on record that Notice to Show Cause were issued to the officers concerned and they replied vide correspondences already set out herein that they met resistance from the tenants and advised that the move be properly planned for security reasons.

11. Having failed to deal with the defendants as a group, the plaintiffs have no alternative but to turn to alternative mode of execution. It is trite law and this court takes judicial notice of the fact that a litigant who has a judgment in his/her favour is entitled to the enjoyment of the fruits of this same. This far the Plaintiffs were entitled to take the alternative measures. Apart from contending that they do not lie, the process taken to access them has not been attacked.

The defence through their counsel has sought to have the orders made on 15.5.2007 in favour of the plaintiffs upset on the following grounds.

(i) Service of the said orders on the defendants should have been proved by calling the process server and the chief to be cross examined on the contents of the Return of Service as there is suspicion in the manner the service is alleged to have been effected as the process server alleges to have been accompanied by the area Chief twice. And secondly the defendants who are working people are alleged to have been found in their houses at ll.00 a.m.

(ii) The eviction orders alleged to have been disobeyed were defective as they did not first direct the defendants to do something failing which they would be evicted.

(iii) That there is no relationship between the current proceedings and Nairobi HCCC.422/80.

(iv) They maintain that continued payment of rents to the City Council by the defendants is not contempt of Court orders as there is confusion created by City Council demanding payment of rent to them; by virtue of which the plaintiffs lost their status as Head tenants when the City Council directed that sub-tenants do pay rents to the City Council at one time and then to the National Housing Corporation at another time.

(v) That the City Council is not a party to these proceedings.

(vi) That the City Council terminated leases with the Head tenants and then resumed direct relationship with the Sub-tenants where by the sub-tenants were required to pay rents to the City Council which the defendants have been doing.

(vii) Lastly that should the court find that there is breach then it should not hand out the drastic remedy of committal to civil jail. But award an alternative remedy.

The responses of the Plaintiffs Counsel are already on the record. The approach that the court is going to use to answer those issues is by reverting back to the lengthy history of the matter already outlined herein, and then consider them in the light of the salient features of the proceedings on which the plaintiffs orders of 15.05.07 are and then determine whether these are to stand or not. Secondly if they stand do they go to uproot the court orders of 15.05.07 or not.

Concerning proof of service as submitted by the plaintiffs counsel, the defendants cannot attack the mode of service without applying to have the process server and the chief to be cross examined on what transpired during the service of the said orders. It is correctly submitted by the Plaintiffs Counsel that since they are the ones complaining, it is them who should have applied for presentation of the named person for cross-examination. In the absence of such request there is nothing to fault, the service of the earlier orders giving rise to orders of 15.5.07 and the said orders of 15.05.07 themselves.

Concerning the defects in the framing of the eviction orders, that cannot be challenged in these proceedings as what the applicant has moved to set aside are the order of 15.05.07 and not the orders of 19.7.1999. Secondly the earlier application to have those orders stayed did not raise that complaint. Neither did they seek leave to challenge them. Thirdly there is no jurisdiction to challenge those orders as the defendants have no locus standi in the matter, them having not entered appearance or filed defence in the said matter. Fourthly, the said orders which are a by product of interlocutory proceedings were anchored on the main prayer in the plaint and were extracted as granted. Their issuance both in the main plaint as well as the interim application were not conditional to the happening of events. The plaintiffs asserted that the defendants had failed to pay rent and for this reason they should be evicted, and since there was no opposition they were granted as prayed. Fifthly since no request was made by the defendants to set them aside they still stand. Indeed they were issued in l999, but in this courts view, they are not stale because the file has been active having been continuously activated by the plaintiffs who have been making efforts to enforce them.

Concerning assertion that there is no relationship between the current proceedings and those in HCCC No.422/80, this court says that there is an abundance of history and documentary proof outlined herein which is to the effect that:-

(i) The plaintiffs were head tenants of the City Council of Nairobi.

(ii) Resolutions were passed to sell the properties to them which were effected and when the City Council tried to retract the resolutions, the plaintiffs moved to court and obtained a perpetual injunction retraining the City Council from doing so which interim injunction culminated in a valid judgment which

has not been upset on appeal. In those proceedings the plaintiffs asserted their right to rents from the Sub-tenants who are the defendants herein and went as far as obtaining orders to order the City Council to refund the rents collected by it from the sub-tenants from the date the Permanent injunction was granted in their favour. They went further to demand accounts to be taken to establish the accounts that the City council was to pay to them. The proceedings in HCCC.422/80 concerned Shauri Moyo Estate within City Council of Nairobi.

It is the plaintiffs success in Nairobi HCCC No.422/80 which led them to file the current proceedings against the sub-tenants. The proceedings were necessitated by the fact that the sub-tenants were not parties to the proceedings in HCCC No.422/80.

In the absence of proof that there are two Shauri Moyo Estates within the City Council of Nairobi, the link between the proceedings of HCCC NO. 422/80 and the current ones have been established. The two are interrelated.

As regards continued payments of rents to the City Council, once judgment was given to the plaintiffs against the Council which council did not appeal against that judgment, and once orders were drawn and served and then the Council acknowledged this fact in correspondences outlined herein, and once the plaintiffs intimated that they were moving against the sub-tenants as a result of their judgment against the City Council and once the Plaintiffs obtained orders against the defendants which orders are still in place, any move by the defendants contrary to the sprit of the judgment in HCCC 422/80 and the eviction orders herein, is a defiance of the said orders and where proved they amount to contempt of the said orders. Herein the contempt has been proved as the defendants have all along resisted eviction.

As for the allegation that the proceedings herein do not hold because the City Council is not a party to these proceedings in the first instance, and in the second instance it the City Council, terminated the leases it had with the Head tenants, and then started receiving rents from the sub-tenants directly. The court makes findings that the assessment in the background information reveals that indeed the City Council tried to revoke the leases and the idea agreement and that is what led to the filing of Nairobi HCCC No. 422/80. This action on its part earned it an interim perpetual injunction in those proceedings. During the pendence of the said interim orders it attempted to correct rent directly and the matter was taken back to court through a threat of contempt proceedings and it abandoned the move. It even issued communication officially as shown on record here that the Head tenants were free to pursue their rights as per the Court, Judgment. It went further to direct the Director of Physical Planning to go ahead, carry out survey of the said Shauri Moyo Estate plots, and issue title deeds to the Head tenants. It therefore follows that the issues between the City Council and the plaintiffs having been settled by the judgment and decree in HCCC No.422/80 as well as by the orders to take accounts between the two to determine the amount refundable to the Head tenants. That issue having been settled there was no justification for joining the City Council of Nairobi to the proceedings herein. Once the perpetual injunction was slammed in the face of the City Council of Nairobi, that action or move cut off the land lord and tenant relationship between the City Council of Nairobi and the Sub-tenants.

As for the National Housing Corporation, indeed it was not party to the proceedings in Nairobi HCCC 422/80 nor the current proceedings. It is however to be noted that its circular is dated 3rd June 2004. Coming this late in time, it does not offer any protection to any party as it has come after the rights of the Head tenants vested by the judgment and decree in HCCC No. 422/80 had already crystallized. Being a circular it cannot be relied upon to upset a judgment of the High Court and it is therefore of no consequence in so far as the proceedings herein are concerned.

The affidavits for and against the application as well at their anenxtures deserve comment. Those traced on record are those of Mitutu Gichuki Wangui Kairu, Andrew Murigi, Enos Peter, Joseph Masii. There is no supporting affidavits for James Mutura, Sammy Susa and Sila Olieti. The affidavits have been drawn in similar format with the exception of paragraphs referring to the deponent in his/her personal capacity. They also have general deponents which tend to demonstrate that they refer to all defendants affected by the proceedings. The general rule is that where such affidavits intend to cover other persons besides the deponents, themselves, they have to come within the ambit of the provisions of

order 1 rule 12 (1) and (2). Order 1 rule 12 Sub rule 1, makes provisions that where there are more than one plaintiff or defendant any number of them can authorize any one or number of them to act on behalf of the rest. Sub rule 2 requires that the authority should be in writing and filed in court. Where there is non compliance with this rule the none deponing parities are not covered by the affidavit in question. Apart from giving a general impression, none of the deponents whose affidavits are on record specifically say that they were deponing on their own behalf as well as on behalf of none deponing parties. There is also no authority by the none deponing parties filed in court to show that the deponing parties had authority to depone so on their behalf. The net effect of this, is that, the non-deponing parties namely James Mutuira Kanya, Sammy Susa and Sila Olieti have no papers opposing the applicants move to have them committed to civil jail for disobedience to a court order.

Order 18 rule 3 Civil Procedure Rules provides that an affidavit be confined to matters within the deponents and if not, knowledge within facts whose sources are disclosed. Paragraph 3,4,5,6,7,9,11,12,14,16,21 of the affidavit of Mutitu Gichuki, paragraphs 3, 4,5,6,7,10,12,14, 19, 20 and 21 of the affidavit of Wangui Kairu, Paragraphs 3,4,5,6,8,10.11,13,15,18, 20 and 21 of the affidavit of Andrew Murigi, paragraphs 3,4,5,6,7,10,11,13,15 and 16 of the affidavit of Enos Peter, paragraph 3,4,5,6,7,8,11,13,15,19 and 20 of the affidavit of Joseph Masii do not disclose the source of the information containing in them. This irregularity is fatal and it is not curable under order 18 rule 7 Civil Procedure Rules which deals only with defects of misdescription of the parties, or otherwise in the title or other irregularity in the form therein of and are therefore ordered to be struck out.

Annextures to the affidavits are also required to comply with the provisions of the oath and statutory declarations Act Cap.15 laws of Kenya. Rule 9 there of requires that the exhibits be marked clearly and they be commissioned. MGI, 2 and 3 to the affidavit of Mutitu Gichuki are marked and commissioned. All the City Council receipts are not commissioned or marked. These exhibits stand to suffer two penal consequences. Firstly, they have been annexed to a fatal paragraph which once struck out, it has to go together with the annextures. Secondly, those not marked too have to be struck out.

All the exhibits to the affidavits of Wangui Kairu suffer the same fatal penal consequences on two fronts, namely of being attached to a paragraph ordered to be struck out and secondly being liable to be struck out because they have not been marked and commissioned in accordance with the provisions of rule 9 of Cap.15 Laws of Kenya.

Those attached to the affidavits of Andrew Murigi suffer the same fate. Those marked as AM and 2 and 3 suffer the fate of being struck out, because they have been annexed to a paragraph which has been struck out where as the rest suffer that penalty because they have not been marked and commissioned in accordance with rule 9 of Cap.15 Laws of Kenya.

Like wise those of Enos Peter suffer the same consequences because they have been annexed to a paragraph struck out and secondly because they have not been marked and commissioned in accordance with rule 9 of Cap.15 Laws of Kenya. Those annexed to the affidavit of Joseph Masii are marked JM1 and 2 but suffer fatal consequences because they have been annexed to the paragraph ordered to be struck out.

The striking out of the defective paragraphs in the named affidavits as well as the annextures robs the defendant's application a basis on which it can be anchored. It is left bare. It is now trite law that a djective affidavit cannot survive the penal consequences. See the case of **RAJPUT VERSUS BARCLAYS BANK OF KENYA LTD AND 3 OTHERS NAIROBI HCCC NO.38 OF 2004 and MULUSIAH LAND CONSULTANTS AND COLOUR GEMS LTD VERSUS INDUSTIRAL DEVELOPMENT BANK, LAWRENCE ODORI NABWANA AND TACT CONSULTANCY SERVICES NAIROBI MILIMANI CIVIL CASE NO. 211 OF 2004,** by O.K. Mutungi J. quoted with approval by this court in the ruling delivered on 25.5.2007 in the case of **SANDEEP SUNGH BENAWRA VERSUS SHIMERS PLAZA LTD AND RAJ DEVANI NAIROBI HCCC NO.104 OF 2007.** And the ruling delivered on 27th day of July 2007 in the case of MESHACK RIAGA OGALO AND SEVEN OTHERS suing in their capacity as officials of LUO COUNCIL OF ELDERS VERSUS HENRY MICHAEL OCHIENG AND 4 OTHERS NAIROBI HCCC NO.3LC 30 OF 2007.

The affidavit of Ali Soitara too does not have a clean bill of life. Paragraph 7 and 8 thereof do not disclose the source of that information and so they suffer the consequences of being struck out. This striking out will not in any way aid the defendants as the application in opposition of which the said affidavit was sworn has been faulted and found to be of no consequence, by virtue of key paragraph in affidavits supporting it being struck out. The striking out leave the application bare. By being left bare the application becomes a proper for striking out and it is accaordingly ordered to be dismissed and or struck out

Turning to the law, the court has to deal with the following legal issues:-

(1) The standard of proof in such proceedings

(2) Legal Avenues through which access can be gained to access the relief orders.

(3) Whether inherent powers of the court can be called into operation to deal with any defects that may have been displayed herein and whether those defects are curable or fatal to the proceedings.

(4) What are the final orders in this ruling in so far as the available remedies and/or options open to the court are concerned.

The inherent powers of the superior court of this jurisdiction are enshrined in section 3A of the Civil Procedure Act which reads "*Nothing in this Act shall limit or otherwise affect the inherent powers of the court to make such orders as may be necessary for ends of justice or to prevent abuse of the process of the Court"*. The circumstances under which these inherent powers of the court are to be tapped have been settled by the Court of Appeal in the case of WANJAU VERSUS MURAYA {1983} KLR 276 among many others. In this case it was held inter alia that section 3A of the Civil Procedure Act (Cap 21) Laws of Kenya although saving the inherent powers of the court to make such orders as may be necessary for rends of justice or to prevent the abuse of the power of court should not be cited where there is an appropriate section or order and rule to cover the relief sought. Applying that to the facts herein, it means that these cannot be called into play to cure the defects in the affidavits in support of the defendants application as there are clear provisions both under order 18 Civil procedure Rules and the Oath and statutory declaration Act Cap.15 Laws of Kenya specifically dealing with the fate of defective affidavits. And as shown by case law there is no cure for such defective affidavits, they have to suffer the penal consequences of being struck out.

As regards legal avenues through which a litigant canpass through to get the relief of redress for a disobedience of a court order or contempt of court orders; these are order 39 Civil Procedure Rules and the Judicature Act Cap.8 Laws of Kenya Order 39 rule 2, A(2) provides that "*in cases of disobedience, or of breach of any such terms, the court granting an injunction may order the property of the persons guilty of such disobedience or breach to be attached and may also order such a person to be detained in prison for a term not exceeding six months unless in the mean time the court directs the release"* This avenue is open to disputes arising under order 39 Civil Procedure Rules only. It means that by exclusion the proceedings herein fall under the Judicature Act procedure under which they were brought. This therefore faults the defence arguments that the correct procedure has not been followed to initiate the proceedings.

The next to be considered is the standard of proof required. The defendants Counsel referred the court to a well known decision of the Court of Appeal on the subject. This is non other than the famous decision of G**ATHARIA K. MUTITIKA AND TWO OTHERS VERSUS BAHARIn, FARM LTD (now called Nakuru House Development Co. Ltd) [1982-88]** 1 KAR 863 where it was held inter alia that in cases of alleged contempt, the breach for which the alleged contemnor is cited must not only be precisely defined but also proved to a standard which is higher than on a balance of probabilities but not as high as proof beyond reasonable doubt.

This Court had occasion to explore the relevant case law on the subject in its ruling delivered on 22nd August 2007 in the case of ELITE STUDIOS LIMITED AND PANA RATILAL SHA T/A

CONTINENTAL OUTFITTERS VERSUS INTERCONTINENTAL HOTELS LTD NAIROBI C.A. 483 OF 2005. These are found at page 6 -13 of the said ruling. For purposes of this record this court will only endevour to draw out the control themes in these decisions.

(1). In the case of SATISH KUMAR VERSUS SAMUEL MAGUA NAIROBI HCCC 188 OF 1994 Ole Keiwua J. as he then was (now JA) ruled that contempt of court has to be swifly punished in order to uphold the fundamental tenet of the rule of law that court orders must be obeyed.

(2). In the case of GEORGE SAGALA AND MATHARU GAEWA LANGO suing in their capacity as the Chairman and Secretary of **MUMIAS SUGAR FOOTBALL CLUB VERSUS PETER KENNETH AND SAMSON KEENGU NYAMWEYA** sued in their capacity as the Chairman and Secretary Kenya Football Federation Bungoma HCCC NO. 147 of 1999 Mbito J., as he then was ruled that, contempt in his view was where a party who is required not to do anything positive and being aware of the requirement not to do the act, proceeds to do that which he is restrained from doing. If the law were otherwise then parties would be at liberty to disobey court orders with impunity until they are served personally which would bring the administration of justice into disrepute and promote strong arm tactics and or law of the jungle.

(3). In the case of **P.N.NJOROGE JIM WAMBIE AND ANTOHER VERSUS REV. MUSA NJUGUNA NAKURU HCCC NO. 247 "A" of 2004** Musinga J. ruled that a person who knowing of an injunction or an order of stay willfully does something or causes others to do something to break the injunction or interference with the stay is liable to be committed for contempt of court as such a person has by his conduct obstructed justice.

(4). In the case of **MWAGI WANGONDU VERSUS NAIROBI CITY COMMISSION, NAIROBI C.A. 1995 of 1998** the Court of Appeal, ruled that the rule of law which the Court, subscribes to requires that orders of our courts, be respected and obeyed and that duty applies equally even where a party is dissatisfied with an order and has appealed to an appellate court against the order, ruling or judgment.

(2) That contemnors undermine the authority and dignity of our Courts, and must be dealt with firmly so that the court, authority is not brought into disrepute.

(5). In the case of **REFRIGERATOR AND KITCHEN UTENSILS LTD VERSUS SULA BACHARND POPAT T/A SHAH AND OTHERS NAIROBI, CA. 39 of 1990** the court of appeal ruled that it is essential for the maintenance of the rule of law and good order that the authority and dignity of our courts are upheld at all times. The court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors.

(6). **HADKINSON VERSUS HADKINSON[1952) 2 A.E.R 567** ruled that it was the plain and unqualified obligation of every person against or in respect of whom an order was made by a court of competent jurisdiction to obey it unless and until it was discharged and disobedience of such an order would as a general rule result in the person disobeying it being in contempt and punishable by committal or attachment and in an application by him not being entertained until he had purged his contempt.

At page 21 of the Elite Studio ruling (supra) this Court set out the ingredients required to be satisfied in such proceedings. These are:-

(1) The applicant must have complied with the laid down procedures for seeking the reliefs sought. Herein the plaintiffs had come by way of the procedure under the Judicature Act. This court has ruled that there are only two avenues for seeking such a relief. That is under the Order 39 Civil Procedure Rules, Procedure and under the Section 5 of the Judicature Act procedure. Having ruling that the order 39 Civil procedure Rules procedure is not applicable here, the section 5 of the Judicature Act Cap.8 Laws of Kenya by which the plaintiffs sought leave is the only proper procedure to be followed. The court therefore rules that the procedure employed by the Plaintiffs to seek relief is the correct procedure.

(2) There must be proof that there is a competent order in existence which order is required to be clear

and unambiguous. Herein there is the interim order of perpetual injunction issued on 8th day of March 1980 and issued on 12th day of July 1982 in HCCC No.422/80. Judgment granted therein on 28th of February, 1991 and the decree issued therein on 3rd July 1991. There are the foundation stones on which the eviction orders issued on 19th July 1999 stand all of which have not been upset and are still in existence.

(3) . There must be proof that the said order was extracted and served personally. Service of the initial eviction orders herein is proved by existence of efforts made to enforce them both through the police and provincial administration which efforts were not successful for reasons directly already given herein. Service of the orders made on 15.5.2007 for committal to civil jail was proved by the fact that the same was not faulted by both the submissions of Counsel and the deponents of the defendants who filed supporting affidavits.

(4) Service on corporation has to be effected both on the corporation and its principal officers which ingredient does not apply to these proceedings.

(5) The requirement for extraction of a notice of penal consequences and service of the same has been proved as in no. 3 above as the service of the same has not been faulted.

(6) The standard of proof required is above that requiring a balance of probability but not as high as one of beyond reasonable doubt as in criminal proceedings. This requirement has been satisfied because:-

(i) The interim order, judgment and the decree in HCCC No.422/80 gave the Head tenants ownership and right to receive rents from the subtenants.

(ii) The eviction orders of 19.7.1999 gave the Head tenant the right to evict the sub-tenants who were not paying rent to them.

(iii) The City Council obeyed the orders in HCCC No.422/80 by giving directives that title deeds be issued to the Head tenants.

(iv) No proof that the defendant subject of this ruling have been paying rent to the City Council since 1991.

(v) The defendant's application to set aside the orders of 15.05.07 has been faulted.

(7) The remedies available to an aggrieved party are either of fine a civil jail or both depending on the circumstances of each case. This Court will apply the same standard when determining the appropriate remedy. The plaintiff seek civil jail while the defendants counsel pleaded for alternative remedy should the defendants be found to have been in breaches.

(8). The whole essence of contempt proceedings is to ensure that court orders are not flouted with impunity. Once issued even if challengeable they must first of all be obeyed and then challenged later. The scenario displayed herein is one where court orders have been disobeyed with impunity by persons who have not even found it fit to put themselves properly on record to dispute the said orders. This has gone on since l991 in respect of the HCCC No.422/80 orders and 1999 in respect of the orders granted herein.

(9). The machinery for enforcing obedience to court orders and punishing the contemnors for such proven disobedience is the court itself as by law empowered. This court is duly empowered to deal with the proven disobedience herein appropriately.

(10). The ultimate benefit for such punishment is to ensure that the authority and dignity of the court is upheld at all times. This enjoins this court to ensure that the dignity of the Court is so far as orders subject of this ruling are concerned are obeyed.

In review of the reasoning herein and after due consideration of

In the final analysis, after due consideration of all the relevant facts and issues herein, this court makes the following findings in conclusion of this matter.

1) The judgment in HCCC 422 of 1980 delivered on 28th February 1991 and decree issued on 3rd July 1991 fore closed the right of the City Council of Nairobi of demanding and receiving rents directly from the sub-tenants of Shauri Moyo estate on the one hand. And on the other hand it cemented the right of the Head tenants among them the plaintiffs not only to demand but also to receive rents directly from the sub-tenants of Shauri Moyo Estate; and the right to move the court to evict the said tenants for non payment of rent.

2) Since the sub-tenants were not party to the proceedings in HCCC 422 of 1980, the judgment and decree, cemented the Head tenants right to move to court to file the current proceedings to seek eviction of the defendants for non payment of rent to them.

3) Since the relief in the amended chamber summons was similar to the main relief in the amended plaint, the granting of the same on the basis of the amended chamber summons on 19th July 1979 and the vacation of the stay orders staying their execution as per Aluoch J's orders of 7th March 2002, this had the effect of short circuiting the suit and finally determining it. This in effect fore closed the defendants right to challenge the said eviction orders subsequently. The vacation of the stay orders removed the veil that had shielded the defendants respondents and thense forth firm exposed them to execution process.

4) The contents of the correspondences from the OCS (Officer Commanding Police Station) Shauri Moyo p/st dated 6th December, 1999 ref e © gen/11/vol 111 (32) and the one from the District Officer Pumwani dated 10th November, 1999 Ref gen/11/vol.111.99 addressed to the D/R of this court in response to the NTC (Notice to show cause) issued to the two, to show cause why they had not executed the court order to the last orders of 19th July 1999 as directed by court, show that the attempt to evict the sub tenants among them the dependants was resisted and it became a security risk. It had to be called off to avoid chaos and insecurity. This is proof that enmass eviction is likely to turn chaotic hence the need to seek for a more peaceful mode of execution such as the one currently resorted to namely of committal to civil jail of the defendants on small dozes basis.

5) The filing of the plaintiffs application dated 8th March 2007 and filed on 9th March 2007 was such a move of seeking to enforce the decree in small dozes to avoid creating security risk situations as adviced by the Officer Commanding Police Station Shauri Moyo and District Officer Pumwani as in No.4 above.

6) Service of the eviction orders in the first instance is proved by correspondence from the Officer Commanding Police Station Shauri Moyo and District Officer Pumwani that indeed they tried to provide security to the court bailiffs to effect eviction of the defendants but, met resistance leading to a security risk, thus forcing them to call off the exercise.

7) There is direct relationship between Nairobi HCCC 422 of 1980 and the current proceedings in HCCC 66 of 1997 because it is on record that the plaintiffs were Head tenants of the City Council of Nairobi. Resolutions were passed to sell the properties to them which were effected and when the City Council tried to re tract the resolutions, the plaintiffs moved to court and obtained a perpetual injunction restraining the City Council from doing so, which interim injunction culminated in a valid judgment and decree which has not been upset on appeal to-date. In these proceedings the plaintiffs asserted their right to rents from the sub-tenants who are the defendants herein and went as far as obtaining orders to order the City Council to refund the rents collected by it from the sub tenants from the date the injunction was granted in their favour. They went further to demand accounts to be taken to determine the exact amount to be paid to them.

8) It is the plaintiff's success in Nairobi HCCC No. 422 of 1980 which led them to file Nairobi HCCC No.66 of 1997 subject of this ruling necessitated by the fact that the sub-tenants were not party to the

proceedings in HCCC No. 422 of 1980 hence no execution process could be levied against them insofar as orders emanating from HCCC 422 of 1980 were concerned. In the absence of proof that there are two Shauri Moyo Estate within the City Council of Nairobi, the link between HCCC 422 1980 and HCCC 66 of 1999 has been established.

9) Once judgment was given to the plaintiffs against the City Council, which Council did not appeal against those orders, and there being proof on record that after these orders were drawn and served, the Council acknowledged this fact in the correspondence outlined. It is also on record that all the plaintiffs intimated that they were moving against the sub-tenants as a result of their judgment against the City Council and once the plaintiffs obtained orders against the defendants which orders are still in place, any move by the defendants contrary to the spirit of the judgment in HCCC 422 of 1980 and the eviction orders herein is a defiance of the said orders and where proved they amount to contempt of the said orders. Herein the contempt has been proved as the defendants have all along resisted eviction.

10) The assessment in the background information rreveals that indeed the City Council tried to revoke the leases and sale agreements with the Head tenants which action led to the filing of Nairobi HCCC 422 of 1980. This action on its part earned it an interim perpetual injunction in those proceedings. During the pendence of the said interim injunction order it attempted to collect rent directly and when the matter was taken back to court through a threatened contempt of court proceedings it abandoned the move and issued communication outlined on record that the Head Tenants were free to pursue their rights as per the court judgment in HCCC 422 of 1980 and to direct the Director of physical planning and Architecture to carry out survey and issue the title deeds to Head – tenants. It therefore follows that the issues between the City Council and the plaintiffs having been settled, the judgment and decree in HCCC No. 422 of 1980 as well as the orders to take accounts between the two to determine the amount refundable to the Head-tenants that issue having been settled there was no justification for joining the City Council of Nairobi to the proceedings herein. Once the perpetual injunction was slammed. In the face of the City Council of Nairobi, that action or move or cut off the landlord and tenant relationship between the City Council of Nairobi and the sub-tenants.

11) Indeed the National Housing Corporation is not a party to both proceedings. However its circular dated 3rd June 2004 came late in time and does not offer any protection to any party as it has come when the rights of the Head-tenants vested by the judgment and decree in HCCC 422 of 1980 and the eviction in HCCC 66 of 1997 had already crystallized. Being a circular it cannot be relied upon to upset both judgments and orders.

12) It is not true as alleged by the defendants both in their deponement and counsels' submissions' that the defendants were not aware of the eviction orders issued herein on 19th July 1999, and that neither were they served in respect of the same as it is on record that the service of these orders on them by the Officer Commanding Shauri Moyo Police Station and District Officer Pumwani is what prompted them to hire a lawyer, a Mr Ombete to put in an application for staying of the eviction orders of 19th July 1999. The application is dated 20th March 2000. The notice of appointment reads that the said Counsel was acting for all the defendants which fact has not been denied by them in the current proceedings. This application of 20th March 2000 led to the issuance of the stay orders by Aluoch J on 7th March 2000.

13) It is this court's findings that the proceedings via the defence application of 20th March 2000 filed by their own lawyers to stay the eviction orders granted exparte were sufficient notice to the defendants that if they were desiruous of resisting the plaintiff's right of demanding rent as Head tenants from the defendants, as sub-tenants, the only way open for them to do so was to instruct their lawyer to seek leave of court for them to enter appearance and file defence out of time. This would have given them an opportunity to demonstrate to the court and the plaintiffs as to why the plaintiffs cannot receive rent as Head-tenants and why they should continue paying rents to the City council.

14) The vacation of the stay order which had been granted by Aluoch J on 20th March 2000 by the vacation orders which had been granted by the same Aluoch J on 7th March 2002, this action restored the effectiveness of the eviction orders which had been granted by Mitey J as he then was on 19th July 1999.

15) The restoration of the effectiveness of the eviction orders of 19th July 1999 on 7th March 2002, in the absence of appearance, and defence, on record robbed the defendants any further right to challenge the plaintiffs' right as Head tenants to demand that they defendants as sub-tenants pay rent to the plaintiffs or they be evicted. It also robbed them of the right to allege lack of knowledge of existence of the eviction orders.

16) Correspondence from the Town Clerk City council of Nairobi dated 28th March 1985 .to Director Planning and Architecture directing survey and issuance of title deeds to Head tenants of Shauri Moyo is sufficient proof that indeed Head tenants among them the plaintiffs have been allocated houses in Shauri Moyo estate as owners. This is proof that the City council had divested itself ownership in favour of the Head-tenants. This proof of divestation of ownership from City council of Nairobi to Head-tenants among them plaintiffs is sufficient proof to entitlement of rent by plaintiffs from the sub-tenants the defendants and right to eviction in the event of default.

16. The defendants application dated 11.07.07 which sought to set aside this courts orders of 15.05.07 seeking to commit the defendants to civil jail has been faulted and the same stands dismissed for the following reasons:-

(i) The key paragraphs as well as the annextures relied upon were struck out for failure to comply with the provisions of order 18 rule 3 Civil Procedure Rules, in that they failed to disclose the source of the information which defect was held not curable under order 18 rule 7 of the Civil Procedure Rules. The annextures or exhibits which had been properly marked suffered penal consequences because the paragraphs in respect of which they were annexed were struck out in the first instance. In the second instances others were struck out and expunged because they had not been marked and commissioned in accordance with rule 9 of the oath and statutory Declarations Act Cap.15 Laws of Kenya.

(ii) Three defendants as mentioned had no affidavits in support of the said application and since the defendants who filed supporting affidavits had not complied with the provisions of order 1 rule 12(1) and (2), those affidavits Could not operate to cover the defendants who had not filed affidavits in opposition. They are therefore deemed not to have been opposing the plaintiff's orders of 15.05.07.

(iii). The faulting of the defendants application dated 11.07.07 and its attendant dismissal brings to therfore eviction orders made on 19.7.l999 which required the defendants to be evicted.

(iv). The defendants have no locus standi to oppose the said orders as they did not enter appearance or file defence herein as their right to do so was foreclosed when their advocates then on record failed to seek leave to set aside the exparte orders, and, then seek leave for them to be heard on merit on the interim application and the main suit.

(v). It is on record that indeed the orders of 19.7.1999 were wrongly granted as they short circuited the main relief in the plaint. But as long as they stand the principles established by case law set out herein demand that they be obeyed.

(vi).The defendants cannot take refuge under the umbrella of the City Council of Nairobi and the National Housing Corporation by alleging that these two entitles are the ones authorized to receive rents as their power to receive such rents, from the subtenants was taken away by the Court in Nairobi HCCC. 422/80 whose judgment and decree took away that right and vested it in the plaintiffs therein. These orders have not been upset. The Plaintiffs in HCCC NO.422/80 are part of the Plaintiffs herein who are entitled to enjoy the fruits of their judgment.

vii Further restoration of the effectiveness of the eviction orders of 19.7.1999 crystallizes the Plaintiff's right to evict in default of payment of rent.

Viii There has been no demonstration by the defendants that they have been paying rent even to the two entities mentioned in No. 5 above. Absence of such a demonstration is evidence of disobedience of court order on payment of rent.

17. All the foregoing factors as set out above in No.1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, and 16 all go to demonstrate that the plaintiff rightfully earned the orders of 15.05.07. No cause has been shown as to why the defendants should not be committed to civil jail.

18. The finding in No. 17 above does not take away this court's discretion to resort to an alternative remedy as opposed to civil jail. This court has taken into consideration all the relevant factors herein and arrived at the conclusion that a fine is appropriate.

Imposing the said fine, the court takes into consideration the fact that the defendants have benefited from the disobedience of the orders by of the defendants by virtue of their living and making use of the said premises without paying rent as already ruled that there is no proof that rent was being paid either to City Council or National Housing Corporation from 1995 to date.

They are each fined Shs. 20,000/= in default two months imprisonment with a warning that continued disobedience will attract heavier penalties.

19. The said defendants stand evicted from the said premises and should vacate immediately they pay the fine or upon completion of serving of the civil jail as the case may be.

20. The Plaintiff will have costs of the proceedings.

21. The plaintiff will also have liberty to proceed against the other remaining defendants in a similar manner.

Dated, Read and delivered at Nairobi this 30th day of November 2007.

**R. NYAMBUYE**

**JUDGE**