



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT ELDORET**

**Civil Case 96 of 2005**

**STEPHEN KIPROP CHESIRE ..... PLAINTIFF**

**VERSUS**

**FRANCIS ODIPO OSANO ..... 1<sup>ST</sup> DEFENDANT**

**MORRIS MWAMBURI MGENDI ..... 2<sup>ND</sup> DEFENDANT**

**LAZARE ETIEGNI ..... 3<sup>RD</sup> DEFENDANT**

**GEORGE CHAKUA NYASWENTA ..... 4<sup>TH</sup> DEFENDANT**

**OLOSIKA TRUPHOSA MAUREEN ..... 5<sup>TH</sup> DEFENDANT**

**GEORGE MWANGI NJOGU ..... 6<sup>TH</sup> DEFENDANT**

**SOLOVEA KOKI IRENE ..... 7<sup>TH</sup> DEFENDANT**

**MARGARET WASIKE NAFULA ..... 8<sup>TH</sup> DEFENDANT**

**HUSSEIN SALIM KIBWANA ..... 9<sup>TH</sup> DEFENDANT**

**KIMUTAI CHERUIYOT KOLUM ..... 10<sup>TH</sup> DEFENDANT**

**ASISCO PHARMACY LIMITED ..... 11<sup>TH</sup> DEFENDANT**

**ULTRA VERTIS LIMITED ..... 12<sup>TH</sup> DEFENDANT**

**CLEAC COLLEGE ..... 13<sup>TH</sup> DEFENDANT**

**JOSEPH LAGAT T/A HALIFAX VETERINARY ..... 14<sup>TH</sup> DEFENDANT**

**KIPLAGAT CHERUTICH T/A HICHEM PHARMACEAUTICAL ..... 15<sup>TH</sup> DEFENDANT**

**SAMBAI KITUR T/A BANDAPTAI AGROVET ..... 16<sup>TH</sup> DEFENDANT**

**RULING**

This matter revolves around property known as ELDORET MUNICIPALITY/BLOCK 7/184 (“subject property”) which was bought by Stephen Kiprop Chesire at a public auction on 27/3/2002. Though he acquired title to it on 23/8/2002, Sambai Kitur who was the owner prior to the sale has refused to vacate the premises and continues to collect rent from the various tenants. Efforts to evict him proved futile as the process was thwarted by the said Sambai Kitur and other people who were armed with bows and arrows.

In the meantime despite having been notified of the sale and consequent transfer, all except the 7<sup>th</sup> respondents continued paying the monthly rental to the said Sambai Kitur.

Chesire decided to file this suit against the 15 tenants and Sambai Kitur and on 2/11/2005 he obtained the following order, as an interim measure.

*“(a) Pending the hearing and determination of this application, a temporary injunction be and is hereby issued restraining the 1<sup>st</sup> to the 15<sup>th</sup> Defendants from paying out rent and or any other money to the 16<sup>th</sup> Defendant and further restraining the 16<sup>th</sup> Defendant from receiving any rent or other money arising from the 1<sup>st</sup> to the 15<sup>th</sup> Defendants occupation of the Plaintiffs’/Applicants’ land parcel number ELDORET MUNICIPALITY BLOCK 7/184.*

*(b) Pending the hearing and determination of this application, the 1<sup>st</sup> to the 15<sup>th</sup> Defendants be and are hereby ordered to deposit the monthly rent accruing from their occupation of land parcel number ELDORET MUNICIPALITY BLOCK 7/184 into a joint interest earning account in the names of the Deputy Registrar of Court and counsel for the Plaintiff/Applicant or in the alternative the monthly rent be deposited in Court.”*

Chesire who has now moved the court in an application to cite the aforementioned 15 persons (except the 7<sup>th</sup> respondent) for contempt, depones that each one of the defendants was personally served with the aforementioned Order. It is his prayer that the fifteen be imprisoned for a period not exceeding 6 months for such contempt.

The evidence on record and especially, the current water and electricity bills, disclose that the premises are occupied by these 16 respondents and there can be no dispute to that effect. As stated earlier, the 7<sup>th</sup> respondent, who complied with the court Order shall not be a party to these particular proceedings.

I have no evidence to show that these 14 respondents have paid the rentals to court as ordered on 2/11/2005, nor is there evidence to show that Sambai Kitur, has deposited in court the rents so received from the 14, who occupy the said premises.

Of the 15, only the 10<sup>th</sup>, 14<sup>th</sup> respondents filed replying affidavits in which each denies service. The 16<sup>th</sup> respondent has filed grounds of objection in which he mainly denies having been served with the order, that in any event the order was directed at other people. He urges the court to order a full and comprehensive taking of evidence, otherwise it would be tantamount to determining the suit substantively on an interlocutory application.

In an application of this nature the guiding principles were as laid down in **Re Maria Annie Davies (1) (1888) 21 QBD 236 at paragraph 239**, it being that “*recourse ought not to be had to process of contempt in aid of a civil remedy where there is any other method of doing justice*”. The court relied on the observations of the late Master of the rolls in the case of **Re Clement** when he stated that, “*it seems to me that this jurisdiction of committing for contempt being practically arbitrary and unlimited, should be most jealously and carefully watched, and exercised, if I may say so, with the greatest reluctance and the greatest anxiety on the part of judges to see whether there is no other mode which is not open to the objection of arbitrariness, and which can be brought to bear upon the subject. I say that a judge should be most careful to see that the cause cannot be fairly prosecuted to a hearing unless this extreme mode of dealing with persons brought before him on accusations of contempt should be adopted. I have myself*

*had on may occasions to consider this jurisdiction, and I have always thought that, necessary though it be, it is necessary only in the sense in which extreme measures are sometimes necessary to preserve men's rights, that is, if no other pertinent remedy can be found. Probably that will be discovered after consideration to be the true measure of the exercise of the jurisdiction'.*"

Disobedience of a court order is a form of contempt, and it is important that I point out at the outset, that an order of the court, whether issued at an interlocutory stage or at the final stage, it carries the same weight in law. It must be complied with. It must be adhered to. A party who feels prejudiced by the disobedience can and has a right to move the court at any stage of the proceedings for an order to cite a party who is in contempt of that court order. It is not therefore proper for Mr. Mbugua to urge the Court to find that to entertain this particular application would be tantamount to determining the suit substantially through an interlocutory process. I hold the view that an application of this nature can be determined on affidavit evidence, it cannot therefore lie for Mr. Mbugua to urge the court to order the taking of full and comprehensive evidence as the court would order during a full hearing, before determining this application.

Be that as it may, where a party is seeking committal to civil jail against another party on grounds that the order which was delivered by the court has been disobeyed, the party sought to be committed or cited for contempt must be personally served with a properly extracted order which must also have a penal notice appended to it.

The standard of proof on contempt proceedings must be higher than proof on a balance of probabilities, and almost, but not exactly, beyond reasonable doubt as it is not safe to extend the latter standard to an offence which is quasi-criminal in nature. *"The guilt of the contemnor has to be proved with such strictness of proof as is consistent with the granting of the charge"* (**Mutitika v. Baharini Farm Limited [1985] KR 227**) and *"the principle that must be borne in mind is that the jurisdiction to commit for contempt should be carefully exercised with the greatest reluctance and anxiety on the part of the court to see whether there is no other mode which can be brought to bear on the contempt"*.

It is therefore my duty to establish whether the all the respondents against whom this order is sought, were served with the relevant notices.

I have therefore perused the affidavits of service on record and I note that the process server depones that he effected service of the relevant order with a notice of penal consequences, on the following persons on the given dates:

1. Dr. Francis Odipo Osano on 8/11/2005
2. Solovea Koki Irene on 7/11/2005
3. Morris Mwamburi Mgendi on 9/11/2005
4. George Mwangi Njogu on 9/11/2005
5. Salim Kibwana on 10/11/2005
6. Lazare Etiengni on 3/11/2005
7. George Chakua Nyaswenta on 3/11/2005
8. Olosika Truphosa Maureen on 3/11/2005
9. Margaret Wasike Nafula on 3/11/2005
10. Kimutai Cheruiyot Kolum T/a

Asisco Pharmacy on 3/11/2005

11. Directors of Ultra Vertis Ltd on 3/11/2005

12. Directors of Cleac College on 3/11/2005

13. Joseph Lagat on 3/11/2005

14. Kiplagat Cherutich on 3/11/2005

15. Sambai Kitur on 3/11/2005

Based on his affidavits of service I am convinced beyond any reasonable doubt, that service of the said order and penal notice was effected on all except the 12<sup>th</sup> and the 13<sup>th</sup> respondents, which are companies, and on whose directors the order was allegedly served, which in my mind was not effective service as the names of the 'directors' who were allegedly served were not specified.

Having been served, I find that the twelve chose to disobey the orders of this court. I need not re-emphasize the fact that court orders must be obeyed by all to whom they are directed at. It is not for a party, who feels aggrieved by the specific order to flout it, disobey or disregard it in the hope that he will get away with it, otherwise it would lead to breakdown in the rule of law and to anarchy. A party who feels aggrieved by an Order of the Court has other avenues open to him to air his grievances, for he can move the court by way of review or appeal, whichever would be most suitable given the circumstances. It would be a never ending saga if the court was to enquire why such a party has not complied with the order, as Mr. Mbugua, for the 16<sup>th</sup> respondent urges this court to find, for were that to be done, then orders of court would never be worth their name. It would be tantamount to encouraging parties to ignore orders with impunity for all flimsy reasons which one would think of. It should never be allowed to happen. Court orders must be obeyed to the letter.

I find that by refusing to deposit the rental sums in Court, as ordered on 2/11/2005, I find that it has been established beyond reasonable doubt that **FRANCIS ODIPO OSANO, MORRIS MWAMBURI MGENDI, LAZARE ETIEGNI, GEORGE CHAKUA NYASWENTA, OLOSIKA TRUPHOSA MAUREEN, GEORGE MWANGI NJOGU, MARGARET WASIKE NAFULA, HUSSEIN SALIM KIBWANA, KIMUTAI CHERUIYOT KOLUM, JOSEPH LAGAT, KIPLAGAT CHERUTICH** and **SAMBAI KITUR**, are in contempt of this court's orders, and their conduct amounted to obstruction of the course of justice. They have in the circumstances prejudiced the rights of the applicant who is the registered proprietor of the subject property.

I do hereby order that Francis Odipo Osano, Morris Mwamburi Mgendi, Lazare Etiegni, George Chakua Nyaswenta, Olosika Truphosa Maureen, George Mwangi Njogu, Margaret Wasike Nafula, Hussein Salim Kibwana, Kimutai Cheruiyot Kolum, Joseph Lagat, Kiplagat Cherutich shall each be subject to a fine of K.Shs. 20,000/00 and in default, to serve one month imprisonment. Sambai Kitur shall be liable to a fine of K.Shs 280,000/00 and in default to serve two months imprisonment.

It is so ordered.

Dated and delivered at Eldoret this 2<sup>nd</sup> day of May 2006.

**JEANNE GACHECHE**

**JUDGE**

Delivered in the presence of:

Mr. Gicheru for the plaintiff

No appearance for or by 1<sup>st</sup> defendant

Mr. Momanyi for 4<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 13<sup>th</sup> defendants

No appearance by 5<sup>th</sup> defendant

Mr. Onyinkwa for the 6<sup>th</sup> defendant

Mr. Kathili for the 10<sup>th</sup>, 11<sup>th</sup>, 14<sup>th</sup> & 15<sup>th</sup> defendant

Mr. Kigamwa for the 2<sup>nd</sup> defendant

3<sup>rd</sup> defendant present in person

Mr. Njuguna for the 12<sup>th</sup> defendant