



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Misc Civ Appli 245 of 2004

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR AN ORDER OF
CERTIORARI TO**

QUASH THE DECISIONS OF THE 1ST July 2004 & 5TH July 2004 BY THE RESPONDENTS

AND

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR AN ORDER OF
PROHIBITION PROHIBITING**

**THE RESPONDENTS FROM ACTING ON THE DECISIONS OF THE 1ST & 5TH July, 2004
RESPECTIVELY**

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

NAKURU DISTRICT WORKS OFFICER.....1ST RESPONDENT

P.S. MINISTRY OF PUBLIC WORKS & HOUSING....2ND RESPONDENT

ENG. C. M. MUKUVA.....3RD RESPONDENT

EXPARTE

RICHARD KIPCHILLAT & 14 OTHERS.....SUBJECTS

AND

COMMISSIONER OF LANDS.....INTERESTED PARTY

RULING

By a notice of motion dated 5th October 2006, the applicant prayed for leave to institute contempt proceedings against the panel members of Nakuru District House Allocation Committee namely Mr. S. N. Kiala, Andrew Gitonga Rukaria and James M. Oino, for disobeying orders which were issued by this court on 14th July 2004. They also prayed that the status quo currently obtaining be maintained and the eviction notice issued on 28th September 2006 by the secretary, District Housing Allocation Committee, be stayed pending the hearing and determination of the contempt proceedings.

The application was supported by an affidavit sworn by Thomas Onseria Ongubo. He stated that he was the proprietor of parcel of land known as **Nakuru Municipality Block 4/175** and that he commenced these proceedings when the District Works Officer issued a letter dated 5th July 2004 demanding that he pays rent to the Government in respect of the aforesaid premises. On 14th July 2004 this court issued an order staying the aforesaid decision. That was after the applicant had been granted leave to institute judicial review proceedings for an order of certiorari to bring to this court and quash decisions made on the 1st and 5th July 2004. Leave had also been granted to the applicant to apply for an order of prohibition to prohibit the respondents from acting on the said decisions.

Mr. Ongubo further deposed that Mr. Simon Nthiwa Kiala of the District House Allocation Committee was aware of the existing orders, being in charge of Government estates within Nakuru and having sworn an affidavit in response to a similar application as this one filed by other parties, that is, **Misc. Civil Application No.351 of 2004**. Page one of an affidavit sworn by the said Mr. Kiala in that matter was annexed to the affidavit of Mr. Ongubo. No reason was given as to why the full affidavit was not annexed and neither was the date of swearing of the said affidavit indicated. The deponent herein went on to state that on 28th September 2006, the District House Allocation Committee, by a letter signed by Mr. Kiala, gave him one week's notice to vacate the house in question in default of which he was to be evicted. It was alleged that the house was owned by the Government. In his view, the said letter was highly contemptuous in view of the orders that had been issued by this court on 14th July 2004. That was the basis upon which the application for leave to commence contempt proceedings was made.

Before leave to commence contempt proceedings can be granted by a court, it has to be shown by the applicant that the person or persons intended to be cited for such contempt were served with the orders that are alleged to have been disobeyed. That can be done by exhibiting an affidavit of service to satisfy the court that service of the orders was duly effected. Alternatively, the court has to be satisfied that the alleged contemnors were aware of the orders which they are alleged to have breached, or that the orders were made in their presence. In this matter, no affidavit of service has been filed to verify that the orders issued by this court on 14th July 2004 were served upon the members of the Nakuru District House Allocation Committee and in particular Mr. S. N. Kiala, Mr. Andrew Gitonga Rukaria and Mr. James M. Oino.

Secondly, as hereinabove stated, only the first page of Mr. Kiala's affidavit in Misc. Civil Application No. 351 of 2004 was annexed to the affidavit of Mr. Ongubo. The date of swearing of the said affidavit was not shown. It is not clear whether it was sworn before the orders of 14th July 2004 were made or not. It cannot therefore be said that Mr. Kiala was explicitly aware of the orders that had been made in this matter.

Contempt of court is a very serious offence and the standard of proof that is required is higher than that which applies in ordinary civil matters, that is on a balance of probabilities, and almost, but not exactly beyond reasonable doubt as was held in ***MUTITIKA VS BAHARINI FARM LTD [1985] KLR 227***. I would equally say that before such proceedings are commenced, an applicant must also strictly satisfy the court that all the prerequisite requirements for bringing such an application have been met. In my view, the applicant in this matter has not done so. In the circumstances the application for leave to commence contempt proceedings is declined. However, in the interest of justice, the status quo currently

obtaining in the suit premises should be maintained until the judicial review application is heard and determined in terms of the orders that were issued on 14th July 2004.

DATED, SINGED and DELIVERED at Nakuru this 25th day of October, 2006.

D. MUSINGA

JUDGE

Ruling delivered in open court in the presence of Mr. Ogola for the applicant.

D. MUSINGA

JUDGE