

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS

Civil Suit 282 of 1996

JOHN MULWA NZIOKI.....PLAINTIFF/APPLICANT

VERSUS

PHILIP KIVUVA NZIOKA.....1ST DEFENDANT

JOSEPH MUNYAO KIILU.....2ND DEFENDANT/RESPONDENT

RULING

This application was dated the 9.5.2006. It sought that the 2nd defendant, the respondent in this application, be committed to prison for a term not exceeding 6 months for committing contempt of this court by causing distress to be levied in the suit premises –Machakos Town Block II/285 in which the 2nd respondent is the landlord and the applicant is the tenant.

Apparently this court on 1.3.2000 made an order to the effect that...**the 2nd defendant's action to levy distress as against the plaintiff at this stage are stopped by way of injunction...Orders to remain in force until this suit is finally determined or further orders of this court...**"

It was the applicant's case that the 2nd respondent contrary to the above order caused distress to be levied against the applicant by issuing a distraining letter through Kande Enterprises & Auctioneers dated.....and thereafter through a breaking order of the Machakos Chief Magistrate's Court dated 24.4.06. The above conduct, argued the applicant, were deliberate and intended to override the original order of this court aforementioned and that they amounted to open challenge of the said order.

The applicant also said that although the distress process by the respondent failed to obtain goods, nevertheless it succeeded in treating the relevant court order with contempt. Further more it was indicated that the 2nd respondent deliberately failed to disclose the existence of the relevant order to the Subordinate Court which issued the breaking order and that the purpose thereof was to mislead the said court. The applicant also submitted that had the contemnor disclosed the relevant information to the lower court the court would not have issued the order which was against this court's order.

The respondent through Mrs Nzei, admitted that this court's order indeed existed; that the distress for rent was sought by the 2nd respondent through Kande Enterprises & Auctioneers; and that the 2nd respondent sought and obtained the breaking order, without revealing the existence of this court's relevant order to the lower court. But she argued that the distress failed to succeed because there were no goods to attach. She further argued that although the breaking order was in the process of effecting a distress operation, there was no existing order restraining the breaking orders that were sought and obtained. She therefore argued that the breaking order by the lower court was a valid order. She however admitted that the said lower court orders have since been vacated due to being contrary to this court's orders. She finally argued that the original order of this court, now the subject of this application may have been overtaken by events because a fresh lease in relation to the property in issue has since been issued.

I have carefully considered this application. There is no doubt that there is in existence this court's order restraining the 2nd respondent from levying distress. Whether the order is fair or not considering the negative effect it is causing on the property seven years since it was made, is not an issue before me. It could be challenged for the purpose of alteration or variation if the 2nd respondent so wished. But until

then, it stands and must be obeyed.

The 2nd respondent, with full knowledge therefore clearly sought to levy distress. He obtained a distraining letter from Kande Enterprises & Auctioneers. The latter went to levy distress but found the premises locked. They went to court and obtained breaking orders which they effected. The fact that they found no property to distress is of no consequence in my view. The fact is that they took all those measures in advancing the levying of distress. To that extent they succeeded in openly disobeying this court's order of 1.3.2000. They even lured or misled the lower court to make orders in ignorance of the court order and it is only commendable that the lower court has since getting the relevant information, withdrawn its orders that no goods were found during the process of levying distress as earlier said, is of little consequence. The 2nd respondent did not, in my view, only commit contempt of this court, but he also committed fraud by deliberately obtaining lower court orders through what clearly amounts to cheating.

For the above reasons, I find that the 2nd respondent committed the act of contempt of this court in levying distress contrary to an order of court dated 1.3.2000. He is accordingly hereby convicted of the offence. The court will sentence him after hearing him personally or through his counsel but with his presence in court. It is so ordered.

Dated and delivered at Machakos this **3rd** day of **November**, 2006.

D.A. ONYANCHA

JUDGE