



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**Misc Appli 325 of 2005**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE MUNICIPAL COUNCIL OF NAKURU.....RESPONDENT**

**RULING**

On the 17th of May 2005, the subjects/applicants (hereinafter referred to as the applicants) sought leave of this court to institute a judicial review application for the writs of prohibition, certiorari and mandamus to prevent the respondent from evicting or removing them from their place of business at East road next to the Nakuru wholesale market.

In the said application for leave, the applicants further sought the following order: “That leave so granted to apply for orders of prohibition and certiorari do apply as a stay of the decision and/or notice of the Municipal Council of Nakuru concerning any action by the Municipal Council of Nakuru by itself, its officers, employers, agents or otherwise howsoever from interfering, destroying and/or demolishing structures and/or stalls put up by the subjects and/or from removing, evicting the subjects from that area next to the Nakuru wholesale market referred to as East Road”.

This court granted leave to the applicants. At the same time that leave was granted, this court granted stay of the decision of the respondent as prayed by the applicants. However when the order issued by this court was extracted, on the stay granted, the said order was extracted to read as follows: “THAT the grant of leave to apply for orders of prohibition and certiorari SHALL apply as a stay against the Municipal Council of Nakuru by itself, its officers, employees, agents or otherwise howsoever from interfering, destroying and/or demolishing structures and/or stalls put up by the subjects and/or from removing, evicting the subjects from the area next to the Nakuru wholesale market referred to as East Road.

It is clear that the order as extracted was not the same order that was issued by this court. The applicants served the said order upon the respondent. By a notice of motion made under Section 5 of the Judicature Act and Section 3A of the Civil Procedure Act, the applicants have now made an application seeking to have the Town Clerk of the Municipal Council of Nakuru punished for contempt of the said orders issued by this court on the 17th May 2005. The applicants claim that after the said order was served upon the respondent’s Town Clerk, the respondent in utter disregard of the said court order evicted the 3rd applicant from the said area and later charged him in court for erecting an illegal structure. The applicant states that the applicants stalls were destroyed on the 6th of June 2005 inspite of the orders issued by this court. The applicants therefore sought to have the Town Clerk of the respondent committed to civil jail for contempt of court. The application is supported by the annexed affidavit of George Kinuthia.

The application is opposed. Peter Kabete, a Deputy Senior Enforcement Officer has sworn a lengthy replying affidavit in opposition to the application. In summary he has deponed that at the time the respondent was served with order of this court on the 19th of May 2005, the applicants were no longer conducting business at the said road. Neither were there any structures which had been erected by the applicants. He depones that after the said order had been served, the applicants on the 20th of May 2005 encroached on the suit land and erected structures thereon purportedly pursuant to the orders of this court. He further deponed that the respondent was mandated under the Local Government Act (Cap 265 Laws of Kenya) to control trades and occupations within its area of jurisdiction. The respondent prayed for the application to be dismissed as the same did not have any foundation in law.

At the hearing of the application, I heard the submissions made by Mr Mbiyu, Learned Counsel for the applicants and Mrs Mbeche Learned Counsel for the respondent. The issue for determination by this court is whether the applicants have established to the required standard of proof that indeed the respondent's Town Clerk was in contempt of the orders of this court and therefore ought to be punished for contempt of court. The jurisdiction of this court to punish for contempt of court is provided by Section 5(1) of the Judicature Act. Before this court can punish any person who is alleged to be in contempt of court, it must be established that such a person was served with an order of this court and thereafter disobeyed the said order issued. This court must be satisfied that such a person committed the breach of the court order complained of. In the present case, this court issued an order staying the decision and or the notice issued by the Municipal Council of Nakuru to evict the applicants from an area next to the Nakuru Wholesale Market referred to as East Road. The order of stay only related to the decision and or the notice issued by the respondent that it would evict the applicants from the area complained of. This court did not stay any eviction that could have taken place prior to the filing of the said suit and pursuant to the decision and or the notice issued by the respondent.

As stated earlier in this ruling, the order which was extracted by the applicants and served upon the respondent was not the order which had been issued by this court on the 17th of July 2005. The order as extracted was coached in terms which made it appear that this court had restrained the respondent from interfering, destroying or demolishing the structures which had been put up by the applicants in the suit area. This court could not possibly have issued such orders. By its very nature, writs of judicial review are issued to quash decisions arrived at by quasi-judicial or statutory bodies contrary to either the rules of natural justice or where the said decision is arrived at is ultra-vires the statutes which set up such bodies. This court could not have issued an order of stay whose effect would be to injunct the respondent from performing its statutory functions. In my considered view, the said order was extracted either to embarrass this court or to achieve some ulterior motive only known to the applicants.

Having carefully considered the pleadings filed by the parties to this application and the submissions made by the counsels for the parties, I do hold that the respondent could not have breached an order which this court in the first place had not issued. This court only stayed the decision and or the notice issued by the respondent to evict the applicants from the suit area. From the evidence placed before this court, it is clear that the applicants had been evicted from the suit area long before they came to this court to seek the reliefs sought in the application for leave to institute judicial review proceedings. The applicants did not disclose to this court the fact that they had been evicted from the suit area prior to filing the application seeking leave for the writs of judicial review.

It is now evident that the applicants sought leave for ulterior motives. They sought leave with specific purpose of re-entering the suit area where they had been evicted earlier by the respondent. The application for contempt of court against the respondent's Town Clerk was brought to put pressure on him to allow the applicants back to the suit area. The application was not brought to punish the respondent's Town Clerk for contempt of court. This court holds that the applicants have abused the due process of this court in filing this application for contempt of court against the respondent. The applicants have miserably failed to prove that the respondent's Town Clerk had breached any order of this court.

What these proceedings have revealed, is the depth in which some litigants can sink into their purported pursuit of legal remedies from the courts of law. The applicants have shamelessly forged an order of this court and now want this court to give their action a stamp of approval. That cannot be. This application should be consigned to where it belongs, the dustbin of mischievous and frivolous applications.

For the reasons stated, the application is dismissed with costs to the respondent.

**DATED at NAKURU this 11th day of November 2005.**

**L. KIMARU**

**JUDGE**