



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA NYERI**  
**CIVIL CASE NUMBER 26 OF 2014**

**JOHN ROBERT WAIGANJO.....PLAINTIFF**

**VERSUS**

**THERESA WAMBUI KAGO.....DEFENDANT**

**RULING**

On 5th December 2014 the plaintiff herein filed a suit against the defendant seeking orders inter alia restraining the defendant from interfering with his occupation of the leased property on plot no D294 Sagana.

- a) for a declaration that the defendant notices to terminate tenancy dated 7<sup>th</sup> of May 2014 and her subsequent conduct of pouring building materials at the plaintiff premises doorsteps and removal of doors to the premises constitutes fundamental breach of lease agreement dated 1 July 2011 and trespass.
- b) a permanent injunction directed against the defendant does hereby issue against trespassing onto the plaintiff premises, comprised in the demise created in the lease dated 1<sup>st</sup> July 2011
- c) damages for trespass
- d) costs plus interest on (c)

The cause of action arose from the lease for the plot number D294 Sagana which the plaintiff and his wife had leased from the defendant and from where they were operating a mini supermarket. The lease was for five years and three months effective 1<sup>st</sup> July 2011 to September 2016. According to the plaintiff as soon as his wife took occupation of the premises the defendant began to renege on the express provisions in the contract of the lease. On 7<sup>th</sup> May 2014 she issued a notice to terminate the lease purportedly under CAP 301. Prior to that defendant had attempted to use the office of the public health, to procure the closure of the business premises. This did not succeed. The plaintiff filed a complaint before the Business Premises Tribunal the tribunal case number 96 of 2014 and was granted conservative orders. On 3<sup>rd</sup> of December 2014 the defendant descended on the premises and re poured building materials right to the door step and further proceeded to remove by force all the doors to the premises. The plaintiff felt that these actions by the defendant made it almost impossible to operate the supermarket. The plaintiff averred that the defendant's conduct constituted a fundamental breach of the lease agreement and he was seeking the protection of the court from unlawful eviction harassment.

Together with the plaint the plaintiff filed a notice of motion brought under section 3A and order 40 rules 1,2 and 3 of the Civil Procedure Act and all the enabling provisions of the law, seeking inter alia;

- a) that the application be heard ex parte in the first instance owing to its urgency
- b) that an order of temporary injunction does issue directed against the defendant barring her to trespass, blocking, continuing to block and /or interfering with the plaintiff's rights of entry and exit from the demise premises in plot number D294 Sagana Township pending the hearing and determination of this suit
- c) that the defendant be compelled by order of this court to remove all the building materials from the entry/exit point to the demise premises
- d) that the OCS Sagana police station do enforce these orders
- e) that the cost of this application be provided for

The application was brought under the certificate of urgency of plaintiff's advocate Charles Muchemi Karweru and was supported by the affidavit of the plaintiff sworn on the 5 December 2014.

The matter was heard by Justice Ngaah who granted temporary injunction barring the defendant from trespassing, blocking, continuing to block and/ or interfering with the plaintiff's rights of entry and exit /from the demise premises plot number D294 Sagana township pending the hearing and determination of the suit, compelling the defendant to remove all the building materials dumped in front of the entry/exit of the demised premises and setting the inter partes hearing of the application on the **19<sup>th</sup> December 2014**.

The defendant entered appearance through Nderi & Kiingati & Co advocates and filed a replying affidavit on 16 December 2014. In the replying affidavit the defendant conceded that there was a lease agreement between herself and the plaintiff and that the application by the plaintiff was premature as clause one of the lease agreement provided for arbitration in case of a dispute. She conceded that she had indeed issued a notice to terminate the lease for reasons that there had been a fundamental breach of the agreement by the plaintiff.

When **the matter came before Justice Ngaah on the 19 December 2014** Mr. Karweru appeared for the plaintiff /applicant and Mr. Nderi appeared for the defendant /respondent. In response to the defendant's response regarding the arbitration clause, Justice Ngaah made the following orders

- 1. That parties to consider appointing an arbitrator pursuant to that the arbitration clause in the lease agreement between the parties.**
- 2. Before such an appointment aforesaid in paragraph (1) above the status quo in terms of the interim orders to remain in force**
- 3. That the matter be mentioned on the 20<sup>th</sup> March 2015 before the ELC.**

There is nothing on the record to show that the matter was actually mentioned before the ELC. Never the less the next entry in the record is dated 20<sup>th</sup> July 2015 in which Mr. Karweru appeared for the applicant in the present application dated **17<sup>th</sup> July 2015 seeking the reinstatement of the plaintiff/ applicant to the status quo before 4<sup>th</sup> July 2015**.

The application was by way of Notice of motion brought under order 40 rules 1, and 3, sections 1, 1A, 3, and 3A of the Civil Procedure Act and all enabling provisions of the law. The applicant seeks orders;

- a) that the application be heard ex parte in the first instance**
- b) that the court to order the defendant to immediately reinstate the plaintiff in the premises comprised plot number D 294 Sagana and in lieu thereof the applicant be at liberty to remove**

**the barricades now erected at the entrance and immediately take possession.**

**c) That the honorable court orders the OCS Sagana police station to enforce order (b) immediately**

**d) that this court does punish the respondent herein by committing her to civil jail for a period not exceeding six months for unlawful disobedience of a court order dated 5<sup>th</sup> December 2014 and confirmed on 19<sup>th</sup> December 2014.**

**e) That this honorable court does call and bring before this court for scrutiny and such remedial or other orders of the court may deem fit Baricho PMCC number 5 of 2015**

**f) that this court to issue such orders as it may deem fit to prevent abuse the court process by the respondent**

**g) that the costs of this application be provided for**

The grounds for the application as set out on the face of the application include;

a) that valid court order exists barring the respondent from illegally evicting the plaintiff from the premises herein

b) that the said orders were served upon the respondent

c) that aware of the said order the respondent has evicted the applicant through unlawfully obtained orders from Baricho PMCC number 54 of 2015

d) that the Hon Senior Principal Magistrate's Court had no jurisdiction to handle this matter

e) that in any event the applicant has never been served with any court papers

f) that the respondent through orders obtained through deceit, willful perjury and contempt of court evicted the applicant forcefully on Saturday, 4 July 2015

The application is supported by the affidavit of the plaintiff /applicant giving the history of the matter. That following the orders of 19 December 2014 the parties had agreed on an arbitrator in the name of Lucy Mwai and Co advocates. He attached the letter dated 3 June 2015 in which Lucy Mwai & Co advocates accepted to conduct the arbitration and requested for the pleadings and other relevant documents that would assist in identifying dispute and the issues in contention.

According to the applicant the respondent while aware of the above, secretly and maliciously and without notice filed the Baricho SPMCC number 5 of 2015 and obtained orders which she used on 4<sup>th</sup> July to forcibly evict him from the premises through the removal of the outer doors and the throwing out of his merchandise.

When he reported the OCS Sagana police station he was informed that there was an eviction order from Baricho court.

He annexed to the affidavit;

**a. the order of 5<sup>th</sup> December 2014**

b. letters dealing with the arbitration process

c. copies of pleadings in Baricho PMCC 5 of 2015

d. photographs of the supermarket goods strewn all over the pavements

e. photographs of the broken doors and the barricades

**The matter was placed before Justice Ngaah on the 20<sup>th</sup> July 2015.**

The judge granted one order;

**that the defendant herein to immediately reinstate the plaintiff into the premises comprised plot number D 294 Sagana and in lieu the applicant be at liberty to remove the barricades now erected on the entrance and immediately take possession pending the hearing of the motion into parties; the hearing be on 17 September 2015.**

On 17 September 2015 defendant filed a notice of change of applicants from Nderi & Kiingati to Kinyanjui, Kirimi and Co advocates.

On 1 October 2015, she filed a replying affidavit opposing the application on the grounds that it is fundamentally and procedurally flawed, had no substratum in law and no legal basis and was brought in bad faith and in an outburst of personal vendetta and jealousy and was an abuse of court.

She denied that the plaintiff had been evicted from the premises stating that it is the plaintiff himself who had approached her in a bid to surrender the premises as he could no longer afford the rent. By that time, he was in arrears of 6 months, that she advised him to surrender the premises soonest after paying the arrears.

That on 4 July 2015 the plaintiff to voluntarily vacated the premises taking away every item from the premises.

She denied ever taking up the services of an auctioneer, but conceded filing the matter in the Baricho court and obtaining court orders, which she said were never effected. Of great significance, she denied ever being served with the orders of this court of the 5<sup>th</sup> December 2014 and 19<sup>th</sup> December 2014. She denied any knowledge of any arbitration orders. She also stated in her affidavit that there were no longer any premises available to rent out to the plaintiff.

On the 17<sup>th</sup> September 2015 the matter was before Mativo J. Mr. Kirimi sought an adjournment on the ground that he had just been instructed. Mr. Karweru raised concern that the premises were being renovated and there was danger of them being leased out.

**It was agreed by consent that the status quo would be maintained and the defendant was ordered not to lease out the premises in question.**

This was a simple confirmation of Justice Ngaah's orders.

The application was fixed for hearing on the 1<sup>st</sup> October 2015.

The matter did not proceed because Mr. Karweru had just been served with the defendant's replying affidavit and sought leave to cross examine her on the contents of her affidavit. The court granted leave to Mr. Karweru to file a further affidavit, and for both parties to appear at the next hearing date for cross examination.

On 3<sup>rd</sup> October 2015, and 9<sup>th</sup> December 2015, the matter was adjourned at the behest of the plaintiff applicant's counsel. The matter was fixed for 9<sup>th</sup> of March 2016.

On 9<sup>th</sup> of March 2016 an issue arose regarding an affidavit of one Virginia Wanjiku which had been filed out of time by Mr. Karweru for the plaintiff applicant. After some arguments in which Mr. Kirimi raised

objections to the same the court ruled in favour of the applicant and it was deemed to have been properly filed. The defendant/ respondent was granted leave to respond.

The application finally proceeded for hearing.

Under cross examination the defendant/ respondent told the court that she had engaged the firm of Nderi Kiingati as her advocate, she swore the affidavit of 30<sup>th</sup> September 2015, and that on the 19<sup>th</sup> December 2014, she was in court with her counsel Mr. Nderi before justice Ngaah.

She told the court that **on 19<sup>th</sup> December 2014**, when the orders restraining her from evicting the applicant were issued, the Court told the lawyers what to do but her lawyer never told her what had happened and that was the reason she had changed advocates. **She denied receiving any orders from court barring her from evicting the plaintiff.** She said that Mr. Nderi used to prepare papers on her behalf, that she instructed Mr. Nderi to file an application on 15<sup>th</sup> December 2014 and she signed the supporting affidavit.

The defendant/ respondent further told the court that she did not instruct an auctioneer to evict the plaintiff, that because her lawyer never told her the next step in this case she filed the case in Baricho Court. She stated she was " not aware of the other case".

She said she filed the case in Baricho and acted in person because she needed to be paid rent. She did not know what happened on 4<sup>th</sup> July. She came and found when everything had been removed from the premises. She denied engaging any auctioneer. She said she rented the premises out to another tenant in September 2015. She denied that by then she had been served with this application.

In reexamination she confirmed that Nderi advocate called her to pick the application before court but by then she had already rented out the premises. She admitted to engaging auctioneers to collect rent for her. She claimed that the auctioneers were bribed with Ksh 200,000, and that the plaintiff applicant removed the goods himself.

The matter was adjourned to the 15<sup>th</sup> June 2016 for further hearing. On that date the plaintiff applicant was absent and matter was fixed for 31<sup>st</sup> August 2016 when the plaintiff was cross-examined by counsel for the defendant.

He told the court that he operated a shop in the premises rented from the defendant but that it was his wife who knew everything about what happened on the 4<sup>th</sup> of July 2015, and the Baricho case.

Virginia Wanjiku Kago, told the court that the plaintiff was her husband but they had been separated for 2-3 years at the time of the hearing. That she is the one who was in active occupation of the shop. She told the court that on the **4<sup>th</sup> July 2015** she had opened her shop as usual about 7:00am when, about 15 men entered the shop and began to demolish the doors, windows, using metal bars. She called her lawyer who told her to go to the police, but the police said they had 'letter' and they could not intervene. She told the court she had never been served with any papers from the Baricho court.

Under cross examination she told the court she was aware of the lease. That she had filed a case at the Tribunal herself, which found it had no jurisdiction over the matter. She said she had been paying rent by cash, but at some point the defendant refused to take the money so she paid via M Pesa, still the defendant returned the money. She said there was no court order saying she should not pay rent. She said by January 2015 she had arrears of 2months. That rent was about Ksh 9000 per month, that she paid the auctioneer Ksh 200,000.

She said the auctioneer never served her with nay papers. That some of her goods were stolen and what was rescued she gave to her husband to sell. That it was the auctioneer and his team who took the goods out of the shop scattering them out, and that she was assisted with a room at a church where she kept them.

Parties then agreed to file written submissions.

### **The Plaintiff's Submissions**

According to the plaintiff the issues for determination are as follows;

- a. Do the actions of the defendant respondent amount disobedience and transgression of a court order?
- b. Can the court countenance a party acting unlawfully through open transgression of a court order to keep benefit of the unlawful act?
- c. Should the court punish the respondent for deliberate and willful disobedience of a court order?
- d. Is it sufficient for a party to feign ignorance of a court order and proceeded to file a suit with the object of rendering orders of the high court moribund and act contrary to their express directions?

It was submitted on behalf of the plaintiff that the defendant was all along aware of the court orders barring her from evicting the plaintiff but she still went ahead and disobeyed them.

The plaintiff relies on;

- Order 40 rule 1 and 3 of the Civil Procedure Rules which empower the court punish party for willful disobedience of a lawful court.
- **ROYAL MEDIA VS TELKOM KENYA LIMITED (2000) EA 210 (CCK)**

That orders must be obeyed

- **GUSII MWALIMU and TWO OTHERS VS. MWALIMU HOTEL KISII LIMITED**

A party must not enjoy the benefits from unlawful acts committed in ignorance and disobedience of lawful court orders.

### **Defendant's submissions**

According to the defendant's submissions, the issues to be determined are;

- a. Whether the order was personally served?

See **Awadh vs. Marumbu (2004) 1KLR 458**

- b. Whether the order was endorsed with a penal notice?

See **Henry Gitonga Homeboys Store &Anor vs. Asha Ramadhan [2014] eKLR**

- c. Whether the plaintiff has satisfied the ingredients of a contempt case? Is mere knowledge sufficient?

See **Emma Wanjiku Ndung'u vs. Farnicis Njoroge Kamau [2012] eKLR**

In my view, and having considered the respective issues for determination, the only substantive issue for my determination is whether the defendant is in contempt of the lawful orders of this court.

The orders complained of herein were granted pursuant to order 40 rule 1. Disobedience or breach of orders issued there under is punishable under Order 40 rule 3 which states as follows;

(1) In cases of disobedience, or of breach of any such terms, the court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the court directs his release.

(2) No attachment under this rule shall remain in force for more than one year, at the end of which time, if the disobedience or breach continues, the property attached may be sold, and out of the proceeds the court may award such compensation as it thinks fit, and shall pay the balance, if any, to the party entitled thereto.

(3) An application under this rule shall be made by notice of motion in the same suit.

The record will show that I inherited this matter from Hon Justice Mativo at the point where submissions had already been filed.

The record will also show that all the substantive orders herein were made by Hon Justice Ngaah. It is only him who would know what transpired in his court on the 5<sup>th</sup> December 2014 and 19<sup>th</sup> December 2014. I am alive to the fact that his court is the allocating court, but in this case, he made the orders of **5th December 2014**, confirmed them on **19th December 2014**, and issued the mandatory orders of **20th July 2015**, all of which are the subject matter of the motion of **17th July 2015**.

As I continued writing the ruling the issue of the interpretation of “**court**” under order 40 rule (3) of the **Civil Procedure Rules** kept disturbing my mind. I am alive to the fact that it may not necessarily mean the individual judge. But I was not disturbed for nothing. I have previously been challenged by counsel when a matter where coincidentally the same Judge had made orders was placed before me in an application for review. Taking into consideration that the Judge who had made the said orders is still in this court I referred the file back to him. The matter did not come back to me.

In this case, every order under scrutiny related to this application was issued by Hon Justice Ngaah, who is very much present in this court as the presiding Judge. Ideally he ought to be the one dealing with the issue of **the disobedience of the orders issued under his own hand**.

In my view it does not augur well for me to be dealing with matters of contempt against orders issued by another Judge who is within the same court.

Hence, although I have jurisdiction to determine the issues, and I have done a summary of application and the case for each party, it is my view that the Hon Justice Ngaah ought to deal with the application of contempt pursuant to order 40 rule (3) of the Civil Procedure Rules.

I therefor refer the case to him for directions and the necessary orders.

It is so ordered.

Right of Appeal 30 Days

**DATED, SIGNED AND DELIVERED THIS 5<sup>TH</sup> DAY OF JUNE 2017 AT NYERI**

**TERESIA MATHEKA**

**JUDGE**

Macharia holding brief for Kirimi for respondent

Karweru for the applicant N/A

COURT ASSISTANT HARRIET

**Mention before Hon Justice Ngaah on the 14<sup>th</sup> June 2017.**