



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KISII**  
**ENVIRONMENT AND LAND COURT CASE NO. 479 OF 2014**  
**KENNEDY MARITA SAGINI.....PLAINTIFF**  
**VERSUS**  
**JAMES SIIKA AMOS.....1<sup>ST</sup> DEFENDANT**  
**ALFRED MDEIZI t/a PAVE AUCTIONEERS.....2<sup>ND</sup> DEFENDANT**  
**AND**  
**ELIJAH MOBEGI OGARO**  
**JEFF OGUTA.....INTERESTED PARTIES**

**RULING**

1. The plaintiff by a plaint dated 11<sup>th</sup> December 2014 filed in court the same day averred that he had been a tenant of the 1<sup>st</sup> defendant in the premises known as **Kisii Municipality/Block I/374**. The plaintiff claims that the 2<sup>nd</sup> defendant on 28<sup>th</sup> November 2014 without any notice to the plaintiff purported to levy distress for rent arrears and pounced upon the plaintiff's rented premises and threw out all the plaintiff's properties thereby paralyzing the plaintiff's operations. The plaintiff contends the levy of distress was illegal and unlawful and resulted in the plaintiff suffering loss and damage as itemized in the plaint.
2. The plaintiff by the plaint inter alia prayed for judgment against the defendants for:-
  - a. **A declaration that the distress and eviction of the plaintiff from the rented premises was irregular and illegal;**
  - b. **Permanent injunction;**
  - c. **Special damages of kshs. 190,000/= with interest from 28<sup>th</sup> November 2014 to the day of judgment;**
  - d. **Damages including general, punitive and aggravated damages;**
  - e. **Costs and interest.**
3. Simultaneously with the above plaint, the plaintiff filed a Notice of Motion expressed to be made under

Order 40 Rule 1 and 2 of the **Civil Procedure Rules** seeking the following prayers:

1. **Spent**

2. **That an interim mandatory injunction do issue compelling the defendants to open the applicant's rented premises situated on Plot No. Kisii Municipality/Block III/374 at the 2<sup>nd</sup> floor pending the hearing and determination of this application inter partes.**

3. **That a temporary injunction do issue restraining the respondents herein its employees, agents and/or servants from interfering with the quiet enjoyment of the rented premises situate on land parcel No. Kisii Municipality/Block 111/374(hereinafter also known as suit premises) pending the hearing and determination of this suit.**

4. **The costs of and incidental to this application be provided for.**

4. Hon. Justice Okong'o on 18<sup>th</sup> December 2014 granted an interim order in terms of prayer (2) of the Notice of Motion pending the hearing of the Notice of Motion inter partes. Before the application could be heard inter partes, the plaintiff filed the Notice of Motion dated 24<sup>th</sup> June 2015 which is the application the subject of this ruling. The application is expressed to be brought under Order 40 Rule 3 of the **Civil Procedure Rules** and Section 63 (c) of the **Civil Procedure Act** and inter alia seeks the following orders:-

1. **That this honourable court be pleased to enjoin Elijah Mobegi Ogaro and Jeff Oguta as interested parties/respondents for the purposes of this application.**

2. **That an order of committal to be made against James Siika Amos, Elijah Mobegi Ogaro and Jeff Oguta the respondents herein to prison for such a period that this honourable court may deem fit and just for disobeying the court's order of injunction given on 18<sup>th</sup> day of December, 2014.**

3. **The interested parties/respondents be directed to purge the contempt by giving vacant possession of the subject premises to the applicant forthwith.**

5. The plaintiff's said Notice of Motion was premised on the grounds set out on the face of the application and on the supporting affidavit sworn by the plaintiff on 24<sup>th</sup> June 2015. The plaintiff averred that the 1<sup>st</sup> defendant and his agents and/or caretakers namely **Elijah Mobegi Ogaro** and **Jeff Oguta** who the plaintiff sought to be enjoined as interested parties to the suit for purposes of the instant application had deliberately disobeyed and were in breach of the court order granted by the court on 18<sup>th</sup> December 2014 and should be cited and punished for contempt of court. The relevant order was order number (1) of the extracted order which was issued on 22<sup>nd</sup> December 2014. The order was in the following terms:-

**“That an interim mandatory injunction do and is hereby issued compelling the defendants herein to open the applicant's rented premises situated on Plot No. Kisii Municipality/Block III/374 pending the hearing of this application inter partes.”**

6. The plaintiff stated that even though the order was served on the defendants, the defendant did not comply with the order but rather handed over the premises to the persons sought to be enjoined as interested parties who proceeded to demolish the fittings that had been fixed by the plaintiff in utter disregard of the court order. The plaintiff further states that the order granted on 18<sup>th</sup> December 2014 was made in the presence of the defendants' advocates and the said caretakers sought to be enjoined as interested parties. The plaintiff avers that even though the 1<sup>st</sup> defendant opened the premises he gave the same to third parties and not to the plaintiff and it is the plaintiff's contention that this was done with a view of defeating the implementation of the order.

7. The 1<sup>st</sup> defendant in a replying affidavit sworn on 6<sup>th</sup> August 2015 in opposition to the plaintiff's application denies that he was personally served with the order granted on 18<sup>th</sup> December 2014, stating that the order together with other documents were served on his caretaker who later handed the same to his previous advocates on record M/s Nyatundo & Company Advocates. The 1<sup>st</sup> defendant stated he was hospitalized in Nairobi when the service was supposedly effected on him. The plaintiff nonetheless admits he subsequently got to know the contents of the order of 18<sup>th</sup> December 2014 and that the same were explained to him by his advocates. The 1<sup>st</sup> defendant states he did not disobey the court order and maintains that the premises were and have never been locked as alleged by the plaintiff. In the replying affidavit sworn by the 1<sup>st</sup> defendant on 26<sup>th</sup> January, 2015 in response to the plaintiff's initial application, the 1<sup>st</sup> defendant contended that the plaintiff's lease in the suit premises had terminated and that following the levy of distress, the levied goods were released to the plaintiff's agent, a Mr. Jeremiah Angwenyi, on 28<sup>th</sup> November 2014 after the plaintiff had settled the rent arrears.

8. The 1<sup>st</sup> defendant in an endeavour to demonstrate he was not served with the order of 18<sup>th</sup> December, 2014 applied to cross examine the process server, one **Daniel Nyang'au** who had sworn an affidavit of service on 23<sup>rd</sup> June 2015 confirming he had served the order on the 1<sup>st</sup> defendant on 22<sup>nd</sup> December 2014. Leave to cross examine was granted and the process server was indeed cross examined on 4<sup>th</sup> November 2015. The process server's evidence of service was unshaken during the cross-examination and in my view the process server explained in sufficient detail, how he went about the service. Although the 1<sup>st</sup> defendant in his replying affidavit had stated he had been hospitalized on 22<sup>nd</sup> December 2014 when the service is alleged to have been effected on him, he adduced no evidence to support his assertion that he had been hospitalized. I accept the process server's evidence that he indeed served the 1<sup>st</sup> defendant at his home at Amakara Matutu Settlement Scheme.

9. Having held that the 1<sup>st</sup> defendant was appropriately served with the order granted on 18<sup>th</sup> December 2014 the issue to determine in this application is whether the 1<sup>st</sup> defendant and the proposed interested parties deliberately disobeyed this order so as to invite penal sanctions for being in contempt of court. Court orders are intended to be obeyed and it matters not that a party may not like the order and/or considers that the order is oppressive, unfair, and/or unjust to him. It is not for a party to choose which court order to obey and not to obey. To enable the dignity of the court to be maintained and upheld all court orders must be obeyed by all parties at all times. If a party considers a court order to be oppressive, unjustified, and/or unfair, the option he has is not to dishonor the same or refuse to obey the same but to seek its review, variation and/or setting aside of the order and until that happens the order remains valid and has to be obeyed notwithstanding its consequences.

10. The applicant and the respondent in the instant application filed written submissions. The applicant maintains the 1<sup>st</sup> defendant and the intended interested party were in flagrant breach of the court order dated 18<sup>th</sup> December 2014, insisting the 1<sup>st</sup> defendant instead of complying with the order opened the premises and parted with possession of the same to the intended interested parties. The 1<sup>st</sup> defendant for his part insists the premises were never closed at any time and that the order did not require that the plaintiff was to be reinstated and/or restored back in the premises.

11. For a party to be held to be in contempt, the order that the party is stated to have disobeyed must be clear and not ambiguous. A court of law will not punish for contempt unless the court is satisfied that the court order alleged to have been disobeyed was served on the party said to be in contempt and that the court order was clear and unequivocal and was unambiguous. Alternatively, it has to be established that the party said to be in contempt of the court order was fully aware of the contents and nature of the order. Proof of personal service of the order is no longer a prerequisite before a party can be held to be in contempt. Knowledge of the contents of the order is sufficient. See **Gatimu Farmers Company –vs- Geoffrey Kagiri Kimari & 3 Others [2005] eKLR**.

12. In the present matter, while the interim order required the defendants to be compelled to open the applicant's rented premises on the suit property, the order did not require the defendants to reinstate the

applicant into the premises. From the pleadings (the plaint and application dated 11<sup>th</sup> December 2014) it is apparent the 1<sup>st</sup> defendant in carrying out the levy of distress constructively evicted the applicant. The applicant's goods were strewn outside as per the photographs annexed as "KMS3" in supporting affidavit of the initial application. In the particulars of illegality pleaded under the plaint the applicant states that the defendants in distressing for rent evicted the plaintiff. The applicant has by the plaint further claimed for loss and damage of all his goods and furniture and fittings in the rented premises. This is evidence of the fact that the applicant indeed had been evicted and/or shucked out of the premises.

13. Contempt of court carries criminal sanctions and a court of law will only convict of contempt in the clearest of cases and where a court has a doubt as to whether a contempt has been committed, it will not cite a party for contempt. In the instant case, had the applicant sought reinstatement back to the premises, where indications are that he had been evicted from, and the court granted the order, the court would have found the defendants to have been in contempt if they failed to reinstate the applicant to the premises. To the extent that the court order that the applicant claims was disobeyed by the defendants did not require that the applicant be restituted, restored and/or reinstated back in the premises where he had been evicted from, I am not able to hold the defendants were in contempt. I do not find the charge of contempt proved to the required standard.

14. It does appear to me that the applicant's remedy, if any, is for damages for wrongful levy of distress and eviction as pleaded in the plaint. The upshot is that the plaintiff's application dated 24<sup>th</sup> June, 2015 is hereby ordered dismissed. Having regard to the circumstances of this matter, I direct that the costs of the application will be in the cause.

**Ruling dated, signed and delivered at Kisii this 8<sup>th</sup> day of April, 2016.**

**J. M MUTUNGI**

**JUDGE**

**In the presence of:**

..... for the plaintiff

..... for the 1<sup>st</sup> and 2<sup>nd</sup> defendants

.....for the interested party

**J. M. MUTUNGI**

**JUDGE**