



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENT AND LAND DIVISION**

**ELC. CASE NO. 620 OF 2014**

**ROY MUTUA KIVUSYU.....1<sup>ST</sup> PLAINTIFF/APPLICANT**

**JOYCE MUTUA KIVUSYU.....2<sup>ND</sup> PLAINTIFF/APPLICANT**

**VERSUS**

**NAIROBI CITY COUNTY.....DEFENDANT/RESPONDENT**

**RULING**

Coming up before me for determination is the Notice of Motion dated 24<sup>th</sup> November 2014 in which the Plaintiffs/Applicants seek for orders that Lillian W. Ndegwa, the County Secretary and Head of the County Public Service of the Defendant, be committed to civil jail or be otherwise punished for contempt of court and further that she be condemned to pay the costs of this Application.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of the 1<sup>st</sup> Plaintiff, Roy Mutua Kivusyu, sworn on 24<sup>th</sup> November 2014 in which he averred that he previously filed an application for a mandatory injunction herein which this honourable court granted on 17<sup>th</sup> October 2014 directing the Defendant to grant the Plaintiffs/Applicants vacant possession of the City Hall Garden Restaurant (hereinafter referred to as the “suit premises”). He further averred that a formal order was extracted and served upon the Defendant through the said Lillian W. Ndegwa on 28<sup>th</sup> October 2014. He further averred that subsequently, his Advocates gave him a letter dated 3<sup>rd</sup> November 2014 addressed to the said Lillian W. Ndegwa requesting her to comply and enforce the court orders by giving him vacant possession of the suit premises. He further averred that from that date until 18<sup>th</sup> November 2014, he visited the office of the said Lillian W. Ndegwa daily where she would send him to other officers who told him that they have no authority to enforce the orders. He further stated that the said Lillian W. Ndegwa refused to see him thereafter. He stated further that it is the duty of the said Lillian W. Ndegwa to enforce and comply with the court order and that her failure to do so amounts to defiance and contempt of court.

The Application is contested. The contemnor, Lillian W. Ndegwa filed her Replying Affidavit sworn on 28<sup>th</sup> January 2015 in which she averred that she was aware of the court order directing the Defendant to grant the Plaintiffs/Applicants vacant possession of the suit premises. She averred that on 24<sup>th</sup> January 2014, after a contract was signed with the Plaintiff and the Defendant, she personally wrote a memo to the County Chief Officer Lands, one S.G. Mwangi, with strict instructions to hand over the keys to the suit

premises to the Plaintiffs. She stated further that the said S.G. Mwangi in turn wrote a memo dated 27<sup>th</sup> January 2014 to the Chief Valuer, one Nyoike N.I., seeking compliance with her directives. She further stated that vide a memo dated 30<sup>th</sup> January 2014, the said Chief Valuer wrote back to the County Chief Officer Lands informing him that the keys to the suit premises could not be traced in the office and that they were searching for them with an assurance that they would be forwarded once found. She further indicated that it was much later, being 28<sup>th</sup> October 2014 that she came to learn that the said keys were in fact never handed over to the Plaintiffs as per her initial instructions and that an order of the court had been issued over the same. She stated that she wrote another memo to the County Chief Officer, Lands dated 28<sup>th</sup> October 2014 informing him to immediately handover the keys to the Plaintiffs. She then conceded that despite all their diligent efforts to try and trace the keys to the suit premises so as to comply with the court's orders, the keys have not been traced to date. She further stated that they reported the matter to the police and obtained a police abstract to that effect. She sought more time to trace the keys and requested the court not to commit her to civil jail for contempt.

Both sides made oral submissions. The Plaintiffs on their part pointed out that the Defendant's Executive Officer, Lillian W. Ndegwa, changed tunes by first stating that she could not give the Plaintiffs access to the suit premises on the basis of security concerns raised by the County Assembly but later stated that the keys to the suit premises cannot be traced. The Plaintiffs also submitted that the said contemnor has made no attempt to purge the contempt. On her part, the contemnor submitted that she is not in custody of the keys to the suit premises but the same was in custody of other officers of the Defendant and therefore she cannot as an individual comply with the court order. She further contended that the Defendant, to whom the mandatory injunction was directed, is a corporate body while she is only one of the officers thereof. She further submitted that all the Plaintiffs want is access to the suit premises and that sending her to civil jail will not give them what they seek. She encouraged the court to exercise its wide discretion and issue breaking orders in the absence of the keys to the suit premises. She stated that she has done everything within her power to comply with the court order. She encouraged the court to order that the Plaintiffs be at liberty to access the suit premises through breaking in and that the OCS Central Police Station be ordered to supervise the breaking in. In response thereto the Plaintiffs contended that if the said Lillian W. Ndegwa encountered difficulties in complying with the court order she should have come to court in person to explain and not to wait until a contempt application has been filed. Further, the Plaintiffs submitted that every institution has a person who has authority to enforce decisions including court orders and that in the case of the Defendant, the right person is Lillian W. Ndegwa and that she cannot now pass the buck to the other officers of the Defendant.

The issue I must determine is whether to commit Lillian W. Ndegwa into civil jail for disobedience of this court's order issued on 17<sup>th</sup> October 2014 compelling the Defendant to give the Plaintiffs vacant possession of the suit premises. **Order 40 rule 8** of the **Civil Procedure Rules, 2010** provides as follows:

**“An injunction directed to a corporation is binding not only on the corporation itself but also on all members and officers of the corporation whose personal action it seeks to restrain.”**

Going by this legal provision, it is clear to me that the contemnor is bound to enforce this court's order issued on 17<sup>th</sup> October 2014 directing the Defendant to give the Plaintiffs vacant possession to the suit premises.

While that is the case, after careful consideration of the submissions made by both sides, I am convinced that the contemnor made efforts to comply with this court's order. It is true, however, that she did not revert back to the court to explain the difficulties she was facing in gaining access to the suit premises. However, I consider that the contemnor did face difficulties in enforcing the court order. I am also in agreement with the submission that committing the contemnor to jail for a term of whatever length shall not give effect to the desire of the Plaintiffs to be granted vacant possession of the suit premises to carry on a restaurant business. I rely on the case of **Gatharia K. Mutitika & 2 Others vs. Baharini Farm Ltd. [1985] KLR 227**, where it was held:

**“Recourse ought not be had to process of contempt in aid of a civil remedy where there is any other method of doing justice. This jurisdiction of committing for contempt being practically arbitrary and unlimited, should be most jealously and carefully watched and exercised with the greatest reluctance and the greatest anxiety on the part of judges to see whether there is no other mode which is not open to the objection of arbitrariness, and which can be brought to bear upon the subject. A judge must be most careful to see that the cause cannot be mode of dealing with persons brought before him. Necessary though the jurisdiction may be, it is necessary only in the sense in which extreme measures are sometimes necessary to preserve men’s rights, that is, if no other pertinent remedy can be found...”**

In this particular matter, the Plaintiffs/Applicants have also sought for “other appropriate orders be made” as their prayer no. 4. In the circumstances, I consider that sending the contemnor to civil jail is not the most effective way to enforce this court’s order issued on 17<sup>th</sup> October 2014. In the circumstances, I hereby issue an order that the entrance of the suit premises be broken into in order to allow the Plaintiffs access thereto for the purpose of operating their restaurant business therein and I further order that the Officer Commanding Police Station, Central Police Station do supervise the breaking in. The costs of this Application shall be borne by the Defendant.

It is so ordered.

**DELIVERED AND SIGNED AT NAIROBI THIS 10<sup>TH</sup> DAY OF APRIL 2015.**

**MARY M. GITUMBI**

**JUDGE**