



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL CASE NO. 378 OF 2013

PIUS OYARO OBIO.....APPELLANT

VERSUS

SUSAN NJERI MAINA.....RESPONDENT

RULING

Before me is a notice of motion dated the 30/9/13. The application is brought under article 159 of the Constitution of Kenya, Orders 52 Rules of England, Section 5 of the Judicature Act Cap 8, Section 1A, 3A and 63 of the Civil Procedure Act Cap 21 of the Laws of Kenya. The applicant seeks the following orders;

1. That the Hon. Court be pleased to be hold that the respondent even was at all material times in contempt of an express court order.
2. That the Hon. Court be pleased to sentence the respondent and simultaneously order that she pays a fine not less than Kshs. 500,000/- or such amount as the court may deem fit and expedient.
3. That the Hon court do issue an order for the respondent to account to the applicant for loss of earning within such period as this court shall direct.
4. That any other orders as this Hon Court may deem just and expedient to uphold its dignity under all circumstances of this case.
5. That costs of the application be provided for.

The application is based on six (6) grounds stated on the face of the application.

In a supporting affidavit dated the 30/9/13 the appellant deposes that; on the 5/7/13 he filed the appeal herein and an application to for stay pending appeal. That on the 10/7/13 Justice Waweru gave orders in HCCA No. 378 of 2013 that there be an interim stay of execution of the judgment and decree of the tribunal issued on the 7/6/13 by Hon. D. Mochache Chairperson Business Premises Rent Tribunal No. 854/11 until the hearing date 20/11/13. That the said order contained a penal notice. That the order was extended and served on the respondent on 15/7/13 as deposed in the affidavit of service of by Ethan Kamau. That on the 19/7/13 the respondent went to the suit premises insulted him and removed his wares from the business premises. That despite the order that gave him possession of the premises on the 26/7/13 the respondent brought in police officers who arrested him and took him to Shauri Moyo Police Station where the respondent alleged that he had stolen her shares and that he had refused to vacate the premises. That she was advised by the police to obey the court order. That despite the Court order being in force the respondent on diverse dates from the 19th to 26th July continued to disturb and interfere with his peaceful possession of the premises and is in flagrant disobedience and contempt of the Court order. That the respondent was served with the Penal notice

on the 26/7/13 in the presence of the OCS Shauri Moyo but declined to sign.

The respondent swore a replying affidavit dated the 19/11/13. She deposes that she was served with the court order Penal Notice and the letter dated 2nd April 2013 on the 26/7/13 at Shauri Moyo Police Station in the presence of the OCS and she acknowledged receipt. That on receipt of the said documents she called her lawyer on record and sought advice on the same as the applicant had vacated the premises on the 7th July 2013 and she had to take physical occupation on the 8/7/13. That her advocate advised her that the order gave a conditional order of stay in that it indicated that there would only be a stay of the execution of the decree of the BPRT if the applicant was still in possession of the premises yet he was not. That she has not been served with the application dated 4/7/13 neither the advocate. That the affidavits of Ethan Kamau which state that she was served with the order and Penal Notice on the 2/4/13 are false as she was served on the 26/7/13 at Shauri Moyo Police station. That she has not been served nor has she received the letter dated 24/7/13. She asked that this application be dismissed with costs as it is an abuse of the court process.

Advocates for the parties in their oral submissions in court reiterated what is deposed by the parties in their affidavits. Mr. Moriasi for the applicant stated that by 15/7/13 the appellant was still in possession yet the respondent continued to insult him and even removed his wares. That the applicant did not move out on the 7/7/13 as they came to court on the 10/7/13 and the court gave orders. That the applicant was in possession up to the 26/7/13. That the respondent has not purged the contempt. That the process server's affidavits have not been challenged as there was no application to cross-examine him. That the respondent was served with the application but did not respond. Mr. Moriasi sought that the applicant be committed to jail for six months or as the court may order.

Mr. Kibera for the respondent urged the court to note that the order with the Penal Notice, the letter was served on the 26/7/13 yet the appellant had vacated by 7/7/13. That through a letter dated 2/8/13 filed in the court file they advised the appellant's counsel that their client had moved out on the 7/7/13. That to date the application that gave rise to the orders has not been served on them. That the letters dated 2/4/13 and 24/7/13 are identical and the one annexed to the application is meant to mislead the court. That the applicant has failed to show through OB abstract that he was arrested. That the applicant has not shown that the respondent in contempt of the court orders.

In reply Mr. Moriasi stated that there is an affidavit of service on the application in the court file and the court can look at it. That the letter of 2/4/13 has a typographical error on the dates and does not mislead the court. That the applicant admits they received it, but it is the same letter with different dates. That the appellant was still in possession when they came to court. That the respondent does not state why she went to the police station on the 26th July 2013. That their letter of 24/7/13 was before the 27/6/13. That the respondent has failed to demonstrate why she did not respect the court order.

In determining this application I have carefully gone through the court file and record and this is what I note. The applicant filed a notice of motion in Court on the 5/7/13 seeking a stay of the judgment and decree of the Tribunal issued on the 7/3/13 by the Chairman of the Business Premises Rent Tribunal Hon. Mochache in BPRT No. 854/11. The matter was filed under certificate of urgency on the 5/7/13. The matter was placed before Justice Waweru the duty judge on the 8/7/13. He declined to give an interim order but ordered that the application be served for inter partes hearing on the 10/7/13. On the 10/7/13 an affidavit of service sworn by Ethan Kamau dated 9/7/13 was filed. He states the following at paragraph 2, **“that on the 9/7/2013 he recovered copies on the notice of motion and memorandum of appeal from M/s Ombachi Moriasi to serve Susan Njeri Maina respondent. That he proceeded to confirm where she does business (paragraph 3).**

Of importance are paragraphs 4,5,6,and 7, where the process server states that he did not find the applicant and so he left the pleadings with one Margaret Wambui after being instructed by the applicant. I note that the respondent was not personally served but one Margaret Wambui.

On the 10th July 2013 the court gave a conditional order that **“ if the appellant is still in possession there will be interim stay of execution until the hearing”**. The respondent states in her replying

affidavit that the appellant had vacated by the 7th July 2013 and that she took possession on the 8th July 2013. There is no denial by the applicant that he moved out by the 7th of July 2013. His counsel chose to inform the court during his oral submissions that by then his client was still in possession of the premises. Though he states that the respondent took police to arrest the appellant on the 26/7/13.

On the issue of contempt a party is held to be if he disobeys the court order. A court order served on party who is alleged to be in contempt must have the Penal Notice. The order the appellant claims he served on the 15/7/13 had no Penal Notice and so they sought to serve her with the Penal Notice, which they did in the 26th July 2013. By then it is not clear if the appellant was still in possession. There is the letter dated 2nd August 2013 addressed to the applicant counsel stating that the applicant had vacated on the 7th July 2013.

There was court order dated 10th July 2013 that was served on the 15th July 2013 without the Penal Notice. On the 26th July 2013 the respondent was served with the Penal Notice. I do note that the order given by Justice Waweru gave was a conditional order. What I cannot tell is whether the appellant was still in possession on the 26th July 2013. Thus I am unable to find that the respondent was in contempt as alleged. I therefore decline to grant prayers 1 & 2 of the application dated 30/9/13. Prayer No. 3 cannot be granted at an interlocutory stage it is a prayer to be dealt with at the hearing of the appeal. The applicant should pursue it then. I therefore find no merit in the application dated 30/9/13 and dismiss it with costs to the respondent.

Orders accordingly.

Dated, signed and delivered this 6th Day of February 2014

R. E OUGO

JUDGE

In the presence of:

..... **...APPELLANT/APPLICANT**

..... **...RESPONDENT**

..... **...COURT CLERK**