



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL DIVISION**  
**ELC SUIT NO. 309 OF 2011**

**SAROJ K SHAH .....PLAINTIFF**

**VERSUS**

**1. NARAN MANI PATEL**  
**2. KANTILAL NARAN MANJI**  
**3. HEBROS TRADERS.....DEFENDANTS**

**R U L I N G**

1. This ruling concerns the **notice of motion dated 4<sup>th</sup> April 2012** filed by the Plaintiff. It is a contempt application brought under **section 5(1) of the Judicature Act, Cap 8** and also under **Order 52, Rule 3 of the Rules of the Supreme Court of England, 1965(!)**. **Section 3A of the Civil Procedure Act, Cap 21** has also been cited.

2. The application seeks the main order of committal for contempt couched in the following terms –

**“An order of committal to be made against NARAN MANI PATEL, KANTILAL NARAN MANJI and BALLON NANGALAMA t/a HEBROS TRADERS (Defendants herein) to prison for such period as this ... Court may deem fit and just in that they, the said Defendants, have blatantly disobeyed Orders of this ... court given on 12<sup>th</sup> May 2011, 9<sup>th</sup> December 2011 and 14<sup>th</sup> December 2011 compelling and directing the Defendants herein not to unlawfully evict the Plaintiff from her residence.”**

3. The application is accompanied by a statement dated 4<sup>th</sup> April 2012 to which a number of documents, including the orders said to have been disobeyed by the Defendants, are annexed. There is also a supporting affidavit sworn by the Plaintiff. The alleged act of the Defendants said to constitute the disobedience of the court orders is pleaded in paragraph 5 of the supporting affidavit as follows -

**“5. That the landlord proceeded to break into my residence, took away household items and evicted me from my residence (annexure 3).”**

4. Annexure 3 to the supporting affidavit is a “Notification of Sale of Moveable Property” dated 16<sup>th</sup>

May 2011 apparently following “distress”.

5. The Defendants have opposed the application by replying affidavit (sworn by the 1<sup>st</sup> Defendant) filed on 10<sup>th</sup> October 2012. The following grounds of objection, among others, emerge from the replying affidavit –

(i) That the order of 27<sup>th</sup> June 2011 (Mwera, J) obtained *ex parte* was stayed by a ruling delivered on 18<sup>th</sup> December 2011 (Nyamweya, J).

(ii) That the orders alleged to have been disobeyed were never personally served as required by law.

(iii) That the Plaintiff is guilty of non-disclosure of the following material facts, *inter alia* -

a. The Plaintiff’s tenancy was for a year, to expire on 28<sup>th</sup> February 2011, and that her request to renew was refused, a fact communicated to her in writing before the tenancy expired.

b. The Plaintiff refused to give up vacant possession of the premises upon expiry of the tenancy on 28<sup>th</sup> February 2011 or pay outstanding rent.

(c) The Plaintiff’s application before the Chief Magistrates’ Court to prevent her eviction from the premises was refused on 24<sup>th</sup> June 2011 upon the basis, *inter alia*, that the tenancy had expired by effluxion of time.

(d) The Plaintiff then came to this court in the present suit and sought to same reliefs and obtained *ex parte* orders.

(e) In any event the orders of Mwera, J of 27<sup>th</sup> June 2011 were stayed on 1<sup>st</sup> December 2011 (Nyamweya, J).

(f) The 1<sup>st</sup> Defendant therefore lawfully sought vacant possession of the premises and outstanding rent from the Plaintiff by letter dated 2<sup>nd</sup> December 2011.

(g) The subsequent levy of distress against the Plaintiff was also lawful.

(h) When the distress was levied the Plaintiff had locked the premises and she never went back to the same.

(i) The 1<sup>st</sup> Defendant therefore rented out the premises to a third party to mitigate his loss.

6. I have considered the submissions made by the respective learned counsels for the parties, including the cases cited. I have also perused the court record in order to fully understand the original dispute between the Plaintiff and the 1<sup>st</sup> Defendant. It is a dispute that has taken an inordinate amount of the court’s time as is apparent from the court record.

7. The background to the dispute is as follows –

(i) The Plaintiff had a one year lease from the 1<sup>st</sup> Defendant upon a

residential flat commencing 1<sup>st</sup> March 2010 and ending on 28<sup>th</sup> February 2011.

(ii) The tenancy agreement contained a renewal clause for a further one year subject to increment of rent by a certain percentage.

(iii) Prior to the tenancy ending on 28<sup>th</sup> February 2011 the 1<sup>st</sup> Defendant communicated his unwillingness to renew the same and demanded vacant possession on 1<sup>st</sup> March 2011. The reason of the 1<sup>st</sup> Defendant's unwillingness to renew the tenancy appeared to be arrears of rent.

(iv) The Plaintiff did not give vacant possession of the premises and instead filed suit before the Chief Magistrate's Court seeking injunctive relief to prevent her eviction from the premises. Her application was heard *inter partes* and refused on 24<sup>th</sup> June 2011.

(v) The Plaintiff then came to this court in the present suit on the same day and apparently without disclosing existence of the suit before the lower court obtained *ex parte* certain orders on 27<sup>th</sup> June 2011 (Mwera, J).

(vi) In the meantime, the 1<sup>st</sup> Defendant had gone to the **Business Premises Rent Tribunal** and there obtained an order to permit him to levy distress for rent against the Plaintiff. The Tribunal granted him the order but cautioned him not to evict the Plaintiff in the course of levying distress.

The 1<sup>st</sup> Defendant's action of going to the BPR Tribunal was obviously mischievous as that tribunal deals with controlled tenancies in **business** premises. It has no jurisdiction in **residential** premises. The 1<sup>st</sup> Defendant must have misrepresented to that tribunal that the premises concerned were business premises.

(vii) In due course the 1<sup>st</sup> Defendant brought to the attention of this court the existence of the suit in the lower court, and on 1<sup>st</sup> December 2011 the court (Nyamweya, J) stayed the proceedings in this suit as well as the *ex parte* orders of 27<sup>th</sup> June 2011 pending disposal of the lower court matter.

(viii) There being no longer any order in place to protect the Plaintiff, the 1<sup>st</sup> Defendant on 2<sup>nd</sup> December 2011 demanded from the Plaintiff vacant possession and unpaid rents of KShs 352,000/00. On 2<sup>nd</sup> December 2011 the 1<sup>st</sup> Defendant levied distress against the Plaintiff.

(ix) The 1<sup>st</sup> Defendant says that by then the Plaintiff was no longer living in the premises though it appears her household goods were still in the flat. The Plaintiff says that by his action the 1<sup>st</sup> Defendant evicted her from the flat contrary to what the BPR Tribunal had directed, that in the course of levying distress for unpaid rent the 1<sup>st</sup> Defendant should not evict her.

(x) Then on 9<sup>th</sup> December 2011 the court (Mwera, J) ordered that the "*status quo* to hold until" 14<sup>th</sup> December 2011 when the matter would be mentioned before Waweru, J.

(xi) On 14<sup>th</sup> December 2011 the court (Waweru, J) directed, *inter alia*, that "parties must obey any previous orders made under pain of necessary

sanctions, including being denied audience”.

8. That then is the background that informs the contempt application under consideration in this ruling. The Plaintiff’s case is that the Defendants disobeyed the orders of the BPR Tribunal of 12<sup>th</sup> May 2011 and of this court of 9<sup>th</sup> and 14<sup>th</sup> December 2011.

9. The order obtained from the BPR Tribunal was clearly irregular for want of jurisdiction. It should not be permitted to found any further proceedings; that would just perpetuate an illegality.

10. Regarding the order of 9<sup>th</sup> December 2011, the Plaintiff appears to interpret the same as requiring the 1<sup>st</sup> Defendant to restore her into the premises from which she says she was unlawfully evicted on 2<sup>nd</sup> December 2011 in the course of levying distress. The 1<sup>st</sup> Defendant’s stand is that the distress was lawful as the order of 27<sup>th</sup> June 2011 had been stayed by the order of 1<sup>st</sup> December 2011. That appears to be so.

11. What about the apparent eviction of the Plaintiff in the course of distress for rent? The 1<sup>st</sup> Defendant says that the Plaintiff had locked the premises when distress for rent took place on 2<sup>nd</sup> December 2011. But it is usual for people to lock their houses when they are not in! The 1<sup>st</sup> Defendant does not say that he allowed the Plaintiff back into the premises. He says he rented them out to a third party to mitigate his losses. On the other hand the Plaintiff does not state that she did not owe the rents that were being distained for.

12. There cannot be any doubt that the 1<sup>st</sup> Defendant evicted the Plaintiff in the course of the distress for rent on 2<sup>nd</sup> December 2011.

13. Did the order of 9<sup>th</sup> December 2011 require the Defendants to restore the Plaintiff into the premises? Did the direction “*status quo* to hold until (14<sup>th</sup> December 2011)” require the Defendants to restore the Plaintiff into the premises? In other words, what was the “*status quo*” that was to hold until 14<sup>th</sup> December 2011?

14. That *status quo* was that the Plaintiff had been evicted from the premises on 2<sup>nd</sup> December 2011. She did not seek any **mandatory** injunction to have the Defendants restore her into the premises. Her application by notice of motion dated 9<sup>th</sup> December 2011 upon which the orders of that date were made sought **restraining** orders to protect her occupation and possession of the suit premises as if she was still in such occupation and possession, which was not the case. The order of 9<sup>th</sup> December 2011 cannot be interpreted to mean that the Defendants were required to restore her into the premises. I find that the Defendants were not in disobedience of that order.

15. The order of 14<sup>th</sup> December 2011 was merely a throw-back to the order of 9<sup>th</sup> December 2011. It did not direct anything new.

16. In the circumstances I find that present contempt application has no merit. It is dismissed with costs to the Defendants.

17. As I have already mentioned, this dispute has already taken up an inordinate amount of the court’s time. There have been numerous applications and some counter-applications. If there is anything outstanding in the suit worth proceeding to trial on the merits, the parties should proceed towards that end.

**DATED AND SIGNED AT NAIROBI THIS 2<sup>ND</sup> DAY OF JULY 2013**

**H. P. G. WAWERU**

**JUDGE**

**DELIVERED AT NAIROBI THIS 5<sup>TH</sup> DAY OF JULY 2013**