



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL CASE NO 3098 OF 1990**

**DUNCAN NDERITU.....PLAINTIFF**

**BETHWELL MAREKA GECAGA .....PLAINTIFF**

**JAMES SIDNEY NESBIT t/a Trustees**

**Of African Club.....PLAINTIFF**

**VERSUS**

**JOHN HARUN.....DEFENDANT**

**RULING**

This is an application brought by the successful plaintiffs for the committal of the unsuccessful defendant for disobeying lawful court orders. The application is expressed to be brought under s 5 (1) of the Judicature Act, Cap 8 Laws of Kenya. The section empowers the High Court to punish for contempt of court.

The procedure to be adopted in applications of this nature is set out under o 52 of the Rules of the Supreme Court of England. This application was brought pursuant to leave which this Court granted on 3rd June, 1991, and pursuant to the provisions of o 52 rule 3, Rules of the Supreme Court. Whether or not the procedure adopted here is the correct one I propose to consider the issue later.

The applicants obtained summary judgment for possession of premises. They thereafter applied to be put in possession. At about the same time the respondent applied for stay of execution pending the entering and hearing of an appeal against the judgment. A stay was refused, but the applicants were granted, an order of eviction and to be put back in possession of the suit premises. On 30th May, 1991, the court bailiff forcibly evicted the respondent and put the applicants in possession.

This application was provoked when the respondent forced himself back into possession and allegedly threw out the applicants' agents or employees. The respondent does not seem to dispute the facts. His contention and counsel's submission is on the main, that the applicants have no *locus standi* to bring the application they having not produced authority from members of the Africa Club, to sue; that even if they had such authority he has never been served with the order for possession; that this Court lacks jurisdiction to hear and deal with the application, and that the application is bad in law, misconceived and an abuse of the process of the Court.

An affidavit filed in opposition of the application introduces another angle to the matter. It is that there is another suit pending, to wit Nairobi High Court Civil Case No 5705 of 1989, in which the same parties here are parties with the respondent here as plaintiff. In that case the respondent was granted an order of

injunction to restrain the applicants from evicting him except by proper process of law.

There are two main issues which are central to the just determination of this application. The first one is whether failure to serve the order for possession disentitles the applicants to the order sought. Secondly, whether the order of injunction in Nairobi Civil Case No 5705 of 1989 conflicts with the order for possession of this case.

On the first issue the English practice is that where a defendant against whom judgment for possession of certain premises has been given or entered the successful plaintiff is obliged to serve a notice of the judgment or order and call upon him to give up possession. This appears to be the position whether or not the defendant was present when the judgment was being given or order being made. In this Country the provisions of o 21 rules 86 and 87 Civil Procedure Rules appear to state the position slightly differently, but it would appear to me that the effect is more or less the same.

Rule 86 (1) states in, pertinent part, as follows:-

“Where the holder of a decree for the possession of immovable property ... is resisted or obstructed by any person in obtaining possession of the property, he may make an application to the Court complaining of such resistance or obstruction.”

Sub-rule (2) enjoins a Court to fix a date for the investigation of the complaint and to notify or to summon the party against whom the complaint is made to be present to answer the complaint. It is upon the Court being satisfied that there was no just cause to resist that it shall proceed to direct that the applicant be put into possession. Any further obstruction thereafter will result in committal.

So that in Kenya like in the English situation a successful litigant for possession of immovable property is obliged to serve a notice of the judgment or order for possession upon the affected party, and only to apply for eviction where there has been some resistance or obstruction in obtaining the possession.

In this matter possession was ordered to be given forthwith. The record does not show the respondent was present when the ruling was pronounced. Nor is there any indication that his advocate was present although it can be inferred that he was. An advocate did apply for copies of proceedings and ruling for purposes of appeal. The date when the application was made is not shown. I presume it was soon after the ruling was pronounced. It can also be inferred from the record and affidavit sworn by the respondent in support of an application for stay of execution that he became aware of the Court's ruling and order before he was evicted. So because of that Mr Mukuria, learned counsel for the applicants contended and submitted that there was no necessity for the order of eviction to be served upon the respondent. In his view service of the order is intended to notify the affected party about the existence of that order.

While I agree with Mr Mukuria that service of the order is to bring to the attention of the affected party the details of a judgment, I do not agree with him that mere knowledge of the existence of an order or judgment satisfied the requirements of the relevant law. Service of the judgment or order is basically intended to aid the Court in discerning whether upon a complaint that its order has been flouted, such flouting was wanton and therefore punishable.

The applicants have adduced evidence to show the Court directed that the applicants be put in possession and that they were actually put in possession. However the respondent having not been served with the order he cannot be said to have wrongfully resisted the obtaining of possession by the applicants. Having not been given an opportunity in the specific manner provided for under o 21 rule 86, Civil Procedure Rules, and there being no evidence that he was served with the copy of the order he is alleged to have disobeyed, I find it difficult to hold that he wantonly flouted the court order. I come to that conclusion because committal for contempt is a serious matter. It is a criminal matter which in effect means that all pre-requisites must be shown to have been complied with before the Court can punish for contempt.

Moreover, the respondent is saying that he had obtained an order of injunction against the applicants. Although the Court before giving summary judgment dealt with the issue, the respondent having not been

served with a copy of the ruling cannot be said to have had full notice of the contents thereof.

There is one matter which merits comment before coming to the end of this ruling. A Court of competent jurisdiction dealt with two applications here. In both of these applications the respondent was served with notice to appear and defend the same, and he did in fact appear by advocate and presented arguments on his behalf. Thereafter the Court ordered that the premises be broken into and the applicants be put in possession. Those orders presupposed that the respondent had resisted the applicants obtaining possession, and therefore force was essential. The Court must have had good reason for short circuiting the provisions of o 21 rule 86 Civil Procedure Rules. Those reasons are not before me. Had they been I would have been inclined to hold that the respondent was in contempt of court. But as the matter stands I cannot be able to say so.

One thing is, however, clear. The respondent through this application has been made aware of the full effects of the order which requires him to vacate forthwith and deliver vacant possession of the suit premises to the applicants. He may not be in agreement with the orders. He may be taking steps to challenge the order on appeal. However, the order is still valid and enforceable. It has not been set aside. An application for its stay was dismissed. So the applicant is obliged to comply with it. His reasons for failing to comply with it have now been heard. They are not such as are persuasive to entitle this Court to excuse any future resistance to the giving of effect to the order for possession. Merely on humanitarian grounds I will grant him 4 days to clear up from the suit premises.

Before I conclude there is one point on procedure I would like to comment on. This application was brought under s 5 of the Judicature Act. As I stated earlier the power to punish for contempt is vested in the High Court by that section. However not all contempts are punishable under that section. Disobedience of court orders is provided for in the relevant provisions of the law with regard either to the making of those orders or with regard to their execution or disobedience. The present application was improperly brought under s 5 Judicature Act. It should have been brought under the provisions of o 21 Civil Procedure Rules. The error is not fatal. It, however is material on the issue of costs. The applicant adopted a longer and more expensive procedure. Were I to be inclined to grant the orders sought I would have been disinclined to award full costs. The point does not arise here now because I have decided to order that each party bear own costs. I came to that conclusion on the basis that the respondent was to some degree culpable.

I decline to grant the order of committal.

No order as to costs. Orders accordingly.

**Dated and delivered at Nairobi this 11th day of March, 1992.**

**S.E.O BOSIRE**

**JUDGE**