



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI**

**ELC CIVIL SUIT NO. 25 OF 2010**

**FAZA HOLDINGS LIMITED**

**T/A DOWN TOWN HOTEL.....PLAINTIFF**

**VERSUS**

**JOHN KAGONYE NGURURI.....1<sup>ST</sup> DEFENDANT**

**KANGERI WANJOHI**

**T/A KINDEST AUCTIONEERS.....2<sup>ND</sup> DEFENDANT**

**RULING**

**Introduction**

The Plaintiff is seeking the following orders in an application made by way of a Notice of Motion dated 24<sup>th</sup> June 2011:

1. That the 1<sup>st</sup> Defendant, John Kagonye Ngururi be committed to detention for such period as this Court still deem necessary for being in contempt of court or for so long as he remains in contempt of the order given herein on 26<sup>th</sup> January 2010 by Hon. Justice Mbogholi.
2. That the 2<sup>nd</sup> Defendant, Kang'eri Wanjohi trading as Kindest Auctioneers be committed to detention for such period as this Court shall deem necessary for being in contempt of court or for so long as he remains in contempt of the orders given herein on 26<sup>th</sup> January 2010 by Hon. Justice Mbogholi.
3. That the Defendants be jointly and severally found liable to the plaintiff herein in the amount of Kshs.9,161,600/= for the replacement and restoration value occasioned by the Defendants' action on 22/01/2010 at LR 209/4356 together with interest at Court rates from 22/01/2010 until payment in full.
4. That in default of payment of such sum as will be awarded by this Court to the Plaintiff on account of the replacement and restoration value, this court do order the attachment and sale of the Defendants' property wherever situated including but not limited to any such sum that may be found to be due and payable to them by any party as well as shares held in their name or in the names of their nominees and the proceeds thereof be paid to the Plaintiff.
5. That this Court do grant such further orders and reliefs as it may deem just to grant.

**The Plaintiff's Case**

The Plaintiff's application is supported by affidavits sworn on 17<sup>th</sup> June 2011 and 24<sup>th</sup> June 2011 by Mohamed Abubakar, a Director of the Plaintiff company, as well as a further affidavit and supplementary affidavit sworn by the same deponent on 5<sup>th</sup> March 2012 and 26<sup>th</sup> July 2013 respectively. The application is premised on the grounds that on 26<sup>th</sup> January 2011, Msagha Mbogholi J. issued a mandatory order of injunction requiring the Defendants to forthwith without any conditions return the plaintiffs goods carried by the Defendants from Downtown Hotel on 22<sup>nd</sup> January 2010.

Further, that the Defendants were duly served with the said court order together with a notice of penal consequences, but that they have deliberately and blatantly disobeyed the same as the goods have not been returned to date. The Plaintiff avers that in further breach of the said court order the Defendants on 15<sup>th</sup> June 2011 advertised the said goods for sale by public auction and on 22<sup>nd</sup> June 2011 sold the all the distrained Plaintiff's goods by public auction. The Plaintiff thereafter procured a Valuer, Gilbert Kibire of Neo-Westend Ltd, who prepared an assessment of compensation of the damaged and removed items together with fittings in respect of the premises L.R. 209/4356 where the Plaintiff carries on business as Downtown Hotel.

The Plaintiff's further affidavit depones to further contempt committed by the 1<sup>st</sup> Defendant during the pendency of this application. The Plaintiff avers in this regard that on 04/11/2011, the 1<sup>st</sup> Defendant through Pyramid Auctioneers accompanied by police officers and acting on the strength of a court order, broke into L.R No. 209/4356 and violently distrained goods belonging to Faza Holdings Limited trading as Downtown Hotel. The Plaintiff annexed the proceedings in **CMCC Milimani Commercial Court Miscellaneous Application No. 734 of 2011** from which Pyramid Auctioneers obtained a Court order dated 28/10/2011

The Plaintiff further stated that on 18/11/2011 in "**The Star**" newspaper at page 43, he saw an advertisement for an auction by Pyramid Auctioneers on 26/11/2011 at 10.30 am at Pangani Auction Centre along Muranga road with respect to "The Landlord- vs- Mohamed Abubakar T/A Down Ton Hotel Ltd." Further, that he was personally present outside Pangani auction centre and saw items from Downtown Hotel being ferried away from the said auction centre by various purchasers at the auction by Pyramid Auctioneers on 26/11/2011.

The Plaintiff stated that he thereafter caused to be prepared a Report and assessment by Mohamed A. Samji to ascertain the replacement cost of the illegal distress by the 1<sup>st</sup> Defendant through Pyramid Auctioneers on 04/11/2011.

The Plaintiff denied that the 1<sup>st</sup> Defendant was owner of the property on which the Plaintiff is situated, and stated that the said property, being L.R No. 209/4356 is registered in the name of Abubakar Mohamed Habib (Deceased) under the Registration of Titles Act (since repealed), in Title Number I.R 114860. He stated that he is an Administrator of the Estate of the Late Abubakar Mohamed Habib, and attached a copy of the said title and of the Grant of Letters of Administration intestate issued on 3<sup>rd</sup> July 2008 and a certificate of confirmation of Grant dated 19<sup>th</sup> April 2012.

The Plaintiff further stated that a purported transfer of the said title in the 1<sup>st</sup> Defendant's favour was cancelled on 25<sup>th</sup> June 2011, and that the Registrar of Titles did in a letter to the 1<sup>st</sup> Defendant dated 18<sup>th</sup> October 2010 state that the purported Transfer and replacement Charge were irregular and are revoked. Further, that the 1<sup>st</sup> Defendant Application dated 29<sup>th</sup> March 2012 for Judicial Review in **HC JR No ELC 111 of 2011 - Republic (Exparte John K. Ngururi) versus Minister of Lands & Registrar of Titles** was dismissed by Korir J. in a judgment read and delivered on the 26<sup>th</sup> June 2013. The Plaintiff annexed a copy of the said letter and judgment.

### **The Defendant's Case**

The 1<sup>st</sup> Defendant and 2<sup>nd</sup> Defendants opposed the said Notice of Motion in replying and further

affidavits which they both swore on 26<sup>th</sup> July 2011 and 10<sup>th</sup> July 2013 respectively. They stated that that they have never been personally served with the orders given by the court on 26<sup>th</sup> January 2010, and that the said orders which were given ex parte were not extended when the parties appeared before Msagha Mbogholi J. on 4<sup>th</sup> February 2010, and as such lapsed.

The 1<sup>st</sup> Defendant further claimed that the Plaintiff's goods which were the subject matter of the application dated 22<sup>nd</sup> January 2010 were also the subject matter of a Chamber summons application dated 25<sup>th</sup> January 2010 filed in **Nairobi Milimani HCCC No. 153 of 2001- Mohamed Abubakar –vrs- Ecobank Kenya Ltd & John K. Ngururi**, a copy of which he annexed. That in the application filed in **Nairobi Milimani HCCC No. 153 of 2001**, the Plaintiff sought among others an order for the return forthwith to the suit premises of the items carried away by the 1<sup>st</sup> Defendant's agents/auctioneers. The subject goods had been attached and removed from the suit premises by the 2<sup>nd</sup> Defendant in the matter of distress for rent.

The 1<sup>st</sup> Defendant further stated that the High Court delivered its ruling in **Nairobi Milimani HCCC No. 153 of 2001** on 12<sup>th</sup> May 2011 and made the following orders:

- a. The court dismissed the application dated 25<sup>th</sup> January 2010.
- b. The court granted the plaintiff 30 days within which to pay the rents due to the 1<sup>st</sup> Defendant.
- c. That the 2<sup>nd</sup> Defendant herein was directed to accord the Plaintiff 30 days in order to enable him pay the rents due.

The 1<sup>st</sup> Defendant attached a copy of the said order. He stated that after the delivery of the ruling, the Plaintiff filed an application under certificate of urgency in the Court of Appeal being **Nairobi Civil Application No. Nai 123 of 2011 (UR 82/2011)- Mohamed Abubakar –vrs- Ecobank Kenya Ltd & John K. Ngururi** seeking an injunction under Rule 5(2) (b) of the Court of Appeal Rules pending the hearing and determination of an appeal from the ruling and orders of the High Court. Further, that the Court of Appeal declined to grant the injunction in a ruling delivered on 10<sup>th</sup> June 2011 on the ground that the fear of distress being levied can be avoided by the Plaintiff paying the rent. The 1<sup>st</sup> Defendant annexed copy of the ruling by the Court of Appeal.

The 1<sup>st</sup> Defendant contended that his Advocates on record wrote a letter to the Plaintiff's Advocates on 13<sup>th</sup> June 2011, requesting for payment of rent, but that to date no payments have been made. Further, that it is after the Plaintiff failed to pay the rent within a period of 30 days as ordered by the court in **Nairobi Milimani HCCC No. 153 of 2001** or at all that the 1<sup>st</sup> Defendant's Advocates instructed the 2<sup>nd</sup> Defendant by a letter dated 13<sup>th</sup> June 2011 to sell the attached goods. That subsequently the 2<sup>nd</sup> Defendant advertised and sold the Plaintiff's goods on 22<sup>nd</sup> June 2011 at Pangani Auction Centre. The 1<sup>st</sup> Defendant annexed copies of the said letters.

The 1<sup>st</sup> Defendant averred that it was therefore evident that he had not deliberately and blatantly disobeyed and refused to comply with the court order given by the court on 26<sup>th</sup> January 2010, as the advertisement and sale of the attached goods was pursuant to a ruling delivered by the High Court on 12<sup>th</sup> May 2011 in **Nairobi Milimani HCCC No. 153 of 2001**, which ruling has not been complied with. The 1<sup>st</sup> Defendant also stated that other than the Plaintiff's goods that had been proclaimed and removed by the 2<sup>nd</sup> Defendant in the matter of distress for rent, he had no knowledge of the destruction and removal of the goods listed in the Report and Assessment of Gilbert Kibire.

The 1<sup>st</sup> Defendant further claimed that he is the registered proprietor of L.R No. 209/4356, Grant No. I.R. 114860 having purchased the same from Ecobank Kenya Ltd at a consideration of Kshs.60,500,000/= vide an Agreement for Sale dated 30<sup>th</sup> September 2008, which he annexed. Further that the suit property was transferred to him vide a Transfer dated 15<sup>th</sup> December 2008 and registered against the Grant on 31<sup>st</sup>

December 2008. He also annexed copies of the Transfer dated 13<sup>th</sup> December 2008 and Grant No. I.R 114860.

The 1<sup>st</sup> Defendant deponed that he was aware that the Transfer in his favour was expunged from the grant by the Registrar of Titles pursuant to a ministerial directive issued by the Minister of Lands, and that he challenged the Minister of Lands' directive and the Registrar of Titles action by way of an application for Judicial Review being Nairobi **H.C.J.R. No. ELC 111 of 2011 - Republic Exparte John K. Ngururi) – vs- Minister of Lands & Register of Titles.**

On the allegations by the Plaintiff of further contempt, the 1<sup>st</sup> Defendant stated that he had no knowledge of the actions of Pyramid Auctioneers, and denied instructing Pyramid Auctioneers through Kinuthia Kahindi & Co. Advocates to levy distress on the Plaintiff's goods in the suit premises. Further, that he is a stranger to the proceedings in **CMCC Milimani Commercial Court Miscellaneous Application No. 734 of 2011**, and that if the Plaintiff has suffered loss and damage as a result of Pyramid Auctioneers' actions, its claim should be addressed to and made against Kinuthia Kahindi's & Co. Advocates and the said firm of Auctioneers.

The 2<sup>nd</sup> Defendant on its part reiterated the explanations and averments made by the 1<sup>st</sup> Defendant, and stated that he was not in contempt of court as the advertisement and sale of the attached goods on 22<sup>nd</sup> June 2011 was pursuant to a ruling delivered by the High Court on 12<sup>th</sup> May 2011 in **Nairobi Milimani HCCC No. 153 of 2001**. He further stated that the only goods he removed from the Plaintiff's premises on 22<sup>nd</sup> January 2010 pursuant to instructions given to him to distress for rent were those listed in the catalogue annexed to the supporting affidavit of Mohamed Abubakar sworn on 24<sup>th</sup> June 2011. He annexed the following documents that listed the goods removed from the Plaintiff's premises on 22<sup>nd</sup> January 2010 and sold by public auction on 22<sup>nd</sup> June 2011.

- a. Pangani Auction Centre's goods acceptance form dated 22<sup>nd</sup> January 2010
- b. Kindest Auctioneers catalogue .
- c. Kindest Auctioneers letter/statement of account dated 23<sup>rd</sup> June 2011

The 2<sup>nd</sup> Defendant averred that other than the goods listed in the documents he did not remove any other goods from the Plaintiff's premises, and that he did not damage the Plaintiff's premises or any goods therein in the course of levying distress. He denied removing or damaging the goods listed in the Report and Assessment of Gilbert Kibire dated 24<sup>th</sup> August 2010 annexed to the supporting affidavit of Mohamed Abubakar sworn on 24<sup>th</sup> June 2011.

Lastly, the 2<sup>nd</sup> Defendant stated that it was evident that he did not distrain goods belonging to the Plaintiff on 4<sup>th</sup> November 2011, as the alleged distress for rent on said date was carried out by Pyramid Auctioneers. Further, that he was a stranger to the actions of Pyramid Auctioneers.

### **The Submissions**

The Plaintiff's counsel in submissions dated 26th November 2013 reiterated the facts leading to their contempt of court application. The Plaintiff relied on section 5 of the Judicature Act and Order 40 Rule 3 of the Civil Procedure Rules for the power of this court to deal with contempt of court, and relied on the holding by the Court of Appeal in **Mwangi H.C. Wangondu vs Nairobi City Commission (Civil Appeal No. 95 of 1998)** to this effect.

On the requirement of personal service the Plaintiff relied on several decisions including **Kariuki & 2 Others vs Minister for Gender Sports, Culture & Social Services & 2 Others, (2004)**, **Jacob Zedekiah Ochino & Another vs George Aura Okombo, Civil Appeal 36 of 1989**, and **Nyamogo vs Kenya Posts and Telecommunications Corporation, CA Nai 264 of 1993**, where it was held that no order of a court requiring a person to do or to abstain from doing any act may be enforced, unless a copy

of the order has been served personally on the person required to do or abstain from doing the act in question.

The Plaintiff submitted that in the instant application an affidavit of service was sworn by Robinson Muhando Khalial on 2nd February 2010 and filed on 4th February 2010, was proof that personal service of the orders were effected on the 2nd Defendant. However, that despite of service and knowledge of the said orders the 2nd Defendant as duly appointed by the 1st Defendant proceeded to sell the Plaintiff's good in contempt of and disregard of the said court order.

The Plaintiff further submitted that the allegations that the exvparte orders granted on 26<sup>th</sup> January 2010 lapsed and that the public auction was sanctioned by orders in **Nairobi Milimani HCCC No. 153 of 2001** were decided in the ruling by Okwengu J. (as she then was) on 29<sup>th</sup> July 2010 on the Plaintiff's Notice of Motion dated 22<sup>nd</sup> January 2010, and in the ruling delivered by the said judge on 29<sup>th</sup> July 2010 to the Defendants' preliminary objection. The Plaintiff submitted in this regard that the mandatory order issued on 26<sup>th</sup> January 2010 is still alive to date, and that the goods distrained by the 2<sup>nd</sup> Defendant were those of the Plaintiff herein, a separate and distinct party from those in **Nairobi Milimani HCCC No. 153 of 2001**.

Lastly, on the relief sought, the Plaintiff relied on various judicial decisions on the need to punish for contempt of court to uphold the dignity of the courts. He also stated that such punishment is specifically provided for in section 63(c) and Order 40 Rule 3 (1) of the Civil Procedure Rules.

The Defendants' counsel filed written submissions on 11<sup>th</sup> July 2013. The Defendants made submissions on various grounds on which they opposed the Plaintiff's application. On the ground that the Defendants have never been personally served with the order given by the court on 26<sup>th</sup> January 2010, the Defendants argued that the affidavit of service sworn by Robinson Muhando Khalial on 2<sup>nd</sup> February 2010 confirmed that the 1<sup>st</sup> Defendant was never personally served with the said court order. Further, that the 2<sup>nd</sup> Defendant denied that he was served by the process server as alleged.

The Defendants submitted that the Plaintiff had therefore not complied with the mandatory provisions of section 5(1) of the Judicature Act requiring the personal service of order be effected on the alleged contemnors before an application for contempt of court can lie. They relied on the decisions in **Mwangi H.C. Wangondu vs Nairobi City Commission** , Nairobi Civil Appeal No. 95 of 1998, **Ochino & Another vs Okombo & 4 Others** (1989) KLR 165, **Rodgers Muema Nzioka & 2 Others vs Tiomin Kenya Ltd, Mombasa HCCC No 97 of 2001** and **Nyamodi Ochieng Nyamogo & Another vs Kenya Post & Telecommunications Corporation** (1990-1994) E.A. 464 in this regard.

The Defendants also relied on Order 40 Rule 4(2) of the Civil Procedure Rules, and Order 39 Rule 3(2) of the repealed Civil Procedure Rules to argue that the ex parte injunction that was issued by the Court on 26<sup>th</sup> January 2010 was not extended when the inter partes hearing on the same was held on 4<sup>th</sup> February 2010, and therefore lapsed.

The Defendants further argued that the advertisement and sale of the Plaintiff's goods was sanctioned by the High Court in **Nairobi Milimani HCCC No 153 of 2001- Mohamed Abubakar vs Ecobank Kenya Ltd and John K. Nguriri** as well as by the Court of Appeal. Further, that the Plaintiff had therefore not proved beyond reasonable doubt that the Defendants are in contempt of the court order issued on 26<sup>th</sup> January 2010 as required by the decision in **Mwangi H.C. Wangondu vs Nairobi City Commission** , Nairobi Civil Appeal No. 95 of 1998.

The Defendants reiterated that they were strangers to the distress for rent and actions of Pyramid Auctioneers. Lastly, on the prayers sought by the Plaintiff, they argued that the claim for Kshs 9,161,600/= and/or Kshs 8, 584,920/= being the alleged costs of replacement and restoration of the Plaintiff's goods and premises, is a claim for special damages that has to be specifically pleaded and proved at the trial. Further, that committal of the Defendants to civil jail is too punitive a measure in light of the opaque circumstances of this case. The Defendants relied on the decisions in **Ahmed Noorani vs**

**Joyce Akinyi Ochieng, Nairobi HCCC ELC No 319 of 2008 and Re Maria Anne Davies, (1888) 21 Q..B.D. 236** in this respect.

### **The Issues and Determination**

There are three issues before the court for determination arising from the pleadings and submissions highlighted in the foregoing. The first is whether there was personal service of the orders given by this court on 26<sup>th</sup> January 2010 on the Defendants. Secondly, if so, whether the alleged contemnors are culpable for contempt of court. The last issue is if the alleged contemnors are found culpable, whether the Plaintiff can be granted the remedies sought.

Order 40 Rule 3 of the Civil Procedure Rules provides for the consequences of breach of an order of injunction, and states that in cases of disobedience, or of breach of any such terms, the court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the court directs his release.

The procedure to be followed in making such an application is provided under order 51 of the Civil Procedure Rules that provides for the mode of filing, serving and hearing of applications brought under the Civil Procedure Rules. The substantive law that applies to contempt of court is the English law on committal for contempt of court by virtue of section 5(1) of the Judicature Act which provides that:

**“The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate courts.”**

Personal service of the orders alleged to have been disobeyed, and of a penal notice is a requirement in proceedings for committal for contempt of court as a result of the application of English law, which has traditionally insisted on compliance with certain procedural safeguards before courts could exercise their jurisdiction to punish for contempt of court. This insistence arose from the arbitrary nature of contempt of court proceedings as courts essentially apply a summary jurisdiction, and also because of the threat that is presented by such proceedings to the liberty of the alleged contemnors.

This Court notes that Kenyan courts have also as a result held personal service of orders and a penal notice to be a requirement in contempt of court proceedings, and reference is made to the Court of Appeal decisions in **Nyamogo & Another v Kenya Posts and Telecommunications Corporation, (1994) KLR 1**, and **Ochino & Another v Okombo & 4 others (1989) KLR 165** in this respect.

The applicable English Law in this respect is Part 81 of the English Civil Procedure Rules of 1998 as variously amended, which part repealed in most part the Rules of the Supreme Court that previously applied, including Order 52 and parts of Order 45 of the Rules of the Supreme Court. The law on the personal service of court orders is now found in Rule 81.8 of the English Civil Procedure Rules. The said rule provides that unless the court dispenses with service, a judgment or order may not be enforced by way of an order for committal unless a copy of it has been served on the person required to do or not do the act in question. Rule 81.6 of the English Civil Procedure Rules specifically provides that the method of service shall be personal service, which is effected by leaving the order with the person to be served.

Similar provisions were also provided by Order 45 Rule 7 (2) and (3) of the Rules of the Supreme Court that was repealed by Part 81 of the English Civil Procedure Rules of 1998.

The Plaintiff herein argued that a process server of the High Court, one Robinson Muhando Khali al effected personal service of the orders given by this court on 26<sup>th</sup> January 2010 on the Defendants, which allegation is denied by the said Defendants. I have perused the affidavit of service sworn by the said process server on 2<sup>nd</sup> February 2010 and filed in court on 4<sup>th</sup> February 2010. He stated therein that he served the said orders on the 2<sup>nd</sup> Defendant who was known to him on 1<sup>st</sup> February 2010 at KICC

Cafeteria grounds, but that the said Defendant refused to sign and ran away with the copies. There is no attestation in the said affidavit of service on personal service on the 1<sup>st</sup> Defendant, nor did the Plaintiff bring any other evidence of such service.

It is the finding of this court after examining the evidence produced by the Plaintiff that there was personal service on the 2<sup>nd</sup> Defendant of the orders of this court given on 26<sup>th</sup> January 2010. The 2<sup>nd</sup> Defendant's assertions that the said personal service was made in a place other than his registered office cannot hold as there is no such requirement in the law and he did not cite any such law. In addition, the 2<sup>nd</sup> Defendant was also at liberty to cross-examine the process server on the contents of the affidavit of service which he alleges are not true to test their veracity, but opted not to do so, even after insistence by the Plaintiff's Advocate. The said affidavit is therefore properly on record, and this court finds it to be evidence of what is stated therein.

As regards service on the 1<sup>st</sup> Defendant, there is no evidence of personal service of this Court orders of 26<sup>th</sup> January 2010. However, after perusal of the court record, I find that the 1<sup>st</sup> Defendant thereafter swore an affidavit on 2<sup>nd</sup> February 2010 in support of a Notice of Motion filed by the Defendants to set aside, vary or discharge the orders given on 26<sup>th</sup> January 2010. In the said affidavit, the 1<sup>st</sup> Defendant attested to being aware of the ex parte orders issued by this court on 26<sup>th</sup> January 2010 and alleges that the Plaintiff misled and misrepresented facts to the court leading to the issue of the said ex parte orders. This affidavit was in addition sworn by the 1<sup>st</sup> Defendant before the public auctions of the Plaintiff's property.

The requirement of personal service can be dispensed with by this court, and that this is allowed under the applicable English Law. This discretion is granted to the court by Rule 81.1(2) of the English Civil Procedure Rules, which provides that in the case of committal proceedings for orders and judgments other than those requiring a person not to do an act, the court may dispense with personal service of the judgment or order if it thinks it just to do so; or may make an order in respect of service by an alternative method or at an alternative place. Similar provisions were provided in the repealed Order 45 Rule 7 (7) of the Rules of the Supreme Court that were applicable previously.

It has also been held in several judicial decisions that if personal awareness of the court orders by the alleged contemnors is demonstrated, they will be found culpable of contempt even though they had not been personally served with the court orders. See in this regard the decisions in **Kenya Tea Growers Association vs Francis Atwoli & Others**, Nairobi High Court Constitutional Petition No 64 of 2010, **Husson v Husson**, (1962) 3 All E.R. 1056, **Ronson Products Ltd v Ronson Furniture Ltd** (1966) RPC 497, and **Davy International Ltd vs Tazzyman** (1997) 1 WLR 1256 .

I therefore find for the above reasons that as of 2<sup>nd</sup> February 2010 the 1<sup>st</sup> Defendant was personally aware of the court order granted on 26<sup>th</sup> January 2010, and hereby dispense with the requirement of personal service of the said order on the said Defendant. Further, that the Defendants were aware of the said court orders during the public auction of the Plaintiff's goods by the 2<sup>nd</sup> Defendant on 22<sup>nd</sup> June 2011, and the public auction by Pyramid Auctioneers on 26<sup>th</sup> November 2011.

On the second issue as to whether the Defendants are culpable for contempt of court, the applicable law as stated in **Mwangi H.C. Wangonde vs Nairobi City Commission**, Nairobi Civil Appeal No. 95 of 1998 is that the threshold of proof required in contempt of Court is higher than that in normal civil cases, and one can only be committed to civil jail or otherwise penalized on the basis of evidence that leaves no doubt as to the contemnor's culpability. In the present case it is not disputed that the Plaintiff's property was auctioned during the public auctions conducted on 22<sup>nd</sup> June 2011 and 26<sup>th</sup> November 2011. The Plaintiff has also brought evidence of the said auctions, and the Defendants admit to the auction held on 22<sup>nd</sup> June 2011.

As regards the auction held on 22<sup>nd</sup> June 2011 the Defendants argued that they are not culpable for

contempt of court because the court order of 26<sup>th</sup> January 2010 had lapsed as it was granted ex parte, and that they were also acting pursuant to court orders issued in **Nairobi Milimani HCCC No. 153 of 2001- Mohamed Abubakar –vrs- Ecobank Kenya Ltd & John K. Ngururi**. The nature of the court order granted on 26<sup>th</sup> January 2010 was dealt with by the ruling on the Plaintiff's Notice of Motion dated 22<sup>nd</sup> January 2010 delivered by Okwengu J. (as she then was) on 29<sup>th</sup> July 2010.

The Defendants had at the hearing of the said application made the same argument that the ex parte order of 26<sup>th</sup> January 2010 had lapsed, and Okwengu J. (as she then was) held that the order given on 26<sup>th</sup> January 2010 was an order of mandatory injunction that required compliance by the Defendants. Further, that it had not lapsed and was not given for a specific period. The Defendants did not appeal the said ruling, and the issue is therefore *res-judicata*.

The court orders given in **Nairobi Milimani HCCC No. 153 of 2001- Mohamed Abubakar –vrs- Ecobank Kenya Ltd & John K. Ngururi** were also the subject of a ruling by Okwengu J. (as she then was) delivered on 28<sup>th</sup> January 2011 with respect to the Defendants' Notice of Motion dated 2<sup>nd</sup> February 2010 seeking to set aside, stay or discharge the order of 26<sup>th</sup> January 2010, and to strike out the Plaintiff's suit. The Honourable Judge held that the suit herein and that in **Nairobi Milimani HCCC No. 153 of 2001- Mohamed Abubakar –vrs- Ecobank Kenya Ltd & John K. Ngururi** did not involve the same parties or parties claiming under the same title.

Further, that in **Nairobi Milimani HCCC No. 153 of 2001- Mohamed Abubakar –vrs- Ecobank Kenya Ltd & John K. Ngururi** the suit was filed by Abubakar Mohammed Habib now deceased, in his capacity as registered proprietor and owner of the suit property, while the Plaintiff in this suit is a limited liability company suing as a tenant of the suit property. The orders in **Nairobi Milimani HCCC No. 153 of 2001- Mohamed Abubakar –vrs- Ecobank Kenya Ltd & John K. Ngururi** cannot therefore be applicable to the Plaintiff in this suit.

This court notes that the two rulings by Okwengu J. (as she then was) were delivered before the public auctions conducted on 22<sup>nd</sup> June 2011 and 26<sup>th</sup> November 2011. More importantly however, it is trite law that a court order, even if alleged to have been irregularly or wrongly obtained must be obeyed until or unless it is stayed or set aside. This can be either upon review by the court that granted the said order, upon appeal by an appellate court, or upon judicial review in the case of orders given by subordinate courts and tribunals. In this respect see the Privy Council decision in **Isaacs vs Robertson (1985) A.C. 97** and by the House of Lords decision in **Re M (1994) 1AC 377**.

In the circumstances of this case I find that there was outright disobedience by the Defendants when they proceeded to auction the Plaintiff's goods on 22<sup>nd</sup> June 2011 even after this court had ruled and clarified that the orders given in **Nairobi Milimani HCCC No. 153 of 2001- Mohamed Abubakar –vrs- Ecobank Kenya Ltd & John K. Ngururi** were inapplicable in this suit. In addition, the Defendants opted to disobey the said orders rather than appeal the said ruling.

As regards the continuing contempt of court committed as a result of the public auction by the Pyramid Auctioneers on 26<sup>th</sup> November 2011, I have perused the proceedings in **Joseph D.K. Kimani Pyramid Auctioneers and John Kagonye Ngururi vs Mohamed Abubakar T/A Downtown Hotel, CMCC Milimani Commercial Court Miscellaneous Application No. 734 of 2011** that authorized the said auction, and that were attached as annexure "MAH 1" to the Further Affidavit sworn on 5<sup>th</sup> March 2012 by Mohamed Abubakar Habib filed in court on the same date. It is evident that the 2<sup>nd</sup> Defendant is not culpable for the same as he was not involved in the proceedings leading to the said auction or in the public auction itself, that was conducted by another auctioneer, namely Pyramid Auctioneers.

The 1<sup>st</sup> Defendant is however indicated as the 2<sup>nd</sup> Applicant in the said proceedings. In addition in an affidavit sworn on 26<sup>th</sup> October 2011 by Joseph D.K. Kimani in support of his and the 1<sup>st</sup> Defendant's Notice of Motion of the same date to distrain the Respondent's property, the deponent stated that he received instructions to distress levy on the Respondent therein from Ms. Kinuthia Kahindi & Co

Advocates on behalf of their client, being the 1<sup>st</sup> Defendant. He annexed a copy of the instructions by the said Advocates where they indicate that the 1<sup>st</sup> Defendant is their client. Further, the 1<sup>st</sup> Defendant in the said letter gives an undertaking to indemnify the auctioneer for any liability as to suits arising from the distress.

The 1<sup>st</sup> Defendant avers that he was a stranger to the said proceedings and that he had reported the matter to the police. He did not bring any evidence of such report, or of disciplinary proceedings undertaken against the said Advocates or auctioneers whom he claims to have acted without his authority, as is required by law. He also has not undertaken any actions to set aside the ruling given by the Chief Magistrates court as a result of the impugned proceedings. The only conclusion that this court can reach in light of the evidence before it is that the 1<sup>st</sup> Defendant was a participant in, and authorized the proceedings in **Joseph D.K. Kimani Pyramid Auctioneers and John Kagonye Ngururi vs Mohamed Abubakar T/A Downtown Hotel, CMCC Milimani Commercial Court Miscellaneous Application No. 734 of 2011**, and is therefore also culpable of continuing contempt in this regard.

The last issue for consideration is whether the Plaintiff can be granted the relief sought. The Plaintiff in this respect has sought committal of the Defendants to detention, and that they be jointly and severally found liable to the Plaintiff for the amount of Kshs.9,161,600/= for the replacement and restoration value occasioned by the Defendants' action on 22/01/2010 together with interest at Court rates from 22/01/2010. Lastly, that in default of payment of such sum as will be awarded on account of the said replacement and restoration value, this court do order the attachment and sale of the Defendants' property wherever situated

This Court notes that the principal sanctions for contempt of court are imprisonment, fine and seizure of the contemnor's goods under orders of sequestration. Seizure of a contemnor's goods can only be made where an order requires a person to do an act within a specified time or to abstain from doing an act, and its purpose is to coerce the contemnor into compliance with the order, and should not be granted in circumstances where it is not effective. In addition, such property as is attached remains in the hands of the court, and is not given to any of the parties. See in this regard **Arlidge, Eady and Smith on Contempt, 3<sup>rd</sup> Edition (2005) Sweet and Maxwell** at paragraphs 14-111 to 14-124.

It is also established that damages are unavailable as a remedy in contempt of court as stated in the decision by the English Court of Appeal in **Chapman v Honig, (1963) 2 QB 502**, for the reasons that the court's jurisdiction in contempt is concerned with a wrong against the administration of justice rather than against an individual. See in this regard **Arlidge, Eady and Smith on Contempt (supra)** at paragraphs 14-148 to 14-164. I therefore in this respect agree with the Defendants that the payment of the sums sought by the Plaintiff as replacement and restoration value of the goods distrained by the Defendants and the damage caused to its premises, should be pleaded and proved as special damages during the full trial of this suit.

It is therefore my finding that the Plaintiff has proved beyond doubt that the 1<sup>st</sup> and 2<sup>nd</sup> Defendant sold the Plaintiff's goods at the public auction held on 22<sup>nd</sup> June 2011 in disobedience of this court's order of 26<sup>th</sup> January 2010, and that the 1<sup>st</sup> Defendant continued with the contempt of court by authorizing and participating in a further public auction of the Plaintiff's property on 26<sup>th</sup> November 2011. This Court accordingly orders as follows:

1. That summons do forthwith issue against John Kagonye Ngururi and Kang'eri Wanjohi trading as Kindest Auctioneers, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants herein, to personally appear in court on 8<sup>th</sup> April 2014 at 9. am to show cause why they should not be committed or otherwise penalized for contempt of court. The Plaintiff to follow-up on the issuance and service of the said summons.
2. The Plaintiff shall personally serve the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and their Advocate with the orders granted herein within 5 days of the date of this ruling.
3. There shall be a mention of this matter on 8<sup>th</sup> April 2014 at 9 am for further directions and orders.
4. The Defendants shall meet the costs of this application.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this \_\_\_\_27<sup>th</sup>\_\_\_\_ day of\_\_\_\_March\_\_\_\_, 2014.

**P. NYAMWEYA**

**JUDGE**