**Wildlife Lodges Ltd v County Council of Narok and another**

**Division:** High Court of Kenya at Nairobi

**Date of judgment:** 2 February 2004

**Case Number:** 1248/03

**Before:** Ojwang AJ

**Sourced by:** LawAfrica

*[1] Contempt proceedings – Priority of hearing* vis-à-vis *other proceedings in the same matter –*

*Applicable principles regarding procedure.*

**JUDGMENT**

**Ojwang AJ:** Within the framework of the main suit there have been several applications running in parallel. The plaintiff/applicant, within the ambit of its plaint, dated 1 December 2003, has filed the following applications:

(*a*) A chamber summons application (under Order XXXIX, rules 1, 2, 3 and 4; sections 3 and 3A of the

Civil Procedure Act (Chapter 21); and section 120 of the Evidence Act (Chapter 80) dated 1

December 2003.

(*b*) A chamber summons application (under Order XXXIX, rules 2A and 28(1) of the Civil Procedure

Rules and section 3A of the Civil Procedure Act (Chapter 21) dated 10 December 2003.

(*c*) An application by notice of motion (under section 10 of the Judicature Act (Chapter 8), Order L of the

Civil Procedure Rules, and section 3A of the Civil Procedure Act (Chapter 21) dated 18 December 2003.

The plaintiff’s chamber summons application of 1 December 2003, which was heard *ex parte*, had the following prayers:

(i) An order that the actions of the County Council of Narok on 30 December 2003 to forcefully evict the plaintiff and its subtenants, in its bid to give possession of all that parcel of land known as Narok/Cis-Mara/Koyaki 3 to Wilderness Lodges Ltd, was in contempt of an order of the High Court issued on 6 November 2003 in another case, High Court civil case miscellaneous, civil application number 1350 of 2003, and therefore null and void;

( ii) A mandatory injunction to compel the first defendant and/or its employees and/or agents and/or assigns and/or anybody whosoever to return possession and the plaintiff’s business at Keekorok Lodge, Narok on land reference number Narok/Cis-Mara/Koyaki 3, Maasai Mara Game Reserve together with the sub-leased accommodation

and adjacent premises to the plaintiff;

(iii) An injunction to issue to restrain the second defendant and/or its employees and/or agents and/or assigns and/or anybody whosoever, from taking possession and taking over the running of the plaintiff’s business at Keekorok Lodge, Narok on land reference number Narok/Cis-Mara/Koyaki 3, Maasai Mara Game Reserve together with the sub-leased accommodation and adjacent premises;

(iv) A permanent injunction to issue to restrain the defendants and/or their employees and/or agents and/or assigns and/or anybody whosoever from evicting and/or inhibiting and/or interfering with the plaintiff together with its employees in their status as lessees and/or lawful occupiers and in the conduct of its business situated at Keekorok Lodge, Narok on land reference number Narok/Cis-Mara/Koyaki 3, Maasai Mara Game Reserve or any adjacent land thereto pending the hearing and determination of this case.

Now on 4 November 2003, the plaintiff had drawn a chamber summons application and filed it on 5

November 2003 within the framework of a different case, a judicial review application, miscellaneous civil application number 1350 of 2003. The main purpose of that application was to obtain leave to apply for an order of *certiorari* directed to the Permanent Secretary, Ministry of Local Government to move into court and quash the Permanent Secretary’s decision of 18 September 2003, authorising the Narok

County Council to execute and register a lease agreement dated 25 September 2003 over land reference number Narok/Cis-Mara/Koyaki 3 on which land the Council has erected buildings known as Keekorok

Lodge. Leave was being sought also for an application for an order of *certiorari* directed to Narok

County Council to quash the said lease agreement in favour of Wilderness Lodges Limited. Leave was being sought, similarly, for an application for an order of *certiorari* directed to the District Land

Registrar, Narok. Leave was being sought as well to apply for an order of *mandamus* compelling the

District Land Registrar, Narok to register a variation lease dated 25 August 2001, over land reference

Narok/Cis-Mara/Koyaki 3 in favour of Wildlife Lodges Limited. The applicant also made the prayer that the grant of leave do operate as a stay of all dealings with the parcel of land known as

Narok/Cis-Mara/Koyaki 3 in the Maasai Mara Game Reserve.

Upon reading the chamber summons application of 4 November 2003 and hearing the presentation thereof *ex parte*, by counsel for Wildlife Lodges Limited, and upon reading the statutory statement in aid of the application and the verifying affidavit, Nyamu J made several orders as prayed, the critical one for the purposes of Civil case number 1248 of 2003 being as follows:

“That leave to apply for judicial review do operate as a stay of all dealings of all that parcel of land known as

Narok/Cis-Mara/Koyaki 3 in the Maasai Mara Game Reserve provided that the application for judicial review is filed within 21 days and served within 8 days from the date of filing.”

By the second chamber summons application in Civil case number 1248 of 2003, dated 10 December

2003, the plaintiff/applicant was praying for orders as follows:

(i) That the first defendant’s chief officers, namely the acting clerk, the treasurer and its advocate be detained in prison for a period of six months for being in disobedience of the court order given by Nyamu J in Civil application number 130 of 2003, on 6 November 2003 and in Civil case number 1248 of 2003 on 1 December 2003.

( ii) That in addition to or in lieu of such committal, the court do order the sequestration of the properties of the first defendant, the acting clerk, the treasurer and first defendant’s advocate, for disobedience to the orders of the court given on 6 November 2003 and 1 December 2003.

(iii) That the second defendant’s managing director, directors, servants, agents and advocates be detained in prison for six months for disobedience to the orders of the court issued on 1 December 2003.

(iv) That in addition to or in lieu of such committal, the court do order the sequestration of the properties of the second defendant, the second defendant’s managing director and advocates for disobedience to the order of court issued on 6 November 2003 and 1 December 2003.

It should be recorded that when Nyamu J heard *ex parte*, the plaintiff’s chamber summons application of

1 December 2003 on that very day, the learned Judge made certain orders. The relevant orders which have a bearing on the plaintiff’s second chamber summons application in Civil case number 1248 of

2003 that of 10 December 2003, are as follows:

(*a*) That it is, hereby, ordered that the actions of the County Council of Narok on the 30 November 2003 to forcefully evict the plaintiff and also its sub-tenants in its bid to hand over possession of all that parcel of land known as Narok/Cis-Mara/Koyaki 3 to Wilderness Lodges Limited is in contempt of the order of the High Court in High Court civil case miscellaneous civil application number 1350 and therefore null and void (*sic*).

(*b*) That a mandatory injunction be, and is hereby, issued to compel the first defendant and/or its employees and/or agents and/or assigns and/or anybody whosoever to return possession and the plaintiff’s business at Keekorok Lodge, Narok on land reference number Narok/Cis-Mara/Koyaki 3, Maasai Mara Game Reserve.

(*c*) That an injunction be and is hereby issued to restrain the second defendant and/or its employees and/or agent and/or assigns and/or anybody whosoever from taking possession and taking over the running or conduct of the plaintiff’s business at Keerokok Lodge, Narok on land reference number Narok/Cis-Mara/Koyaki 3, Maasai Mara Game Reserve together with the sub-leased accommodation and adjacent premises.

The third application by the plaintiff was dated 18 December 2003. This application covers the same general ground as the earlier two chamber summons applications. It seeks orders:

(i) that the court do certify as urgent and an urgent date be set for the hearing of the chamber summons applications dated 1 and 10 December 2003.

( ii) that the court be pleased to give such further or other orders and directions as it may deem fit and just

to grant.

The grounds stated in support of this application by notice of motion readily resolve into the gravamen

(*sic*) of the two chamber summons applications:

(*a*) That on 30 November 2003 the first defendant purported, in breach of court order, to forcefully evict the plaintiff and its sub-tenants from their lawful place of business;

(*b*) That on 1 December 2003 the court issued a further order (apart from the one made on 6 November

2003) to enforce compliance with the earlier order;

(*c*) That owing the disobedience to court orders by the respondents, there is now a proliferation of litigation over rights centered on the suit property, and the following may be cited;

( i) *Wilderness Lodges Ltd v The Permanent Secretary, Ministry of Local Government*, High Court

civil case miscellaneous application number 1260 of 2003;

( ii) *Balloon Safaris Ltd v County Council of Narok*, High Court civil case number 1235 of 2003;

( iii) High Court civil case miscellaneous application number 1413 of 2003;

( iv) *Amir suleiman v Narok County Council*, High Court civil case number 1221 of 2003;

(*d*) That the respondents have further disobeyed the orders of the court in High Court miscellaneous civil application number 1413 of 2003 (made by Nyamu J on 6 November 2003) and High Court civil case number 1235 of 2003 (issued by Nyamu J on 28 November 2003);

(*e*) That the actions of the County Council of Narok and the second defendant are designed to deprive the plaintiff of its rights in Land reference number Narok/Cis-Mara/Koyaki 3:

(*f*) That there is need to establish a basis for the resolution of the multiplicity of suits, and to underline the paramount authority of the law and restore the status of the courts as the principal enforcers of the law.

The last prayer in the application by notice of motion dated 18 December 2003 was: “It is pertinent that the chamber summons applications dated 1 and 10 December 2003 are heard during the vacation as the applicant continues to suffer irreparable breach and injury to its constitutional rights to the suit property that has been unlawfully taken away from it”.

The matter came up for hearing during the court vacation, on 23 December 2003.

Mr Ochieng *Oduol* for the plaintiff stated that the leave to apply for judicial review orders, granted by

Nyamu J in High Court civil case miscellaneous civil application number 1350 of 2003 on 30 November

2003 had stayed all dealings with the suit property, land reference number Narok/Cis-Mara/Koyaki 3, and that this order had been duly served on the Narok County Council, on the Deputy Land Registrar and on the Attorney-General. He said that the Narok County Council purported to overlook the order and to dispossess the plaintiff as well as eject the sub-tenants; and that this led to the filing of civil case number

1248 of 2003, on 1 December 2003. The plaint was filed together with a chamber summons application which was heard *ex parte* the same day and appropriate orders, incorporating the earlier orders issued in

High Court civil case miscellaneous civil application number 1350 of 2003 made. The new orders were duly served on the respondents; but it was the contention of counsel that the respondents have disobeyed these orders. The question of disobedience became the main subject in the hearing, as counsel for the applicant submitted, quite correctly with respect, that the whole purpose of litigation, as a process of judicial administration, is lost if court orders are not complied with. Mr Ochieng *Oduol* for the applicant rightly proposed that, of the set of applications on file, the one that ought to be heard first was the chamber summons application of 10 December 2003. His submissions were entirely devoted to that application, and it is to that application that the respondents addressed themselves. Hence this ruling is squarely focused on the chamber summons application of 10 December 2003. In that application the main prayer is that certain identified individuals, perceived as contemptors, be committed to jail until they purge their contempt of court orders.

Counsel for the plaintiff/applicant submitted that the court should not consider matters pending within the framework of the present suit, before first resolving the contempt question. He submitted that there ought, in principle, to be no hearing accorded a party who is in contempt, until the court makes appropriate orders to deal with the contempt, and that as a vital matter of administration of justice, court orders must be obeyed by those to whom they are addressed. Counsel submitted that the two respondents had no right to be heard, and that the court should ideally proceed to hear the applicant *ex parte*: the reason being that the advocates for the respondents would otherwise be enjoying audience while their clients were in contempt.

Mr Ochieng *Oduol* for the plaintiff/applicant submitted that Nyamu J had, in the judicial review proceedings of 6 November 2003 stayed all dealings with the suit land. Yet the first defendant/respondent was claiming that the second defendants/respondent was in legal possession of the suit land by virtue of an agreement dated 25 September 2003 and that consequently the first defendant/respondent cannot hand over possession of the premises. Counsel argued that the first and second defendant/ respondents could not rightly act on an agreement of 25 September 2003 since the court had made orders staying all dealings with the suit land. Counsel argued that in the light of the order of the court issued on 6 November 2003 the first and second defendants could only have come by possession of the suit land illegally, and therefore, possession by the second defendant was illegal possession. Counsel stated that the purpose of the mandatory injunction made by the court was to terminate the state of illegal possession and to restore legal possession to the applicant who had all along been the legal occupier. Counsel submitted that the act of the defendants in defying the court’s orders is set not only to expose such orders to ridicule, but also to deny the legitimacy of the law as the basis of possession of real property. He submitted that the first defendant, the County Council of Narok, had defied two separate court orders – the one of 6 November 2003 and the one of 1 December 2003. He submitted that the second defendant, as it was not a party to the judicial review proceedings in High Court civil case miscellaneous civil application number 1350 of 2003, was in contempt of one court order, that of 1 December 2003. Mr Ochieng *Oduol* submitted, on the basis of the English authority *Hadkinson v Hadkinson* [1952] 2 All ER 575, that it was in law irrelevant what misgivings the defendants may have had against the court orders which they chose to disobey; they were required to obey those orders. He argued that suitors must come before the court if they are dissatisfied with any orders already made; but they have no right or liberty to disregard valid court orders or to treat them as a nullity.

*Hadkinson v Hadkinson* [1952] 2 All ER 575 is a landmark case on contempt. It is eminently relevant in this country which shares the common law heritage with England and the other countries of the

Commonwealth, and the procedural law of which is intimately guided by the procedures governing the

Supreme Court in England. This case had been relied on by both the plaintiff/applicant and the respondents. It is, hence, apposite that I draw on this case, in building the governing principles to lead to a resolution of the present application.

In *Hadkinson* (*supra*) the fundamental issue before the court was whether a party clearly in contempt of an existing court order could be heard in a different but related motion, such as an appeal against the substantive decision that carried the order in question. The summarised holding in the case (at 575) reads as follows:

“It was the plain and unqualified obligation of every person against, or in respect of, whom an order was made by a court of competent jurisdiction to obey it unless and until it was discharged, and disobedience of such an order would, as a general rule, result in the person disobeying it being in contempt and punishable by committal or attachment and in an application to the court by him not being entertained until he had purged his contempt . . .”

To quote the words of Romer LJ:

“. . . I am clearly of the opinion that the mother was not entitled, in view of her continuing contempt of court, to prosecute the present appeal and that she will not be entitled to be heard in support of it until she has taken the first and essential step towards purging her contempt of returning the child within the jurisdiction.”

In a paragraph of definite relevance to the present application, Romer LJ quoted a passage from the judgment of Lord Cottenham, LC in *Chuck v Cremer* (1 Coop temp 342):

“A party who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it. . . It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid – whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question. That the course of a party knowing of an order which was null or irregular, and who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it existed it must not be disobeyed.”

Counsel for the plaintiff/applicant also referred the court to a Kenyan decision, *Mawani v Mawani* [1977]

KLR 159, clearly based and the *Hadkinson*(*supra*) principles. The following passage from the judgment of Simpson J (as he then was) may be cited:

“. . . the respondent to the present application was awarded the custody of the two children of her marriage to the applicant’s principal. In defiance of the court order she removed the children from her flat in Nairobi and took them that night by air to Pakistan. The children have not yet been returned. The applicant’s principal is accordingly in contempt of court and, by appointing an attorney, is avoiding a return within the jurisdiction of the court . . .

. . . Now the father, through the medium of an attorney, has the effrontery to seek the assistance of this Court which he has defied . . .

In my opinion he should not be permitted to do so. I rule that this application shall not be heard until the applicant’s principal has purged his contempt by returning the children to Kenya.”

Mr *Muite*, for the first defendant/respondent, submitted that disobedience to court orders should not be inferred from the pertinent facts regarding the making of those orders. He contended that the stay on dealing with the suit land which Nyamu J ordered on 6 November 2003 and 1 December 2003 was not in clear enough terms to rule out possible misapprehension.

Counsel argued that what was stayed by the learned Judge was dealings with the title to the suit property, and that such a notion would not make it clear whether sale, or transfer or leasing were incorporated within the stay orders.

The practical purpose of this particular argument did not emerge entirely clearly, as a reasonable and ordinary understanding of the stay orders made by the learned Judge would be that the *status quo* was to remain intact; the title holders would not begin to sell off the land and to transfer title, nor would they begin to lease the land to a new tenant, nor would they engage in an eviction exercise against current tenants, nor would they lodge new entries in the relevant land register, nor would they in any way disturb the current state of occupancy of the suit lands. I would take this to be what the learned Judge would have meant and did mean. In any case, it is not apparent that the defendants had appeared confused as to the reasonable meaning that could be attached to the learned Judge’s stay orders. Had there been any misapprehension in the minds of the defendants, then the expectation of them is that they would have made an application to the court for the resolution of any misunderstanding; this would have been the lawful course of action.

Counsel for the first defendant/respondent submitted that, as at 6 November 2003 when the first court order was made, in High Court civil case miscellaneous civil application number 1350 of 2003, the title to the suit land had already been leased to the second defendant/respondent, and there was nothing to be caught in the web of a stay order, and hence the stay order of 6 November 2003 had no application to the

Narok County Council, the first defendant. Counsel argued that by the time the first order was made on 6

November 2003 a valid lease in favour of the second defendant had already been registered on 17

October 2003.

The effect of this argument is that the order made by Nyamu J on 6 November 2003 was misdirected at a subject already concluded and which had conclusively determined the legal standing between the first defendant and the second defendant and that both of them were in pretty good standing with the law in all respects. Now as for the second defendant, that would be so, as counsel for the plaintiff has admitted that the second defendant was not party to the relevant suit, High Court civil case miscellaneous civil application number 1350 of 2003. But the Narok County Council, the first defendant was a party to that suit and definitely knew of the learned Judge’s stay order directed at the first defendant and others, and with respect to the suit land.

The question whether the court’s order of 6 November 2003 was, in law, rightly directed at the Narok

County Council was a contentious one for consideration in an interlocutory application. But the question whether an order had been made by the court, intended to limit the first defendant’s scope for action, could not be disputed; which means that this Court would have expected the Narok County Council either to comply with that order in silence, or to challenge that order by way of a formal application in court. In support of this reasoning fully adopt the remarks of Lord Cottenham, LC in *Chuck v Cremer* (1

Corp. temp. 342):

“A party who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it. . .It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid – whether it was regular or irregular.”

Consequently, I hold that the Narok County Council had a duty either to comply with the order of 6

November 2003, or, if this was thought to be impossible or incorrect in law, to move the court to make a variation to its order.

Mr *Muite*, for the first defendant, made a number of submissions on the prayer in the plaintiff’s application, that certain officers of the Narok County Council be committed for contempt. He submitted that the court’s authority to commit, on perceptions of contempt, is so drastic that it ought to be exercised only very sparingly. In counsel’s view, the general contest surrounding the plaintiff’s case and its interlocutory motions would not compel the solution of committal. In particular counsel remarked the *Ex*

*Parte* mode of the various applications so far made by the plaintiff. He questioned the *Ex Parte* nature of the orders of 6 November 2003; the fact that the plaintiff did not seek solutions to its dissatisfaction through one case, High Court civil case miscellaneous civil application number 1350 of 2003, but elected to commence Civil case number 1242 of 2003, when the two were really dealing with the same set of circumstances, the fact that under Civil case number 1248 of 2003 the plaintiff had also obtained *Ex*

*Parte* mandatory injunctions on 1 December 2003.

Counsel for the first defendant submitted that contempt is a criminal matter and must be proved beyond reasonable doubt. In support of this argument, he cited the case *Gatharia K Mutitika and Two others v Baharini Farm Limited,* (Now called Nakuru House Development Co Ltd) (1982-88) 1 KAR

863. Counsel drew attention to page 867, where the following passage is taken from the judgment of

Lord Denning, Mr in *Bramblevale Ltd, Re* [1969] 3 All ER 1062:

“A contempt of court is an offence of a criminal character. . . A man may be sent to prison. It must be satisfactorily proved. To use the time-honoured phrase, it must be proved beyond reasonable doubt.”

I should, however, note that the Court of Appeal in the *Mutitika*(*ibid*) case was not in agreement with the above passage in the *Bramblevale* (*ibid)* case. The holding of the court, as summarised at 863-864, is as follows:

“In cases of alleged contempt, the breach for which the alleged contemnor is cited must not only be precisely defined but also proved to a standard which is higher than proof on a balance of probabilities but not as high as proof beyond reasonable doubt.”

Counsel for the first defendant also relied on the case *Kaaturilal Laroya v Mityans Staple Cotton Co Ltd and another* [1958] EA 194, to support the contention that the law of contempt should not be invoked inaid of civil causes when there exist other modes of implementation of court orders. My attention wasdrawn to a passage from the English case, *Re Maria Annie Davis* (1) [1888] 21 QBD 236 at 239.

“Recourse ought not to be had to [the] process of contempt in aid of a civil remedy where there is any other method of doing justice. The observations of the late Master of the Rolls in the case of *Clement, Re* (*supra*) seem much in point. ‘It seems to me that this jurisdiction of committing for contempt being practically arbitrary and unlimited, should be most jealously and carefully watched, and exercised, if I may say so, 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. I say that a judge should be most careful to see that the cause cannot be fairly prosecuted. To a hearing unless this extreme mode of dealing with persons brought before him on accusations of contempt should be adopted. I have myself had on many occasions to consider this jurisdiction, and I have always thought that, necessary though it 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. Probably that will be discovered after consideration to be the true measure of the exercise of the jurisdiction.”

Using the principle in *Re Clement* (*supra*), Sir Audley McKisack CJ, in the *Kaaturilal Laroya* case(*supra*), in the High Court for Uganda, ruled in favour of the respondent (at 195):

“In result, therefore, I find that the conduct of the respondents (on the assumed facts) does not amount to an obstruction of the course of justice or to prejudice to the decree holder’s interest, and the mere fact that there has been disobedience to an order of the court does not, in those circumstances, render the respondents liable to be dealt with as for a contempt.”

Counsel was, in effect, arguing that the circumstances of alleged contempt in the present matter should not be treated as contempt, particularly because the pertinent facts and issues still stand to be determined in the trial of the main suit, and as such the stage was still not set for a clear, final order with which the first defendant/respondent must comply, on the pain of committal to jail in case of default. Counsel submitted that the critical reference point in assessing the first defendant’s obedience or disobedience to court order, was the question which belongs to the trial process, whether the registered purported extension of lease for the second defendant was valid or not valid. Counsel urged that the court ought to consider whether there was no other mode of dealing with the problems raised by the suit, than committal – a move that would not be subject to perceptions of arbitrariness. He urged that it be considered undesirable that *ex parte* orders such as those obtained by the plaintiff/applicant, should lead to committal on a contempt charge. He submitted that there were numbers of facts in dispute between the parties, and these ought to be sorted out in the full process of litigation, rather than constrain the trial process in certain direction through the contempt jurisdiction. He was of the view that in the particular circumstances of the case, in which the court orders in question emanated from *ex parte* applications, a particularly heavy burden of proof of contempt should be placed on the plaintiff/applicant. Counsel did concede, however, that the case of *Hadkinson v Hadkinson,* [1952] 2 All ER 575 did carry the essential principles of contempt law applicable to Kenya, and that by these principles, one who falls in contempt of a court order is required to purge that contempt. He cited the case of *Gatharia K Mutitika and others v*

*Baharini Farm Ltd,* (1982-1988) 1 KAR 864 to support the submission that a court order had to be clear and unambiguous, and its breach be equally clear and indubitable, to sustain a valid claim of contempt subject to committal. In this submission the orders of 6 November 2003 and 1 December 2003 did not satisfy the principles in the *Mutitika* case (*supra*), and accordingly, this was not a fit case for committal for contempt. Counsel argued that the stay orders were vague, and could not be readily complied with.

He submitted too that the contempt jurisdiction may be exercised to the extent of refusing to hear a party, in the manner called for by counsel for the plaintiff/applicant, only where the contempt in question had the effect of impending the cause of justice, and as he saw it, there was no contempt in the present case which had that effect.

Although counsel for the first defendant laid much store on vagueness in the court orders of 6

November and 1 December 2003, the facts do not bear out this position. The legal argument is unanswerable: for a court order to unquestionably claim obedience, it should not be case in a language of equivocation. But the orders made by Nyamu J on 6 November 2003 were quite clearly worded, as has been intimated earlier.

If the court’s orders are not complied with, would this tend to impede the process of justice?

I will take judicial notice that inherent social limitations afflicting most people in a developing country such as Kenya have the tendency to restrict access to the modern institutions of governance, and more particularly to the Judiciary which is professionally run, on the basis of complex procedures and rules of law. Yet, this same Judiciary is generally viewed as the impartial purveyor of justice, and the guarantor of an even playing ground for all. This perception ought to be strengthened, through genuine respect for the courts of justice, and through compliance with their orders. Against this background, I would take the position that consistent obedience to court orders is required, and parties should not take it upon themselves to decide on their own which court orders are to be obeyed and which ones overlooked, in the supposition that this oversight will not impede the process of justice.

I do not think, besides, that if parties to whom the court orders of 6 November 2003 and 1 December

2003 were addressed fail to comply with them, this would not impede the process of justice. Justice dictates even-handedness between the claims of parties; and if it is the case that the plaintiff/applicant has not been accorded a level playing ground for the realisation of its economic activities, a matter that, of course, can only be fully established through evidence in the main suit, then the court ought to provide relief, by applying the established principles of law, one of these being the law of contempt.

Counsel for the second defendant has been consistent in impeaching the court’s *ex parte* orders as the basis for the exercise of the contempt jurisdiction. I have to state clearly that an *ex parte* order by the court is a valid order like any other. To obey the orders of the court is to obey orders made both *ex parte* and *inter partes.* The court, by Constitution section 60 is the repository of unlimited first instance jurisdiction, and in this capacity it may make *ex parte* orders where, after careful and impartial consideration, it is convinced that issuance of such an order is just and equitable. There is nothing necessarily potentially oppressive in an *ex parte* order, since such an order stands open to be set aside by simple application, before the very same court (*sic*). Where a party considers an *ex parte* order to cause him undue hardship, simple application will create an opportunity for an appropriate variation to be effected thereto; and, therefore, there will be no excuse for a party to disobey a court order merely on the grounds that it had been made *ex parte*. This argument, therefore, will not avail either the first or the second defendant.

Counsel for the first defendant generously argued a point in favour of the second defendant: that while the second defendant had not been a party to the judicial review proceedings in Miscellaneous civil application number 1350 of 2003, now it had been netted through Civil case number 1248 of 2003, and was by this design being subjected to the court’s contempt jurisdiction, in relation to orders emanating from a different cause of action. This submission would not be sustainable, as counsel for the plaintiff/applicant did clarify that the complaint against the second defendant/respondent was only in relation to the court orders of 1 December 2003, made within the framework of Civil case number 1248 of 2003.

Counsel for the first defendant submitted that it was wrong, in law, for the plaintiff to file civil case number 1248 after filing Miscellaneous civil case number 1350 of 2003, and in support he cited section 6 of the Civil Procedure Act (Chapter 21 Laws of Kenya). He submitted that section 6 prohibits the trial of any suit in which the matters in issue are also directly in issue in another court having jurisdiction. He argued that in both miscellaneous civil application number 1350 of 2003 and civil case number 1248 of 2003, the same matter was, and the same issues were, involved. He submitted that in the premises, civil case number 1248 cannot be proceeded with, in which case it has no probability of success. He submitted that counsel for the plaintiff had not disclosed the relationship between the two cases, and that this amounted to failure to make proper disclosures before the court.

As a basis for assessing the merits of this argument regarding miscellaneous civil application number

1350 and civil case number 1248 it is necessary to set out the provision of section 6 of the Civil

Procedure Act.

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

Counsel for the plaintiff/applicant did make specific submissions in response. He stated that

Miscellaneous civil application number 1350 of 2003 was a different type of case, as it was in the nature of judicial review proceedings. That case was in quest of distinct remedies and could not have been used as the foundation of prayers for injunctions.

After careful consideration of the pleadings in the two cases, I have come to the conclusion that they could not have been merged into one case, as Miscellaneous civil application number 1350 of 2003 is a straightforward judicial review case seeking the court’s prerogative orders directed to a certain number of public bodies; whereas Civil case number 1248 of 2003 is an ordinary type of civil claim, with a varied set of prayers founded on claims of fraud. I find, accordingly, that there was nothing improper in the filing of both cases at the same time. The first defendant’s preliminary objection to the plaintiff’s chamber summons application of 10 December 2003, therefore, could not be sustained.

Counsel for the first defendant submitted that the contempt case was inappropriate and did not deserve to be heard, and that, instead, the court ought to hear the applications of the defendants for discharge of the *ex parte* orders won by the plaintiff. This was also the position taken by counsel for the second defendant/respondent, but counsel for the plaintiff/applicant was of the view that so long as the defendants had not complied with the orders of the court, in law there was no basis upon which they could be heard. He urged the court to decline to hear the defendants until such time as they had purged their contempt. He underlined the fact that the first defendant, at the point of dispossessing the plaintiff of the suit property, were not themselves in legal possession and they violated lawful court orders when they purported to acquire possession and then transfer the same to the second defendant.

Counsel for the first defendant had also challenged the plaintiff’s application on the ground that leave had not been sought before filing proceedings for committal of the defendants for contempt. Counsel for the plaintiff, in this regard, rightly drew the attention of the court to the case of *Isaac J Wanjohi and*

*Isaiah Kirindi Wambugu Mutonyi v Rosaline Macharia,* Civil case number 450 of 1995, in which the

Honourable Mr Justice Bosire (as he then was) had ruled that such formalities were not required in contempt cases. In the words of the learned Judge:

“It would appear to me that applications for committal for contempt of court made in this country fall in the category of those applications in England made to courts other than the divisional courts. Consequently no leave would ordinarily be necessary although it is common practice in Kenya, improperly so in my view, to commence committal proceedings in every case by an application for leave to bring the application. The authority for that cannot possibly be the Rules of the Supreme Court of England.”

The committal proceedings cannot, thus be challenged for want of form.

The managing director of the second defendant did respond to the plaintiff’s application to invoke the contempt jurisdiction of the court, through an affidavit filed on 16 December 2003. He denied that the second defendant through its directors, servants, agents and advocates was guilty of disobedience of the court’s orders of 1 December 2003. He made other pertinent averments as follows:

(i) That the second defendant had felt aggrieved by the *ex parte* orders of 1 December 2003 and it had on

3 December 2003 applied for the discharge of those orders;

( ii) That on 5 December 2003 and acting on the advice of its advocates, the second defendant had instructed the lodge manager to initiate the process of handing over the lodge to the first defendant who was the lessor of the second defendant;

(iii) That the plaintiff in its *ex parte* application of 1 December 2003, had not sought an order to compel

the second defendant to transfer the suit premises to the plaintiff;

(iv) That in the foregoing circumstances, the second defendant had not refused to comply with the court order of 1 December 2003.

It is clear from the content of the second defendant’s affidavit that the main issue in contention, in respect of which the court order of 1 December 2003 applied, was between the plaintiff and the first defendant rather than between the plaintiff and the second defendant. As the order of 1 December 2003 when related to the second defendant presupposes, prior solution to the dispute between the plaintiff and the first defendant, I will take the position that the second defendant may not be immediately fixed with the legal consequences of contempt, but on condition that the second defendant shall forthwith carry out the handing over process, covered in the fifth paragraph of the affidavit sworn by Nayan Patel, the second defendant’s managing director, on 16 December 2003 and filed on the same day. Subject to the requirement carried in the foregoing sentence, I will exclude the second defendant from the immediate operation of the contempt rule and with regard to the court order of 1 December 2003. As I have stated earlier that the contempt jurisdiction has not been invoked in respect of the court order of 6 November

2003 and with respect to the second defendant, I hereby discharge the second defendant conditionally from possible liability for contempt of court. The implication of this decision is that subject to the requirement that the second defendant forthwith hand over the suit premises as stated above, any issues in the dispute between the plaintiff and the second defendant must be resolved through the expeditious prosecution of both Miscellaneous civil application number 1350 of 2003 and Civil case number 1248 of 2003 – a task which must rest primarily on the plaintiff. I hereby prescribe the outer limit of time within which the second defendant is to hand over the suit premises as 28 days from the date of this ruling.

The notice of motion under section 3A of the Civil Procedure Act (Chapter 21, Laws of Kenya) Order

XXXIX, rule 4 and Order L, rules 1, 2 and 17 of 3 December 2003, filed on the same date by the second defendant, had sought a discharge of the orders of the court made on 1 December 2003. While it is right and legitimate that the second defendant should move the court in this way, the condition is to be prescribed that the said application by notice of motion is to come before the court for hearing, only after the second defendant has complied with the conditions set out in this ruling. This is because this ruling has had to deal with issues touching on contempt, which must take precedence over any other case of invocation of the jurisdiction of the court. The second defendant is, thus, given leave to secure a date for the hearing of the notice of motion application as soon as the conditions in the ruling are satisfied. The plaintiff, too, will be at liberty to make any necessary application within the framework of the suit to which the second defendant is a party. The profile of the whole matter under consideration runs as follows:

(i) there are several applications filed by different parties, within the framework of the main suit; but the one which came up for hearing was that by the plaintiff dated 10 December 2003 the reason being that it concerned compliance with past orders of court, and related to the contempt jurisdiction;

( ii) with regard to the first defendant, contempt was alleged in relation to orders of 6 November 2003 in

High Court Civil case miscellaneous civil application number 1350 of 2003 and also in relation to orders of 1 December 2003 in civil case number 1248 of 2003;

(iii) With regard to the second defendant contempt was alleged only in relation to the orders of 1 December

2003 in civil case number 1248 of 2003;

(iv) The law on contempt of court is quite clear; those in contempt are not allowed to seek the court’s services before they purge their contempt and such parties may be committed to jail until they purge their contempt:

( v) The first defendant may very well have had a genuine grievance against the orders of court made in the two cases to which it was a party, namely High Court civil case miscellaneous application number 1350 of 2003 and Civil case number 1248 of 2003 – orders made respectively on 6 November 2003 and 1 December 2003; but the first defendant failed to comply with these orders and has sought to find excuses for the non-compliance;

(vi) Even as the court duly warns itself of the drastic effect of the contempt jurisdiction, it must be prepared to exercise this authority to ensure justice between parties, and to restore the authority of the law and of the judicial organ when this is exposed to threats from any self-interest of a party.

In the application invoking the contempt jurisdiction of the court, what is the position of the first defendant? This is the main question still outstanding and will be disposed of in orders based on the specific prayers in the chamber summons application of 10 December 2003.

It is quite clear that the first defendant is in contempt of the orders of the court made on 6 November

2003 and 1 December 2003. The first defendant being fully aware of the content of the two orders, took no action to move the court to effect a variation, but simply disclaimed these orders. To redress this mischief, I now make the following orders:

1. The application, by notice of motion filed by the second defendant on 3 December 2003, may be set down for hearing on the basis of priority once the second defendant, within 28 days from the date of this ruling, hands over the suit premises with its operations to the first defendant.

2. In the meantime, the plaintiff will have leave to make any such applications as may be necessary and in relation to the suit premises and the operations conducted thereon.

3. The managing director of the second defendant shall, within the next 30 days, appear before a judge in chambers to show that he has duly complied with the first order above, or, in the alternative, to show cause why he should not be committed for contempt.

4. The acting town clerk of the first defendant, the treasurer of the first defendant and the advocate of the defendant, Moitalel ole Kenta, shall each and all, within the next seven days, take due action to purge their contempt of the court orders of 6 November 2003 and 1 December 2003 and they shall each and all, appear before a judge in chambers ten days from the date of this ruling, to show that they have purged their contempt, or, in the alternative, to show cause why they should not be committed for contempt.

5. The plaintiff’s costs in this application shall be borne by the first defendant; the second defendant shall bear its own costs.

For the appellant:

*Mr Ochieng Oduol*

For the first respondent:

*Mr PK Muite* and *Mr Nzioki*

For the second respondent:

*Mr Kimani*