



**REPUBLIC OF KENYA**

**High Court at Nairobi (Milimani Commercial Courts)**

**Civil Case 379 of 2008**

**FRANCIS MWAURA NJINU.....PLAINTIFF**

**- VERSUS -**

**HANNAH WANJIKU MBURU.....1<sup>ST</sup> DEFENDANT**

**G.M. MUHORO ADVOCATE .....2<sup>ND</sup> DEFENDANT**

**JULIUS MUTUKU MUMINA .....3<sup>RD</sup> DEFENDANT**

**MUTHOKI BROTHERS CO. LTD. ....4<sup>TH</sup> DEFENDANT**

**RULING**

**1.** Before the court is a **Notice of Motion** application dated **18<sup>th</sup> January 2012**. The application is filed under Order 40 Rule 3 of the Civil Procedure Rules and seeks the following orders:-

**1.** That the following persons be cited for contempt of court and punished by way of imprisonment for upto 6 months and fined by attachment of their personal property and until they purge their contempt they be denied audience:-

- i. Julius Mutuku Mumina
- ii. James Kangenthe Mumina
- iii. Irene Kamene Mumina
- iv. Naomi Njeri Mungai a.k.a. Naomi Njeri Kariuki
- v. Paul Masiuki Wasanga

**2.** That costs of this application be provided for.

**2.** The application is premises on the several grounds set out therein among them that:-

**a)** That on **8/7/2008** an *ex-parte* order was issued restraining the 3<sup>rd</sup> to 5<sup>th</sup> Defendants and their agents from accessing, taking possession, selling, transferring, charging and/or in any other manner dealing with the suit property or sub-divisions thereof pending hearing and determination of the application *inter-partes*.

- b) That the said order was duly served upon the Defendants and also registered against the title at the Lands Registry.
- c) That the said application came up for hearing on **22/7/2008** before Lady Justice Khaminwa when the Defendants sought and the court while granting the adjournment ordered that the interim orders be extended until final hearing of the application and suitable dates were to be taken at the registry.
- d) That the said application was finally heard and determined on **16/10/2009** when Lady Justice Khaminwa confirmed the interim orders pending the hearing and determination of the suit.
- e) That the 3<sup>rd</sup> to 5<sup>th</sup> Defendants being aggrieved, lodged an appeal **Civil Appeal No. 48 of 2010**, which appeal is pending determination at the Court of Appeal.
- f) That the 3<sup>rd</sup> Defendant, 4<sup>th</sup> Defendant and IRENE KAMENE MUMINA are the directors of the 5<sup>th</sup> Defendant and its controlling mind.
- g) That NAOMI NJERI MUNGAI *a.k.a.* NAOMI NJERI KARIUKI is the Company Secretary and Advocate of the 5<sup>th</sup> Defendant and partner at KIARIE KARIUKI ASSOCIATES. The firm of Kiarie Kariuki represented the 3<sup>rd</sup> to 5<sup>th</sup> Defendants until the delivery of the said ruling on **16/10/2009**.
- h) That the 5<sup>th</sup> Defendant in a Sale Agreement drawn and witnessed by the said NAOMI NJERI KARIUKI sold a sub-division of the suit land to PAUL MASIUKI WASANGA, the Interested Party.
- i) That in so doing, the mentioned persons acted and are guilty of willfully disobeying the prohibitory orders of the court issued on **8/7/2008** and **16/10/2009**.
- j) This application is brought to vindicate the authority or dignity of the court being the pillar of rule of law and administrative of justice.
- k) That unless the said persons are punished by the court they will continue in defiance of the court and lower its dignity.
- l) That there is urgent need to restore and enforce the authority of the court considering the totality of the circumstances.

3. The application is supported by affidavit of **FRANCIS MWAURA NJINU**, the Plaintiff herein, dated **18<sup>th</sup> January 2012** with annextures.

4. The application is opposed vide a replying affidavit sworn by **NAOMI NJERI KARIUKI**, dated **27<sup>th</sup> November 2012**. The deponent is also one of the parties against whom this application is brought.

5. With leave of the court the parties dispensed with this matter vide written submissions. However, on **28<sup>th</sup> November 2012**, Mr. Ojiambo for the Plaintiff/Applicant informed the court that his client had withdrawn the application as against the 4<sup>th</sup> and 5<sup>th</sup> contemnors being M/s Naomi Njeri Mungai *a.k.a.* Naomi Njeri Kariuki and Mr. Paul Masiuki Wasanga, and left the fate of the remaining alleged contemnors to the court.

6. Briefly the history of the application is that the contemnors have been accused of disobeying this court's order issued on **16<sup>th</sup> October 2009**. That order restrained the 3<sup>rd</sup> to 5<sup>th</sup> Defendants and their agents from accessing, taking possession, selling, transferring, charging and/or in any other manner dealing with the suit property or sub-division thereof pending the hearing and determination of the suit. In violation of the said order, it is alleged that the 5<sup>th</sup> Defendant in a sale drawn and witnessed by the said Naomi Njeri Kariuki sold a sub-division of the suit land to Paul Masiuki Wasanga. It is also alleged that

the 3<sup>rd</sup> and 4<sup>th</sup> Defendants and Irene Kamene Mumina are the directors of the 5<sup>th</sup> Defendant and its controlling mind, and as such are directly responsible for the operations and faults of the 5<sup>th</sup> Defendant, and that in authorizing the sale of the sub-division of the suit property these persons acted and are guilty of willfully disobeying the prohibitory orders of the court issued on **16<sup>th</sup> October 2009** and that they should be punished in order to restore the dignity and authority of the court.

7. I have carefully considered the application, and in my view, the only issue I wish to consider is whether or not the said court order was properly served upon the contemnor in order to enable this court to grant the application.

It is not in dispute that the alleged court order was never personally served upon the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents or the 3<sup>rd</sup> contemnors. However, both parties agree that the 5<sup>th</sup> Defendant was served through its Company Secretary and Advocate. Upon that service, the 3<sup>rd</sup> to 5<sup>th</sup> Defendants came on record through the firm owned by that Company Secretary i.e. Kiarie Kariuki Associates. They then filed a joint defence and a replying affidavit to the application. In the case of **KENYA ANTI-CORRUPTION COMMISSION – VS – GEMINI PROPERTIES LTD. & OTHERS**, the court held that

**‘ . . . the court is satisfied that the directors of the 1<sup>st</sup> Defendant company . . . have continued to disobey this . . . court’s orders under the guise that the orders were incapable of being obeyed or that the orders were not personally served upon the two.’**

The court in above case found the directors liable to a charge of contempt although they were not personally served with the court order.

8. In **MUTITIKA – VS – BAHARINI FARM [1982 – 88] 1 KAR 863 at page 867**, the Court of Appeal (Hancox J.A.) held that:-

**‘ . . . It is perfectly clear . . . that anyone who knowing of an injunction or an order of stay, willfully does something, or causes others to do something, to break the injunction or interfere with the stay is liable to be committed for contempt. See Acrow (Automation) Limited – Vs – R. Chainbelt Inc [1971] 1175 at 1180. The reason is that by doing so he (or she) has conducted himself (or herself) so as to obstruct the course of justice and so has attempted to set the order of the court at naught.’**

In the case of **GATIMU FARMERS COMPANY LTD. – VS – GEOFFREY KAGIRI KIMANI & OTHERS (Nakuru HCCC No. 302 of 2004)**, Justice Kimaru held that:-

**‘ . . . The most important aspect of obedience of an order of the court is knowledge. If a person becomes aware of an order of the court which binds him, he has no option but to obey it. Such person need not be party to the suit. If he chooses to disobey such order of the court, he shall be punished for being in contempt of the said order.’**

**Order 52 Rule 3 (1) of Supreme Court Practice Rules** makes it mandatory for the contemnor to be served but in its explanatory notes, the said order provides:-

**‘ . . . No order will normally be issued for the committal of a person unless he has been personally served with the order, disobedience to which it is said to constitute the contempt, or if the order is directed to a group of persons or a corporation, some appropriate member has been personally served.’**

9. From the foregoing it is clear to me that the 3<sup>rd</sup> to 5<sup>th</sup> Defendants were a group of persons properly served through their Company Secretary who was the appropriate person. They entered appearance and filed joint pleadings. They cannot be heard to say the order was not properly served or that they had no knowledge of the said order.

10. From the foregoing paragraphs I am satisfied that there were valid court orders which were

blatantly disobeyed by the contemnors.

**11.** However, that is not the end of the matter. The service which connects the contemnors with the said court orders was effected through their advocate Naomi Njeri Kariuki. Indeed the Applicant joined the said M/s Kariuki as a party to these contempt proceedings on the grounds that she was the advocate of the contemnors and service was through her and that she was aware of the court order which she also disobeyed. However, in her Replying Affidavit filed in court on **27<sup>th</sup> November 2012**, M/s Kariuki has totally denied any involvement in the matter. She has also denied service or acting for the contemnors except for limited instructions. Instead of pursuing or replying to her affidavit further, the Applicants have instead chosen to withdraw the case against M/s Kariuki and Mr. Paul Masiuki Wasanga. There is no explanation as to why this withdrawal was made or why it was necessary.

**12.** In my view, if the Applicants have decided to remove the only nexus the contemnors have with the court order, and since that nexus also totally denies having acted for the contemnors at the relevant period, there is no legal nexus to connect the contemnors with the court order. Service then, whether personal or not, becomes disputable or at best, unclear, notwithstanding that pleadings were filed on behalf of the contemnors.

**13.** I believe the removal of the said M/s Kariuki from the proceedings deny the application of the relevant legal nexus to tie the contemnors with the court order, and since the said M/s Kariuki has denied service on behalf of the contemnors during the relevant period, I am unable to allow the application. The same is dismissed with no orders as to costs.

It is so ordered.

**DATED, READ AND DELIVERED AT NAIROBI**

**THIS 29<sup>TH</sup> DAY OF JANUARY 2013**

**E. K. O. OGOLA**

**JUDGE**  
**PRESENT:**

*Muiruri H/B for Ojiambo for the Plaintiff*

*Uvyo for the Defendants*

*Teresia – Court Clerk*