



**REPUBLIC OF KENYA**

**High Court at Kitale**

**Civil Suit 41 of 2011**

**JOSEPH OTWABE**

**MARAGIA OGETO**

**ROBINSON TAI .....} PLAINTIFFS**

**VERSUS**

**JACKSON NYANDIEKA .....DEFENDANT**

**R U L I N G**

This is a ruling in respect of an application dated and filed in Court on 26/09/2012. It is brought under the provisions of Order 40 Rule 3 of the Civil Procedure Rules. The application is supported by the affidavit of Joseph Otwabe one of the Applicants and on a further affidavit of Maragia Ogeto who is also one of the Applicants in the application. The Applicants seek Orders of Court committing the Applicant to jail for disobedience of a Court Order. The genesis of this application began when three persons who are members of a land buying firm called Nyamira Farm brought a suit against the Defendant who had annexed a Public utility plot onto his which was neighbouring his plot. Nyamira Farm was sub-divided and each member received individual titles. During the sub-division, one parcel was reserved for public utility to be used as a quarry.

On 01/12/2011, the Applicants filed an application seeking injunction Orders against the Defendant in respect of Plot No. Kiminini/Matunda Block 4/Nyamira/75. The application was heard on 27/06/2012 and in a ruling delivered on 05/07/2012, the Respondent was restrained from trespassing, working on, constructing or in any other way interfering with the suit land pending hearing and determination of the suit.

An Order of injunction was duly extracted which had a penal notice and was duly served upon the Defendant/Respondent in person. Notwithstanding service of this restraining Order, the Defendant went ahead to cultivate the suit land contrary to Orders issued by the Court. This prompted the Applicants to file the present application for contempt of Court.

The first Applicant, Joseph Otwabe swore an affidavit in support of the application in which a copy of the extracted Order was exhibited as well as the affidavit of service. Also annexed to the affidavit is a photograph of the suit land showing maize and other trees growing on it. The application for contempt came up for hearing on 21/11/2012. The Respondent's lawyer, Mr. Apollo undertook to advise his client to stay off the suit land until the hearing and determination of the main suit. On this undertaking, the Applicants did not urge their application for contempt. The Applicant's counsel M/S Arunga fixed the matter for mention. The Defendant and his advocate were duly served but they did not attend Court. The Applicant's counsel sought for leave to file a further affidavit and for a hearing date for the contempt

application. The contempt application was slated for hearing 14/01/2013. Come 14/01/2013, the Defendant and his advocates who had been duly served did not appear. The application therefore proceeded ex-parte.

In the further affidavit sworn by the second Applicant Maragia Ogeto, he deponed that when their application for contempt of Court Order came up for hearing on 21/11/2012, the Respondent undertook to comply with Court Orders given on 05/07/2012 but when he was passing by the suit land on 22/11/2012, he saw the Respondent's son cultivating the suit land. The Respondent's son told him that he intended to plant cabbages. He approached the Defendant to know why he was not complying with the Court Order but the Defendant became hostile to him threatening to cut him with a panga.

I have carefully considered the application herein. There is no doubt that the Defendant was restrained from dealing in any way with the suit property until the hearing and determination of the suit. The only issue for determination is whether the Respondent is in contempt of the Court Order.

In matters relating to contempt of Court Orders and particularly injunctions, the Applicant is bound to prove that the contemnor was actually served in person with the Order requiring him to refrain from doing a particular activity and that the Order contained a penal clause warning of penal consequences in case of disobedience and that this notwithstanding, the contemnor went ahead to do that which he was not supposed to do.

In the present application, the Applicant has demonstrated that there was personal service of the Court Order which contained a Penal Clause. There is an affidavit of service which was prepared and was annexed to the supporting affidavit. When the application for contempt came up for hearing on 21/11/2012, the Respondent's lawyer expressly undertook to advise his client to remain out of the suit property until the hearing of the main suit. This was put down on record. This goes on to confirm that the Respondent had actually gone against the Orders and in his bid to avoid the consequences of contempt of Court, he decided to promise not to continue with the breach until the case is determined. It is apparent that the Respondent had no intention of complying with what he had promised. In fact, the following day, he went to the suit property and did exactly the contrary of his promise. This is a litigant who has no regard for Court Orders. If all people were to behave the way the Respondent herein is behaving, there will be chaos as a result of that. Court orders are not given in vain. Courts cannot allow their orders to be disobeyed with impunity. Court orders have to be obeyed. I find that the Respondent is in contempt of Court and as such he has to face the penal consequences prescribed by law. In this regard, I issue warrant of arrest against the Respondent. The warrants to be executed by the O. C. S. of the nearest Police Station within whose jurisdiction the Respondent resides. Upon execution of the warrants, the Respondent should be brought before the Court for necessary action as soon as practically possible.

The Respondent shall bear the costs of this application.

It is so ordered.

**Dated, signed and delivered at Kitale on this 25th day of February, 2013.**

**E. OBAGA  
JUDGE**