



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**  
**MISC. CIVIL APPLICATION NO. 30 OF 2011**

1. JOSHUA NGUSALE
2. NICHOLAS SAVWA
3. KENNEDY SAMBI
4. LUCAS ASENJI
5. NOEL MAKUNGU
6. PHINORA ATONYA
7. SUDI LUVANDA
8. RASOHA KIVAYIRU
9. PATRICK ADALO
10. BEATRICE MACHAYO ..... APPELLANTS

AND

WYCLIFFE L AHOYA.....INTERESTED PARTY/APPELLANT/APPLICANT

VERSUS

REV. ELIJAH UKIRU (suing for and on behalf of

AFRICA DIVIDE CHURCH ..... RESPONDENT

**R U L I N G**

The **Notice of Motion** dated 1/7/2011 is premised on **Order 40 Rule 3** of the **Civil Procedure Rules** and **Section 3A** of the **Civil Procedure Act**.

The substantive order sought is that the Respondent, its trustees, agents or otherwise especially **Rev Elijah Ukiru, Patrick Olome, Archbishop John Saiya James, John S. Mahero, Ibrahim Odera and Jacob Onim** be committed to civil jail for a period not exceeding 6 months.

The applicant's case as set over in the supporting affidavit sworn on 1/7/2011 by **Joshua Ngulase** is that on 3<sup>rd</sup> January 2011 applicants moved this court seeking a stay of the orders issued in **SRMCC Vihiga No. 51/10** pending the hearing of the appeal. That pending the court's ruling, orders for maintenance of *status quo* were made on 17<sup>th</sup> March 2011. That the applicants served the Respondents with the said orders complete with a duly appended penal notice. It is averred that the Respondents failed to comply and/or obey the said orders and instead proceeded to demolish and alter the premises the subject matter of the suit. The applicant's prayer is for the Respondents to be committed to civil jail for a period not exceeding six months.

The application was opposed as per the replying affidavit sworn by **Rev. Elijah Ukiri** on 26/9/2011.

According to the said affidavit, the *status quo* orders favoured the Respondents as they were the party in possession of the suit premises. The Respondents denied any destruction of the suit premises. Service of the order was denied. The Respondent further stated that subsequent to the issuance of the maintenance of *status quo* orders, the applicant's main application was dismissed and thereby rendered the present applicant incompetent and unsustainable.

**Nganga Advocate** appeared for the applicants while **Musiega Advocate** appeared for the Respondents. The application proceeded by way of written submissions which I have duly considered.

There is no dispute that **Hon. Justice Lenaola** gave the orders dated 17/3/2011 for the *status quo* to be maintained. There is no evidence of service of the said order on the Respondents. No affidavit of service has been exhibited. The Court of Appeal as held that as a general rule, no order of a court requiring a person to do or to abstain from doing any act may be enforced by committing the person for contempt, unless a copy of the order has been served personally on that **person (see Ochiro & Another -vs- Okombo and 4 Others (1989) KLR 165)**.

A copy of the order must be endorsed with a notice informing the person on whom the order is served that if he disobeys the order he is liable to the process of execution to compel him to obey it.

In the application at hand, those cited for contempt include persons who were not specifically named as parties to the suit. The Respondent is named in the proceedings as **Rev. Elijah Ukiru** suing on behalf of African Divine Church. Paragraph No. 5 of the affidavit in support generally states that the respondents proceeded to demolish and alter the subject matter. There are no details when this was done and specifically by who. This is a pertinent point because the order of maintenance of *status quo* was made on a specific date and the same lapsed with the delivery of the court ruling on 5/7/2011. In my view, there is no sufficient evidence to prove the breach of the orders complained about. The threshold of proof in contempt cases is higher than in normal civil cases (**see Mutitika -vs- Baharini Farm Ltd (1985) KLR 227**). One can only be committed to jail on the basis of evidence that leaves no doubt as in the contemnor's capability.

With the foregoing, I dismiss the application with costs to the Respondents.

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**B. THURANIRA JADEN**

**JUDGE**

Dated and delivered at Kakamega this **18<sup>th</sup>** day of **April** 2013.

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**SAID J. CHITEMBWE**

**JUDGE**