



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CIVIL CASE NO. 37 OF 2006

1. SAMMY KIILU MUSAKI
2. JACKSON MUTUKU KAVOI PLAINTIFFS/APPLICANTS

VERSUS

1. MWISHO MUTUNGA
2. MUEMA MUTUNGA
3. MASYULA MUTUNGA
4. MWIKUYU MUTUNGA alias MWAI MUTUNGA
5. ROSE KALUU MUTUNGADEFENDANTS/RESPONDENTS

R U L I N G

The application dated 5/6/2009 is brought under **Order XXXIX Rules 2 (3) Section 5 (1)** of the **Judicature Act, Section 60 (1)** of the **Constitution of Kenya, Section 3A and 63 (a)** of the **Civil Procedure Act**.

The application is supported by the affidavit sworn by the 2nd Applicant, **Jackson Mutuku** on 5/6/2009.

The background facts as set out in the said affidavit is that the Applicants filed an application seeking an order of injunction against the Respondents and the said orders were granted on 10th June 2008. The Respondents were served with the said orders on the 15th November 2008. The Applicant's complaint is that the 1st – 4th Respondent continued to disobey the said orders by grazing cattle on the land, cutting down trees and burning charcoal and committing other acts of waste on the land that is the subject matter of this suit.

In opposition to the application, the 2nd Respondent, **Muema Mutunga**, swore a replying affidavit on 3/11/2009. The Respondents have denied that they were served with the order in question. According to the Respondents, they became aware of the order after they were served with the application herein. The Respondents termed the application as defective stating that the name of the deponent of the said affidavit is not the same one that appears on the jurant.

The application was canvassed by way of written submissions which I have duly considered. I have scrutinized the affidavit of service sworn by the process server, **Jacob M Muthenya** on 21/11/2008. Paragraph No. 4 of the said affidavit states as follows:-

“That I introduced myself to them and the purposes of my visit whereby I served each of them with a copy of the hearing notice and an order which service they tried to refuse telling me to go and serve the same to the firm of F.M. Mulwa & Co. Advocates.”

The said paragraph and indeed the entire affidavit of service does not specifically state the persons who were served. The persons served have not been named. Although the process server has deponed that he personally knew the Defendants because he had previously served them, the affidavit of service does not reveal through which previously filed affidavits of service this happened. I have perused the court file and the previous affidavits of service on record. I have not seen any affidavit of service that specifically refers to the Respondents herein.

As stated by the Court of Appeal in **Jacob Zedekiah Ochino & Another –vs- George Aura Okombo & 4 Others Nairobi Civil Appeal No. 36 of 1989(UR):-**

“.....no order of a court requiring a person to do or abstain from doing any act may be enforced by committing him for contempt unless a copy of the order has been served personally on the person required to do or abstain from doing an act”.

The affidavit of service herein is so unsatisfactory that service cannot be considered to have taken place.

The Respondents have criticized the order dated 10th June 2008 as *ex parte* and they have denied having committed the acts complained of. However, it is observed that this is not the correct forum to raise those issues. If the Respondents wish is to have the said orders set aside, then it is upon them to file an appropriate application.

No objections raised on the basis of technicalities are fatal. I would agree with the persuasive authority in **Isaac J. Wanjohi & Another –vs- Roseline Macharia Nairobi HCCC No. 450 1995 (ur)** that no leave is required if contempt proceedings are pursuant to an order of injunction under **Order XXXIX (new Order 40)** of the **Civil Procedure Rules**.

However, having found that there was no service or proper service, the application has no merits and is dismissed with costs.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this **18th** day of **July** 2013.

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B. THURANIRA JADEN

JUDGE