



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUNGOMA**  
**MISC. APPLICATION NO. 84 OF 2013**

MICHAEL NASIMOLO MUYELELE.....APPLICANT

VERSUS

REBA KIBABA.....1ST RESPONDENT

DAVID WALIAULA..... 2ND RESPONDENT

**RULING**

The applicant has filed the notice of motion dated 27th March 2013. He seeks court's leave to apply for contempt proceedings against the Respondent for disobeying the order dated 13th February 2013 granting temporary stay of construction. And if leave is granted, the application for contempt be filed within 14 days.

The application is supported by the affidavit of Michael Nasimoli sworn on 28th March 2013 and his supplementary affidavit sworn on 14th May 2013.

In his affidavit he avers the Respondent was served with the order on 18th February 2013 and that he never stopped construction. In the supplementary affidavit he says the Respondent applied to set aside the orders of 13th February 2013 and he never raised the issue of title to the suit land.

The application is opposed. The Respondent has filed a replying affidavit where he says he has not been served with any order stopping construction on **L.R. No. S. Malakisi/N & C Namwela/573**. The order served on him did not refer to **L.R. No. S. Malakisi/N & C Namwela/573**.

I would like to point out that the order complained of arose from Bungoma CMCC No. 10 of 2011. I do not know the reason why the applicant has chosen to apply for leave in the higher court instead of the court which issued the order. The pleadings from which this order arose were also not annexed to the present application.

In several decisions of The High Court of Kenya, it has been held that if the contempt emanates from injunctions issued under Order 39 Rule 2 (now Order 40 Rule 3(1)), then a party does not require leave to commence contempt proceedings. This was the holding by Justice Ransley in **Fidelity Shield Commercial Bank Ltd. Vs. Shamsherali K. Kurji & another, Nbi HCCC No. 1276 of 2001**. Similarly

Justice V. Juma (as he then was) emphasized in the case of *John Sachia Ndirangu Vs. Peter Ngang'a & another, Nbi HCCC No. 3697 of 1995* that you do not require leave to institute contempt proceedings under Order 39.

I have read through the case law cited by the Respondent i.e *Godfrey Kimani Vs. Thomas Wambura [2012] e KLR, Joseph Peter Gichoya vs. Patrick D. Ikiefwe [2006] e KLR and HFCK S. Ngige Kitson Mondo [2006] e KLR* all relate to the application for contempt. However the instant application is for leave to institute contempt proceedings. The authorities are therefore not relevant at this stage of the proceedings.

Having explained that leave of court is not necessary if the order disobeyed emanated from the former Order 39 (now Order 40). And taking into account that this is merely an application for leave, there is no reason given to this court by the respondent why the same should not be granted. I therefore proceed to allow it. The Respondent will have opportunity to contest the application for contempt once proceedings for the same is instituted. Not forgetting to remind the applicant to commence the contempt proceedings in the court whose order has been disobeyed. The application is allowed with costs in the cause.

**RULING DATED, SIGNED, READ AND DELIVERED** in open court this 20th day of June 2013.

**A. OMOLLO**

**JUDGE.**