



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT**  
**AT NAIROBI**  
**MILIMANI LAW COURTS**

**Petition 164 of 2011**

IN THE MATTER OF THE ENFORCEMENT OF THE BILL OF RIGHTS UNDER ARTICLE 19, ARTICLE 20, ARTICLE 21, ARTICLE 23(1), ARTICLE 23(2),(3) (A), (B),(C), (D),(E), ARTICLE 56, ARTICLE 165(3),(B),(D),(4),AND SECTION 19 OF THE 6<sup>TH</sup> SCHEDULE OF THE 2010 CONSTITUTION OF THE REPUBLIC OF KENYA.

AND  
 IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLE 26,ARTICLE 27, ARTICLE 28,ARTICLE 29,ARTICLE 40,ARTICLE 43,ARTICLE 47 OF THE 2010 CONSTITUTION OF THE REPUBLIC OF KENYA.  
 AND

**IN THE MATTER OF THE CIVIL AVIATIONACT CAP 394.**

**IN THE MATTER OF REGISTRATION OF TITLES ACT 281.**

**BETWEEN**  
**MITU-BELL WELFARE SOCIETY.....**  
**PETITIONER**  
**AND**

**THE HON. ATTORNEY GENERAL.....1<sup>ST</sup>**  
**RESPONDENT**

**THE KENYA AIRPORTS AUTHORITY.....2<sup>ND</sup>**  
**RESPONDENT**

**THE COMMISSIONER OF LANDS..... 3<sup>RD</sup>**  
**RESPONDENT**

**RULING**

1. The petitioners have brought the application dated the 17<sup>th</sup> of January 2012 seeking orders for arrest and committal of the 2<sup>nd</sup> respondent herein and/or its principal officer namely the Managing Director to

prison for a term not exceeding six months for contempt of court orders issued by Hon. Lady Justice Jean Gacheche on 22<sup>nd</sup> September, 2011. The application is supported by the affidavit of Benjamin Kaunda Gishemba, the Chairman of the petitioner, Mitu-Bell Welfare Society.

2. The 2<sup>nd</sup> respondent filed an affidavit in opposition to the application sworn by **Eng. Stephen Gichuki** on the 9<sup>th</sup> of February 2012.

3. The petitioner filed written submissions dated the 7<sup>th</sup> of May 2012 while the respondents also filed written submissions dated the 15<sup>th</sup> day of March 2012. The application was argued before me on the 16<sup>th</sup> of May 2012.

4. The facts as they appear from the pleadings and submissions are that on the 22<sup>nd</sup> day of September, 2011 the petitioners filed this petition together with a Chamber Summons Application seeking among others, an order in the following terms:

**That pending the hearing and determination of this application inter partes, a conservatory order be issued restraining the 2<sup>nd</sup> respondent or any of them and any State Officer or organ of state from carrying on with the process of evicting and or demolishing any buildings, installations, or erection situate and or within the area better described as Mitumba Village near Wilson Airport.**

5. Upon hearing the application, Justice Gacheche granted the orders sought on the 22<sup>nd</sup> of September 2011, which order was served on the 2<sup>nd</sup> respondent. The petitioners state that upon service, the 2<sup>nd</sup> respondent appointed the firm of **E.Mutua & Company Advocates** to represent it in court, and a notice of appointment was filed in court on 30<sup>th</sup> September 2011.

6. The petitioner's case as presented by Mr. Kinyanjui is that despite service with the said orders and its advocates being in court every time the orders were extended, the 2<sup>nd</sup> respondent disobeyed the orders by demolishing the houses of members of the petitioner on 19<sup>th</sup> November 2011 and on no less than four subsequent occasions thereafter despite conservatory orders being in place. The petitioner was granted leave to commence contempt proceedings following its application dated 25<sup>th</sup> November, 2011.

### **The Petitioner's Case**

7. The petitioner submits that it is necessary for the purpose of upholding the authority, dignity and integrity of the court that the court should grant the orders sought; that courts do not and should not give orders in vain.

8. The petitioner submits further that the court has jurisdiction to punish for contempt of court and relies on the case of **Joseph Peter Gichoya Mbogo C/O Stephen Macharia Kimani Advocate –v-Patrick Dennis Ok'eefee & Another (2006)** in which the court set out the jurisdiction of the court to punish for contempt.

9. The petitioner submits *that* there was personal service of the orders of Gacheche J issued on 22<sup>nd</sup> September 2011 Since the 2<sup>nd</sup> respondent is a body corporate, personal service of the order was done through its representative in the legal department, one G. Kamau, on the 23<sup>rd</sup> of September 2011. The said Kamau accepted service by signing and stamping on the petitioner's copy of the order. The petitioner argues that it complied with the requirements of Order 5 Rule 3(a) of the Civil Procedure Act 2010 with regard to effecting service on a corporation.

10. The petitioner argues that the fact of service was confirmed by the appointment by the 2<sup>nd</sup> respondent of a firm of advocates to represent its interests in the matter before the court. The petitioner also points out that the 2<sup>nd</sup> respondent was represented in court each time the matter came up, and it would be expected that the 2<sup>nd</sup> respondent was kept aware and was informed each time the orders were extended.

11.The petitioner also referred the court to the case of **Harun Mugo Kabuchi & 6 Others –v- Ndimo Farmers Co-Operative Society & 8 Others (2006) eKLR** in which Kimaru, J observed that

***“The acts of the Respondents make a mockery of the said order issued by this court. The Respondents cannot be allowed to interpret a court order with a view of disobeying it.”***

### **The 2<sup>nd</sup> Respondent’s Case**

12.On its part, the 2<sup>nd</sup> respondent through its Counsel, Mr. Mutua, while readily conceding that there was an order of this court in force, contends that the petitioner’s application does not demonstrate that the order was served personally on the Managing Director of the 2<sup>nd</sup> respondent. Mr. Mutua argued that the petitioner, in the affidavit supporting the application for committal, does not state that the order was served on the Managing Director of the 2<sup>nd</sup> respondent, or indicate who in particular was served with the order; that there was no affidavit of service exhibited to inform the court when and how and to whom the order was served yet it was only through an affidavit of service that the court can address itself on how service was effected.

13.Mr. Mutua referred the court to the case of **Ochieng-Nyamogo & Another -v- Kenya Posts and Telecommunication Corporation (1993) KLR 1** and submitted that in the absence of personal service and an affidavit of service showing such service, the application could not succeed and ought to be dismissed.

14.Mr. Mutua also contended that it had not been shown that the Managing Director authorised the demolitions, and in view of the fact that the court was being asked to interfere with his freedom under the Constitution, it is necessary that specific acts of disobedience be pointed out by the applicants. In the absence of such acts, the Managing Director’s rights under the Constitution should not be interfered with.

15.Mr. Ojwang from the Attorney General’s office associated himself with the submissions of Counsel for the 2<sup>nd</sup> respondent and urged the court to dismiss the application.

### **Findings**

16.From the submissions of the parties before me in this matter and the pleadings on record, certain matters are undisputed. First, there is no dispute that Justice Gacheche issued order directed at the 2<sup>nd</sup> respondent as prayed by the petitioner. The order, issued on the 22<sup>nd</sup> of September 2011, and extended on various dates thereafter, and which is still in force, is as follows:

***‘That a conservatory order be and is hereby issued restraining the 2<sup>nd</sup> Respondent or any of them and any State Officer or organ of state from carrying on with the process of evicting and or demolishing any buildings, installations, or erection situate and or within the area better known as MITUMBA VILLAGE near Wilson Airport pending the hearing of this application interpartes on 5<sup>th</sup> October 2011.***

17.It is also not in doubt that the orders were served on the 2<sup>nd</sup> respondent. This is confirmed by the fact that the firm of Eric Mutua came on record for the 2<sup>nd</sup> respondent on the 30<sup>th</sup> of September 2011 and filed a replying affidavit to the petition sworn by **Joy Nyaga**, the Acting Corporation Secretary of the 2<sup>nd</sup> respondent, on the 25<sup>th</sup> of October 2011. The firm could only come on record and file a reply upon the instructions of the 2<sup>nd</sup> respondent

18.My perusal of the court record reveals the following:

i.The parties appeared in court before Warsame J on the 5<sup>th</sup> of October 2011. Mr. Mutua was already on record for the 2<sup>nd</sup> respondent. The interim orders issued on the 22<sup>nd</sup> of

September 2011 were extended to the 11<sup>th</sup> of October 2011.

ii. On the 11<sup>th</sup> of October 2011, the parties appeared before me and I gave directions with regard to the filing of submissions and extended the interim orders to the 23<sup>rd</sup> of November 2011.

iii. On 23<sup>rd</sup> November 2011, Counsel for the petitioner informed the court that the 2<sup>nd</sup> respondent had carried out evictions of the petitioners despite the orders of the court still being in force. Mr. Mutua did not deny that the demolitions took place but stated that the demolitions were being carried out by the 'executive arm of government.'

19. From the foregoing, it is clear that the orders of the court issued on 22<sup>nd</sup> September 2011 were served on the 2<sup>nd</sup> respondent. The 2<sup>nd</sup> respondent issued instructions to the firm of Advocates currently on record to appear on its behalf. On all the occasions prior to the demolition on 19<sup>th</sup> November 2011, the 2<sup>nd</sup> respondent was fully aware of the existence of the orders, and was aware that the orders were extended by the court.

20. The respondent relies on what are, in my view, purely technical arguments in opposition to the application. The first is that the Managing Director of the 2<sup>nd</sup> respondent was not served personally, and the second is that there is no affidavit of service to prove service.

21. I will deal with the latter argument first. Once a party has appointed a firm of advocates to come on record on its behalf, can it be heard to argue that there is no affidavit of service to prove service and that therefore there was no service? On what basis would the advocates have come on record if there had not been proper service of the proceedings in question?

22. Further, it is trite law that a corporation such as the 2<sup>nd</sup> respondent acts through its principal officer, in this case the Managing Director. For the corporation to issue instructions to its advocates to act, and for its corporation secretary to swear an affidavit in opposition to the proceedings, it must do so on the authority of the principal officer. It would clearly therefore be less than candid for the 2<sup>nd</sup> respondent to argue that since there was no evidence of personal service on the Managing Director, there was no service and he cannot therefore be held to have been in contempt of the court order.

23. In any event, the Constitution enjoins the court, in hearing matters before it but particularly so in matters pertaining to protection of fundamental rights, not to be unduly restricted by technicalities. Article 22(3)(d) of the Constitution provides as follows:

***'the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities;***

24. At article 159 (2) the Constitution provides that

***(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles***  
—

***(a) justice shall be done to all, irrespective of status;***

***(d) justice shall be administered without undue regard to procedural technicalities; and***

***(e) the purpose and principles of this Constitution shall be protected and promoted.***

25. The members of the petitioner are the ‘people of Kenya’ from whom judicial authority is derived as provided in Article 159(1). While they may be deemed of low social status as residents of a slum settlement, they, too, are entitled to justice, such justice to be administered without undue regard to procedural technicalities.

26. The 2<sup>nd</sup> respondent wishes to hide behind the technicality that its Managing Director was not served personally, and that therefore there is no disobedience of the orders of this court. This is a technicality that will not avail the 2<sup>nd</sup> respondent in the new constitutional dispensation.

27. This court takes note of the submissions by Mr. Mutua with regard to the service of orders and the decision of the Court of Appeal in **Ochieng -Nyamogo & Another -v- Kenya Posts and Telecommunication Corporation**(supra). The court is of the view, however, that service on the legal officer of a corporation in line with the provisions of Order 5 of the Civil Procedure Rules 2010 is sufficient. The 2<sup>nd</sup> respondent cannot be heard to argue that because its Managing Director was not served personally, an order for contempt cannot issue against him. He was fully aware of the orders of the court; as the principal officer of the corporation, he is taken to have appointed or directed the appointment of Counsel to appear for the corporation. It would render court orders meaningless if every principal officer of a corporation were to take the position taken by the 2<sup>nd</sup> respondent in this case. The 2<sup>nd</sup> respondent was aware of the orders of the court but chose to disregard them and proceed with the demolitions.

28. The issue of personal service as against a party’s awareness of the existence of a court order has been recently considered in this court. In finding members of the Kenya Medical Laboratory and Technicians and Technologists Board to have been properly served, Musinga, J in **R-v-The Minister Ministry of Medical Services and Another High Court Misc. Civil Appl. No. JR 316 of 2010**, cited with approval the words of Kimaru, J in the case of **Gatimu Farmers Company – versus- Geoffrey Kagiri Kimari & Others Nakuru High Court Civil Suit No. 245 of 2001** where he observed as follows:

***“There can be no denial that all the members of the Board and other persons who may have acted on instructions of the Board in respect of the acts complained about were fully aware of the existence of this court’s orders. The argument that personal service of the orders was not effected upon all the persons sought to be punished or that the order was not indorsed with a penal notice is, in my view, no more than a subterfuge - a seemingly clever explanation or trick intended to justify the contemptuous acts complained of.”***

29. While respecting the views of the Court of Appeal in **Ochieng -Nyamogo & Another -v- Kenya Posts and Telecommunication Corporation** (supra), and after due consideration of the effects of loyalty to the reasoning behind that decision, I take the view that we must now begin to develop a jurisprudence that is in conformity with the requirements of the new Constitution. To hold otherwise is to render the principles and aspirations set out in the Constitution meaningless.

30. The Managing Director of the 2<sup>nd</sup> respondent swears in his affidavit that he did not in any way and in his capacity authorize any officer of the corporation or agent to carry out any demolition or eviction as alleged by the petitioners. He lays the blame for the demolitions on the ‘**government of the Republic of Kenya**’ when he depones as follows at paragraph 6:

***‘THAT I am however aware that when the government of the Republic of Kenya went to war with Somalia in the last quarter of the year 2011, it commenced a countrywide security operation by demolishing all illegal structures erected near airports as a security measure.’***

31. This averment is not, however supported by any evidence. The petitioners have annexed to their petition a notice issued by the Managing Director Kenya Airports Authority, requiring them to vacate the land in question. The 2<sup>nd</sup> respondent does not deny that it issued the notice. There is nothing to show that

any other arm of government was involved in, or required demolition of the Mitumba Village. In the circumstances, the court takes the view that the 2<sup>nd</sup> respondent is hiding behind what it refers to amorphously as ***'the government of the Republic of Kenya'*** in order not to take responsibility for its disobedience of the court order. In any event, the 2<sup>nd</sup> respondent is a state corporation and therefore part of the 'government of the Republic of Kenya'. It cannot be heard to argue that it was not aware of or party to the demolitions.

32. As Kenya embarks on the implementation of the new Constitution with its provisions on the rights of citizens, all parties must be reminded of the need to observe the rule of law which is the core and the foundation of our society. Without observance and obedience of the orders of the court by parties in the position of the 2<sup>nd</sup> respondent and indeed by all organs of state and all persons, the aspirations of Kenyans set out in the Constitution will remain a mirage. The court must be on guard to prevent this.

33. In the circumstances I find and hold that the Managing Director of the 2<sup>nd</sup> respondent is guilty of contempt of court for having knowingly and deliberately disobeyed the orders of this court issued on the 22<sup>nd</sup> of September 2011. The Managing Director of the 2<sup>nd</sup> respondent is hereby ordered to appear before this court on the 20<sup>th</sup> of June 2012 for mitigation and sentencing.

34. The 2<sup>nd</sup> respondent shall also bear the costs of this application.

**Dated, Delivered and Signed at Nairobi this 13<sup>th</sup> day of June 2012**

**Mumbi Ngugi**  
**Judge**