



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**ENVIRONMENTAL & LAND CASE 425 OF 2010**

**IN THE MATTER OF THE GOVERNMENT LANDS ACT (CAP 280)**

**AND**

**IN THE MATTER OF THE LIMITATION OF ACTIONS ACT (CAP 22)**

**AND**

**IN THE MATTER OF LAND REFERENCE NUMBER 1/157(ORIGINAL NUMBER 1/22/3)**

**BETWEEN**

**BISHOP PAUL YOWAKIM (Suing as Trustee for and on behalf of the COPTIC ORTHODOX CHURCH).....**

**PLAINTIFF/APPLICANT**

**AND**

**ITOGA INVESTMENTS HOLDING LIMITED.....**

**DEFENDANT/RESPONDENT**

**IN THE MATTER OF: AN APPLICATION BY THE PLAINTIFF/APPLICANT FOR LEAVE TO APPLY FOR AN ORDER OF COMMITAL FOR CONTEMPT DIRECTED TO THE DEFENDANT'S DIRECTORS, INCLUDING MR. JESSE NGARI AND THE DEFENDANT'S ADVOCATE, M/S W.G. WAMBUGU.**

**AND**

**IN THE MATTER OF: THE JUDICATURE ACT (CAP 8 OF THE LAWS OF KENYA), ORDER 52 OF THE SUPREME COURT OF ENGLAND PRACTICE RULES AND SECTION 3A OF THE CIVIL PROCEDURE ACT (CAP 21 OF THE LAWS OF KENYA).**

**AND**

**IN THE MATTER OF: AN ORDER MADE BY THE HONOURABLE MR. JUSTICE MBOGHOLI MSAGHA ON 17<sup>TH</sup> SEPTEMBER, 2010 DIRECTED TO THE DEFENDANT PURSUANT TO THE PLAINTIFF'S APPLICATION DATED 17<sup>TH</sup> SEPTEMBER 2010.**

**RULING**

1. The application under consideration was taken out by the Plaintiff under the provisions of the

Judicature Act chapter 8 of the Laws of Kenya , Order 52 of the Supreme Court of England Practice Rules and Section 3A of the Civil Procedure Act chapter 21 of the Laws of Kenya. In it the Applicant prays that the Defendant's directors and in particular Mr Jesse Ngari and the Defendant's advocate Ms W.G. Wambugu described as **contemnors** be committed to prison or such other punishment as the court may deem fit in the circumstances be ordered against the contemnors for their respective contempt of this honourable court and that the contemnors purge their contempt before they can be heard on any matter between the parties. The Applicant prayed for the costs of the Application.

2. The Applicant stated that he brought the application because he obtained an ex parte interim injunction on 17<sup>th</sup> September 2010 from this court and on the same date notified the firm of W.G. Wambugu & Company Advocates for the Defendants of the court order that had been obtained in favour of the Applicant. Service of the order was served by an advertisement in some daily newspaper as well as by registered post on 23<sup>rd</sup> September, 2010 after the firm of Advocates of W.G. Wambugu and Company declined the same the previous day. And although the Defendants were thus informed of the order, its directors including Mr Jesse Ngari sent a gang of some 20 workmen to the Plaintiff's premises and inspite of their being shown the court order they started digging a trench so as to construct a boundary wall, and W.G. Wambugu advocate was on site and instructed the workmen to continue digging the trench and ignore the court order. The Applicant saw this as a blatant refusal to comply with a court order which is a serious contempt of court and prayed as earlier stated. There were filed various affidavits in support of the application. The first of those affidavits alleged that the deponents were made aware that a court order had been obtained and that it had been served. That the Defendants' workers were also made aware of the existence of the order but nevertheless continued in the disobedience of the same urged on by W.G. Wambugu the Defendants' counsel who made it her business to personally visit the site and despite being aware that a court order had issued restraining any further works on the suit land, the said counsel instructed the workers to continue in the same.

3. The said W.G. Wambugu opposed the application and filed a Preliminary Objection as well as swearing a Replying Affidavit on her own behalf through her advocate and that of the Defendants whom she represented in the case. The Defendants filed Replying Affidavits vide two of its officers. The application was described as an abuse of process as there was no personal service of any order and that the court lacked jurisdiction to hear and determine the application. In the Affidavits and in particular in the affidavit of W.G. Wambugu advocate she deponed that indeed Mr Z.H. Alibhai advocate for the Plaintiff/Applicant called her on 17<sup>th</sup> September, 2010 informing her that he had obtained certain orders but did not explain the contents of the order to her. She informed the Applicant's Counsel that she had no instructions to act in the case and that the Applicant's counsel ought to serve the Defendant's directly. Counsel for the Defendants added that she was later instructed on 23<sup>rd</sup> September, 2010 whereupon she rang the Applicant's counsel calling for the documents which she did not see until 26<sup>th</sup> September, 2010. She denied ever having spoken to Grace Attwa one of the deponents of the affidavits in support of the application. She further denied ever having instructed the Defendants' workers at site to breach any court order. She concluded that for the period of over twenty-five years that she has practiced law, she has had the utmost regard for court orders.

4. **Jesse Ngari** a director of the Respondent company swore a Replying Affidavit in opposition to the application and categorically denied that the Defendants' workers smashed through any boundary fence as there was no such fence. He further denied knowledge of the existence of any court order and therefore breached none. As concerns the trench alleged to have been dug by the Defendants' workers the deponent said that the said trench was dug way back and he cited the case **HCCC ELC 155/2010** wherein the Applicant had complained of the trench on 30/3/2010. One **Philip Kariuki Miricho** an employee of the above named **Jesse Ngari** who is a director of the Defendant swore a Replying Affidavit and stated that on 25/9/2010 he was at the suit land when one Grace Attwa of the Applicant informed him that they (deponent) could not construct as there was a court order and so he called their lawyer W.G. Wambugu who came to the site, spoke to the said Grace Attwa but she did not instruct the workers to dig any trench.

5. Parties filed written submissions which were highlighted before me in court. I was referred to various authorities.

6. The issue for determination, as I see it, is whether or not there was an order dated 17<sup>th</sup> September, 2010 and to whom it was addressed and whether or not that order was served as by law prescribed after which there was a breach of the same. The first issue is the simplest one to resolve. There was annexed to the affidavit in support of the application sworn by one Grace Attwa and marked “**Exhibit GA/1**” an order issued on the 17<sup>th</sup> September, 2010. It was granted ex parte by the Hon. Mr. Justice Mbogholi Msagha. It was directed at the Defendant by itself, its agents, servants and/or employees from entering, occupying, attempting to take possession of or otherwise interfering in any manner howsoever with the Plaintiff’s possession of the suit land.

7. The next issue is whether there was service of that order. Any disregard of a lawful court order is a serious matter for it interferes with the administration of justice, undermines and impairs the authority of the court, which dispenses injustice and contempt where proved, must be punished for the protection of the public see **QUEEN –vs- GRAY (1900) 2QB 36**. Contempt of court is the worst that could happen to the administration of justice because it reduces the authority of the court, abuses justice and brings to ridicule the rule of law. Where it is proved it deserves the severest of punishments and this is so because court orders must be obeyed for the proper dispensation of justice, upholding the rule of law for the benefit of all. It is for this reason that the law requires that for contempt to be punished there must be brought to the notice of the contemnor the fact that he/she has been ordered to do or not to do some event and he/she has not done what was required or him/her to do or has done that which he/she was prohibited from doing. The mode of notice of the existence of the order has been required to be one of personal service see – **MWANGI H.C. WANG’ONDU –VS- NAIROBI CITY COMMISSION, Civil Appeal No. 95 of 1988** wherein the Court of Appeal had the following to state:-

**“.....as a general rule, no order of court requiring a person to do or to abstain from doing any act may be enforced unless a copy of the order has been served personally on the person required to do or abstain from doing the act in question. The copy of the order served must be endorsed with a notice informing the person on whom the copy is served that if he disobeys the order, he is liable to the process of execution to compel him to obey it.”** (emphasis is mine). It is for that reason that in contempt proceedings personal service is the procedure.

In this application the applicant did not allege or show personal service of the order on the persons now intended to be punished for contempt. On that account alone this application would fail.

8. But there is more. The standard of proof required in contempt proceedings to show that the defendant has proper notice of the terms of the order and that breach of the injunction has been occasioned is quite high, it is proof beyond reasonable doubt; as indicated in the authority of **In re BRAMBLEVALE LTD (1970) ch. 128** in the following words of Lord Denning M.R. at page 137,

**“A contempt of court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved. To use the time honoured phrase, it must be proved beyond reasonable doubt.”**

In our case, no proof, forget about it being beyond reasonable doubt, was shown that indeed there was breach following the personal service of an order by persons to whom such order was directed.

9. For these reasons this application must fail and the same is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19<sup>TH</sup> DAY OF JULY, 2012.

**P.M. MWILU**  
**JUDGE**

In the presence of :-

.....Advocate for Applicant

.....Advocate for Respondent

.....Advocate for alleged contemnor

.....Court Clerk

**P.M. MWILU**  
**JUDGE**