



1. GEORGE OCHIENG ODODA

2. SIMONS M MAHUGU

3. BONIFACE K NGUI

4. JOHN YAA KAATANA

5. JOSPEH MUTISO

6. JAMES WAWERU & OTHERS..... PLAINTIFFS

VERSUS

KENYA RAILWAY STAFF RETIREMENT

BENEFIT SCHEME .....DEFENDANT

## RULING

1. On 9<sup>th</sup> October 2009 the court herein (Ali-Aroni, J) granted a temporary injunction pending disposal of the suit –

**“... restraining the Defendant or its servants or agents or any person claiming under it from interfering with the Plaintiff’s quiet enjoyment of the houses the Plaintiffs’ are occupying, removing, attaching, disposing of or in any other way alienating the Plaintiffs’ personal effects and/or household goods in the premises...”**

2. The court was satisfied that the Plaintiffs had demonstrated a *prima facie* case with a probability of success, and further that the balance of convenience tilted in their favour. The court also noted that a similar temporary injunction had been granted in **Nakuru HCCC No. 397 of 1998** (Msagha, J) filed by the same Plaintiffs against **Kenya Railways Corporation** which was then the registered owner of the houses/premises in question. Apparently that order had been disobeyed and Kenya Railways Corporation had transferred the houses/premises to the Defendant in this suit (its own staff retirement benefits scheme), thus necessitating the filing of the present suit.

3. It is to be noted that Nakuru HCCC No 397 of 1998 was eventually dismissed after full hearing in a judgment delivered on 9<sup>th</sup> May 2011. That judgment may or may not have an impact on the present case.

4. The Plaintiffs subsequently filed the **notice of motion dated 24<sup>th</sup> June 2011** (which is the subject of this ruling) thereby instituting contempt proceedings against the Defendant in respect to the aforesaid order of 9<sup>th</sup> October 2009. Two main orders are sought –

(i) That the Chief Executive Officer and the Estate Manager of the Defendant be cited for contempt.

(ii) That the two be committed to civil jail for six (6) months for contempt.

The grounds for the application on the fact thereof include –

(i) That despite the Defendant's counsel being present when the order of 9<sup>th</sup> October 2009 was made, the order (together with a penal notice) was served upon the Defendant at its head office at Nairobi.

(ii) That the Defendant has disobeyed the said order by evicting the Plaintiffs.

5. The supporting affidavit is sworn by the 6<sup>th</sup> Plaintiff, JAMES WAWERU. It discloses no personal service of the order alleged to have been disobeyed upon the persons sought to be cited for contempt. The affidavit also does not disclose the actual act of the Defendant alleged to constitute disobedience of the court order – **eviction** of the Plaintiffs. The affidavit discloses **service of notices to vacate** the houses/premises occupied for non-payment of accrued rent and arrears.

6. The Defendant has stated in the replying affidavit sworn by the Chief Executive Officer, CAROLINE NYORORO, that the notices were issued in error by the Estate Manager of the Defendant who did not know of the order of 9<sup>th</sup> October 2009, but that the notices have since been withdrawn. There does not appear to have been eviction of any of the six Plaintiffs named in the plaint. Though it has been stated that this is a representative suit, I did not find in the record a list of the "other" plaintiffs on whose behalf the suit may have been brought.

7. The Defendant has also raised the issue of service of summons to enter appearance. It has been deponed in the replying affidavit that it has never been served with the same. This is not denied in the supplementary affidavit of the 6<sup>th</sup> Plaintiff filed on 11<sup>th</sup> August 2011.

8. Service of summons to enter appearance is vital in our adversarial system of justice. It is what formally brings the defendant into the suit, followed by strict time-lines within which certain steps must be taken (like filing of pleadings, making discovery, etc) towards the ultimate aim of having the suit itself heard and determined without undue delay.

9. Thus, if indeed summons to enter appearance have not been served more than three (3) years since the suit was filed (and it appears to be so) the suit may well have abated, or be amenable to be struck out.

10. But I will confine this ruling to the application at hand and state that the same has no merit and is dismissed with costs to the Defendant. It is so ordered.

11. The delay in preparation of this ruling is deeply regretted. It was caused by my poor state of health the last few years. But thank God I have fully recovered my health.

**DATED AT NAIROBI THIS 11<sup>th</sup> DAY OF OCTOBER 2012**

**H.P.G. WAWERU**  
**JUDGE**

**DELIVERED AT NAIROBI THIS 12<sup>TH</sup> DAY OF OCTOBER 2012**