



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**ELC CIVIL SUIT NO. 577 OF 2009**

DEVLAN COMPANY LIMITED.....1<sup>ST</sup> PLAINTIFF  
ROCK VILLE INVESTMENT LIMITED.....2<sup>ND</sup> PLAINTIFF

***VERSUS***

CITY COUNCIL OF NAIROBI.....DEFENDANT

**RULING**

On 26<sup>th</sup> November, 2009 Onyancha J. gave a ruling allowing the plaintiffs' application for injunction orders which order was subsequently served upon the officers of the defendant for compliance. This compliance was not hedged by the said officers and the plaintiffs brought an application by way of Chamber Summons under Sections 3A and 63 (c) & (e) of the Civil Procedure Act and Order XXXIX Rule 2A(2) of the Civil Procedure Rules for orders;

1. That the officials of the respondent namely the Town Clerk, Director of City Planning Mr. Patrick Tom Odongo and Deputy Director of Legal Affairs Mr. Mung'alla be committed and detained in prison for a term not exceeding six (6) months for disobeying and or breaching this honourable court orders issued on 26<sup>th</sup> November, 2009.
2. That the costs of this application be provided for.
3. That this honourable court does make such other or further orders as are deemed necessary to meet the ends of justice.

The application is based on the affidavit sworn by Joseph Warari Gathoga, who is a Director of both plaintiffs companies and the grounds set out on the face of the application which are;

1. That on 26<sup>th</sup> November, 2009 this honourable court made an injunction order restraining the respondent from interfering with the plaintiffs' construction on the suit premises.
2. That the said order was personally served on the respondent with a penal notice that failure to comply could result to being committed to jail for contempt.
3. That the respondents have willfully refused to comply with the said order by interfering with the applicants' construction on the premises known as LR.No.209/10172/14 and 209/10172/17 and have consequently rendered this application necessary in order to safeguard the dignity, authority and sanctity of the court and indeed the entire judicial process.

The application is opposed by the defendant and there is an affidavit sworn by P.T. Odongo who is said to be the Director of the City Planning and Architecture in the 2<sup>nd</sup> defendant.

In the said reply Mr. Odongo addresses the issue as if he is opposing the application for injunction. It will be noted that, when the court granted the orders sought by the plaintiffs on 26<sup>th</sup> November, 2009 the defendant/respondent was not represented notwithstanding that, service of the application had been effected. Indeed, the court observed that the defendant/respondent had been properly served.

The issues before me now are, whether or not the Chief Officers of the defendant had been served with an order that required them to comply with the injunction orders and whether or not they had failed to do so.

The return of service filed by Mr. Martin M. Mutua and sworn on 9<sup>th</sup> April, 2010 confirms that the order was served upon the Town Clerk and the Director of City Planning Mr. Patrick Tom Odongo through their Deputy Director of Legal Affairs Mr. M.N. Mung'alla.

I know and agree that service of such orders should be upon the party supposed to comply with, personally. I also know and agree that the penal notice must be endorsed on the said order. However, there are circumstances under which such orders can be said to be properly served if directions are given by the person supposed to be served, that such an order should be served upon a person so mandated to accept service. The affidavit by Mr. Mutua aforesaid confirms as such. I have no doubt that the Town Clerk and the Director of City Planning were aware of the said order which required them to comply with the orders set out therein.

At the same time, Mr. Mung'alla could not have received the order on behalf of his seniors without tacit instructions from them so to do. By accepting service on their behalf, he in effect committed those officers to compliance thereto.

There is no application on record to review the order on record. The order therefore, unless otherwise set aside, remains in place. There is no apology that has been advanced or made by the cited officers and there is no attempt to purge the disobedience of the said order. The position remains that, there is a lawful court order directed at the defendantS through its senior officers, which, order has not been complied with. Instead, it is the applicants' case that the defendant has moved to demolish the construction by the plaintiffs.

This court cannot countenance construction without approved plans, but with the same breath demolishing structures without lawful orders or notice is equally not acceptable. I find that a proper and lawful order was given by the court. This order contained a penal notice. The order was properly served and that the same has not been obeyed by the defendant.

Mr. Mung'alla was simply a receiving officer and cannot be held liable for any disobedience. The officers who were supposed to obey this order are the Town Clerk and Mr. P.T. Odongo a Director of City Planning. They are in contempt of the court order.

As the authority of the court must be upheld, any party disobeying a court order exposes himself to the consequences thereof. The Town Clerk and the Director of City Planning Mr. P.T. Odongo deserves to be punished for the said contempt of the court order. I direct that each of the said officers is hereby fined Kshs.100,000/= in default to serve three (3) months imprisonment. The said fine shall be paid within seven (7) days of the date of this ruling.

Orders accordingly.

***Dated, signed and delivered at Nairobi this 15<sup>th</sup> day of February, 2011.***

**A. MBOGHOLI MSAGHA**

**JUDGE**