



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT ELDORET**

**CIVIL CASE NO. 126 OF 2010**

**DAVID ONJILI OMBELE.....1<sup>ST</sup> PLAINTIFF**  
**ELZEBA MUINDE.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**LILIAN ISIGI MUYESHI.....1<sup>ST</sup> DEFENDANT**  
**MUGESHI MISHIBA NEBERT.....2<sup>ND</sup> DEFENDANT**  
**ISAAC ALUDA SONGORE.....3<sup>RD</sup> DEFENDANT**  
**ELDOLAND PROPERTIES LIMITED.....4<sup>TH</sup> DEFENDANT**

**RULING**

On 4<sup>th</sup> October, 2010, the plaintiffs appeared *ex parte* before **Mwilu J**, on their application dated 1<sup>st</sup> October, 2010 and sought a temporary injunction restraining the respondents from interfering with, occupying selling and/or dealing with land parcel numbers Pioneer/Langas Block 1/139 in any manner detrimental to the plaintiffs, pending hearing of the application *inter partes*. The plaintiffs believed that the temporary injunction in the terms sought had been granted and extracted an order to that effect. They say they served that order upon the respondents. By their present Notice of Motion, the plaintiffs seek that **Lilian Isigi Muyeshi and Mugeshi Mishiba Nebert** (hereinafter “the present respondents”) do attend court to show cause why they should not be committed to Civil Jail for a term not exceeding six months for being in contempt of the said order. They also seek attachment and sale of the present respondents’ assets in case of continued disobedience of the same order. The application is expressed to be brought under Order 40 Rule 2(2) and 4 of the Civil Procedure Rules, Sections 3 and 3A of the Civil Procedure Act, Section 5 of the Judicature Act and all other enabling provisions of the law. The application is predicated upon the primary ground that, the present respondents in disregard and disobedience of the said order, on 11<sup>th</sup> February, 2011, entered the suit land and carried out construction work therein and continue to do so in impunity. There is a supporting affidavit sworn by the 1<sup>st</sup> plaintiff which elaborates the ground for the application. The application is opposed and there are Grounds of Opposition filed by the advocates for the present respondents. It is alleged in the said grounds, *inter alia*, that personal service of the said order has not been demonstrated; that no detrimental act has been demonstrated and that no act of contempt has been demonstrated beyond reasonable doubt.

The application was canvassed before me on 22<sup>nd</sup> March, 2011, by **Mr. Okoth** Learned Counsel for the applicants and **Mr. Barasa**, Learned Counsel for the present respondents. Counsel reiterated their clients' stand-points taken in their respective papers and urged those positions before me.

I have considered the application, the supporting affidavit, the Grounds of Opposition and the submissions of counsel. Having done so I take the following view of the matter. When the plaintiffs appeared ex-parte they sought the following order:

***“That an interlocutory injunction do issue against the defendants/Respondents jointly and severally restraining them whether by themselves, their servants and or agents from interfering with, occupying, selling and/or dealing with the suit land being land parcel number Pioneer/Langas block 1/139 measuring 0.085Ha. or thereabout in any other manner that is detrimental to the plaintiffs/applicants pending hearing of this application inter partes.”***

The record shows that **Mwilu J** who heard the application at the exparte stage, on 4<sup>th</sup> October, 2010, stated as follows:-

***“I grant urgency and a temporary stay until 19/10/2010 inter partes.”***

However, counsel for the plaintiffs extracted the following order:-

***“That an interlocutory injunction do issue against the Defendants/Respondents jointly and severally restraining them whether by themselves, their servants and/or agents from interfering with, occupying, selling and/or dealing with the suit land being Land Parcel No. Pioneer/Langas Block 1/139 in any manner that is detrimental to the plaintiffs/Applicants pending hearing of this application inter partes.”***

It is plain that whereas the Learned Judge may have intended to grant the temporary injunction sought by the plaintiffs. She did not do so in her written order with the result that the order extracted was not in consonance with the actual order granted.

The record further shows that, the exparte order granted by **Mwilu J** was extended from time to time including 19<sup>th</sup> January, 2011. Yet counsel for the plaintiffs extracted the following order as having been given on 19<sup>th</sup> January, 2011.

***“(a) That an interlocutory injunction do issue against the Defendants/Respondents jointly and severally restraining them whether by themselves, their servants and/or agents from interfering with, occupying, selling and/or dealing with the suit land being land Parcel No. Pioneer/Langas Block 1/139 in any manner that is detrimental to the Plaintiffs/Applicants pending hearing of this application inter partes.”***

Counsel indicated in the order that I had infact given the said order on some matter coming up for hearing before me on 19<sup>th</sup> January, 2011. I have perused the record again and again and cannot trace any application which came before me for hearing on 19<sup>th</sup> January, 2011. On that date I delivered a ruling on a Preliminary Objection which had been canvassed before me on 30<sup>th</sup> November, 2010. After the ruling, I

fixed the application for injunction for hearing on 15<sup>th</sup> June, 2011 and extended the interim orders which were in force then. The only interim order in force was the one given by **Mwilu J** aforesaid. I therefore agree with counsel for the present respondents that the order as extracted is defective and is not a reflection of the order given by the court. On that basis this application is for dismissal.

Even if an order of injunction had been given in the terms extracted, the plaintiffs would not succeed in their application as they have not demonstrated that the present respondents were indeed served with the same. **David Onjili Ombele** who swore the supporting affidavit merely deponed that he had been informed by his advocates that the present respondents had been served with the order. He did not exhibit any affidavit of service. His advocate did not avail affidavit evidence of the alleged service. In the premises the basic prerequisites for an order of committal for contempt have not been demonstrated. In **Ochiro & Another -Vs- George Aura Kombo & Others (CA NO 36 of 1989)(UR)**, the Court of Appeal held that it was fetal to fail to serve a copy of the order allegedly disobeyed with an endorsement of the penal consequences in case of disobedience.

In the premises, this application must fail. It is dismissed. As the plaintiffs believed that they had obtained the order they had sought ex-parte before **Mwilu J**, I order that each party bears his/her own costs of the application.

Orders accordingly.

**DATED AND DELIVERED AT ELDORET THIS 10<sup>TH</sup> DAY OF MAY, 2011**

**F. AZANGALALA**

**JUDGE**

Read in the presence of:-  
Mr. Okoth for the applicants and  
Mr. Barasa for the respondent

**F. AZANGALALA**

**JUDGE**

**10<sup>TH</sup> MAY, 2011**