



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**MISC. APPL. 218 OF 2010**

DR. JULIUS OKELLO OKUNGU ..... 1<sup>ST</sup> APPLICANT

HESBON OTHIENO OMANJO

*(Suing on behalf of the members of Evangelical*

*Christ Church of Africa ..... 2<sup>ND</sup> APPLICANT*

**-VERSUS-**

JOHN HENRY TULU ..... 1<sup>ST</sup> RESPONDENT

MESHACK TUJU ROCHE ..... 2<sup>ND</sup> RESPONDENT

MARGRET ADHIAMBO MBASA ..... 3<sup>RD</sup> RESPONDENT

CLERKSON ODHING JIENDA ..... 4<sup>TH</sup> RESPONDENT

MAURICE OKELLO ..... 5<sup>TH</sup> RESPONDENT

NELSON OCHIENG MARIMU ..... 6<sup>TH</sup> RESPONDENT

**RULING**

The application before me is dated 20<sup>th</sup> December, 2010. It seeks for 3 substantive prayers. It is brought by way of notice of motion under Section 5 of the Judicature Act, Section 3A, 1A and 1B of the Civil Procedure Act.

The prayers sought are:-

- 1. That this application may be certified urgent and matter be heard ex parte in the first instance.**
- 2. That the court be pleased to jail the respondent for six months for contempt of court.**
- 3. The costs of this application be provided for.**

The application is supported by the affidavit of **Dr. Julius Okello Kungu** and on the grounds that the respondents have been in contempt of a court order for six months and that the Church has incurred loss and confusion.

The respondent did not file any response to the application. However at the date set for hearing counsel for the respondents raised various objections and submitted that consideration for contempt should be the last resort of a court. That a court should be satisfied that the alleged contempt infringes and obstructs the administration of justice. Further that there has to be proof of service of the court order that ought to have been accompanied by a penal notice.

Contempt proceedings by their nature are *quasi criminal*. If found guilty for contempt a party may be fined or incarcerated which entails curtailment of one's freedom. The standard of proof required therefore is higher than proof in an ordinary civil application. It is higher than proof on a balance of convenience.

In the affidavit in support of the application dated 21<sup>st</sup> December, 2010 **Dr. Julius Okello Kungu** states in part:-

“ ----

**3. That I know of my own knowledge that the court delivered the ruling on 29/1/2010 ordering the respondents to return the church property to the headquarters based at Migosi Plot NO. 377 Migosi Site estate next to the headquarters Ezra Gumbe Primary (attached hereto is the ruling marked DJOK3).**

4. ----

**5. That I know of my own knowledge that the orders of the court were so clear ----**

**6. The court must stamp its authority by dealing with the respondent squarely as per the law and the court gave us leave on 9<sup>th</sup> December, 2010 to cite the respondent for contempt.”**

Despite the averments above, the applicants failed to give the court reasonable grounds to find the respondents in contempt. There is no proof of service of the court order subject matter accompanied by any penal notice. The fact that the court was convinced to grant leave alone is not sufficient. Secondly there is no proof that the application for leave to institute these proceedings and the order thereof were ever served upon the alleged contemnors.

In the absence of proof of service of the court order and a penal notice, the leave and application thereof in compliance with the Judicature Act and Section 3 of Order 52 of the Supreme Court of England, this application fails to meet the necessary threshold.

There are several questions unanswered in the mind of the court were the alleged contemnors served with the court order, penal notice, the application and order granting leave? Is there an affidavit of service? Can the court in the absence of such proof condemn the alleged contemnors? The answer is in the negative.

Consequently the application before me being wanting it must fail.

No orders as to costs.

**DATED AND DELIVERED THIS 19<sup>TH</sup> DAY OF OCTOBER, 2011.**

**ALI-ARONI  
JUDGE**

**In the presence of:**

..... present for Appellant

.....present for Respondent