



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**ELC. 361 OF 2010**

**ELIUD GITAU NJOROGE –CHAIRMAN .....1<sup>ST</sup> PLAINTIFF**  
**DAVID KIBORO – SECRETARY .....2<sup>ND</sup> PLAINTIFF**  
**GILBERT ARIGA – TREASURER .....3<sup>RD</sup> PLAINTIFF**  
**(all suing as officials of Kariobangi South Jua Kali Society)**

**V E R S U S**

**PURITY THUGURI .....1<sup>ST</sup> DEFENDANT**  
**ROBERT NDAMA ONGUTE .....2<sup>ND</sup> DEFENDANT**  
**CAROLINE A. OJUOK .....3<sup>RD</sup> DEFENDANT**  
**CITY COUNCIL OF NAIROBI .....4<sup>TH</sup> DEFENDANT**

**R U L I N G**

On 27<sup>th</sup> July, 2010 the Plaintiffs filed this suit claiming that they were the officials of Kariobangi Jua Kali Society which owned plot No. Kariobangi South Sector VI following an order in 1992 by the President to the 4<sup>th</sup> Defendant to allocate it to them. They claimed that on 5<sup>th</sup> July, 2010 the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, who were not their members, trespassed on plots 137 and 68 belonging to their member James Ogolla (deceased) and commenced construction thereon. They found out that the two Defendants had purportedly been sold the plots by the 1<sup>st</sup> Defendant who in turn had been allocated the same by the 4<sup>th</sup> Defendant. The suit was filed for a declaration that the 1<sup>st</sup> to 3<sup>rd</sup> Defendants were trespassers on the suit property. A permanent injunction was also sought against the Defendants.

With the suit was filed a chamber application under **Order 39 rules 1 and 2** of the **Civil Procedure Rules** for a temporary injunction. The Plaintiff's advocate went before Justice Msagha on 28<sup>th</sup> July, 2010 under a Certificate of Urgency and obtained an *ex parte* order of injunction restraining the Defendants, their servants and or agents from entering into, remaining into, constructing on or developing or in any manner interfering with the suit property pending *inter partes* hearing on 6<sup>th</sup> August, 2010. On 25<sup>th</sup> August, 2010 the Plaintiffs filed the present application by way of motion under **Order 39 rule 2A** and **9** of the **Civil Procedure Rules** to have the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants committed to prison for a period not exceeding 6 months for contempt of court on basis that they had disobeyed the injunction order. It was further sought that they be ordered to demolish the constructions they were undertaking on the suit property. The 1<sup>st</sup> Plaintiff swore a supporting affidavit to say that on 2<sup>nd</sup> August, 2010 the order and the penal notice were served on the 4<sup>th</sup> Defendant. The process server (Conrad Wekesa) then went to the site and found construction going on. The 2<sup>nd</sup> Defendant was present and he was served but refused to acknowledge by signing. However, the 1<sup>st</sup> Plaintiff continued, the construction had not stopped. Photographs ("EGN 3") were annexed as evidence of continued construction.

The 2<sup>nd</sup> Defendant swore a replying affidavit on his own behalf and that of the 3<sup>rd</sup> Defendant to say that he was not served as alleged, or at all. He stated that a photocopy of the order was found on the site by his workers on 2<sup>nd</sup> August, 2010. He took the order to his advocates who went to the High Court Registry where he obtained a copy of the application as none had been left on site. By this time, the Defendant stated, the construction had gone up to the ground floor but that they immediately stopped and nothing else has been done to the site. He stated that the photographs annexed by the 1<sup>st</sup> Plaintiff had been doctored.

From the affidavit of 1<sup>st</sup> Plaintiff it is clear he did not know the 2<sup>nd</sup> Defendant before. He says a

man emerged from the construction saying he was the owner of the plot and that that was the man who was served. The Affidavit of Service sworn on 5<sup>th</sup> August, 2010 also shows that the process server did not know the 2<sup>nd</sup> Defendant before. In fact, the process server says he served a man who did not disclose his name but who said he was the owner of the plot. The 2<sup>nd</sup> Defendant says he was not at the site then and was therefore not served. On the evidence, I accept the version of the 2<sup>nd</sup> Defendant. Now that the process server and the 1<sup>st</sup> Plaintiff did not know the name of the person they allegedly served it cannot be said the man they found was the 2<sup>nd</sup> Defendant. It was important for them to indicate who introduced the 2<sup>nd</sup> Defendant to them.

It was stated by the Court of Appeal in **Nyamogo and Another –Vs- Kenya Posts & Telecommunications Corporation [1993] LLR 2152** that no order of court requiring a person to do or abstain from doing any act may be enforced unless a copy of the order has been personally served on the person required to do or abstain from doing the act in question. I do find that there was no personal service of the order to the 2<sup>nd</sup> Defendant.

It is not indicated anywhere that the 3<sup>rd</sup> Defendant was personally served, or at all. The order to the 4<sup>th</sup> Defendant was allegedly served on the Deputy Director of Legal Affairs on behalf of the Town Clerk. That would mean that the Town Clerk, the Chief Executive of the 4<sup>th</sup> Defendant, was not personally served.

The 2<sup>nd</sup> Defendant states that when he became aware of the order he stopped the construction work. The 1<sup>st</sup> Plaintiff alleges the construction work did not stop and relies on the photographs, which the 2<sup>nd</sup> Defendant claims have been manipulated. I am mindful that the standard of proof in contempt proceedings is higher than proof on balance of probabilities, and almost, but not exactly, beyond reasonable doubt (**Mutitika –Vs- Baharini Farm Ltd [1985] KLR 227**). I am unable to find that the Plaintiffs have discharged that burden in this case.

The consequence is that the application dated 25<sup>th</sup> August, 2010 is dismissed with costs.

**DATED AND DELIVERED AT NAIROBI**  
**THIS 2<sup>ND</sup> DAY OF NOVEMBER 2010**  
**A. O. MUCHELULE**  
**J U D G E**