



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT ELDORET**  
**CIVIL SUIT NO. 38 OF 2007**

**JOSEPH MUCHOE WANYAMA (suing for and on behalf of members of  
Yuya Farmers Co-operative Society Ltd) ..... PLAINTIFFS**  
**=VERSUS=**  
**MERCIA MULIRO (Sued as a Personal Representative of  
MASINDE MULIRO DECEASED ..... DEFENDANTS**

**RULING**

The applicant, **Joseph Muchoe Wanyama**, by his chamber summons dated 3<sup>rd</sup> March 2010, seeks two main orders expressed as follows:-

- 1). That **Mercia Muliro**, the defendant, be committed to civil jail for a period of time not exceeding six (6) months for contempt of court.
- 2). That the same defendant be not heard on any matter in this suit until she purges the contempt.

The main reasons for the application are as follows:-

- (a) That on 27/3/2007, this court issued an order of injunction restraining the defendant, her servants and or agents from alienating, selling or in any other way parting with possession of 201.7 acres in L.R. No. 11209 known as Sibanga farm clearly defined by beacons put up by a surveyor pursuant to a decree in Kitale Land Case No. 12 of 2000.
- (b) That the said order was served personally upon the defendant.
- (c) That the defendant has either by herself, her servants and/or agents flagrantly and without any reasonable cause and or justification disobeyed the order by renting and leasing out the suit parcel of land.

The application is supported by the plaintiff's affidavit sworn on 3<sup>rd</sup> March 2010. It is deponed in the said affidavit, *inter alia*, that the said order of injunction was served on the defendant personally by one Timothy K. Njoroge, a process server, on 27/3/2007, and that the defendant has cultivated the suit land and has also leased parts thereof to nine (9) persons and is therefore in contempt of the said court order. Annexed to the affidavit is a copy of the said affidavit of service sworn on 29/10/2007. There are also copies of photographs of ploughed land.

The application is opposed on the basis of grounds of objection filed by counsel for the respondent. The main grounds are as follows:-

- (1) That no Notice was given to the Attorney General prior to the filing of this application.
- (2) That no Penal Notice was served.
- (3) That no leave was granted for filing this application.
- (4) That the affidavit of service is defective as it does not indicate who drew the same.
- (5) That the names of the people who leased the land and the lease agreements are not given.

The application was canvassed before me on 10/11/2010. The applicant, who appeared in person, reiterated the grounds in the application and his affidavit. On his part, counsel for the respondent contended that as leave was not sought or obtained and no notice served upon the Attorney General, the application was incompetent. Counsel invoked the decision of **Ouko J, in Victoria Pumps Ltd &**

**Another –vrs- Kenya Ports Authority & 4 Others [2002] IKLR 708 and Godfrey Kilatya Kituku & 6 Others –vrs- Malindi Municipal Council [HCCC No. 45 of 2005] (UR)**

Counsel further submitted that the Process Server did not demonstrate how the respondent was identified and that the defendant had not demonstrated how the said court order had been violated.

Having considered submissions made before me, I take the following view of this matter. With regard to the objection raised by counsel for the respondent that there was no compliance with the mandatory provisions of section 5 of the Judicature Act, I do not find the objection well taken. I say so because of the clear provisions of Order XXXIX Rule 2A (2) of the Civil Procedure Rules which read as follows:-

**“(2), In cases of disobedience, or breach of any such terms, the court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and my be detained in prison for a term not exceeding six months unless in the meantime the court directs his release”.**

And Rule 9 of the same order reads as follows:-

**“ 9 Applications under rules 1 and 2 shall be by Summons in Chambers”**

It appears to me that Order XXXIX Rules 2a (2) and 9 of the Civil Procedure rules adequately deal with the manner of proceeding where disobedience of an order of injunction is alleged. To my mind, a party aggrieved by such disobedience may, by chamber summons, apply that the offending party be detained in prison for a term not exceeding six months. The jurisdiction to punish for disobedience of an order of injunction under Order XXXIX Rule 2 A(2) appears therefore to be independent of the jurisdiction donated under Section 5 of the Judicature Act. The Rules Committee in my view did not envisage compliance with the English Procedure by a party invoking the courts jurisdiction under Order XXXIX Rule 2 A (2) of the Civil Procedure Rules.

I must therefore with all due respect and painfully depart from the path taken by my brother **Ouko J** in the cases cited to me by counsel for the defendant. I find and hold that as the applicant moved the court under order XXXIX Rule 2 A (2) of the Civil Procedure Rules, he was not obliged to comply with section 5 of the Judicature Act strictly. Failure to serve a notice to the Attorney General and to obtain leave of the court to institute these proceedings was not fatal.

Counsel for the respondent also contended that the contempt application could not succeed since the order allegedly disobeyed was not endorsed with penal notice. That contention is not without merit. I say so because the consequences of failing to comply with the order are dire. The respondent may lose his/her liberty. The Court of Appeal has also held as fatal, the failure to serve a copy of the order allegedly disobeyed with an endorsement of the penal consequences in case of disobedience (See **Jacoel Zedekiah Ochiro & Another –vrs- George Aura Kombo & Others [CA No. 36 of 1989] (UR)**).

In this case, the applicant has not exhibited the extracted order which he alleges was disobeyed by the respondent, let alone a served copy of the order. I cannot therefore determine whether the copy of the order allegedly disobeyed carried a notice of the penal consequences of disobedience. The one sealed by the Deputy Registrar on 14/3/2007 forming part of this record does not have the endorsement. The order also refers to a decree issued in Kitale Land Case Number 121 of 2000. There is no evidence that that order was also served. The Process Server did not mention it in his affidavit of service. Compliance could not have been possible without the decree in the said Land Case. I have also observed that the Process Server in his affidavit of service did not state how he identified the respondent. At paragraph 5 of his affidavit, he stated as follows:-

**“ 5, That the said ..... Became known to me at the time of the said service.”**

It cannot be overemphasized that contempt proceedings, because of the consequences in the event of successful prosecution, are criminal in nature. As I have already observed above, if proved, the contemnor may lose his/her liberty. He /she should only do so where the applicant has demonstrated satisfactorily that there has indeed been contempt. I am not satisfied that the applicant has reached that threshold. This application is therefore for dismissal. I accordingly order that it be and is hereby dismissed with costs.

Orders accordingly.

**DATED AND DELIVERED AT ELDORET THIS 1<sup>ST</sup> DAY OF DECEMBER 2010.**

F. AZANGALALA  
**JUDGE**

***Read in the presence of:-***

The Plaintiff.

F. AZANGALALA  
**JUDGE**  
1/12/2010