



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL OF KENYA**  
**AT NAKURU**  
**CIVIL CASE 194 OF 2004**

**PETER K. YEGO.....1<sup>ST</sup> PLAINTIFF**  
**MUSA BOIT.....2<sup>ND</sup> PLAINTIFF**  
**MICHAEL KIPRUTO.....3<sup>RD</sup> PLAINTIFF**  
**MICHAEL KIPRUTO T/A AIRNOPTICH**  
**BOREHOLE WATER PROJECT.....3<sup>RD</sup> PLAINTIFF**

**VERSUS**

**PAULINE NEKESA KODE.....DEFENDANT**

**RULING**

By their notice of motion dated 27<sup>th</sup> May 2008, the plaintiffs seek under **Order 39 Rule 2A(2)** of the **Civil Procedure Rules** and **Section 5** of the **Judicature Act** to cite the defendant for contempt of court. What the defendant is alleged to have disobeyed is the order of temporary injunction granted by this court on 13<sup>th</sup> May 2005 which restrained her, her servants or agents from subdividing, disposing off, constructing on, cultivating or cutting trees on the suit piece of land known as Title No. Miti Mingi/Mbaruk/3/505 [Baruti].

It is alleged in the affidavit in support of the application that the defendant was served with a copy of that order on 4<sup>th</sup> December 2007.

The application is opposed on the ground that the defendant was never served with the order. Mr. Okeke for the defendant submitted that the affidavit of service is obviously false as the defendant is an old illiterate woman who does not know how to write. The question of her having refused to sign does not therefore arise. He also pointed out that the affidavit in support of this application contradicts the one of service on the date of the alleged service.

I have considered these submissions and read the record. As contempt of court is criminal, it must be proved that one has actually disobeyed the court order before one is cited for contempt. One of the most important elements to be proved in such a charge is service of the order upon the alleged contemnor. In this case the affidavit in support of the application claims that the defendant was served on 4<sup>th</sup> December 2007 while the affidavit of service says the service was effected on 7<sup>th</sup> December 2007. It is therefore not clear when, if at all, the defendant was served with the order she is alleged to have flouted. In the circumstances I find no basis for this application and I dismiss it with costs.

**DATED and delivered this 27<sup>th</sup> May 2009.**

**D. K. M ARAGA**

**JUDGE.**