



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

**Civil Suit 141 of 2008**

**SAMWEL K. SANKOK.....1<sup>ST</sup> PLAINTIFF/APPLICANT**

**RUMPE MALETO.....2<sup>ND</sup> PLAINTIFF/APPLICANT**

**BENSON MEMUSI ROIKEN.....3<sup>RD</sup> PLAINTIFF/APPLICANT**

**SAMUEL L. SETEK.....4<sup>TH</sup> PLAINTIFF/APPLICANT**

**NTIWA OLE MALETO.....5<sup>TH</sup> PLAINTIFF/APPLICANT**

**JACKSON TAJEWO SAINGIEV.....6<sup>TH</sup> PLAINTIFF/APPLICANT**

**LEKAPASOI O.ROTIKEN.....7<sup>TH</sup> PLAINTIFF/APPLICANT**

**VERSUS**

**KENYA FOREST SERVICE .....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**DIRECTOR KENYA FOREST SERVICE.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

On 4<sup>th</sup> December, 2006 this court delivered a substantive Ruling in the 7 Plaintiffs/Applicants' application dated 31<sup>st</sup> July, 2008 in which I ordered the immediate release of the Plaintiffs' timber by the Respondents. The Respondents did not comply with the said order and, on 17<sup>th</sup> December, 2008, upon an application being made by the Plaintiffs, this court ordered and directed that summons do issue upon the 2<sup>nd</sup> Respondent to appear in court on 31<sup>st</sup> December, 2008 to explain why the orders had not been complied with and to show cause why he should not be punished for the disobedience thereof.

On 31<sup>st</sup> December, 2008 the matter was stood over by consent to 20<sup>th</sup> January, 2009 on the ground that the 2<sup>nd</sup> Respondent was out of the country. An attempt by the Respondents to have the matter put off again on 20<sup>th</sup> January, 2009 was contested by the Plaintiffs/Applicants and the adjournment refused by the court, which found no reasonable ground to allow the same. The Plaintiffs/Applicants' prayer that a warrant of arrest do issue against the 2<sup>nd</sup> Defendant/Respondent was granted, with a further order that the matter be mentioned on 4<sup>th</sup> February, 2009. The court also gave the Defendants/Respondents leave to

apply for a variation in the event that the latter did comply with the orders.

At the mention on 4<sup>th</sup> February, 2009 counsel for the parties herein appeared before me wherein **Mr. Kahiga**, for the Plaintiffs, intimated to the court that he had information, supported by a letter dated 2<sup>nd</sup> February, 2009 shown to him and to the court, by counsel for the Defendants, to the effect that the 2<sup>nd</sup> Respondent was then willing to comply with the orders of 4<sup>th</sup> December, 2008. Indeed, counsel then appearing for the Defendants, **Mr. Kipkoech** submitted before me as follows:

***“I confirm the position as stated by my learned friend. The Plaintiffs can collect their properties today, as per my instructions.”***

In view of the above, the warrant of arrest was suspended and the matter stood over to the 9<sup>th</sup> February, 2009 by consent. On that date, counsel for the Plaintiffs submitted that the orders of 4<sup>th</sup> December, 2008 had only been complied with partly, and that the 4<sup>th</sup> Plaintiff’s timber had been forfeited, allegedly on the strength of an order issued at the subordinate court at Makadara in a case where a stranger to these proceedings had been charged. I accepted counsel’s submission that a lower court’s order cannot override a Ruling of this court and ordered, yet again, the immediate release of the subject matter herein, specifically requiring due compliance by the close of business on 9<sup>th</sup> February, 2009 failing which the Director of the 2<sup>nd</sup> Defendant, Mr. David K. Mbugua would be arrested and jailed for contempt as earlier ordered. At the same time, I recorded that the Defendants had lost audience before this court in view of their contempt.

Thereafter, on 13<sup>th</sup> February, 2009, the Defendants’ attempted to have the orders of this court lifted ex-parte. The court refused to entertain any ex-parte application brought by the Defendants and directed that any application by them should be served on the other side. On 5<sup>th</sup> March, 2009, the court went out of its way and heard learned counsel, Mr. Ojienda in an ex-parte application for a temporary stay of the orders of 9<sup>th</sup> February, 2009 pending a hearing inter partes on 12<sup>th</sup> March, 2009. The court refused to grant such stay and dismissed the application being of the considered view that the Defendants/Applicants were asking the court to go against its own orders and to dispense with the requirement of full compliance for no valid reason. On 12<sup>th</sup> March, 2009 counsel for both sides appeared before me on the Defendants’ application dated 10<sup>th</sup> February, 2009 in which the Defendants seek the following orders:

- 1. THAT this application be certified as urgent and that the same be heard ex-parte.***
- 2. THAT pending the interpartes hearing of this application, this Honourable Court be please to issue an order staying it’s decision of 9<sup>th</sup> February 2009 for the arrest of the Defendant’s Director if he fails to release the 4<sup>th</sup> Defendant’s produce by end of the day of the said 9<sup>th</sup> February 2009.***
- 3. THAT this Honourable Court be pleased to review, set aside and/or after it’s order issued on 9<sup>th</sup> February 2009 for the arrest of the Defendant’s Director if he fails to release the 4<sup>th</sup> Defendant’s produce by end of the day of the said 9<sup>th</sup> February 2009.***
- 4. THAT costs of this application be provided for.***

This court upheld Mr. Karanja’s objection that the Defendant had lost audience before the court and were therefore not deserving of a hearing. It then proceeded to hear Mr. Karanja’s other objections to the application which, as appearing in the statement of grounds of opposition dated and filed on 5<sup>th</sup> March 2009 are as follows:

- 1. The application does not raise any ground whatsoever to warrant a review.***
- 2. The application is grossly incompetent, bad in law and an abuse of the process of the court.***

**3. The orders issued are valid and remain valid. Any person dissatisfied ought to have appealed.**

Having considered the objections herein and taking the proceedings herein in their entirety, this court has no option but to find that the Defendants' application dated 10<sup>th</sup> February 2009 is a gross abuse of the process of this court. It is a great shame that the Defendants, who are well represented by able counsel, appear to have been greatly misled by their own advocates to disregard court orders in the belief that the orders will somehow evaporate and lose effect. It is clear to me that the Defendants and their advocates do not believe in the non-enforceability of the orders herein otherwise they would have challenged the same on appeal. The advocates involved in defending the Defendants' position, including the Defendants' in-house counsel, who has sworn the supporting affidavit, ought to know that the lower court's order they rely on is of no effect, and has no bearing whatsoever on the powers and jurisdiction of this court. In any event, my cursory perusal of the proceedings and the order of the lower, which have somehow found their way into this file are, in my considered opinion, invalid, null and void having being based on a non-existent offence, under the provisions of the **Forest Act**, upon which the Defendants seek to rely on. I need not say anything further save to mention that in my considered view, the said orders should be subjected to a review.

The Defendants' application of 10<sup>th</sup> February, 2009 is hereby dismissed with costs to the 4<sup>th</sup> Plaintiff/Respondent who is still entitled to the release of his property as previously ordered. I find that the Defendants' purported forfeiture and/or continued detention of the subject matter is illegal. The 2<sup>nd</sup> Defendant having failed to comply with this court's orders for the release of the same despite his undertaking of 4<sup>th</sup> February, 2009 and having been found to be in contempt, ought to be punished through the enforcement of the arrest warrant hereinbefore issued.

Orders accordingly.

**Dated, signed and delivered at Nakuru this 20<sup>th</sup> day of May 2009**

**M. G. MUGO**

**JUDGE**