



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Case 409 of 2008**

**DOROTHY NGENYI MUSEMBI & 4 OTHERS.....PLAINTIFFS**

**VERSUS**

**TIMOTHY MUSEMBI KINAMA.....1<sup>ST</sup> DEFENDANT**

**NICODEMUS MULI MUSEMBI.....2<sup>ND</sup> DEFENDANT**

**BONIFACE MULOO MUSEMBI.....3<sup>RD</sup> DEFENDANT**

**RULING**

The plaintiffs filed suit against the defendants in the subordinate court (**i.e. Nairobi CMCCC No.465 of 2008**) seeking certain prayers connected with properties allegedly owned by the 1<sup>st</sup> defendant. On 7<sup>th</sup> March 2008, the subordinate court issued the following order in regard to an interlocutory application that had been filed by the plaintiffs:

*“That there be no disposal, alienation or transfer of ownership of all the property set out in the schedule pending the hearing and determination of the suit or until further orders of the court.”*

According to the plaintiffs, they extracted the order, drafted a notice of penal consequences and served upon the defendants the said order and notice of penal consequences. The reverse of a copy of the order which was allegedly served on the defendants was filed in court in this application. It indicates that on 15<sup>th</sup> March 2008, the process server served the 1<sup>st</sup> defendant on behalf of himself and on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. There is no evidence that the 1<sup>st</sup> defendant acknowledged receipt of the said order on his own behalf and on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants or that he had authority to receive the said order and notice on behalf of the 2<sup>nd</sup> & 3<sup>rd</sup> defendants.

According to the plaintiffs, the defendants have breached the said order of the court. On 5<sup>th</sup> June 2008, they sought leave of this court to institute contempt of court proceedings against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants in the present suit. Leave was granted by this court for the plaintiffs to institute the said contempt of court proceedings on 2<sup>nd</sup> February 2009. The court ordered the plaintiffs to file the substantive motion to commence contempt of court proceedings within fourteen (14) days of the date of the order. On 11<sup>th</sup> February 2009, the plaintiff filed a notice of motion pursuant to provisions of **Order XXXIX Rule 2A(2)** of the **Civil Procedure Rules, Section 5** of the **Judicature Act** and **Section 52 Rule 2** of the **Rules of Supreme Court of England** seeking orders of the court to commit the defendants herein to jail for six (6) months for allegedly willfully and without reasonable excuse disobeying orders of

the subordinate court in **Nairobi CMCCC No.465 of 2008**. The plaintiffs further prayed for an order of this court to have the assets amassed by the defendants pursuant to their contemptuous activities to be seized and sold.

The plaintiffs allege that the order issued by the subordinate court, despite being served on the defendants was disobeyed. They allege that the defendants had proceeded to “*deplete and mass waste the parcels of land reserved in the order by scooping sand, building, cutting trees and drastically reducing the site value of the land*”. They further complained that the defendants had “*deliberately put up a permanent stone houses on all the portions of land*” that the plaintiffs “*were staking a claim on and this was a deliberate calculation and move to ensure that they are deemed to have an upper hand*” in the division of the suit properties. The defendants have denied that they were served with the order in question or that they had disobeyed the said order.

At the hearing of the application, I heard submissions made by Mr. Mbaluka for the plaintiffs and Mr. Ngolia for the defendants. I have read the pleadings filed by the parties herein in support of their respective opposing positions. The plaintiffs and the defendants are members of one family. The 1<sup>st</sup> defendant is the husband of the 1<sup>st</sup> plaintiff. The 2<sup>nd</sup> – 5<sup>th</sup> plaintiffs and the 2<sup>nd</sup> and 3<sup>rd</sup> defendants respectively are the sons of the 1<sup>st</sup> defendant by different by different mothers. It is apparent that there is a dispute between the members of the 1<sup>st</sup> defendant’s family concerning the distribution of properties owned by the 1<sup>st</sup> defendant. It is strange that the children of the 1<sup>st</sup> defendant are litigating over distribution of his properties while he is still alive! But the world being what it is today, there are occurrences which are stranger than fiction.

In the present application, the plaintiffs obtained the order in terms of what was referred to by this court at the beginning of the ruling. It is clear that the said order restrained the defendants from disposing, alienating or transferring ownership of the suit properties pending the hearing and determination of the suit. The order did not prohibit the defendants from utilizing the parcels of land in question. It appears that the complaint by the plaintiffs relate to the manner which the properties are being exploited. If that is the thrust of the plaintiffs’ application wishing to cite the defendants for being in contempt of the orders of the court, then, I think the application is misplaced. No evidence was placed before the court to support the alleged breach of the said court order, for instance, in form of an agreement for sale of any of the properties that were prohibited to be disposed off by the defendant.

Further, it was evident that the plaintiffs did not serve a copy of the order and the notice of penal consequences upon the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. It is trite that no person can be punished for being in contempt of an order of court if the applicant fails to establish that he had brought notice of the said order to the attention of the alleged contemnor. It is also a fundamental rule that the person being cited for contempt of court must be personally served with the order of the court before he can be cited. As was held by the Court of Appeal in **CA Civil Application No. Nai 264 of 1993 Nyamodi Ochieng – Nyamogo & Anor vs Kenya Posts & Telecommunications Corporation (unreported)** at page 6:

*“The law on the question of service of order stresses the necessity of personal service. In Halsbury’s Laws of England (4<sup>th</sup> Ed) Vol.9 on p.37 para 61 it is stated:*

*“61. Necessity of Personal Service. As a general rule, 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 served personally on the person required to do or abstain from doing the act in question...Where the order is made against a company, the order may only be enforced against an officer or the company if this particular officer has been served personally with a copy of the order...”*

In **Ochino & Anor vs Okombo & 4 others [1989] KLR1** at page 5 the Court of Appeal held as follows:

*“The power to deal with contempt of court is provided for under Section 5 of the **judicature Act (Cap 8)** and **Order 39 rule 2(3) of the Civil Procedure Rules**. We have to follow the procedure and practice in England. As we read the law, the effect of the English provisions is that as a general rule, no order of*

*court requiring a person to do or abstain from doing any act may be enforced (by committing him for contempt) unless a copy of the order has been served personally on the person required to do or abstain from doing the act in question. The copy of the order served must be indorsed with a notice informing the person on whom the copy is served that if he disobeys the order, he is liable to the process of execution to compel him to obey it. As this court pointed out recently in the case of **Mwangi Mangondu v Nairobi City Commission (Civil Appeal No.95 of 1988)**:*

***“This requirement is important because the court will only punish as a contempt a breach of injunction if satisfied that the terms of the injunction are clear and unambiguous, that the defendant has proper notice of the terms and that breach of the injunction has been proved beyond reasonable doubt.”***

In the present application, it was evident that the plaintiffs failed to personally serve the 2<sup>nd</sup> and 3<sup>rd</sup> defendant with the order and the notice of penal consequences. Even if this court were to accept that the process server did indeed serve the 1<sup>st</sup> defendant on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, it is apparent that the plaintiffs have not established the contempt that the 1<sup>st</sup> defendant has committed in regard to the order that he was served with.

In the absence of proof of personal service of the order and notice of penal consequences upon the 2<sup>nd</sup> and 3<sup>rd</sup> defendant, they cannot be cited for being in contempt of an order that they were not aware of. Further, there are no competent contempt of court proceedings against the 1<sup>st</sup> defendant. The plaintiffs did not obtain leave of the court to cite the 1<sup>st</sup> defendant for being in contempt of the orders of the court. I have perused the application filed by the plaintiffs seeking leave of this court. In the application, the plaintiffs applied to cite only the 2<sup>nd</sup> and 3<sup>rd</sup> defendants for being in contempt of the orders of the court. In the substantive application, the plaintiffs included the 1<sup>st</sup> defendant as a party in the contempt proceedings. That cannot be. The plaintiffs can only proceed against parties whom they had obtained leave of this court to cite for being in contempt of the orders of the court.

As stated earlier in this ruling, for the plaintiffs to succeed in the application to cite the defendants for being in contempt of the orders of this court, they must establish that the defendants were personally served with the order in question and further than the defendants, having been so served with the order, disobeyed it. The plaintiffs placed no evidence before this court to support their claim that the defendants had contemptuously breached the order of the subordinate court.

It is evident from the foregoing that the plaintiffs have failed to establish a case for citing the defendants for being in contempt of the orders of this court to the required standard of proof. Their application lacks merit and is hereby dismissed with costs.

**DATED AT NAIROBI THIS 17<sup>TH</sup> DAY OF JULY 2009**

**L. KIMARU**

**JUDGE**