



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

**Civil Case 250 of 2007**

**MAHMOUD SHEE MBWANA .....PLAINTIFF**

**VERSUS**

- 1. JUSTIN MWANYOLO**
- 2. ZACHEAUS MAGANGA**
- 3. DAVIS MAINA MBUTHIA ..... DEFENDANTS**

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**RULING**

By the application dated 7<sup>th</sup> July 2008 seeking leave to commence contempt of court proceedings for the committal of (1) JUSTIN MWANYOLO, (2) ZACHEUS MAGANGA and (3) DAVID MAINA MBUTHIA.

The brief facts of the case are as follows. On 9<sup>th</sup> May 2008 my learned senior brother Hon. Justice Njagi read out a ruling in open court by which he allowed the chamber summons dated 23<sup>rd</sup> October 2007 in the following terms:-

- “1. *THAT pending the hearing and determination of this suit, the defendants personally or through their employees, servants and/or agents be and are hereby compelled and/or ordered to demolish the fence and/or structure they have erected and/or constructed on the site where kiosk No. 52 (hereinafter “the kiosk”) existed before it was razed by fire.*
2. *THAT pending the hearing and determination of this suit the defendants personally or through their employees, servants and/or agents be and are hereby restrained from entering into or building or constructing any structure or in any way dealing with the site where kiosk No. 52 (“the kiosk”) existed before it was razed by fire.”*

Following this order the Applicants filed another application seeking leave to commence contempt of court proceedings as against the Respondents on the basis that the Respondents were in continual breach of the orders of 9<sup>th</sup> May 2008. This application for leave was again heard by Hon. Justice Njagi on 8<sup>th</sup> July 2008 and leave was granted to the Applicants to commence contempt of court proceedings. As a result the Applicant’s contempt proceedings were set down for hearing. By a consent entered into by the parties on 5<sup>th</sup> May 2009 it was agreed that parties do file and exchange written submissions on the matter. The Applicants took the date of 30<sup>th</sup> September 2009 for parties to highlight submissions in the Court Registry. Notice of this mention date was duly filed upon the Respondents vide the affidavit of service sworn and filed by one Joseph Ngoro which notice was duly received and stamped by M/s Moses Mwakisha & Company Advocates for the Respondent. On the appointed hearing date the Respondents failed to appear either in person or by way of counsel. The matter therefore proceeded in their absence. I do note however that the Respondents did file in court their written submissions dated 16<sup>th</sup> June 2009 which submissions I have perused together with the Applicant’s written submissions. I will take both into account in coming to my decision.

In a case such as the present one where the Applicant seeks the committal to civil jail of the Respondent the court must of necessity satisfy itself of two crucial facts:-

- (a) *Firstly that the order in question was clear, unambiguous and unequivocal*
- (b) *Secondly that service of the said order was in fact effected personally upon the Respondent.*

On the first question the order in issue in this case is that which was issued by Hon. Justice Njagi on 9<sup>th</sup> May 2008. I have reproduced that order earlier in this ruling. In his written submissions counsel for the Respondent argues that the order as given was neither clear nor unambiguous. The property referred to in the order is “*the site where kiosk No. 52 (hereinafter “the kiosk”) existed before it was razed by fire*”. The original chamber summons dated 23<sup>rd</sup> October 2007 which sought these orders also referred to the suit premises merely as kiosk No. 52. I do agree with counsel for the Respondent that it is not clear at all where this kiosk No. 52 is located. Is it in Nairobi, Kisumu, Mombasa or elsewhere. It would have been helpful if the land Reference Number was included as well as the town or city where the kiosk was located. I am sure that there are several such Kiosk No. 52 in the various market places across this country. It is not at all clear exactly which kiosk is being referred to. I am quite mindful of the fact that this was an order issued by my learned senior Justice Njagi and ideally it is he who ought to have been called upon to decide on these issues and/or to clarify his orders. However in view of the fact that he has been transferred to a different court and bearing in mind the unnecessary delay that will be caused by post-poning this ruling to await his clarification I feel that in the interests of justice I proceed with the matter as it is. My finding therefore is that the order as extracted was too ambiguous in its terms such as would lead to great difficulty in compliance with the same.

The second crucial question is that of service. In this case there are three Respondents. It is a requirement that each Respondent must be personally served with the order in order to bring the same to their attention. There is on record an affidavit of service dated 16<sup>th</sup> June 2008 and sworn by one GEORGE M. MWAKAZI of P.O. BOX 329, VOI who in paragraph one of the same describes himself as “*an authorized process server of the High Court of Kenya ...*” He claims to have served the relevant order on the Defendants named therein on 3<sup>rd</sup> June 2008. The relevant paragraphs of his affidavit read as follows:

- “2. *That on 3<sup>rd</sup> June 2008 I received an order to from the Hamza Adam Omar with instructions to serve the defendants herein*
3. *That on the same date at 5.00 p.m. I visited the defendant’s place of residence at Kariokor and Voi town where I served them with a copy of order dated 29<sup>th</sup> May 2008 thereof, and requiring their signature on the original. They accepted the service by signing at the reverse showing date and time ...*”

The order which is marked “D” is annexed and a look at the reverse thereof reveals three signatures all of which are dated 3<sup>rd</sup> June 2008.

In my view this affidavit of service as sworn by the said process server is incompetent as it is unclear and is too ambiguous to pass as proper proof of service. In paragraph (3) the process server avers to having served upon the Respondents a copy of the order dated 29<sup>th</sup> May 2008. This must have been a different order from the one in question which was dated 3<sup>rd</sup> May 2008. It is not clear which order was served on the Respondents. Secondly the process server appears to have served the same order on all three Respondents as evidenced by the three signatures on the single copy. He ought to have served each individual Respondent with their own copy of the order. Thirdly in paragraph (3) of his affidavit of service the process server indicates that he visited the Respondents at Kariokor and Voi. He certainly could not have found all three in both places at the same day. Who did he meet at Kariokor and who did he meet at Voi? This is not disclosed. Was service on the three Respondents simultaneous? This could not have been the case if some were served at Voi and others at Kariokor. I find this service to have been deficient and it cannot be relied upon by the court as proof of personal service on each individual Respondent. More pertinently this affidavit of service cannot in my view form a safe basis upon which to hold the Respondents in contempt. The order the Applicant seeks of six months jail term for the Respondents is a very severe penalty and if allowed will result in the deprivation of personal liberty for the three Respondents. Before a court can issue such for reaching orders it must be satisfied that all the pre-conditions to making such an order have been strictly met. Based on the foregoing I find that this is not the case here. The order itself is ambiguous and the service on the Respondents is deficient. As such the application to commit the three Respondents to civil jail must fail. The Applicant needs to file further particulars of the exact location of this kiosk 52 and service must be proved to have been personal to each Respondent. I therefore dismiss this application to commence contempt proceedings. Costs in the cause.

Dated and Delivered at Mombasa this 21<sup>st</sup> day of October 2009.

**M. ODERO**

**JUDGE**

**21/10/2009**

Read in open court in the presence of:

Mr. Khaemba for Plaintiff

Mr. Mwakisha for Defendant

**M. ODERO**

**JUDGE**

**21<sup>ST</sup> OCTOBER 2009**