



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT KISII**

**Civil Case 11 of 2008**

**PRISCAH NYANCHAMA GETONTO (suing as administratrix to the estate of PAULINE MOMANYI BITENGO (DECEASED))**

.....A.....APPLICANT/PLAINTIFF

**-VERSUS-**

**JAMES NYAMBINYA  
OBAGA.....  
RESPONDENT/DEFENDANT**

**RULING**

The plaintiff /applicant is the administratrix of the estate of the deceased Pauline Momanyi Bitengo who was the registered proprietor of land parcel No. West Mugirango/Bomanono/171. It was claimed that the defendant/respondent had on 22/11/2007 trespassed upon the land and begun clearing vegetation thereon, and cutting and falling old trees and carrying away the logs . The suit was filed seeking permanent injunction and general damages.

With the suit was filed an application under *Order 39 rules 1 and 2 of the Civil Procedure Rules and sections 3, 3A and 63(e) of the Civil procedure Act* for temporary injunction. An *ex-parte* order was granted on 27/2/2009 after the matter was certified urgent. The application was ordered to be heard on 8/4/2009. On that day the Respondent sought time to engage an advocate. Mr. Minda for the applicant did not oppose request to adjourn. Orders were extended to 20/5/2008. On that day the respondent indicated he had not put together funds to hire an advocate. He was granted more time and the orders extended to 16/9/2009. An order was made that:

*“The respondent must however obey the orders that were issued by this court on 27/3/2008”.*

On 16/9/2008 the Court was busy with an election petition and order was made that the application be heard on 24/10/08. Orders were extended. On 24/10/2008 the respondent was present and informed Court he had not filed any papers in response because of lack of money. Mr. Minda successfully prayed that the interim orders be confirmed. The orders that issued read as follows:-

“*THAT pending the hearing and determination of this case the defendant/respondent, his agents, servants, hirelings or employees are hereby restrained from encroaching, trespassing into, cutting down trees or in any way interfering with any portion the land parcel no. West Mugirango/Bomanono /171*”.

The order was accompanied by a Penal Notice. It was served on the respondent and on Nyangeri Mwamba on 15/4/2009.

The present application by way of Notice of Motion was filed on 12/5/2009 seeking that the respondent and one Nyangeri Mwamba be committed to civil jail for a term not exceeding six months and or their property be attached to such extent as may be directed for disobeying and or disregarding the Court order issued on 24/10/2008. In the Supporting Affidavit, the applicant deponed that the respondent and Nyangeri Mwamba have continued tilling the land and cutting down trees even after the order was served. It is indicated that the respondent has leased the land to Mwamba. The application has brought under *Order 39, rule 2A (2) of the Civil Procedure Rules and section 3, 3A and 63 (e) of the Civil Procedure Act*.

The application was not defended, although served on 12/6/2009.

The respondent was in court when the order was issued and he had the responsibility to obey it. He was subsequently served with the order and the Penal Notice. Mwamba was served with the order and the Penal Notice. He was duty-bound to obey the order. The injunction was in clear and unambiguous terms. I accept the uncontroverted evidence contained in the affidavit by the applicant that the respondent and Mwamba have continued to trespass on the land and to till it and also to cut trees thereon. That was, I find, in blatant and total disobedience and disregard of the order issued.

I am aware that proof of contempt should be at a level above proof on a balance of probabilities (See *Sean Francis Jones –V- Cedar Ruta Kyamirwa Morgan Andanother H.C.(Milimani) No. 152 of 2004*). I find the applicant has discharged this burden. In regard to Mwamba, the law is that the court has jurisdiction to commit for contempt a person, though not a defendant to the action for injunction and against whom injunction has now been granted, who, knowing of the injunction, abets, aids and assists in committing a breach of it by the person against whom the injunction has been granted {See *Mutitika .V.Baharini Farm LTD [1985] KLR 2270*), He was aware of the order and assisted the respondent to disobey it. He has by his conduct obstructed justice.

I allow the application with costs and issue warrant against the respondent and Nyangeri Mwamba to be brought to court to be punished.

Dated, signed and delivered at Kisii this 27<sup>th</sup> day of November, 2009.

**A.O.MUCHELULE**

**JUDGE**

**27/11/2009**

Before A.O.Muchelule-J  
Court clerk-Mongare  
Mr. Koina for Mr. Minda –present

COURT: Ruling in open court.

**A.O.MUCHELULE**

**JUDGE**

**27/11/2009**