



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**MILIMANI LAW COURTS**  
**Environmental & Land Case 495 of 2009**

**IN THE MATTER OF AN APPLICATION FOR COMMITTAL TO JAIL FOR CONTEMPT OF COURT**

**BETWEEN**

**BERNARD KONGO NJAU.....PLAINTIFF/APPLICANT**

**VERSUS**

**CITY COUNCIL OF NAIROBI.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**GEORGE KIARIE NG'ANG'A.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**R U L I N G**

**The Application**

1. By his Notice of Motion application dated 29/10/2009 filed pursuant to leave granted by this Honourable Court on 28/10/2009, the Plaintiff/Applicant seeks **ORDERS**

1. *THAT George Kiarie Nganga, Jackline Wambui Njeru and Njoroge Wachira be committed to civil jail for contempt of court for disobeying the order of the court given by the Hon. Lady Justice Sitati on the 7<sup>th</sup> day of October, 2009.*

2. *THAT George Kiarie Nganga, Jackline Wambui Njeru and Njoroge Wachira be detained in prison for a term not exceeding six (6) months for disobedience of the court order herein dated 7<sup>th</sup> October, 2009.*

3. *THAT the property of George Kiarie Nganga, Jackline Wambui Njeui and Njoroge Wachira be attached and sold in compensation as the court deems fit.*

4. *THAT the costs of this application be borne by George Kiarie Nganga, Jackline Wambui Njeru and Njoroge Wachira.*

2. The application is expressed to be brought under Section 5(i) of the Judicature Act, Cap 8 Laws of Kenya, Section 3A of the Civil Procedure Act Cap 21 Laws of Kenya and Order 52 Rule 3 of the Rules of the Supreme Court of England, 1965 (UK), Order XXXIX Rule 2A(2), (3) Civil Procedure Code (sic). The application is premised on 9 grounds on the face of the application. The gist of the grounds is that George Kiarie Ng'ang'a, Jackline Wambui Njeru and Njoroge Wachira are all in blatant breach of the

order of this Honourable Court issued on 7/10/2009 endorsed with a penal notice. The Applicant says that despite having been restrained by the said court order from entering into, constructing and/or interfering with all that parcel of land known as LR No. 209/7383/356 Kimathi Estate Nairobi IR No. 704466 until 13/11/2009, the citees have disobeyed the said order shown gross arrogance and inexcusable disrespect to this Honourable Court. The Applicant also avers that since the citees have acknowledged that they were duly served with the court order, the three should be punished for undermining the dignity of this Honourable Court.

3. The application is supported by the sworn affidavit by Bernard Kiongo Njau dated 29/10./2009. The deponent says in his affidavit that the order complained of was served upon George Kiarie, the 2<sup>nd</sup> Respondent while Jackline Wambui Njeru and Noroge Wachira are admittedly aware of the existence of the court order. The Applicant prays that the 3 citees be committed to civil jail for violating the orders of this Honourable Court with impunity.

### **The Replying Affidavits**

4. The application is opposed. There are several Replying Affidavits in this regard. The 1<sup>st</sup> Replying Affidavit is sworn by Jackeline Wambui Njeri. She says that the orders of injunction in this case were issued against the 2<sup>nd</sup> Defendant, George Kiarie Ng'ang'a who is the registered proprietor of all that property known as LR No. 209/7383/356 situate within the Kimathi Estate in Nairobi. The deponent says she is the Contractor on site for the construction of 110 Apartments duly approved by the City Council of Nairobi, the 1<sup>st</sup> Defendant herein. The deponent concedes that she was served with the court order on 12/10/2009 and that her understanding of the order was that it was the 2<sup>nd</sup> Defendant who was expected to obey the order. The deponent says that after receiving the court order, she was advised by her advocate, M/s Wanjiku Ithondeka to halt all works on site until further orders of the court; and further that the project consultants have since advised her to stop all works on site pending the outcome of the court case. The deponent however says at paragraph 15 of her Replying Affidavit that as a Contractor, she has an obligation to maintain the works on the site by pouring of water on the works which she admits to doing.

5. The 2<sup>nd</sup> Replying Affidavit is sworn by David Ntongai Baimula on the 3/11/2009. Mr. Baimula says he is the Acting Chief of Bahati location, Pumwani Division Nairobi. Though the deponent questions the presence of the court process server, Mr. Kennedy M. Nyamweya, the deponent concedes that he received this court's order of 7/10/2009 in his office and proceeded to serve the order upon the Contractor on site, Jacqueline Wambui Njeru on 12/10/2009. Mr. Baimula says that the Plaintiff personally took the court order to the Chief's office and also accompanied Mr. Baimula to the suit premises for service of the order upon Jacqueline Wambui Njeru.

6. The 3<sup>rd</sup> Replying Affidavit is sworn by Njoroge Wachira, advocate. Mr. Wachira avers that the Applicants/Plaintiff's application is defective and incurably untenable in that –

- a. *The Applicant failed to state the precise date of the contempt.*
- b. *There is absolutely no evidence of personal service.*
- c. *The orders made by the Honourable Lady Justice Sitati on 7<sup>th</sup> October 2009 has not been disobeyed.*
- d. *The procedure was not complied with by the Applicant.*
- e. *The Attorney General was not served.*
- f. *The Affidavit of service at para 13 contradicts (:BK2”) the endorsement on the back of the order allegedly served (“BK 1”)*
- g. *In any case the 2<sup>nd</sup> Defendant was never served with the injunction application giving rise to the*

contempt proceedings as is evident from the 2<sup>nd</sup> Defendants application to discharge the ex parte orders issued on 7<sup>th</sup> October, 2009.

h. The injunction orders were issued after the Applicant lied and misled this Honourable Court as is evident from the 2<sup>nd</sup> Defendants application dated 19<sup>th</sup> October 2009.

i. The process server is penerial liar (sic) as is evident from his own documents.

j. Jackline Wambui Njeru and I are not parties to this suit and cannot be cited for contempt.

Mr. Wachira prays that the Plaintiff, Bernard Kiongo Njau and the process server, Kennedy M. Nyamweya ought to be punished for contempt.

7. The 4<sup>th</sup> Replying Affidavit is sworn by G.K. (George Kiarie) Ng'ang'a on 3/11/2009. Mr. Ng'ang'a depones that on the 12/10/2009 when he is alleged to have travelled to Nairobi, he was in Nairobi and further that he has never been served with any court order or documents by the Plaintiff herein. Mr. Ng'ang'a denies disobeying any court order and that as such he prays that the Plaintiff's application dated 29/10/2009 be dismissed.

8. Regarding Mr. Nganga's Replying Affidavit, counsel for the Plaintiff/Applicant asked the court to strike out the same on the ground that the affidavit has been made by 2 different people. Page 1 of the Affidavit shows that it is G.K. Nganga, a resident of Naivasha who is making the affidavit while page 2 thereof the deponent of the affidavit is shown to be Njoroge Wachira. When taken to task over this anomaly, the Respondents' counsel did not give a response. In the mind of the court, this affidavit sworn by G.K. Nganga and Njoroge Wachira in the same breath cannot stand. The same is expunged from the record.

### **The Genesis of this Application**

9. The Plaintiff/Applicant commenced this suit by filing a plaint dated 1/10/2009. The Plaintiff brings the suit as a resident of Kimathi Estate and one of the purchasers of Land Reference No. 209/7383 (the suit land). The Plaintiff seeks among other reliefs a permanent injunction to restrain the Defendants from interfering with the Plaintiff's quiet possession of the suit land and in particular plot 356 thereof.

10. The Plaintiff also filed together with the plaint a chamber summons application dated 1/10/2009 in which he seeks injunctive orders against the Defendants to restrain the said Defendants from entering into, constructing and/or interfering with all that parcel of land known as LR No. 209/7383/356, Kimathi Estate Nairobi pending the hearing and determination of the suit. On the 7/10/2009 a temporary order of injunction was granted to the Applicant in terms of prayer (2) of the application. The interim order was to last until 13/11/2009 when the matter was slated for mention for taking a date for interparties hearing. That is the order which the Plaintiff/Applicant says the Defendants and others have disobeyed.

### **The Plaintiff's Submissions**

11. Mr. Nyakiangana for the Plaintiff submitted that the order complained of was duly served upon the Defendants. He submitted that the 2<sup>nd</sup> Defendant cannot deny service of the order because by his application dated 19/10/2009, the 2<sup>nd</sup> Defendant admits the fact of service and only seeks to set aside the injunctive orders. On the 19/10/2009, the 2<sup>nd</sup> Defendant George Kiarie Ng'ang'a filed a Notice of Motion application under Order XXXIX Rule 4, Order VI Rule 13(b)(c), (d) Order XXV Rule 1, Order L Rule 1 of the Civil Procedure Rules and [sections] 3 and 3A of the Civil Procedure Act Cap 21 Laws of Kenya and all other enabling provisions of the law seeking among other orders, an order of this Honourable Court to set aside and/or discharge the orders made on 7/10/2009.

12. The 2<sup>nd</sup> Defendants application is supported by the affidavit of G.K. Ng'ang'a dated 19/10/2009. The deponent says that he learnt of the existence of this suit from the Mrs. Jacqueline Njeri on or about

15/10/2009; and that a copy of the order issued herein was given to him by the said Jacqueline Njeri. The deponent alleges that he was not personally served with the court order. He also says that his offices are not at Windsor House Nairobi but are at Carol Building next to G45 building in Naivasha.

13. According to Mr. Nyakiangania, the fact that the 2<sup>nd</sup> Defendant was aware of the court order was sufficient to hold the 2<sup>nd</sup> Defendant liable in contempt. The Plaintiff/Applicant cited a number of authorities for the assistance of the court on the issue of contempt. It is not necessary to go through each of the authorities but one or two decisions by the Court of Appeal shall suffice. In the case of **Mutitika – vs- Baharini Farm Ltd. [1985] klr 227**, the court held:-

1. *A person one (sic) who, knowing of an injunction or an order of stay, willfully does something, or causes others to do something, to break the injunction or interfere with the stay, is liable to be committed for contempt of court as such a person has by his conduct obstructed justice.*

2. *The standard of proof in contempt proceedings must be higher than proof on a balance of probabilities and almost, but not exactly beyond reasonable doubt, as it is not safe to extend the latter standard on an offence which is quasi-criminal in nature. The guilt of a contemnor has to be proved with such strictures of proof as is consistent with the gravity of the charge.*

3. *The principle must be borne in mind that the jurisdiction to commit for contempt should be carefully exercised with the greatest reluctance and anxiety on the part of the court to see whether there is no other mode which can be brought to bear on the contemnor.*

14. Regarding the first holding above, the learned Judges of Appeal said that a party who willfully tries to break an injunction or interfere with an order of stay, does so so as to “*obstruct the course of justice and so has attempted to set the order of the court at naught.*” Relying on **Chiltern Districts Council – vs- Keane [1985] Law Society Gazette, 29<sup>th</sup> May page 1567**, the Court said that “where the liberty of the subject is or might be, involved, the breach for which the alleged contemnor is cited must be precisely defined, and in **Re Breamblevale Ltd. 1969 3 All ER 1062**, Lord Denning MR (as he then was) said the following at page 1063:-

*“A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be satisfactorily proved. To use the time honoured phrase, it must be proved beyond reasonable doubt.”*

15. The learned Judges of Appeal in the **Mutitika case** thought that Denning MR had set the standard of proof far too high for an offence that was merely of “*a criminal character*” and “*not a criminal offence properly so defined*”, and that “*proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases.*” The court in the **Mutitika case** also referred to **Oswald, J.F.** Oswald’s contempt 3<sup>rd</sup> Edn p. 16 and said,

*“The court, however, has power to restrain by injunction threatened contempts. It is competent for the court where a contempt is threatened or has been committed, and on application to commit, to take the lenient course of granting an injunction instead of making an order for committal or sequestration, whether the offender is a party to the proceedings or not.”* (emphasis is mine)

16. In the instant case, Mr. Nyakiangana has argued that it is admitted by Jacqueline Wambui Njeru that as Contractor for the 2<sup>nd</sup> Defendant, she has continued to water the buildings on the suit property. In spite of the court order restraining the 2<sup>nd</sup> Defendant and his servants and/or agents from entering into and constructing and/or interfering with the suit property. Mr. Nyakiangana argued that the Respondents in this case are guilty of willful disobedience of this court’s orders made on 7/10/2009 by the fact that Jackline Wambui Njeru continues to enter the suit property and to water the buildings.

### **The 2<sup>nd</sup> Defendants Submissions**

17. The 2<sup>nd</sup> Defendants, represented by M/s W.J. Ithondeka contended that the Plaintiff’s application is

fatally defective on account of failure to comply with order 52 rule 2(3) in that no notice of the contempt was given to the office of the Attorney General. To this argument counsel for the Plaintiff/Applicant contended that the Crown Office referred to in Order 52 rule 2(3) is the office of the Registrar of the High Court and that in this case, the notice was duly given.

18. Counsel for the 2<sup>nd</sup> Defendant also argued that the Applicant's application is defective for seeking to cite more than the leave granted allowed. That the leave was in respect of only George Kiarie Ng'ang'a and that Jackline Wambui Njeru and Njoroge Wachira should not be cited in these proceedings. In response, Mr. Nyakiangana for the Applicant submitted that Order XXXIX Rule 2(A)(I) of the Civil Procedure Rules clearly provides that anybody who disobeys a court order is liable to punishment for contempt.

19. Counsel for the 2<sup>nd</sup> Defendant also contended that in the absence of personal service upon each of the 3 citees, namely George Kiarie Ng'ang'a, Jackline Wambui Njeru and Njoroge Wachira, the court ought not to hold the disobedience of the court order against the three. Counsel for the 2<sup>nd</sup> Defendant cited a number of relevant authorities touching on the subject of contempt of court and submitted that the standard of proof required of the Plaintiff/Applicant has not been met.

### **Issues and Findings**

20. The court has now considered the application, the Submissions and the Law. The issue that arises for determination is whether on the fact and the law, it can safely be said that the 3 Respondents are in breach of this court's order issued on 7/10/2009. It is not in dispute that an order of court was issued by this court on 7/10/2009. The court finds that the order was duly served upon Jackline Wambui Njeru and later upon the 2<sup>nd</sup> Defendant, G.K. Ng'ang'a who has offered no response to the Applicant's application. The court also finds that Mr. Njoroge Wachira has been aware of the court order. The court has also considered the authorities cited by both parties in this matter, and according to the **Mutitika** case, it does not matter that the offender of disobedience is not a party to the proceedings in question.

21. The court finds, and it is admitted that Jackline Wambui Njeru has continued during the life of the order of injunction of 7/10/2009 to enter onto the suit land and to water the buildings on the site. She admits at paragraph 9 of her Replying Affidavit that she received the court order but that notwithstanding, she says at paragraph 15 thus –

*“15. THAT further as Contractor I have an obligation to maintain the works on the site which is the routine pouring of water on the works. No construction was going on since the orders were served.”*

22. The court order of 7/10/2009 restrained the Respondents not only from constructing but also from entering into the suit land. The court finds that the breach of its orders in this case has been deliberate and calculated. In the case of **Republic –vs- Chairman Land Disputes Tribunal Kirinyaga District & Another Exparte Kariuki [2005] 2 KLR 10**, Khamoni J said the following at holding number 9, that:-

*“9. A court judgment or court order whether lawful or unlawful, regular or irregular, null or valid, void or legal must be respected and obeyed by all until lawfully discharged if it has to go.”*

23. In the instant case, the Respondents allege that the Applicant obtained the order complained of through lies. The legal position is that howsoever the order of 7/10/2009 was obtained, it had to be obeyed until lawfully discharged. The Respondents, by their application dated 19/10/2009 seek to have the order of 7/10/2009 set aside and/or discharged but until that application is heard and determined, the order of 7/10/2009 demands obedience, whether or not any of the parties is under some other duty to do or carry out certain activities on the suit property. If the latter position were to be maintained, the courts would be issuing orders in vain. There would be chaos as all manner of excuses would be put forth for not obeying this or that court order. In this case GK Kiarie and Njoroge Wachira did nothing to stop Jackline Wambui Njeru from disobeying the order, so the three are all liable.

24. In the result, the court finds George Kiarie Nganga, Jackline Wambui Njeru and Njoroge Wachira guilty of disobedience of this court's order dated 7/10/2009.

25. Having found the Respondents guilty of contempt, the court makes the following orders:-

1. *Each of the 3 Respondents, G.K. Nganga, Jackline Wambui Njeru and Njoroge Wachira are each fined Kshs.100,000/= payable within the next seven (7) days from the date of this ruling.*

2. *In default, an attachment of the properties of each of the 3 Respondents shall be effected in accordance with Order XXXIX Rule 2A(3) of the Civil Procedure Rules.*

3. *Each of the Respondents and in particular G.K. Ng'ang'a shall accord the court bailiff every opportunity to serve and enforce the orders above;*

4. *In default of (3) above, G.K. Ng'anga shall be held personally liable for the compliance of these orders.*

5. *Mention on the 8<sup>th</sup> day or the next working day from the date hereof.*

6. *Costs shall be paid by the Respondents to the Applicant/Plaintiff.*

Orders accordingly.

Dated and delivered at Nairobi on this 17th day of November, 2009.

**R.N. SITATI**

**JUDGE**

Delivered in the presence of:-

P/P for the Plaintiff/Applicants

Miss Ithondeka For the Defendant/Respondent

Weche - court clerk