



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

**Misc Civil Appli. 521 of 2005**

**STEPHEN MUNYASIA .....APPLICANT**

**VERSUS**

**PETER NJOGU GICHUHI .....RESPONDENT**

**R U L I N G**

By a motion dated 3<sup>rd</sup> August 2005, Stephen Munyasia, the applicant herein, beseeched this court to issue the following orders:

- (i) *To cite Peter Njogu Gichuhi, the Respondent herein, for contempt of Court and consequently commit him to civil jail for six months for defying the court orders issued by the subordinate on 19<sup>th</sup> November 2004 and on 16<sup>th</sup> December 2004 vide Mombasa C.M.C.C.C. No. 2200 of 2001.*
- (ii) *An order of Mandatory injunction directing the Respondent to undo what he had put up contemptuously and a prohibitory order restraining the Respondent from further construction on Plot No. 13/33/ Chaani,*
- (iii) *Costs of the application.*

Stephen Munyasia swore an affidavit in support of the motion.

Peter Njogu Gichuhi filed a replying affidavit to oppose the motion. The history of this dispute can easily be traced by perusing material placed before this court. On the 19<sup>th</sup> day of November 2004, Mrs. Beatrice Jaden, who was then a Principal Magistrate issued an order staying the execution of the decree issued vide C.M.C.C.C. No. 2200 of 2001 for 14 days. On the 16<sup>th</sup> day of December 2004, Miss Priscilla Ngigi, the learned Senior Resident Magistrate issued another order vide the same suit in which she ordered for the status quo to be maintained pending the hearing and the determination of the appeal. The learned Senior Resident Magistrate further directed the Respondent not to construct further on the suit premises and not to evict the applicant from the suit premises. The Respondent had obtained judgment against the Applicant over plot No. 13/33, Chaani on 12<sup>th</sup> October 2004. The execution of the decree was stayed by the orders issue on 19<sup>th</sup> November 2004 and on 16<sup>th</sup> December 2004.

It is the submission of the applicant that the two orders were served upon the Respondent and his advocate. By then it is said that the Respondent had just put up a structure up to the foundation level on the suit premises. The Respondent has been accused of blatantly going ahead with the aggressive construction on the suit premises in total disregard of the court order. The Respondent has denied having been served with the court orders hence he claims he did not breach the orders. The respondent further stated that when he was informed by his advocate of the existence of the court orders he immediately stopped further constructions.

I have considered the arguments tendered by learned counsels from both sides. I have also considered the grounds set out in the motion and the facts deponed in the supporting affidavit and the statement of

facts. I have further considered the contents of the replying affidavit. It is not denied that the aforesaid orders were issued. What is in dispute is whether or not the same were served and whether or not the same were breached. The orders of 19.11.2004 is said to have been served upon the Respondent's advocate on 26.11.04. The affidavit of service of Michael Otieno sworn on 26<sup>th</sup> November 2004 indicates that the firm of Kiume Kioko Advocates was served with the court order. The order of 16<sup>th</sup> December 2004 was given to Philip Nzuki a Process Server on 30<sup>th</sup> December 2004 to effect service upon the Respondent. Philip Nzuki filed an affidavit of service he swore on 5<sup>th</sup> January 2005 in which he indicated that he served the order upon the Respondent on 30<sup>th</sup> December 2004 and upon the firm of Kiume Kioko and Co. Advocates on 3<sup>rd</sup> January 2005. The Respondent has denied having been served. He instead said that he was upcountry on 30.12.2004 hence there was no way he could have been served. The process server was cross-examined on the contents of the affidavit on 16<sup>th</sup> February 2006. He was consistent in his averment that he personally served the respondent who was pointed out by the applicant. In the end I am satisfied that the order issued on 19<sup>th</sup> November 2004 was served upon the advocate but not on the client, the Respondent. I am also convinced that the Respondent was personally served with the order of 16<sup>th</sup> December 2004. His advocate was also served. A careful perusal of the order will reveal that the same is very clear in its terms hence well understood by the Respondent. The order was unambiguous that the Respondent was prohibited from further constructions on the suit premises. It is not denied by the Respondent that he continued with the constructions but he only stopped when his lawyer advised him to do so. The Respondent was directed to stop what he was doing by a court of law but he chose to disobey the same until his lawyer warned him. I find him in contempt of court hence he must suffer for the consequences of such a breach. I have been urged to jail him for six months and to further order for the structures put up to be demolished. After a careful consideration I am convinced that the Respondent should be given an option of paying a fine instead of a custodial sentence. I sentence him to pay a fine of Kshs.120,000/- within 30 days from the date hereof in default to serve three (3) months civil jail. As of now I will not issue the order of demolition of the structures but I direct that the issue awaits the outcome of the appeal.

**Dated and delivered at Mombasa this 2<sup>nd</sup> day of May 2008.**

**J. K. SERGON**

**J U D G E**

In court in the presence of Kiume Kioko for the Respondent and

Mr. Wameyo for the Applicant.