



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

**Civil Case 620 of 2007**

**PETER KIMUNYA NJOROGE..... 1<sup>ST</sup> PLAINTIFF**  
**RAHAB MUGURE KAMAU..... 2<sup>ND</sup> PLAINTIFF**  
**VERONICAH WAMBUI BUTI..... 3<sup>RD</sup> PLAINTIFF**  
**WAHU MBUGUA..... 4<sup>TH</sup> PLAINTIFF**

*[Suing on their own behalf and on behalf of 140 other members/  
shareholders of Mukuyu-ini Farmers Company Ltd listed in the Complaint herein]*

**VERSUS**

**STEPHEN WAWERU NJENGA..... 1<sup>ST</sup> DEFENDANT**  
**MICHAEL NDIRANGU WAHOTI..... 2<sup>ND</sup> DEFENDANT**  
**STEPHEN KIARIE NJENGA..... 3<sup>RD</sup> DEFENDANT**  
**PAUL GITAU MBUI..... 4<sup>TH</sup> DEFENDANT**

**RULING**

This Ruling relates to an objection, raised during hearing on 26.06.08 of notice of motion dated 02.05.08, to any reference being made by plaintiffs/applicants to an affidavit of service by Wilson Wambua Nguta, process server sworn on 02.05.08. The defendants'/respondents' complaint regarding the affidavit is that the affidavit of service was not served on the defendants and that it was not annexed to the notice of motion dated 02.05.08 applying for committal of the defendants to civil jail for 6 months or have their properties confiscated, or both, for defying court orders made by Rawal, J on 03.10.07, with the consent of the parties. Defendants'/respondents' counsel complained that his clients are not aware of the contents of the affidavit of service and that if reference is made to it by plaintiffs/applicants, the defendants/respondents will be denied an opportunity of commenting on it.

For his part, plaintiffs'/applicants' counsel acknowledged that the affidavit of service was not annexed to the notice of motion dated 02.05.08 but pointed out that it is referred to at paragraph 5 of the supporting affidavit of Evans Wachira sworn on 02.05.08. Plaintiffs'/applicants' counsel added that the defendants/respondents had never raised the issue of non-service of the affidavit of service before; that the affidavit is part of the court record; and that affidavits of service are not served as they are merely

intended to prove to the court that service had been effected. It was plaintiffs'/applicants' counsel's contention that if the defendants/respondents wanted to look at the affidavit of service, they could have asked for it from plaintiffs' counsel or peruse the court record which is a public record. Plaintiffs'/applicants' counsel pointed out that the affidavit of service is also referred to at paragraph 5 of the further affidavit of Wahu Mbugua (4<sup>th</sup> plaintiff) sworn on 28.05.08. Plaintiffs'/applicants' counsel also pointed out that the further affidavit of Paul Gitau Mbui (4<sup>th</sup> defendant) sworn on 11.06.08 does not raise the issue of service of the court order in question. Plaintiffs'/applicants' counsel likewise pointed out that on 03.06.08 the defendants sought, and obtained, leave to file a further affidavit in response to Wahu Mbugua's further affidavit sworn on 28.05.08; that Paul Gitau Mbui (4<sup>th</sup> defendant) swore a further affidavit on 11.06.08 in response to Wahu Mbugua's further affidavit of 28.05.08 but did not raise the issue of service of the court order alluded to at paragraph 5 of the said Wahu Mbugua's further affidavit sworn on 28.05.08.

Plaintiffs'/applicants' counsel submitted that the defendants'/respondents' objection is ill-intended; that they are looking for a string on which to hang for purposes of defeating the substantive notice of motion application now before court; that there is no merit in the objection but is merely intended to impede the cause of justice and that the objection should be dismissed.

In reply, defendants'/respondents' counsel pointed out that the issue of service of the court order in question is crucial to an application for orders of contempt of court like the present application and that the affidavit of service of the order is a core document for purposes of the application. He said this is the first time the application was coming up for hearing and that there was no other forum at which the issue of service of the order could have been raised before. Defendants'/respondents' counsel added that it is in any case not correct to say the issue of service of the court order had not been raised before. In the latter regard he referred to the replying affidavits of all the defendants sworn on 22.05.08 where, at paragraph 3, each of the defendants denied having been served with the court order in question (which they erroneously stated to have been made on 13.10.07, instead of 03.10.07). Defendants'/respondents' counsel submitted that it was not necessary for the defendants to repeat their denial of service on them of the court order in any subsequent affidavit. With regard to non-mention of the issue of service of the court order in Paul Gitau Mbui's further affidavit sworn on 11.06.08, defendants'/respondents' counsel pointed out that leave to file that further affidavit was for purposes of responding to specific paragraphs in Wahu Mbugua's further affidavit sworn on 28.05.08, i.e. paragraphs 8, 9 and 10, considered by defendants to have raised new issues and that the said Paul Gitau Mbui's further affidavit sworn on 11.06.08 concerned itself with those specific paragraphs, which had nothing to do with the issue of service of the court order.

Defendants'/respondents' counsel submitted that the affidavit of service of the court order is paramount to the application under consideration; that it should have been annexed to the application; that failure to annex the affidavit is fatal; and that the plaintiffs/applicants should either proceed without reference to the affidavit of service or withdraw their application.

I have given due consideration to the rival arguments of the parties regarding non-annexing of Wilson Wambua Nguta's affidavit of service sworn on 02.05.08 to the notice of motion dated 02.05.08 and to non – service of the affidavit of service on the defendants.

No legal provision or any precedent was cited for the propositions that an affidavit of service must be annexed to an application for orders of contempt or that such affidavit of service need not be served on a respondent to such application.

The plaintiffs'/applicants' notice of motion application now under consideration avers vide grounds 2 and 3 that the court order in question was duly served on the defendants/respondents and that they disobeyed the said order thereby making the present application necessary. The application is supported by the affidavit of Evans Wachira sworn on 02.05.08. He deponed that he is an advocate having the personal conduct of the suit herein on behalf of the plaintiffs/applicants; that he sent Wilson Wambua Nguta, process server to serve the court order in question; that he, Evans Wachira believes Wilson Wambua Nguta duly served the court order as averred by him in his affidavit of service sworn on

02.05.08 and filed on 02.05.08. The extracted court order was annexed to Evans Wachira's affidavit in support of the plaintiffs' application. Each of the defendants denied being served with the subject order vide paragraph 3 of his affidavit in the following identical terms:

**'3. THAT I have neither been personally served with orders made on 13.10.2007 nor have I been served with the penal notice as alleged in paragraph 5 of the affidavit by Evans M. Wachira or at all.'**

As recorded earlier in this Ruling, defendants'/respondents' counsel objected to the affidavit of service by Wilson Wambua Nguta being referred to, and by implication being relied on, by plaintiffs/applicants since it was not annexed to the notice of motion application or served on the defendants/respondents, to afford them an opportunity to comment on it. Defendants'/respondents counsel went as far as contending that the omission is fatal. There is no doubt in my mind that the issue of service of the subject court order is crucial to the application before court. The issue was not, however, sprung upon the defendants/respondents at the hearing of the plaintiffs' application on 26.06.08. It was averred in the application itself and deponed to in the supporting affidavit of Evans Wachira sworn on the same date as the application, i.e. 02.05.08. What the defendants/respondents were not furnished with are the actual contents or details of the process server's affidavit of service of the court order made on 03.10.07. The order itself made on 03.10.07 is annexed to the affidavit of Evans Wachira sworn on 02.05.08 in support of the application of the same date but in denying service of the court order upon them, the defendants/respondents made reference to an order purportedly made on 13.10.07!

As a court of justice, I hold that the defendants/respondents are entitled to be furnished with the actual contents or details of the affidavit of service by Wilson Wambua Nguta sworn on 02.05.08 and given an opportunity to respond to the said affidavit directly; that non-furnishing by the plaintiffs/applicants of Wilson Wambua Nguta's aforesaid affidavit of service to the defendants/respondents alongside their application is not fatal to the application; and that it is not too late for the defendants/respondents to be afforded the opportunity to respond to the affidavit of service even at this stage. Accordingly, I make the following orders:-

1. Plaintiffs/applicants to serve Wilson Wambua Nguta's affidavit of service sworn on 02.05.08 upon the defendants/respondents by close of business on Wednesday 09.07.08.
2. Defendants/respondents granted up to Wednesday 16.07.08 to file and service affidavit response to the aforesaid Wilson Wambua Nguta's affidavit of service, with corresponding leave to plaintiffs/applicants to file and serve affidavit response thereto if need be by Monday 21.07.08.
3. Parties to take a date for further hearing of the notice of motion application dated 02.05.08 taking into account the aforementioned events.

Orders accordingly.

**Delivered at Nairobi this 8<sup>th</sup> day of July, 2008.**

**B.P. KUBO**

**JUDGE**