



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
Civil Appeal 56 of 2003**

ISAAC KARURI NYONGO)

PETER MIRINGU KIBUI) APPELLANTS/APPLICANTS

VERSUS

RUIRU SPORTS CLUB RESPONDENTS

(Appeal from the original Ruling in Principal Magistrate's Court at Thika Civil Case

No. 773 of 2002 dated 30th day of April 2003 by Mr. Alex Anambo P.M. – Thika)

R U L I N G

On 16th March 2004, this court granted leave to Isaac Karuri Nyongo and Peter Miringu Kibui (hereinafter referred to as the Applicants) to file contempt proceedings against Ronald Grahame Timmis a trustee of Ruiru Sports Club (hereinafter referred to as Timmis). By a notice of motion dated 23rd March 2004 the applicants moved the court under section 3A of the civil Procedure Act and section 5 of the Judicature Act Cap 8 to have Timmis committed to civil jail for failure to comply with the court order dated 17th July 2003.

The order of 17th July 2003 which was issued by this court was in the following terms:

“That temporary injunction is issued to the Respondent their servants/agents restraining them from wasting and or damaging the beacons of all that parcel of land known as LR No. 122/4 East of Ruiru measuring 30 acres and/or interfering with the Appellants by way of threats of any kind or causing the appellants to be arrested until the find determination of this appeal.”

The Respondent indicated on the face of the order is “Ruiru Sports Club.” According to an affidavit of service sworn by one John Waweru a process server the order was served on Timmis who is a trustee of the Respondent on the 23rd October 2003 at the Nairobi Law Court in the presence of the Applicants.

It is contended that notwithstanding such service on the 11th March 2004 in contempt of the orders, “The Respondents, and Mr. Murunga the Manager of the Respondent, Mr. Mbugua O.C.S. Ruiru Police Station and other people numbering about 40 entered into the said parcel of land damaged and pulled down the fence, beacons and damaged and demolished buildings worth millions of shillings.”

From the submissions made by the respective counsels various issues have arisen as follows:-

- **Whether the Respondent was personally served with the orders and a penal notice.**
- **Whether the Respondent against whom the order was directed exists given that**

Ruiru Sports Club is not a corporate entity but is registered under Cap 286 as “Registered Trustees Ruiru Sports Club.”

- **Whether Timmis was a proper party to be cited for contempt.**
- **Whether the order was ambiguous as the agents and servants of the Respondent were not clearly spelt out nor was any specific breach alleged against Timmis.**
- **Whether the Respondent was entitled to be heard given that no grounds of opposition or replying affidavit was filed.**

In the case of **Ochino & Another v/s Okombo & others [1989] KLR 165** at page 167 the court of Appeal stated as follows:

“The power to deal with contempt of court is provided for under section 5 of the Judicature Act (Cap 8) and order 39 rule 2(3) of the civil procedure Rules. We have to follow the procedure and practice in England. As we read the law, the effect of the English provisions is that as a general rule, no order of court requiring a person to do or abstain from doing any act may be enforced (by committing him for contempt) unless a copy of the order has been served personally on the person required to do or abstain from doing the act in question. The copy of the order served must be indorsed with a notice informing the person on whom the copy is served that if he disobeys the order, he is liable to the process of execution to compel him to obey it.”

It is evident that the Respondent being a body whose property is vested under registered trustees under Cap 164 Trustees (perpetual succession Act) service could only have been properly effected through its registered trustees. The order therefore ought to have been directed to the registered Trustee who ought to have been specifically named in the order. Timmis being one of the registered Trustees could be properly cited for contempt provided the order was specifically directed to him and properly served on him together with the penal notice.

In this case although there is the evidence of the process server that an order was served on Timmis, the order was not specifically directed to Timmis. Moreover there is no evidence that the order served on Timmis was endorsed with a notice of penal consequences. Nor is there any evidence of any specific breach alleged against Timmis.

It was submitted that the Respondent was not entitled to be heard given that no grounds of opposition or replying affidavit was filed. There is clearly a confusion between the Respondent which was Ruiru Sports Club and Timmis against whom the orders for committal are sought in this application. A replying affidavit was properly filed by Michael Albert Allen Harris a Registered Trustee of the Respondent in which he addressed the issues raised by the applicants. Timmis had earlier filed an affidavit on 23rd February 2004 which was already part of the court record. Order 50 rule 16(1) was therefore complied with and the issue of the Respondent not being heard did not arise. Of course it would have been desirable for Timmis against whom the allegations were being made to specifically respond to the allegations. His failure to do so did not however prejudice his position as the burden was upon the applicants who were alleging contempt to prove these allegations. As stated by the court of appeal in the case of **Mutitika v/s Baharini Farm Ltd. [1985] KLR 227** (which was cited by the Respondent’s Counsel).

“the standard of proof in contempt proceedings must be higher than proof on a balance of probabilities, almost but not exactly beyond reasonable doubt.”

In this case the persons alleged to have committed the acts of contempt were the Respondent, its Manager a Mr. Murunga, the O.C.S Ruiru, a Mr. Mbugua and a group of unnamed 40 persons. Mr. Timmis is not named as having committed the alleged acts of contempt, he cannot therefore be said to have knowingly and deliberately acted contrary to the court order.

The upshot of the above is that this application must fail as there is no evidence that the order alleged to have been served on Timmis was properly endorsed with a notice of penal consequences. The order was also ambiguous it not being directed to any specific person and finally there is no evidence that Timmis committed any act or omissions which were in disobedience to the court order.

The application dated 23rd March 2004 is therefore dismissed with costs.

Orders accordingly.

Dated signed and delivered this 22nd day of July 2005.

H. M. OKWENGU

JUDGE