



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

**MISCELLANEOUS CASE NO. 187 OF 1998**

**IN THE MATTER OF: ORDER LIII RULES 1 CIVIL PROCEDURE  
RULES**

**A N D**

**IN THE MATTER OF: AN APPLICATION BY SWALEH SALIM  
HADI FOR LEAVE TO APPLY FOR JUDICIAL  
REVIEW**

**A N D**

**IN THE MATTER OF: CRIMINAL CASE NO. 418 OF 1998  
(MUNICIPAL COURT) OF THE RESIDENT  
MAGISTRATE’S COURT AT MOMBASA  
(REPUBLIC VS AWITI BOLO)**

**B E T W E E N**

**THE REPUBLIC**

**- Versus -**

**THE RESIDENT MAGISTRATE**

**(G.N. KATASI) ..... RESPONDENT**

**- Versus -**

**AWITI BOLO ..... INTERESTED PARTY**

**EX-PARTE**

**SWALEH SALIM HADI ..... APPLICANT**

**R U L I N G**

By his application by way of Notice of Motion dated the 13th February 1998, the Ex-parte Applicant, Swaleh Salim Hadi seeks to have the interested party, Awiti Bolo also known as Hezron Awiti Bolo, cited for contempt of court. It is alleged that he disobeyed the order of this court given in HCMisc. App. No. 206 of 1998 on the 30th October 1998 by demolishing the premises occupied by the Applicant on the 14th November 1998, 5th December 1998 and 18th December 1998.

The Application is strenuously opposed. One of the issues raised by Mr. Asige, counsel for the alleged contemnor, is that the application is incompetent for failure by the Applicant to personally serve the alleged contemnor with copies of the application for leave together with the supporting affidavit as well as the statement as required by Rule 3(3) of Order 52 of the English Supreme Court Practice Rules. That rule provides that:-

**“52/3(3) subject to paragraph (4), the notice of motion accompanied by a copy of the statement and affidavit in support of the application for leave under Rule 2, must be served personally on the person sought to be committed”**

This provision is clearly mandatory. The documents must be served personally on the alleged contemnor. Mr. Njoroge, quite properly, conceded that they were not. Instead they were served upon M/s Asige

Keverenge & Anyanzwa Advocates. In **Nyamodi Ochieng – Nyamogo & Another Vs Kenya Posts and Telecommunication Corporation, Civil Application No. NAI 264 of 1993** the Court of Appeal while dealing with the issue of service of the order alleged to have been disobeyed stated that service on counsel for the alleged contemnor was “a wasted effort”. In the same judgment the court stated:-

**“The consequences of a finding of disobedience being penal, the party who calls upon the court to make such finding must show that he has himself strictly complied with the procedural requirements and his failure to so comply cannot be answered by merely saying that the other side was aware or ought to have been aware of what the order required him to do.”**

In the circumstances the Applicant having failed to personally serve the Respondent with copies of the application for leave together with the supporting affidavit as well as the accompanying statement this application is incompetent and the same is hereby struck out with costs to the Respondent.

DATED and delivered this 2nd day of November, 2004.

**D.K. Maraga**

**Ag. JUDGE**