



No.194/2014

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CIVIL SUIT NO. 108 OF 2010**

**PAUL NDIVO NDAMBUKI.....1<sup>ST</sup> PLAINTIFF**

**JOB MUIA KITAVI .....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**WILSON MULOTA SILA.....1<sup>ST</sup> DEFENDANT**

**JOHN KITAVI KIOKO.....2<sup>ND</sup> DEFENDANT**

**ISAAC MWANGANGI KIOKO.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. By way of Notice of Motion the Applicants/Plaintiffs have sought to move this court pursuant to the provisions of **Section 1A and B** of the **Civil Procedure Act** and **Order 40 rules 2 and 3** of the **Civil Procedure Rules**; for an order that the respondents herein be committed to civil jail for a period of **six (6) months** for defying with impunity the order of injunction issued on **16/3/2011** accompanied by **Penal Notice** on **18/3/2011**.
2. The application is premised on grounds that the court issued orders of injunction restraining the respondents from trespassing, encroaching or in any manner interfering with the plaintiff's use, enjoyment and quiet possession of the suit land; the Court Orders and Penal Notice were served upon the respondents and they have defied the court order with impunity and have sold the suit land to unsuspecting people who have fenced it off and blocked two (2) access roads leading to the homestead of the applicant. Therefore the respondents should be punished for contempt.
3. The application is supported by an affidavit sworn by the 1<sup>st</sup> applicant who reiterates what is stated in the grounds in support of the application; and an affidavit deponed by **Phillip Mwoki** who effected service of the court order on the defendants.
4. The application herein is brought pursuant to the **Provisions** of **Order 40 rule 2 and 3** of the **Civil Procedure Rules**. Breach of an injunctive Order is punishable by imprisonment. This court derives the jurisdiction to punish for contempt from statute. **Section 5** of the **Judicature Act** provides thus:-

***“(1) The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority***

*and dignity of subordinate courts.*

*(2) An order of the High Court made by way of punishment for contempt of court shall be appealable as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the High Court”.*

5. The procedure of instituting an application for contempt in England is provided for under **Order 52** of the **Supreme Court Practise Rules**. Which state thus:

*“... 2(1) No application... for an order of committal against any person may be made unless leave to make such an application has been granted in accordance with the rule.*

*2. An application for such leave must be made ex parte to... court... and must be supported by a statement setting out the name and description of the applicant, the name description and address of the person sought to be committed and the grounds on which his committal is sought, and an affidavit, to be filed before the application is made, verifying the facts relied on”.*

*3) The applicant must give notice of the application for leave not later than the preceding day to the crow office and must at the same time lodge in that office copies of the statement and affidavit”.*

6. It is imperative for the Attorney General to be notified of the proceedings because the proceedings are *quasi- criminal* in nature. The contemnor has to be incarcerated by the State if the order is granted. Therefore failure to notify the Attorney General of the intention to institute proceedings is a matter of substance that cannot be overlooked (see ***John Mugo Gachuki versus New Nyamakima Co. Ltd Civil Case No. 456 of 2011***).
7. The applicant herein failed to comply with the law hence the application is incompetent. Being unmerited, it is dismissed with no orders as to costs.

**DATED, SIGNED and DELIVERED at MACHAKOS this 12<sup>TH</sup> day of FEBRUARY 2014**

**L.N. MUTENDE**

**JUDGE**