



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NYERI**  
**ENVIRONMENT AND LAND COURT**  
**E.L.C. NO.109 OF 2013**

**ELIZABETH WARUGURU.....PLAINTIFF**

**VERSUS**

**MOSES KANYINGI.....DEFENDANT**

**R U L I N G**

The application before court is dated 26/6/2014 wherein the applicant seeks prayers that the contempt proceedings herein be set aside and the plaintiff/applicant be released unconditionally.

The application is based on grounds that no order was served to the defendant/applicant in person and that no penal notice was attached to the orders extracted in court. The defendant/applicant is an old man ailing and being frustrated by his family. That the defendant/applicant has not disobeyed any court orders. It is only the plaintiff/respondent who is peddling untruths.

The application is based on the affidavit of Moses Kanyingi sworn on 26/6/2014 and filed on the same date. The import of the supporting affidavit is that the defendant is currently residing in King'ong'o Maximum where he is committed in prison for six months for contempt. That he would not show any contempt to the court and he is a law abiding citizen and has never been served with any orders in this matter or within any other matter.

That even though he is the registered proprietor of all the parcel of land known as **Tetu/Muthuaini/46** and **Tetu/Muthuaini/34**, he has no access to the said parcels of land. His family led by his wife had taken over the said 2 parcels of land and have leased out the said parcels of land to strangers and that he has nowhere to farm on the land. That it is not true that his wife helped develop the said pieces of land or acquired the same as he acquired the same by direct purchase whilst he was working with Nairobi City Council.

He has subdivided his land between his children and his wife. The only portion which he had sold for his maintenance had been excised by his wife who had given it out to strangers. The plaintiff is economical with the truth and conspiring with his children and has chased the defendant from home. The defendant is an old man who cannot farm and the plaintiff has denied him access and rented the land to other people leaving him ailing without food. The defendant has no wish to sell the properties of his sons and their mother. His advocate on record informed him that in contempt proceedings the standard of proof is higher than balance of probability but lower than beyond reasonable doubt. He has never been personally served with any orders nor no penal notice was attached to the said order making it defective

ab initio. The said orders were maintaining status quo as it was and that he should also claim **Tetu/Muthuaini/32** which is registered in the exclusive name of his wife. His family wishes him to die in prison so they can inherit his properties. That it would be in the interest of justice if he is released pending the hearing of this application.

The respondent filed a replying affidavit stating that the applicant is not telling the truth as he was personally served with notice of motion dated 3/6/13 together with orders of injunction issued on 4/6/13 for interparties hearing on 18/6/13 and there is an affidavit of service filed on 12/6/2013 on record.

The plaintiff moved to court to protect their matrimonial home which is on the suit land which she developed extensively. The applicant resides on the suit land and it is not true that she has leased the land as she is not a registered proprietor and she only cultivate the land for her subsistence. That they acquired the suit land together after they got married around 1960 and she contributed financially and physical labour. She denies the allegations made in paragraph 6 of the supporting affidavit and she has no intention of chasing away the applicant as alleged. The applicant has been a perpetual drunkard and is bent on selling the family land for purposes of drinking and wasting the land. The plaintiff has not rented the land as alleged. The children have no problems with the applicant at all only that they are opposed to him selling the land to take alcohol.

That the allegations contained in the letter dated 25/6/14 are not true but aimed to misleading the court to have the applicant released from prison. The applicant has been using the provincial administration and police to harass the respondent and her family. The only issue in the proceedings is violation of court order which the applicant has done. That she had indicated in paragraph 3 that when the application came for interparties hearing on 18/6/13 both the applicant and his advocate were in court. The interim orders were confirmed pending hearing of the suit hence no new orders were issued.

**Mr. Wahinya** for applicant submitted that he applicant has not done any act in breach of the court order. He was not served with the orders made on the 18/6/2013. Moreover, the orders did not include any penal notice hence the orders made should be vacated. He relied on **Ochimo & another -VS- Okombo & 4 others**. He also relied on **Awath -VS- Marumbu and Kariuki & 2 others -VS- Minister for Gender and Sports**.

**Mr. Waruinge** opposed the application as there was no new evidence produced by the applicant and that there was no right of appeal against the orders of contempt. The applicant has not explained why he was not in court on the hearing date when the application was allowed on merit. He submitted that the issue of penal notice is a consequence of English Procedure as order 40 of the Civil Procedure Rules under which the application is made is entirely under a different procedure. Under order 40, the penal notice is not required according to Mr. Waruinge. Injunction are different from other orders. He submitted that the case of ***Kariuki & 2 Others V Minister for Gender, sports, culture & social services (2004) 1KLR*** can be distinguished because it was not an injunction. He argued that the applicant was aware of the orders when the same were extended. He was also served with the orders on 4/6/2014.

He relied on the case of **John Mbasio & 4 others -VS- City Council of Nairobi**.

The chronology of events in this matter is that on the 18th June 2013 this court gave an order that was issued on the 19th day of June 2013 to the plaintiff, Elizabeth Waruguru against the husband Moses Kanyingi, granting her temporary injunction restraining the defendant his servants and/or his against from subdividing selling, transferring, interfering or any other manner dealing with land parcel **L.R. Tetu/Muthuaini/46** and **Tetu/Muthuaini/34** pending hearing and determination of the suit.

On the 12/4/2014, the plaintiff applicant filed a Notice of Motion urging this court to order that the defendant/respondent's property to be attached and/or be detained in prison for a period not exceeding six months for disobeying court orders. The application was grounded on the allegation that the defendant was in the process of disposing the suit property which is a matrimonial home in blatant disobedience of the court order granted on 18/6/2013 by proceeding to subdivide the land and destroying the applicants property.

When the application came for hearing at 8.30am on 27/5/2014, both Mr. Waruinge and Mr. Wahinya for applicant and respondent respectively were absent and the court ordered that the same be mentioned on 13/11/2014. However, Mr. Waruinge appeared at 9.30 and intimated to the court that the respondent was violating the orders of the court. This court ordered the applicant to serve the application upon the respondent personally. The matter was scheduled for hearing on 5/6/2014.

On the 5/6/2014, the matter came up for hearing when Mr. waruinge for applicant was present whilst Mr. Wahinya for the respondent was absent. The applicant proceeded with the application and ruling was reserved for the 9/6/2014. On the said date, the ruling was delivered in open court in absence of the counsel but the applicant was present in person.

The court was satisfied that the defendant was served but decided to disobey the court order with impunity hence he was sentenced to imprisonment for a term of six months.

The above happenings necessitating the application dated 26/6/2014. The court identifies the following issues for determination:-

- 1. Whether the Notice of Motion dated 12/5/2014 was properly served.**
- 2. Whether the order made on 18/6/2013 was properly served.**
- 3. Whether the order was accompanied with a penal notice and whether it was necessary.**
- 4. Whether the court has power to reverse the order made on 24/9/2014.**

This court finds that the Notice of Motion dated 12/5/2014 was served on the defendant only and not his advocate Wahinya & Associates Advocates. The affidavit of service sworn by Christopher Wanjohi Wamaitu states at paragraph 2, 3, 4 and 5 that the notice of motion was served upon the defendant at his home near Giakanya factory at 2.10pm. The defendant accepted service but refused to sign the return copies.

Though the court ordered that the defendant be served personally as this was an application for committal of the respondent to jail for contempt, the plaintiff was under an obligation to serve the application on the advocate for the defendant. Failure to do so was a breach of the rules of the civil procedure and therefore the whole contempt proceedings were tainted with procedural irregularity that this court cannot ignore.

This court also finds that there is no evidence that the order made on 18/6/2013 was properly served. Mr. Waruinge did not produce the affidavit of service of the said order but merely relied on the fact that the defendant was aware of the order when it was extended and he was served on the 4/6/2014.

I have perused the affidavit of service filed on 4/6/2014 sworn by Christopher Wanjohi Wamatu where he states that he received a hearing notice dated 27/5/2014. He also received a certificate of urgency and notice of motion dated 12/5/2014. The hearing notice indicated that the application was slated for hearing on the 5/6/2014. The affidavit of service does not state that the applicant was served with the order of the court. This court finds that there is no evidence that the said order was served. Moreover there is no evidence of a penal notice.

Does this court have the power to review its orders made 24/9/2014?

The applicant has approached the court under Order 45 of the Civil Procedure Rules 2010 which provides that any person considering himself aggrieved by a decree or order from which ***an appeal is allowed, but form which no appeal has been preferred*** or by a decree or order from which no appeal is hereby allowed. Let me pause here and find that the applicant falls within order 45 rule 1(a) as he had the right of appeal from the court's decision but chose to apply for review.

The second limb of Order 45 of the Civil Procedure Rules 2010 to be satisfied by the applicant is that the

applicant must discover a ***new and important matter or evidence which after the exercise of due diligence was not within his knowledge*** or could not be produced by him at the time when the decree was passed or the order made. This court is not satisfied that there is any evidence that there is discovery of a new and important matter as envisaged in the rule.

Lastly the order provides that review is available on ***account of mistake or error apparent on the face of record on for any other sufficient reason.***

This court finds that failure to serve the advocate of the defendant/applicant was unprocedural and denied the applicant the right to representation. The court proceeded with the matter on the assumption that the defendants advocate had been served hence committing a mistake on the face of record. I do find that the said mistake is sufficient reason to review the order made on 9/6/2014.

The upshot of the above is that the order of the court made on the 9/6/2014 is hereby set aside and the application dated 12/5/2014 should be heard de novo. Each party to bear its own costs. Orders accordingly.

***Dated, signed and delivered on 6th day of November 2014.***

**A. OMBWAYO**

**JUDGE**