



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUNGOMA**  
**ENVIRONMENTAL CASE NO. 32 OF 2013**

KASEMBELI SANANE..... PLAINTIFF

VERSUS

MARTIN MULI alias FREDRICK SANANE .....1ST DEFENDANT

MUNASI SITATI.....2ND TH DEFENDANT

JOHN NYONGESA.....3RDTDEFENDANT

GEORGE CHETEKA.....4TH DEFENDANT

PETER SANANE MABONGA .....5TH DEFENDANT

**RULING**

By a notice of motion dated 10th April 2013 brought under Order 51 rule 1 and order 40 rule 3(1) of the Civil Procedure Rules, the applicant urged this court to detain the defendants/respondents in prison for a term not exceeding six months.

According to the applicant, the respondents have ignored the order of this court issued on 21st February 2013 served on them and are currently wasting and building houses on the land. He annexed photographs of the land being tilled.

Mr. Areba submitted that the respondent has admitted service of the order at paragraph 11 of the replying affidavit. The application is supported by an affidavit of Kasembeli Sanane – applicant. He averred that the order was served on 22nd February 2013. he prayed for the application to be allowed.

Mr. Sichangi on behalf of the respondents opposed the application. He submitted that the burden of proof for contempt proceedings is beyond reasonable doubt. The photographs annexed are not enough proof as the person who took them is not known; when and where they were taken is also unknown. He submitted that the 2 – 5th respondents are not living on this land.

It is the respondents further submission that the 1st defendant took possession of the suit land in May 2012 before this suit commenced. That the applicant served the pleadings, order and present application

for contempt together so as to ambush them. He also said that the applicant did not obtain leave before commencing these proceedings. He urged the court to dismiss the application with costs.

The court has also taken upon itself to read through the file to try and get the affidavit of service referred to in paragraphs 4 of the supporting affidavit. None was annexed and none is available in the court file. In the application of Jacob Zedekiah Ochiro & another vs. George Ara Okombo Civ. Appl. No. 36 of 1989 (see Odunga's digest on Civil case law & procedure. The court of appeal stated that *"no order requiring a person to do or abstain from doing any act may be enforced by contempt unless a copy of the order has been personally served and endorsed with a notice informing him that if he disobeys the order, he is liable to the process of execution."* No proof of service has been shown to this court and on this account the application must fail.

Secondly, as put by Mr. Sichangi, proof of contempt must be beyond reasonable doubt (see Odunga's digest at page 275 paragraph 671).

what the applicant did is to annexe photographs which are undated.

There is no affidavit to verify who took them and where they were taken.

There is also no evidence of whether all the defendants or part of the defendants are tiling the land. The 2nd – 5th defendants, it was submitted do not stay on the land. The applicant did not swear any further affidavit to clarify to this court who is exactly living on the land amongst the defendants. The applicant has therefore failed to prove beyond reasonable doubt that the respondents have breached the order on 21st February 2013. In any even one of the photos shows grown bananas and vegetables. This court takes judicial notice of the fact that the bananas take time to mature and cannot be the size as seen from the photos within a period of a month. On account of proof beyond reasonable doubt, the application also fails.

I therefore find this application as lacking in merit and proceed to dismiss it with costs to the respondent.

**RULING DATED, SIGNED, READ and DELIVERED** in open court this 5th day of June 2013.

**A.OMOLLO**

**JUDGE.**