



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**ENVIRONMENT & LAND CASE NO. 465 OF 2011**

**NILS BERNARD FRIDE NELSON & 3 OTHERS.....PLAINTIFFS'**

**VERSUS**

**DUNSON KARU & 7 OTHERS.....DEFENDANTS'**

**RULING:**

The applicants' herein have brought this Notice of Motion dated 13/12/2012 for orders that:-

- a. The 2<sup>nd</sup> Defendant **Siko Worme Dawa** do stand committed to jail for such period as the Court may determine for contempt of Court by wilfully violating and/or disregarding the order made by this Honourable Court on 10<sup>th</sup> October, 2010.
- b. That the property of *Siko Worme Dawe* be attached for such period as his Honourable Court may deem fit to grant for contempt of Court by wilfully violating and/or disregarding the order made by this Honourable Court on 10<sup>th</sup> October, 2012.
- c. That cost of the application be paid by the said Siko Worme Dawa on a full indemnity basis.

The application was premised on these grounds:- That following an inter parties hearing on the Plaintiffs' application dated the 6<sup>th</sup> September, 2011 and a Ruling delivered on 10<sup>th</sup> October, 2011, by Justice Nyamweya which gave injunctive orders against the 2<sup>nd</sup> Defendants that:- A formal order was duly extracted on 19<sup>th</sup> October 2012 and served upon the 2<sup>nd</sup> Defendant's Advocates on 23/10/2012 and upon the Defendant personally on 7<sup>th</sup> December, 2012; however, the 2<sup>nd</sup> Defendant knowingly committed action of direct violation of the Order of the court in which injunctive relief had had been issued i.e. he continued to carry on business within the illegally constructed building in the suit property and also commenced construction of a new building on the suit property. The application was supported by the Affidavits of **Joyce Kariuki** and **George Onyango** the process server.

The process server averred that on 30<sup>th</sup> November, 2012, he proceeded to the residence of *Mr Siko Dewa Worme* and served him, personally with the Court order dated 19<sup>th</sup> October, 2012 but he declined to sign it. *Joyce Kariuki* filed a further Affidavit and attached photographic images taken on 14<sup>th</sup> January, 2012 showing the butchery, shop and a car wash in full operation on the suit premises and construction going on.

The application was opposed by the 2<sup>nd</sup> Defendant. The 2<sup>nd</sup> Defendant took issue with the photographic evidence sought to be relied on which he averred cannot pass the evidential test required by Law. He denied that he has continued to construct on the suit premises. The parties herein filed their written

submissions and highlighted on 3/8/2013.

I have read and carefully considered the instant application and the submissions by the parties herein and I find as follows:- There is no doubt that on 19<sup>th</sup> October, 2012 Judge Nyamweya issued an injunctive against the Defendants in this suit. There are five Defendants herein these orders were:-

*“ The Defendants be and are hereby restrained jointly and severally and whether by themselves or by their servants , agents or otherwise howsoever from trespassing alienating or continuing with the construction of any structure and or any way whatsoever interfering with the Plaintiffs’ quiet possession over all that piece of land known as LR No. 209/14527 situated in the city of Nairobi pending the hearing and determination of the suit herein, or until further orders”.*

The above orders are the ones that 2<sup>nd</sup> Defendant is alleged to have breached or violated. That he has continued to carry on business of butchery, shop and car wash as evidenced by the photographs attached to the further Affidavits of *Joyce Kariuki*. However, the 2<sup>nd</sup> Defendant has denied that he has continued to neither construct on the premises nor carry on business on the suit land as alleged by the Applicants.

This is an application for civil contempt and so the liberty of the alleged contemnor is at stake and the Court has to exercise due diligence and care while deciding on this application. The applicants through the Affidavit of *George Onyango* contended that 2<sup>nd</sup> Defendant was served personally though he declined to sign on the copy received to acknowledge receipt. 2<sup>nd</sup> Defendant on his part did not deny service of the Court order or knowledge of the existence of the same as was held in the case of **Nyamodi Ochieng and another Vs Kenya posts and telecommunication Civil Appeal No. 264 of 1993.**

*“ An order for injunction must be served personally and not on the advocates”.*

The applicants are seeking to have the 2<sup>nd</sup> Defendant committed to Civil jail and sell of his property. The applicants must prove their case beyond a reasonable doubt since this is a case which is of Quasi – Criminal nature. This was the findings in the case of **Mwangi HC Wangondu Vs Nairobi City Commission , Civil Appeal No. 95 of 1998,** where the Court held that -:

*“ Proof of contempt should be beyond reasonable doubt”.*

There is no doubt that this Honourable Court issued a Court Order on 10/10/2012. It was an order for injunction. The 2<sup>nd</sup> Defendant has not disputed receipt of the said Court Order. The question now for determination is whether there is evidence that 2<sup>nd</sup> Defendant has disobeyed the said Court order. The applicants in the Further Affidavit of *Joyce Kariuki* attached photographs. It was alleged that those are activities being carried out by the 2<sup>nd</sup> Defendant herein. 2<sup>nd</sup> Defendant denied carrying out those activities. There were no licences attached to the affidavits to show that the businesses are owned by the 2<sup>nd</sup> Defendant and they are actually being carried on the suit premises.

The photographs attached are undated and they do not show where they were taken from and who took them. There was no evidence to link the photographs with the suit property and especially the said Sunflower Academy that is allegedly affected by the car wash business.

It was the allegation of the 2<sup>nd</sup> Defendant that there are 90 other interested persons occupying the suit premises and it was not the duty of the applicants to avail evidence that indeed it was 2<sup>nd</sup> Defendant herein who was running the said business and not the other interested parties. I will wholly concur with the said submissions by 2<sup>nd</sup> Defendant.

Though Applicants has asked the court to attach the 2<sup>nd</sup> Defendant property, the said property was not identified and the court cannot issue an Order which is uncertain. That was the finding in the case of **Barnard Ondiek & Another Vs Chenadu Guangling Kenya Company Ltd & Another HCCC No. 5/2/2011** by Justice Nyamweya.

Having considered the instant application for contempt and the submissions herein, I find that the applicant has failed to meet the required threshold of proof in contempt proceedings.

I will concur with the applicants submitted authority **Mutitika Vs Baharini Farm Ltd Civil Appeal No. 24 of 1985** where it was held that :-

*“ The standard of proof in contempt proceedings must be higher than proof on a balance of probabilities. The guilt of a contemnor or has to be proved with such strictness of proof as is consistent with the gravity of the charge” .*

The Court having found that the required threshold of proof was not met has no other option but to dismiss the applicants’ application dated 13/12/2012 with no orders as to costs.

It is so ordered.

Dated, Signed and delivered this **8<sup>th</sup> July, 2013.**

**L. N. GACHERU**  
**JUDGE**

**8/7/2013**  
Coram Before Gacheru Judge

Court Clerk Anne

M/s Ogalo for Plaintiff/Applicant

None attendance for the 2<sup>nd</sup> Defendant/Respondent

**L. N. GACHERU**

**JUDGE**  
**8/7/2013**

Ruling read in open Court in the presence of M/s Ogalo for the Applicant.

**L .N. GACHERU**  
**JUDGE**  
**8/7/2013**