



Case Number:	Civil Suit 183 of 2011
Date Delivered:	04 Oct 2013
Case Class:	Civil
Court:	High Court at Nakuru
Case Action:	Ruling
Judge:	Roseline Pauline Vunoro Wendoh
Citation:	Henry Kigera Thuo & 2 others v Jackson Maina Mwangi 3 others [2013] eKLR
Advocates:	Mr. Karanja plaintiffs/respondents Mr. Waiganjo for defendants/applicants
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Nakuru
Docket Number:	-
History Docket Number:	-
Case Outcome:	Declined
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

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IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT NO. 183 OF 2011

HENRY KIGERA THUO.....1ST PLAINTIFF/RESPONDENT

PAUL MURAGU MWANGI.....2ND PLAINTIFF/RESPONDENT

FRANCIS KARIUKI NJOROGE (Suing as

trustees of Victorious Gospel International

Church of Kenya).....3RD PLAINTIFF/RESPONDENT

VERSUS

JACKSON MAINA MWANGI.....1ST DEFENDANT/APPLICANT

PENINA WANJIRU MWANGI.....2ND DEFENDANT/APPLICANT

OBED K. KIMANI.....3RD DEFENDANT/APPLICANT

SAMUEL NGIGI (Operating as

Victorious Community Church).....4TH DEFENDANT/APPLICANT

RULING

The plaintiff; Henry Kigera Thuo, Paul Muragu Mwangi, Francis Kariuki Njoroje (Suing as trustees of Victorious Gospel International Church of Kenya) filed this suit against the defendants namely; Jackson Maina Mwangi, Penina Wanjiru Mwangi, Obed K. Kimani, Samuel Ngigi (Operating as Victorious Community Church) seeking to have the court declare that **Nakuru Municipality Block 29/497** and **Naivasha Maraigushu Block 7/771** belongs to the plaintiffs and that titles issued to Victorious Community Church be cancelled and the defendants be restrained from interfering with the said properties.

By an application dated 1/11/2012, the defendants/applicants sought an order of injunction to issue against the plaintiffs/respondents to stop them from interfering with the running of the affairs of the church located on Block 1/1405 and 7/771. They also sought a mandatory injunction to compel the plaintiffs to surrender to them certain items listed in the application. The application was opposed by the plaintiffs. After hearing both parties, J Ouko found that there were '**many grey areas**' that could only be ascertained or confirmed at the trial, and he ordered that the status quo be maintained. I have quoted part of the court's ruling in order to appreciate what the court meant by its order of status quo. The court said:-

"In paragraphs 5 and 5A of the amended plaint, the respondents have deposed that the two parcels in question and No. Nakuru Municipality Block 29/497 belong to Victorious Gospel International Church; that they have developed them and are in possession. They also maintain

that the applicants fraudulently caused the title deeds of the suit properties to be issued in favour of Victorious Community Church

These are serious matters that will require presentation of evidence at the trial. Another serious issue is the position of the deponent of the affidavit supporting this application, Simon Njugia Ngugi. In swearing the affidavit, he states as follows:-

'1. THAT I have been mandated to swear this affidavit by the defendants and the aggrieved members of Victorious Community Church.'

But it is the same Simon Njugia Ngugi who is said to have also authorized the filing of this suit by the respondents. Together with Paul Muragu Mwangi, Simon Njugia Ngugi signed an authority dated 15th July 2011 to Henry Kigera Thuo to bring the suit. On 15th June 2011, he also recorded a statement to be used during the hearing in which he stated categorically that the title deed in respect of the suit property and in the name of Victorious Community Church was obtained fraudulently.

Bearing in mind these factors and the fact that the dispute relates to ownership of land and a church land at that, it is my considered view that any orders that may disrupt worship must not be issued at this stage.

There are too many grey areas that can only be ascertained and confirmed at the trial. In other words, I resort to the last principle as I am in doubt."

The above ruling was dated 8/3/2013 and delivered on 4/4/2013. On 17/5/2013, the defendants filed a notice of motion of the same date seeking the leave of this court to institute contempt of court proceedings against the plaintiffs. The said leave was granted following which they filed the notice of motion dated 21/5/2013, which is under consideration before me today.

On 24/5/2013, the plaintiffs through their counsel Mr. Waiganjo, also moved to the court and sought leave of the court to commence contempt proceedings against the defendants for disobeying the court order issued on 4/4/2013. Leave was granted and the substantive notice of motion was filed dated 29/5/2013. Both applications were urged before me at the same time. I will first deal with the application dated 21/5/2013 filed by the defendants.

The notice of motion dated 21/5/2013 is filed by the defendants namely; Jackson Maina Mwangi, Penina Wanjiru Mwangi, Obed K. Kimani, Samuel Ngigi on behalf of Victorious Community Church and they are represented by Karanja Mbugua Advocate. The application was brought pursuant to **Section 5(1)** of the **Judicature** seeking the following orders:-

b. That the court do make a finding that the following plaintiffs and their agents Henry Kigera Thuo, Paul Muragu Mwangi, Francis Kariuki Njoroge, Stanley Kamuiru Njau, Joseph Karunda, Cyrus Njoroge, Paul Mwangi, Robert Njuhia, Julius Kariithi, Oliver Kinyanjui, Moses Mwaniki and Peter Mungai Kimani are guilty of contempt of court orders and proceed to commit each of them to civil jail for a term not exceeding six months and attachment and sale by public auction of their moveable properties;

c. That due to the nature of the application the contemnors be served with the application through the OCPD Naivasha and be availed in court on the date of the hearing.

The application was supported by the affidavit of Samuel Ngugi, the 4th defendant, dated 14/5/2013, which accompanied the application seeking leave to commence contempt proceedings. He deponed that J Ouko delivered a ruling on 4/4/2013 in which he ordered that the prevailing '**status quo**' in regard to the two subject parcels of land be maintained. According to Samuel Ngugi, the status quo as at the time of filing of the notice of motion dated 1/11/2012 was that the defendants were in possession of the two parcels of land; **Naivasha Maraigushu Blocks 1/1405 and 7/771**; that the court order made on 4/4/2013 was served on all the plaintiffs but instead that the plaintiffs invaded the defendants and the places of worship in the two churches on 12/5/2013, a Sunday, cut the window grills and brought the services to a stand still. He attached copies of the photographs showing the damage caused (SNN III).

The application was opposed. Stanley Njau Kamiiru, who described himself as Pastor and Secretary General of Victorious Gospel International Churches, deponed that at the commencement of this suit, the plaintiffs were in possession of the suit properties and still remain therein to date and that was the status quo as of 4/4/2013 when the court delivered its ruling ordering the status quo to be maintained. He added that the allegation that the plaintiffs are in contempt of the court order is based on an illegal and forged order. He exhibited the proper extracted order (SNK 2). He also exhibited the alleged forged order (SNK 3) and according to him, it is the defendants who are in contempt of the court's order.

Before one can be cited for contempt of a court order, the alleged contemnor must have been personally served with the court order allegedly disobeyed. In the case of **Mwangi Wangondu v Nairobi City Commission** CA 95/1988, the court had this to say:-

"The procedure for committal for civil contempt in England where an order of sequestration is sought is set out under the Rules of the Supreme Court (RSC) order 45 and 46 and in Halsbury's Laws of England, Vol.9 (4th edition) under the heading 'contempt of court'. Briefly the effect of these provisions is that as a general rule, no order of court requiring a person to do or restrain from doing any act may be enforced unless a copy of the order has been served personally on the person required to do or abstain from doing the act in question. The copy of the order served must be indorsed with a notice informing the person on whom the order is served that if he disobeys the order, he is liable to the process of execution to compel him to obey it."

See also **Ochino & Another v Okombo & Others (1989)KLR 165**.

I have seen the affidavit dated 14/5/2013, sworn by Richard Kipkurui Kerich a process server, who was charged with serving the order dated 8/4/2013 (SNN 1). Paragraph 3 of the affidavit states who he effected the service. He indicated that he travelled to Naivasha, then Karagita Maraigushu, he found the plaintiffs and served them. He did not state exactly where he found the plaintiffs, at what time of the day did he serve, whether he knew the plaintiffs or they were identified by the defendants.

Contempt proceedings are quasi criminal in nature and it is incumbent upon the applicant to prove that indeed there was an order of the court which the respondent was aware of but which he ignored or disobeyed. The standard is said to be higher than proof on a balance of probabilities but not as high as proof beyond all reasonable doubt.

See **Gatharia K. Mutitika & 2 Others v Rahamni Farm Ltd (1982-1988)** and **Sher Kamuturi Ltd v v/d Berg Roses Kenya Ltd HCC 347/2008 (NKU)**.

In the notice of motion dated 21/5/2013, the applicants named a total of 12 people as contemnors, that

is:- Henry Kigera Thuo, Paul Muragu Mwangi, Francis Kariuki Njoroge, Stanley Kamuiru Njau, Joseph Karunda, Cyrus Njoroge Karanja, Paul Mwangi, Robert Njihia, Julius Kariithi, Oliver Kinyanjui, Moses Mwaniki and Peter Mungai Kimani. This is contrary to the application for leave where only the plaintiffs were named as contemnors. The defendants, included strangers who are not parties to the suit, in the main application. The question is whether those strangers were served. Even if they were, they are not parties to this suit to be held to be in contempt and the order sought cannot lie against them. The general rule is that an order cannot lie against a person who is not a party to a suit. The above notwithstanding, there is no evidence that the plaintiffs were duly served with that court order as the affidavit of service does not comply with **Order 5 Rule 15** of the **Civil Procedure Rules** on service.

Mr. Karanja submitted that the order dated 4/4/2013 was ambiguous and could not be enforced. In **Ochino's** case, the Court of Appeal held that the court will only punish as a contempt a breach of injunction if it is satisfied that the terms of the injunction are clear and unambiguous. It is the practice that if a party finds that an order is ambiguous, the party should go back to the judge for clarification. Counsel never went back to the court to ask what the court meant by '**status quo**' if indeed he was in doubt. I have reproduced the order of the court above. In the application dated 1/11/2012, the defendants had alleged that the plaintiffs had carried away some properties belonging to the church, defaced the church and repainted its names on it. It meant the plaintiffs were in possession of the suit properties. The court also considered the fact that the plaintiffs had deponed to being in possession of the suit property and the fact that 'Simon Njugia' who had authorized the filing of this suit and had written a witness statement to the effect that plaintiffs were in occupation of the suit land since 1980s had now changed sides to join the defendants and was alleging the opposite. The said Simon Njugia had stated that the property belongs to the plaintiffs. The court found there to be grey areas in the case based on the different positions taken by the said Simon Njugia and the depositions by the plaintiff that could only be resolved at a hearing. The court in making the order, did not want the church services to be disrupted at that stage. The status quo therefore remained what the plaintiffs and the said 'Simon Njugia' had deponed to be in their plaint and statements, that the plaintiffs were in possession of the church premises all the time they came to court.

The plaintiffs have alleged that the defendants used a forged order to solicit the help of the police to evict the plaintiffs from the church premises. I have seen the order that was initially extracted by the defendants (HKT 3). It was extracted on 8/5/2013 and it partly reads as follows:-

"Hereby ordered;

That pending the hearing and determination of this suit, the prevailing status quo on land parcels No. Naivasha/Maraigushu Block 1/1405 and Naivahsa/Maraigushu Block 7/771 shall be maintained such that the plaintiffs do not interfere with the defendants' affairs, church or pastoral services."

The court only ordered that the status quo be maintained and never specified what the plaintiffs or defendants should not do. I have seen the letter written to the Deputy Registrar by the plaintiffs' advocate, Mr. Waiganjo, drawing the Deputy Registrar's attention to the fact that the order extracted by the defendants was forged and did and asked for the recalling of the order. The Deputy Registrar by the letter dated 13/5/2013 did recall the order from Mr. Karanja Mbugua and it is then that the proper order (HKT 2) was issued on 14/5/2013 which excluded the additional phrase whose effect was that the court had in effect granted the defendants' application dated 1/11/2012, seeking an order of injunction to stop the plaintiffs from interfering with the running of affairs of the church. Clearly, that is not the order that J Ouko gave. Even if the above order had been served, it is not the order granted by the court and the plaintiffs would have had no business obeying an order that was not issued by the court. From the

affidavit of the plaintiff, and that of Francis, the plaintiffs were said to be in possession and it would not have been possible that the plaintiffs disobeyed the court order and forced the defendants out of the premises.

Mr. Karanja Mbugua, counsel for the defendant also alleged that the status quo prevailing was also in terms of the order granted by J Omondi in HCC 150/2011 on 26/1/2012, where a consent was recorded that the defendants should not interfere with the plaintiffs' running of Victorious Gospel International Churches in Subukia, Nyahururu, Rimunga (Laikipia West), Kasambara, Karagita and Mara-Njau in Muranga. In HCC 150/11, the parties are as follows; **Victorious Gospel International Church of Kenya** suing through **John Mboi, James Kingori, Lawrence Kamutu and David Kuria against Cyrus Njoroge Karanja, Stanley Kamuiru Njau, Robert Njehia Kiarie, Oliver Kinyanjui Thiongo, Joseph Karunda, Francis Kariuki Njoroge, Henry Kigera Thuo, Paul Murangu Mwangi, Simon Njugia Ngugi and Julius Kariithi Ndungu**. The people who appear on behalf of the plaintiff in HCC 150/2011 are not parties to the instant suit. Most of the defendants are not party to this suit either save for three of them. The parties are not exactly the same. Further, the disputed properties in this case are only two, namely Nakuru Municipality 29/497 and 7/771. In HCC 150/2011, totally different properties are in dispute, that is; Karagita and Mara-Njau in Murang'a, Subukia, Nyahururu, Rimunga Laikipia West, Kasambara. In my view, the order made in HCC 150/2011 by Judge Omondi can not and does apply to this case.

In the end, having found that service of the order on the plaintiffs is in doubt and the fact that the order extracted is not the order that the court issued on 4/4/2013, the plaintiffs cannot be said to have disobeyed any court order. Lastly, had the defendants extracted the order of the court, the issue of the plaintiffs disobeying a court order would not have arisen because the court order of 4/4/2013 maintained the status quo which meant that plaintiffs remain in possession of the disputed premises. In the end, I dismiss the defendants' application for lacking merit.

By the application dated 29/5/2013, the plaintiff sought the following orders:

- i. **The court do make a finding that the defendants, their agents, hereby Jackson Maina Mwangi, Obed K. Kimani, Samuel Ngigi, Peter Kinuthia Njoroge, Peter Mathai Mwangi, Simon Nguguna Ngugi, Tom Njoroge, Godfrey Maina Kamanda, Peter Gitau, Lawrence Kinuti and Newton Maritm are guilty of contempt of court and proceed to convict each of them to civil jail for a term not exceeding 6 months.**
- ii. **That due to the nature of the application, the above cited and named contemnors be served with this application through the OCPD Naivasha so that they can be availed to court in person on the day of the hearing of this application and that their presence in court is mandatory.**

The application was premised on the affidavit of Stanley Njau Kamuiru. Like the defendants, the plaintiffs allege that after Justice Ouko delivered the ruling of 4/4/2013, ordering that the status quo be maintained, the order was extracted on 14/5/2013 (SMK3) but before the plaintiff could extract it, the defendants obtained a forged order allegedly issued on 8/5/2013 in which they added a clause that the plaintiffs were restrained from interfering with the defendants affairs, church and pastoral services (SKM4). Using the said forged order, the defendant served the order and proceeded to lock the church with their padlock, caused havoc and had the plaintiffs locked out between 10th and 12th May, 2013 until counsel on record, Mr. Waiganjo wrote to the Deputy Registrar Nakuru Law courts on 13/5/2013 to recall

the forged order which was done. The registrar's letter recalling the order is dated 13/5/2013 (SNK 3b)

The application was opposed and Obed Kimani, the 3rd defendant swore an affidavit in reply. He deponed that the plaintiffs had merely copied the defendant's notice of motion dated 21/5/2013 verbatim; that the order as exhibited did not reflect the order dated 4/4/2013; that none of the defendants have been served with the order and they only saw it for the first time when the application dated 29/5/2013 was served on them; that there is no affidavit of service filed to demonstrate service. He deponed further that the defendants were in occupation of the suit premises and after the order of 4/4/2013, the plaintiffs hired armed people who stormed the church, broke the doors, windows as evidenced by the exhibited photographs (OK II); that the word status quo was skewed to facilitate the plaintiffs. He further deponed that the order served does not have a penal notice, the application does not contain grounds, that the status quo is that the defendants are in possession; that leave was not granted to commence the application against some of the contemnors and they can not be cited for contempt based on an order of status quo. That the court granted orders in HC 150/2011 and the status quo is as per the orders therein.

I have considered the application, the affidavit in support, that in opposition and submissions by counsel. Just like the defendants' application considered earlier, the plaintiffs also cited people who are not parties to this suit for contempt. The parties cited and who represent the defendants are Jackson Maina Mwangi, Penina Wanjiru Mwangi, Obed Kamau and Samuel Ngigi. However, in prayer I of the Notice of Motion dated 29/5/2013, other names appear namely, Peter Kinuthia Njoroge, Peter Mathai Mwangi, Simion Njugia Ngigi, John Ngotho Njoroge, Godfrey Maina Kamande, Peter Gitau, Lawrence Kanutu and Newton Maritim. When the plaintiffs sought leave of the court to bring contempt proceedings against the defendants vide the application dated 24/5/2013, the said names were not included. It means that no leave was sought to cite the other 8 people for contempt. Besides, they are not parties in the instant suit and no orders can issue against them unless they are joined to the suit. They are irregularly enjoined to this application.

I have observed earlier in this ruling that one cannot be said to have disobeyed a court's order unless they are made aware and properly served with the order. See **Ochino** case (supra). The plaintiffs have not filed any affidavit of service to demonstrate how the court order of 4/4/2013 was served on the defendants which the defendants have allegedly disobeyed. The plaintiffs filed an affidavit sworn by Kennedy Wesonga Ngesa who served the defendants and contemnors with the instant application and no more. As observed earlier in this ruling, contempt of court proceedings are quasi-criminal in nature and the standard of proof is higher than on a balance of probabilities but lower than beyond reasonable doubt. The plaintiffs have not in any way attempted to discharge that burden. They only allege that the order was disobeyed. I find and hold that the plaintiffs did not serve the court order of 4/4/2013 on the defendants and their agents. The court is aware that the order to be served was the one made by Justice Ouko on 4/4/2013 but it was the duty of the plaintiffs counsel to extract it and serve it on each of the defendants personally. The defence counsel had extracted an order that was not issued by the court and if that is what the defendants knew, then it is likely they would go by what was in their possession. There having been no service of the court order on the defendants and their agents, they cannot be said to be in contempt of any court order. In the end, I wish to observe that had the defendants' counsel not extracted an order substantially different from the court order than what the court issued, the destruction of properties and disruption that occurred at the disputed premises would not have occurred and this court must, in the strongest terms, warn counsel for the defendants against such outright acts of dishonestly and cheating as exhibited in the order that was extracted.

For the reasons given in the ruling, I decline to grant any of the prayers sought in the applications dated 21/9/2013 and 29/5/2013 and each party will bear its own costs. Parties are warned to keep the peace.

DELIVERED and DATED this 4th day of October, 2013.

R.P.V. WENDOH

JUDGE

PRESENT:

Mr. Karanja plaintiffs/respondents

Mr. Waiganjo for defendants/applicants

Kenney – Court Assistant



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