



REPUBLIC OF KENYA



**In re Estate of Wanyonyi Bunyasi Namunyu (Deceased) (Probate & Administration
187 of 2011) [2024] KEHC 10403 (KLR) (23 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 10403 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
PROBATE & ADMINISTRATION 187 OF 2011**

DK KEMEL, J

AUGUST 23, 2024

IN THE MATTER OF THE ESTATE OF WANYONYI BUNYASI NAMUNYU (DECEASED)

BETWEEN

GABRIEL WANJALA WANYONYI PETITIONER

AND

FRANCIS WEKESA SIDANI OBJECTOR

RULING

1. Vide a Notice of Motion application dated 17th July 2023, and filed in Court on 18th July 2023, the Objector pursuant to Order 40 Rule 3 of the Civil Procedure Rules, Section 1A, 1B and 3A of the *Civil Procedure Act* and Section 47 of the *Law of Succession Act* seeks orders that the Petitioner be committed to civil jail for a term of six months for contempt of Court having disobeyed orders issued on 4th April 2022 and that the costs of the application be borne by the Petitioner.
2. In support of the application the Objector preferred grounds on the face of the application and further swore a supporting affidavit on 17th July 2023 which was filed in Court on 18th July 2023 wherein he averred that the Petitioner has willfully ignored the Court Order.
3. In response, the Petitioner swore a replying affidavit on 9th October 2023, wherein he avers that he is the Administrator of the estate of the deceased herein; that the application is defective; that he did not disobey any Court orders and that he is not aware of any consent order recorded in this matter resulting in the adoption of the same as an order of the Court given on 4th June 2022. Further, he avers that the Objector herein is not a family member and that his request for more land than other entitled beneficiaries goes against the Certificate of Confirmation of Grant issued on 12th March 2012. Finally, he averred that the alleged Certificate of Amendment of Confirmation of Grant dated 18th April 2023 is not within his knowledge.



4. Vide Court directions dated 19th October 2023, the Objector's application was to be canvassed by way of written submissions. All the parties complied by filing and serving each other with their rival submissions.
5. I have given due consideration to the application, rival affidavits and submissions. This Court has a duty in principle to look at what the application is about and what it seeks. It therefore behooves this Court to be satisfied that prima facie, with no contention, the application is meritorious and that the prayers may be granted. I will therefore proceed to determine the merits of the application based on pleadings and submissions as tendered by the parties.
6. Section 5 of the *Judicature Act* gives the High Court power to punish for contempt of Court in order to uphold the authority and dignity of Courts. Section 47 of the *Law of Succession Act* provides that the High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient while Rule 73 of the Probate and Administration Rules provides that inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.
7. Court orders must be obeyed at all times in order to maintain the rule of law and good order. While discussing the importance of the rule of law and compliance with Court orders, the Constitutional Court of South Africa in the case of *Kristen Carla Burchell vs Barry Grant Burchell*, Eastern Cape Division Case No. 364 of 2005 stated as follows: -

“Compliance with court orders is an issue of fundamental concern for a society that seeks to base itself on the rule of law. *The Constitution* states that the rule of law and supremacy of *the Constitution* are foundational values of our society. It vests the judicial authority of the state in the courts and requires other organs of state to assist and protect the courts. It gives everyone the right to have legal disputes resolved in the courts or other independent and impartial tribunals. Failure to enforce court orders effectively has the potential to undermine confidence in recourse to law as an instrument to resolve civil disputes and may thus impact negatively on the rule of law.”

8. Contempt of Court is in the nature of criminal proceedings and, therefore, proof of a case against a contemnor is higher than that of balance of probability. This is because liberty of the subject is usually at stake and that the Applicant must prove willful and deliberate disobedience of the Court order, if they are to succeed.
9. Contempt has been described in the Black's Law Dictionary as follows:

“Contempt is a disregard or disobedience to the rules or orders of a legislative or judicial body or an interruption of its proceedings by disorderly behavior or insolent language in its presence or so near thereto as to disturb the proceedings to impair the respect due to such a body.”

The court in the case of *Cecil Miller Vs Jackson Njeru & Another* [2017] Eklr stated as follows:

“As to whether the Respondent is guilty of contempt of court, the element of a civil contempt as espoused in the book titled *contempt in Modern Newzealand* were set out as follows-

- a. The terms of the order or injunction or undertaking were clear and unambiguous and were binding upon the defendant.
- b. The defendant had knowledge or proper notice of the terms of the Order.



- c. The defendant has acted in breach of the terms of the order and;
 - d. The defendant's conduct was deliberate.
10. For the instant application to succeed, the Objector must, as guided by the foregoing, prove the terms of the order; knowledge of the terms of the order by the Petitioner; and failure by the Petitioner to comply with the terms of the order. [See the persuasive case of Republic v Attorney General & another Exparte Mike Maina Kamau [2020] eKLR].
11. Upon proof of these requirements, the presence of willfulness and bad faith on the part of the Petitioner would normally be inferred, but the Petitioner could rebut this inference by contrary proof on a balance of probabilities. [See Kristen Carla Burchell vs Barry Grant Burchell (supra)].
12. In this case, it is not disputed that my learned colleague, Ali Aroni-J (as she was then) in a judgement dated and delivered on 1st November 2018, had ordered that the Objector was to rightfully receive 10 Acres from the property LR. NO. KIMININI/KIMININI/358. It is also not in doubt that the parties herein entered into a consent before this court on 4.4.2022 wherein the Objector's application dated 26.1.2022 seeking for rectification of the certificate of confirmation of grant was allowed in terms of prayer (b) thereof. It is also not in dispute that pursuant to the said consent, a rectified certificate of confirmation of grant was duly issued on 18.4.2023 which duly rectified the precious certificate issued on 12.3.2012 and that the new certificate reflected the Objector's 10 acres out of LR. No.KIMININI/KIMININI/358.
13. The Objector contends that in blatant disregard to the said order made for the execution of the transfer documents in order for him acquiring the title possible, the Petitioner has refused to effect the same as the Administrator of the estate of the deceased. It is in this regard that the Objector seeks to cite the Petitioner for contempt of court orders.
14. The petitioner herein contends that he was not served with the court order or the application seeking rectification of the certificate of confirmation of grant and further that he is not aware of the alleged consent entered on 4.4.2022 allowing the rectification of the certificate of confirmation of grant. He further contends that the Objector is not a family member or beneficiary and that the Objector must have misled the court while seeking for the rectification of the certificate. He further maintains that the affidavit of service is false since the alleged spouse mentioned therein is not his wife. He finally contends that there is no available land to be given to the Objector.
15. This court does not condone the deliberate disobedience of its orders or shy away from its responsibility to deal firmly with proved contemnors. It is however trite that a Court order is binding on the party against whom it is addressed. It is also trite that he who alleges must prove.
16. I have perused the court record and note that summons were issued upon the Petitioner to appear and explain why he had not complied with the court orders dated 4.4.2022. Subsequently, a warrant of arrest was issued against the Petitioner who appeared in court on 14.3.2023 and indicated that he had not been aware of the order and undertook to liaise with the Objector so that the issue is resolved. He apologized about his lack of understanding of the orders dated 4.4.2022. He finally confirmed that the Objector is on the land and that he is willing to obey the order if given some time up to the month of June, 2023 but he could do so by the 25.4.2023. Pursuant to the undertaking given by the Petitioner, he was directed to comply with the order of 4.4.2022 failing which the Objector would be at liberty to institute contempt proceedings. As things would turn out, the Petitioner failed to comply with the orders aforesaid and thus the present application was filed by the Objector.



17. It is thus clear that the Petitioner had had knowledge of the order and he did confirm the same when he appeared in court on 14.3.2023 and undertook to comply with the order and was given more time on 20.4.2023 only to fail to do so and thus the court allowed the Objector to file the present application. I have no doubt in my mind that the Petitioner has been aware of the court order and that he has willfully declined to obey. In fact he did appear in court and stated without batting an eyelid that he was not ready to do so. This can be seen by the narrative that he has weaved in his replying affidavit wherein he has claimed that he had not been made aware of the application seeking for rectification of the confirmed grant and further that there is no more land to be given to the Objector yet in the same breath he confirms that the Objector is on the land. It is instructive that the Petitioner has not seen it fit to seek to set aside the consent dated 4.4.2022 and further that the said consent was duly entered into by his learned counsel. Hence, as matters stand, the horses have already bolted from the staple. The conduct of the Petitioner is one of "Uta Do ?" (What will you?). It is therefore quite clear that the Petitioner is in contempt of the court orders. The Petitioner is out to ensure that the Objector does not get his portion of the land as decreed by this court. It is noted that the Petitioner has not even preferred an appeal against the judgement of Aroni J (as she then was) wherein the Objector was awarded 10 acres out of land parcel Kiminini/Kiminini/358. The Petitioner therefore must now be brought to heel and be punished for being in contempt of court orders. The law of contempt is meant for the maintenance of the rule of law and order in society and the dignity of courts. This court will not condone deliberate disobedience of its orders.
18. The upshot of the foregoing observations is that the Objector's application dated 17th July 2023 has merit. The same is allowed as prayed. Matter is now fixed for mention on 20.9.2024 for sentencing.
- It is so ordered.

DATED AND DELIVERED AT BUNGOMA THIS 23RD DAY OF AUGUST 2024.

D. KEMEI

JUDGE

In the presence of:

Gabriel Wanjala Wanyonyi Petitioner

Murunga for Objector

Kizito Court Assistant

