



**In re Estate of Pius Tembete Kwayiya (Deceased) (Succession Cause 400 of 2002) [2024] KEHC 13467 (KLR) (29 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13467 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
SUCCESSION CAUSE 400 OF 2002  
SC CHIRCHIR, J  
OCTOBER 29, 2024**

**IN THE MATTER OF THE ESTATE OF PIUS TEMBETE KWAYIYA (DECEASED)**

**BETWEEN**

**CHRISPINUS SIMITI TEMBETE ..... APPLICANT**

**AND**

**DESTERIO SALAMB TEMBETE ..... 1<sup>ST</sup> RESPONDENT**

**ELIAKIM LUSABA TEMBETE ..... 2<sup>ND</sup> RESPONDENT**

**DISMUS MUYOVI TEMBETE ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. The Applicant's Notice of Motion dated 6<sup>th</sup> May 2024 seeks for the following orders:
  - a. That the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to be arrested for condemned of the court order dated 19<sup>th</sup> July 2022 or to be charged and imprisoned for six months as per law.
  - b. That this court to issue warrant of arrest to OCS Mukanga police station to arrest them and brought to the high court
  - c. costs of the Application to be met by the Respondents
2. The Application is premised on grounds that the named respondents have disobeyed the court order of 19<sup>th</sup> July 2022; that they have trespassed on the Applicants land parcel No. Busotso/Ingotse/ 3914( suit property); that they have assaulted the surveyor who had gone to survey the land, and finally that the respondents have attacked the Applicant and generally instigated acts of violence in the property.
3. The respondents did not file any response to the Application.



## Determination

4. The Law and procedure for contempt of court is governed by Section 5 of the Judicature Act .The section provides as follows: ."The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate courts."
5. Black's Law Dictionary defines contempt as follows : "Contempt is a disregard of, disobedience to, the rules or orders of a legislative or judicial body, or an interruption of its proceedings by disorderly behavior or insolvent language, in its presence or so near thereto as to disturb the proceedings or to impair the respect due to such a body"
6. The essence and purpose of of contempt proceedings has been the subject of several past decisions of the superior courts. The Court of Appeal in A. B. & Another -V- R. B., Civil Application No. 4 of 2016 [2016] eKLR cited with approval the Constitutional Court of South Africa's decision in Burchell v. Burchell, Case No. 364 of 2005 where the court held: "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 court and requires other organs of the state to assist and protect the court. 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 have 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."
7. Turning to the present Application , on 14<sup>th</sup> July2022 , Justice P.J Otieno issued orders on this matter as follows:
  1. "That the district surveyor kakamega do partition Land parcel No. Busotso/ Ingotse/212 as per certificate of confirmation of Grant dated 18<sup>th</sup> day of may 2018
  2. That the Officer commanding station(OCS) Eshihongo police station do provide security during the partition exercise.
  3. That should any beneficiary refuse to sign the Land Transaction document, the Deputy Registrar High court be empowered to sign on their behalf.
  4. ...
  5. ...."
8. The complain before this court is that the respondents have trespassed on the suit property, that they have interfered with the surveyor's work and have assaulted the Applicant.
9. In an Application for contempt the Applicant must prove the existence of certain elements. In Samuel M. N. Mweru & Others v National Land Commission, Nairobi City Water and Sewerage Company Limited & Nairobi City Water County [2020] KEHC 9233 (KLR), Justice Mativo while citing the Book titled " A contempt in New Zealand" stated as follows:

" There are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases) that:-



- a. the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;
  - b. the defendant had knowledge of 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. The standard of proof of the above elements is beyond reasonable doubt.
11. I have considered the Applicant's case in this regard, and am not satisfied that the standard of proof was attained. Firstly the order as can be seen above was not addressed to the Respondents, but to the District surveyor and OCS- Eshihongo police station. The order was therefore not binding on the respondents.
12. Further , the Applicant has not made any effort to show that the order which was alleged to have been disobeyed was served on the respondents. In the case of Jacob Zedekia Ochino and Ano v George Aura Okombo and 4 others, Civil Appeal No. 36 of 1989 at Nairobi ( unreported)– the Court of appeal applying the principles set out in the case of Mwangi Mwangonde v Nairobi city commission (Civil Appeal No. 95 of 1988) expressed itself on the centrality of service of the order in contempt proceedings as follows: “The power to deal with contempt of court is provided for under section 5 of the *Judicature Act* (Cap 8) and Order 39 Rule 2 (3) of the Civil Procedure Rules (CPR). We have to follow the procedure and practice in England. As we read the law, the effect of the English Provisions is that as a general rule, no order of court requiring a person to do or abstain from doing any act may be enforced by committing him for contempt 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 served order must be indorsed with a notice informing the person to whom the copy is served that if he disobeys the order he is liable to the process of execution to compel him to obey it.....”
13. In short the acts of contempt have not been proved . The Application is unmerited and it is hereby dismissed with no order as to costs.

**DATED , SIGNED AND DELIVERED AT KAKAMEGA THIS 29<sup>TH</sup> DAY OF OCTOBER 2024.**

**S. CHIRCHIR**

In the presence of :

Godwin Luyundi- Court Assistant.

