



In re Estate of Ismail Osman Adam (Deceased) (Succession Cause 121 of 1991) [2023] KEHC 2610 (KLR) (29 March 2023) (Ruling)

Neutral citation: [2023] KEHC 2610 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
SUCCESSION CAUSE 121 OF 1991
G MUTAI, J
MARCH 29, 2023**

IN THE MATTER OF THE ESTATE OF ISMAIL OSMAN ADAM (DECEASED)

BETWEEN

MOHAMED HUSSEIN ISMAIL RESPONDENT

AND

**NURBANU ESMAIL OSMAN ALIAS NOORBHANU
ABDULRAZAK APPLICANT**

RULING

1. The application before the court is dated 25th August, 2022. It is expressed to be brought under Article 2 of *the Constitution* of Kenya, 2010, Sections 1A, 1B and 3A of the *Civil Procedure Act*, Section 5 of the *Judicature Act*, Order 1 rule 3 of the *Civil Procedure Rules*, 2010, Section 3 of the High Court Organization and Administration Act and all other enabling provisions of the law.
2. Vide the said application the 2nd administrator/applicant seeks the following 3 orders to wit that: -
 - a. This honourable court be pleased to grant leave to the applicant to institute contempt proceedings against the 1st administrator for violation/breach of court orders dated and issued on 20th June, 2017 by the Hon Lady Justice M. Thande;
 - b. This honourable court be pleased to join the Registrar of Land at Mombasa to these proceedings for enforcement of court orders; and
 - c. Costs of the application be provided for.
3. The grounds upon which the application is brought is stated in the body of the summons. In support of the said summons the applicant swore a supporting affidavit on 25th August, 2022 and attached thereto the court order dated 20th June, 2017 and the opinion of Al-Muhdhar A. S. Hussein, the Chief



- Kadhi, dated 29th May, 2017 vide which this court was advised on the applicable Islamic law regarding division of the estate of the deceased, a Muslim, to his sons and daughters.
4. The applicant contends that the Hon Lady Justice Thande issued orders on 20th June, 2017 vide which she ordered that the estate of the deceased Ismael Osman Adam, being 1/6 of Title No. MSA/Block XVII/66, be distributed as per the advice of the Chief Kadhi. It was further ordered, in the said order, that the Registrar of Lands Mombasa cancels the title to the said property and issues another title with the name of the applicant herein incorporated.
 5. The applicant avers that the old title has not been cancelled. She attached a copy of search in support of her contention. She averred that the action of the respondent is wilful and deliberate and that it is actuated by malice. The court was invited to find that respondent, despite being aware of the court orders, has no intention of complying with the same. For that reason, this court was called upon to grant leave to the applicant to institute contempt proceedings.
 6. The 1st administrator/respondent opposed the application. He filed a replying affidavit on 27th September, 2022 vide which he averred that the application has no merit. He argued that the same had been filed with a view to embarrassing him. He contends that the order that this court issued on 20th June, 2017 was directed to the then sole administrator, Abdulkader Ismail Osman (now deceased, having died on 17th January, 2019). Upon the death of the former administrator the applicant and the respondent were appointed as joint administrators as per the rectified Grant of Letter of Administrator Intestate dated 17th December, 2020.
 7. The 1st administrator/respondent argues that the as a co-administrator the applicant has as much power as he does to ensure that court orders are complied with and an “equal powers of management of the estate and access to and provision of accounts of the estate”. He further argues that it was impractical for the name of the applicant to be included in the Title as the deceased person, in respect of whom these proceedings arose, owned 1/6 of Title No Mombasa/Block/XVII/66, (equating to one of the 6 flats) and there were nine other beneficiaries who, if the order was interpreted as proposed by the applicant, would also have to be named in the certificate of title.
 8. The respondent states that the estate has not received any proceeds since the applicant and the respondent were appointed and that none of the beneficiaries have derived any benefit from it. He avers that it is now necessary to distribute the estate, something that does not, he avers, require the name of the applicant to be noted in the title. The respondent depones that the applicant has done nothing to enforce the orders of 20th June, 2017. The court is thus invited to dismiss the instant application for not having merit.
 9. What is the law governing contempt of court proceedings in Kenya? The *Contempt of Court Act*, No. 40 of 2016 was declared unconstitutional by Mwita, J in *The Kenya Human Rights Commission v The Attorney General & Another* [2018] eKLR for lack of public participation as required by Articles 10 and 118 (b) of *the Constitution* of Kenya, 2010 and also for encroaching on the independence of the Judiciary, by taking away the inherent jurisdiction of the courts to punish for contempt.
 10. The procedure governing contempt proceedings in Kenya is provided in section 5 of the *Judicature Act*. The said section provides as follows: -
 - a. “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 the subordinate courts;



- b. An order of the High Court made by way of punishment for contempt of court shall be appealable as if it were conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the High court.”
11. My understating of the above quoted provision of the Judicature Act is that the law that governs contempt of court proceedings in Kenya is the English law, applicable in England at the time the contempt is committed.
12. I have looked at the relevant English Rules. It would appear to me that the rules of procedure in England are found in Rule 81 of the English Civil Procedure (Amendment No. 30) Rules, 2020. My reading of the said rule is that no leave is required where the contempt complained is in respect of pending proceedings. The Court of Appeal in *Christine Wangari Chege v Elizabeth Wanjiru Evans and Others* [2014] eKLR held that leave (called “permission” in England) was not required where committal proceedings relate to a breach of a judgment, order or undertaking. In this matter the applicant asserts that the respondent has not complied with the order that this court issued in 2016. That being the case the applicant’s application would appear to me to be superfluous; it seeks leave where none is required. This would be enough to dispose off this matter. I shall nevertheless look at the merit as I am of the opinion that the court must issue further directions so that the administration of the estate of the decedent is completed.
13. What must an applicant prove to succeed in a contempt application? In my view the following ingredients must be shown: -
- Presence of an order whose terms are clear and unambiguous and binding on the respondent / alleged contemnor;
 - The respondent/alleged contemnor had knowledge and proper notice of the terms of the order;
 - The respondent/alleged contemnor acted in breach the terms of the order; and
 - The respondent /alleged contemnor’s conduct was deliberate.
14. Lord Denning, Master of the Rolls, in *Re Bramble Vale Ltd* [1970] 1 CH 128 stated that “contempt of court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved, to use the time honoured phrase, it must be proved beyond reasonable doubt”.
15. Contempt of court is that conduct or action that defies or disrespects authority of court. Black’s Law Dictionary, 9th Edition defines contempt as: -
- “The act or state of despising, the conduct of being despised, conduct that defies the authority or dignity of a court or legislature. Because such a conduct interferes with the administration of justice”.
16. Ibrahim, J (as he then was) in *Econet Wireless Kenya Ltd versus Minister for Information & Communication of Kenya & Another* [2005] KLR 828 emphasized the importance of obeying court orders when he held that: -
- “It is essential for the maintenance of the rule of law and order that the authority and dignity of our courts are upheld at all times. The court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is plain and unqualified obligation of a every person against whom an order is made by court of competent jurisdiction to obey it unless and until the order is discharged.



The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by the order believes it to be irregular or void.”

17. The order said to have been disobeyed by the respondent was issued on 20th June, 2017 in these proceedings. The applicant is named in the order as the petitioner while a Abdulkader Ismail Osman is the respondent.
18. My reading of the said order is that the duty to comply with the same fell on the then respondent Abdulkader Ismail Osman under Section 83 of the *Law of Succession Act*. I note that he did not carry out his duties and that at the time he died 17th January, 2019 the court orders mentioned above had not been complied with.
19. On the application of the parties this court rectified the grant on 17th December, 2020 vide a rectified Grant of Letters of Administration Intestate. Mohammed Hussein Ismail (the respondent) and the Nurbanu Esmail Osman alias Noorbhanu Abdulrazak (the applicant) were appointed as administrators.
20. With the said appointment the duty to comply with the court orders fell upon them jointly from the said date.
21. I am in agreement with the respondent in his submissions that an order giving rise to the contempt proceedings ought to have been directed at the respondent. In this case the order was directed, at the time it was issued, to an administrator who is now deceased. The obligation thereafter fell on the applicant and the respondent to comply therewith. The said obligation is a joint one. Both their efforts and time was required. Although the applicant blames the respondent I have not seen any effort on her part to procure compliance with the said court order.
22. How was the court order to be enforced? Did it call for the inclusion of the applicant’s name in the title? In my view this is a matter that calls for interpretation. That being the case it would not found contempt proceedings. In the Indian case of *Indian Airports Employees Union v Ranjan Chattarjee and Another* [AIR]1999 SC 880:1999 (2) SCC:587 it was held that:-

“In order to amount to “Civil contempt” disobedience must be wilful. If disobedience is based on the interpretation of court’s order, notification and other relevant documents it does not amount to wilful disobedience”.
23. The applicant seeks to hold the respondent liable for a failure that both appear to be responsible for, in respect of nonfeasance that would call for interpretation of the court order. In my view this is not a matter that calls for contempt proceedings, at least at this point. As the Court of Appeal held in *Shimmers Plaza Ltd Versus NBK* [2015] eKLR:-

“It is important however that the court satisfies itself beyond any shadow of doubt that the person alleged to be in contempt committed the act complained off with full knowledge or notice of the existence of the order of the court forbidding it. The threshold is quite high as it involves possible deprivation of a person’s liberty”.
24. I must also note that the element of knowledge of the court order was not proved. The particulars of the conduct said to be contemptuous of this court wasn’t set with sufficient details. I am unable to find that had leave been required I would have given it in this case.
25. I am also unable to find that the respondent acted in breach of the terms of the court order in question nor to find that the alleged contemnor acted, if at all, deliberately to disobey the orders of the court.



The threshold required in this matter wasn't met. I would therefore not have granted the requisite permission under the applicable English Rules, had such permission been required. As I have already indicated no such permission was required in this case.

26. I find no merit in the second prayer of the said Chamber Summons. No evidence was provided showing that the Land Registrar had declined to act as directed by the court.
27. The upshot of this that the application dated 25th August, 2022 has not merit and it is thus dismissed with costs to the respondent.
28. In the interest of justice, I direct the two administrators to take steps to complete the distribution of the estate of the deceased person to the beneficiaries within 6 months of the date of this ruling in accordance with the order of the court dated 20th June, 2017 and to file a full and accurate account of the completed administration.
29. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 29TH DAY OF MARCH, 2023

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GREGORY MUTAI

JUDGE

In the presence of:-

Mr Yose for the Applicant

No appearance for the Respondent

