



**Gachie & another v Gachie (Succession Cause 145 of 2013)
[2023] KEHC 2280 (KLR) (24 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2280 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
SUCCESSION CAUSE 145 OF 2013**

G MUTAI, J

MARCH 24, 2023

BETWEEN

DAVID WAIHAKA GACHIE 1ST APPLICANT

CHARLES WANARUA GACHIE 2ND APPLICANT

AND

EVAN WAMBUGU GACHIE RESPONDENT

RULING

1. Before me is a Notice of Motion application dated November 23, 2022 *vide* which the applicants seek to have the respondent punished for disobeying the orders of this court. The application is supported by the annexed joint affidavit of David Waithaka Gachie and Charles Wanarua Gachie sworn on November 11, 2022.
2. The applicants aver that the respondent failed to comply with court orders issued on February 15, 2022 that froze his account and ordered him to file statement of account within 2 weeks of the said date. They state that the respondent didn't properly account for the money that he received and that he refused to provide bank statements for the period between May 1, 2021 and May 18, 2022 despite being ordered to do so.
3. The application was argued before me on March 7, 2023. The applicants were represented by Mrs Momanyi. Ms Kemunto appeared for the Respondent. Mrs Momanyi submitted in support of her application. She urged the court to find the respondent to be in contempt of court and to penalise him accordingly. It was her submissions that orders of the court should be obeyed and that penalising the respondent would restore the dignity of the court. I was invited to look at the records.
4. Ms Kemunto submitted that the respondent had not been in touch with her for a long period of time. She referred me to her application to cease acting for the respondent. She stated that the respondent hadn't responded to her communication since October 10, 2022. She averred that she felt that she was



- being compelled to act for the Respondent despite her inability and unwillingness to do so. Regarding the application, she submitted that the applicants had not showed evidence of personal service of the application and of the order. She further submitted that the respondent had provided statement of account. Regarding receipts counsel stated that there was no timeline for their provision. Ms Kemunto urged the court to dismiss the application as the court’s jurisdiction hadn’t been invoked properly.
5. In response the applicants’ counsel urged that the respondent’s counsel had in fact confirmed that the respondent were aware of the orders. As he was aware of the orders he should have complied with them, she submitted. By not complying with the orders he was aware of the respondent had been in contempt of court.
 6. I have perused the said application. The respondent did not file a replying affidavit or ground of opposition. I allowed his advocate to submit on the issues of law which she did as indicated above.
 7. After the parties had made their oral submission I directed that they also file written submission within 7 days of the said date regarding the proper procedure applicable in contempt court matters. The advocates failed to do so.
 8. Has a case been made to hold the respondent in contempt of court? In my opinion the answer is in the affirmative. I say this for 2 reasons. The orders which this court issued were not, in my view, complied with. Secondly, there is sufficient evidence before me that the respondent was properly served with the orders of the court and the application dated November 11, 2022.
 9. What is the law regarding contempt of court in Kenya? The *contempt of court Act*, No 40 of 2016, was declared unconstitutional by Mwita, J in the case of the *Kenya Human Rights Commission versus the Attorney General and Another* [2018]eKLR for lack of public participation as required by Articles 10 and 118 (b) of the *Constitution* of Kenya, 2010 and for encroaching on the independence of the Judiciary by taking away the inherent jurisdiction of the courts to punish for contempt.
 10. The effect of the said decision is that the proper procedure to be followed in contempt of court matters is that given in section 5 of the *Judicature Act* (cap 8 Laws of Kenya) which provides that: -
 - 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 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. The effect of the forgoing provision 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. The relevant rules of procedure in England are found in Rules 81 of the English *Civil Procedure (Amendment No 3) Rules*, 2020. I have looked at the said rules and note that no leave is required where the alleged contempt is in respect of pending proceedings. That being so I find and hold that no leave was required in this case.
 13. The Rules however require personal service of the application and the order. I have perused the affidavit of service dated February 16, 2023 and March 6, 2023. From the contents of the said affidavits I am satisfied that the respondent was personally served with the application. I take note in particular of the affidavit of service sworn on March 6, 2023 by Said A Salasia, a process server of this court. The said affidavit has a photograph said to be that of the respondent signing a documents, said to be the application now before this court, that had been served on him in acknowledgment of service.



14. This court issued orders sanctioning the respondent on diverse dates. On February 15, 2022 his bank accounts with KCB and Equity were frozen. He was required to file a statement, within 30 days of the date of the order, showing how he had spend Kes 14,000,000.00 that he had received from Base Titanium. This order was varied on May 18, 2022 to facilitate the issuance of a bank statement. I am not convinced that he complied with the said order.
15. What is purported to be a statement of account, which was filed on July 18, 2022, outside the time he was required to comply, is not a statement within the contemplation of this court. In any case the respondent failed to supply documents in support of the same despite the effluction of 10 months since the order was issued.
16. To date the respondent hasn't provided the requisite bank statement No explanation has been given for the failure to do so. The inescapable conclusion that this court draws is that the respondent has no intention of doing so.
17. The conduct of the respondent is reprehensible. He has acted wilfully and deliberately. He must be under an impression that there will be no consequences for his conduct.
18. This court must not issues orders in vain. The honour and dignity of the court ought to be upheld. A conduct that is contemptuous of court must be punished. Court orders ought to be worth more than the papers they are written on. Allowing a contemnror to go unpunished sends a wrong signal that obedience of lawful orders of the court is optional. Declining to punish him would be an invitation to anarchy.
19. The upshot of the foregoing is that I find the respondent to be in contempt of the court's order of 15th February, and May 18, 2022 that ordered him to file statement of account, bank statements and also to produce receipts of the payments he alleged to have made to various parties. The respondent did neither of these things.
20. I find and hold that he wilfully failed, refused and or neglected to obey court orders.
21. I direct that the respondent appears personally before this court on April 18, 2023 to show cause why he should not be committed to civil jail for 6 months for being in contempt of court.

Orders accordingly.

DATED, SINGED AND DELIVERED VIRTUALLY AT MOMBASA THIS 24TH DAY OF MARCH, 2023

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Gregory Mutai

Judge

In the presence of:

Winnie Migot - Court Assistant

No appearance by the parties

