



REPUBLIC OF KENYA



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**In re Estate of William Cherop Murgor (Deceased) (Probate & Administration
112 of 2022) [2023] KEHC 3977 (KLR) (28 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3977 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
PROBATE & ADMINISTRATION 112 OF 2022**

JRA WANANDA, J

APRIL 28, 2023

**IN THE MATTER OF THE ESTATE OF WILLIAM CHEROP MURGOR
(DECEASED)**

BETWEEN

ENID CHEPTANUI MURGOR ROHOH OBJECTOR

AND

FRANCIS MURGOR 1ST RESPONDENT

CHEMUTAI MURGOR 2ND RESPONDENT

DR JAMES MURGOR 3RD RESPONDENT

FLORENCE MURGOR 4TH RESPONDENT

AND

SHEILA MURGOR APPLICANT

RULING

1. By the Notice of Motion dated 15/08/2022, the Applicant seeks the following orders:
 - i. Spent.
 - ii. The Respondents be cited for contempt of the court orders of 12th May, 2022 and be punished.
 - iii. The Respondents be cited and punished for intermeddling with the estate of the late William Murgor.
 - iv. The Respondent to not be granted audience in court until they purge the contempt.
 - v. The costs of this application be provided for.



2. The Application is premised on the grounds stated therein and the Supporting Affidavit sworn by the Applicant, Sheila Chepng'etich Murgor on 17/08/2022.

Applicant's Supporting Affidavit

3. The Applicant deponed that she is a beneficiary as well as one of the Administrators of the estate of the late William C. Murgor and that on 12/5/2022 the Court delivered a Ruling in which it compelled the Respondents and one Florence C. Murgor to comply with certain directions inter alia as follows:
 - a. Pending the final distribution of the Estate of the deceased, the households of Mrs. Soti Murgor, Mrs Rosa Kimoi Murgor, Mrs Anna Kimoi Murgor and Mrs. Philomena Kimoi Murgor each nominate one representative for appointment as administrators in the estate.
 - b. The Respondents be restrained from exercising any powers over the estate of the deceased, pending submissions of names of 4 proposed administrators reflective of separate houses.
 - c. The 1st and 2nd Respondents provide a comprehensive financial account for the administration of the estate from the date of their appointment as administrators, to the present date.
 - d. The 1st and 2nd Respondents pay into court all rental income received from the date of their appointment as administrators, to the present date including cash held in the estate's bank accounts to facilitate distribution to the widows in keeping with their life interest in the estate of the deceased.
 - e. The 3rd Respondent and Florence C. Murgor be restrained from intermeddling or otherwise managing the property of the estate, specifically Plot No. Eldoret Municipality/Block 4/84, pending final distribution of the estate.
 - f. The 3rd Respondent and Florence C. Murgor be ordered to pay into court all rental and other income derived from Plot No. Eldoret Municipality/Block 4/84 including the rent paid by Caltex Oil Kenya Ltd and Total Kenya Ltd for the last 20 years, pending final distribution of the estate.
 - g. James K. Murgor had been in possession of/gifted IRONG/KESSUP/52- 28HA (70 acres, during the lifetime of the deceased, this parcel shall not form part of the estate to be distributed.
 - h. The following are readily available for partial distribution; Eldoret Municipality Block 4/83 Eldoret Municipality Block 4/84 Iten/Irong 984,993,994,995,996,997,998,1001,1002,1003 and 1005 Iten Township/054 LR No. Sergoit/Koiwaptaoi Block 8/10 Plot No.003 Kapkoi Centre 73 acres of Chepsigot Farm (and all the portions where the beneficiaries obtained title after the demise of the deceased but excluding parcels whose transactions were done during the lifetime, and are supported by records from Advocate Birech's Office.
4. The Applicant deponed further that on 13/6/2022 pursuant to clause (a) of the said Order, the Court adopted and confirmed her as one of the Administrators to the estate, she also has authority from her co-administrator Enid Cheptanui Murgor, to swear the Affidavit on her behalf, she is aware that on 14/6/2022 Enid's Advocate wrote to Counsel on record informing them of the Orders and imploring them to advise their clients to comply with the same, the Orders were also extracted and served upon all Counsel on record via email on 30/6/2022 at 11:23 am., she is aware that on 15/6/2022 and 21/6/2022, Counsel for Florence C. Murgor, wrote back implying that the orders would not be complied with, contrary to clauses (c) and (d) of the Orders the 1st and 2nd Respondents have neither provided a comprehensive financial account for the administration of the estate nor paid into Court



the rental income received from the date of their appointment as Administrators to the present date including cash held in the estate's bank accounts to facilitate distribution to the widows in keeping with their life interest in the estate of the deceased, contrary to clauses (e) and (f) of the Orders, the 3rd and 4th Respondents have not paid into Court the rental and other income derived from Plot number Eldoret/Municipality/Block/4/84 including the rent paid by Caltex Oil Kenya Ltd and Total Kenya Ltd for the last 20 years.

5. The Applicant contends further that the 3rd and 4th Respondents continue to benefit from the use of resources, including the rental, obtained from Eldoret/Municipality/Block/4/84 to the exclusion of the rest of the beneficiaries and that there has been sufficient time, of more than 3 months, to allow the Respondents comply with the orders, the 1st and 2nd Respondents have refused to release the Death Certificate to the newly appointed Administrators despite being asked to do so by the Applicant's Advocates., despite the 2nd Respondent no longer being an Administrator to her late father's estate, she is aware that certain portions of the properties deemed to be available for distribution under clauses (h) of the order are now in danger of being disposed to 3rd parties, according to the Applicant, the action by the Respondents are not only contemptuous but also fall foul of Section 45 of the [Law of Succession Act](#), that criminalizes intermeddling of a deceased's property.
6. The Applicant further depones that she is aware that on 26/7/2018, the Court made Orders for monthly payment of the sum of Kshs.10,000/- to be paid from the estate, to each of the 5 widows as well as to one Josephina Murgor, the Administrators then, Francis Murgor and Chemutai Murgor, have been ignoring the said Order and only intermittently making payments despite having knowledge of the illness bedevilling the widows and Josephina Murgor, the Respondents have thus been in continuous contempt of Court and are undeserving of any equitable or favourable orders from the Court having come to Court with unclean hands, the said Orders have neither been reviewed nor set aside and are still valid and in force and the Respondents should not be allowed to perpetuate an illegality and to bring to this Court to disrepute.

1st Respondent's Replying Affidavit

7. In opposing the Application, the 1st Respondent, Francis Murgor relies upon the Replying Affidavit that he swore on 13/02/2023. In the Affidavit, he depones that he has not wasted any part of the estate neither is he in contempt of any Court order, the Applicant has not stated the specific orders allegedly breached by him or the 2nd Respondent, the Order has been fully complied with by all the parties, he has not exercised any specific power over the estate, on 18/7/2018 he handed over all the title deeds in his custody to his Lawyers on record Messrs Chebii & Co. Advocates to hold them in trust for the estate, he has never received even a single shilling deemed to be the estate property as none of the deceased's estate earned any income at all and that he had fully responded to the letter dated 14/6/2022 from Messrs Murgor & Murgor Advocates in its entirety.
8. He contends further that the estate did not have any rentable premises that earned income which came into his control, at the time of the deceased's death a large part of his estate had been given out inter vivos and none came to his possession or earned any income or was misused by him or the 2nd Respondent who renounced the administration earlier, the property known as EM/Block 4/84 was gifted inter vivos to the 3rd Respondent and this property alongside others gifted earlier inter vivos were not under his control.
9. In regard to the property Irong/Kessup/52 – 28 Ha (70 acres), he maintains that the same does not form part of the deceased's property, in regard to the property known as No. EM/Block 4/83 he depones that while the same is estate property the same is occupied by a family member Thomas



Murgor who holds the title thereto and who has not surrendered the title despite demand by the administrators, property No. EM/Block 4/84 is the one gifted to the 3rd Respondent Dr. James Murgor inter vivos and no income had thus come to his hands thereon, he has handed over all the title deeds in respect of the titles identified as Irong/Iten/984, 993, 995, 996, 994, 998, 1001, 1002, 1003 and 1005 to his Lawyers, Messrs Chebiii & Co. Advocates, all the titles are safe, the Court may make an order on how the administrators may secure the same and the said properties are free land, earning no income, the property known as Iten Township/054 is unknown to the administration and the current administration can identify it if at all, Kapkoi Centre Plot No. 103 is undeveloped land, the same was gifted to Matthews Murgor and is an open field.

10. He acknowledges that the Applicant has since been appointed one of the administrators of the estate and argues that the Applicant should have used her chance to petition for a meeting instead of taking a confrontational stand. He then acknowledges receipt of the demand letter dated 14/6/2022 but states that his Advocates duly responded thereto, the said Orders was never served upon him although he has taken personal steps to comply with the same, the letter from his Advocates dated 16/6/2022 was never replied to by the Applicant nor termed as either being unsatisfactory or not complete, it is not true that Caltex Oil Limited paid rent to Florence Murgor or to the Administrators at all, the new administrators have not called for a meeting for these matters to be ventilated and thus it is not possible to hand over documents in a vacuum, as a family they have in the past raised money out of their own personal pockets to maintain the three widows, all payments due were made and he denied all particulars of illegality pleaded. Finally, he prayed that the Court orders the administrators to meet within 60 days as they seem to lack communication.

3rd Respondent's Replying Affidavit

11. The 3rd Respondent, Dr. James Murgor also opposed the Application and relied on his Replying Affidavit sworn on 23/01/2023. He contends that the Application is bad in law, incompetent, mischievous, frivolous, misleading, an afterthought and an abuse of court process, the Applicant has improperly described the parties to this suit for the following reasons; Enid Cheptanui Murgor is described as an Objector whereas the Court vide its Ruling delivered on 12/05/2022 dealt with the issue of parties, the description of parties is a misjoinder and/or non-joinder since the estate ought to sue and be sued through its personal representatives and or administrators duly appointed in line the with ruling.
12. He added that pursuant to the said order the following members were nominated as administrators; Sheila Chepng'etich Murgor, Francis Murgor and Enid Cheptanui Murgor, having been nominated as an administrator the Applicant and her co-nominees/administrators are guilty of laches for failing to gazette their names with the view of taking up the administration of the estate, the Applicant and the other administrators have failed to apply for gazette and letters of administration so as to administer the estate effectively, the Applicant should explain her indolence in having their names gazetted and applying for grant of letters of administration, the administrator's statutory powers are clearly outlined under Section 82 and 83 of the *Law of Succession Act*, the failure by the Applicant and other persons nominated for appointments as administrators to have their names gazetted and apply for the grant of letters of administration intestate has impeded the process of administration of the estate, the application now before Court is misconstrued and made in bad faith and is an attempt to malign his name, the allegations made against him are untrue as he is a law abiding citizen and he respects, upholds the rule of law and respects all Court orders, the Applicant has failed to demonstrate precisely how he has failed to comply with the orders,



13. He further denies the allegations that he has failed to remit rent collected from Plot No. Eldoret Municipality Block 4/84, the said property is undeveloped, there is no rent capable of being collected in a vacant premise, the lease with Caltex lapsed and there is no new tenant who has taken occupation of the property, it is within the personal knowledge of the Applicant that the property has no tenants and therefore it does not generate any income, the Applicant has not provided any evidence to this Court to demonstrate that the property generates any income, the Applicant has failed to demonstrate how he has intermeddled with the estate and the property of the deceased, the Applicant has not demonstrated any single activity that demonstrates any attempt by him to intermeddle with the estate as provided for under Section 45 of the [Law of Succession Act](#) and the Applicant has not met the threshold for grant of the orders sought as required in law and therefore cannot be granted the orders sought.

4th Respondent's Replying Affidavit

14. The 4th Respondent, Florence Murgor, also opposes the Application and relies on her Affidavit in Reply sworn on 06/2/2023. She contends that the Application is frivolous, premature, unprocedural and an abuse of Court process, the Applicant's Affidavit is tainted with falsehood, contradictions and actuated by malice with no evidence to support the claims therein, she has never received any rental income paid by Caltex Oil (Kenya) Limited & Total Kenya, this specific order is therefore impossible to be complied with, the Applicant have not presented any evidence of the alleged claim of properties being disposed of, the standard of proof in contempt proceedings is higher than proof on a balance of probability and the Applicant has not met this higher standard and that the Court can issue directions for the attendance of witnesses and oral evidence as it considers appropriate.
15. She deponed that one of the grounds in her Appeal is that she was condemned unheard and the orders cannot be complied with, the Applicant has failed to prove that any alleged intermeddling has resulted in wastage or caused loss or damage to the property or made it impossible for the administrators to administer the estate, the Applicants both of whom were appointed administrators on 13/06/2022 have not properly conducted their duties as administrators ever since they were appointed, they have not taken any action to initiate a conversation or proposal on partial distribution of the properties the Court declared part of the estate on 12/05/2022, they have not called for an administrator's meeting, instead the Applicants have acted maliciously and filed this Application with falsehoods and she has no intention to frustrate or demean the Court process when she is seeking justice through the very Court process through an appeal and denying her audience before the Court will be unconstitutional.

Hearing of the Application

16. It was then directed that the Application be disposed of by way of written submissions.
17. Pursuant thereto, the Applicant through her Advocates Messrs Omollo Rotich Barasa & Co. filed his Submissions on 7/03/2023, the 1st and 2nd Respondents through their Advocates Messrs Chebii & Co. filed their Submissions on 5/03/2023, the 3rd Respondent through his Advocates Messrs Morgan Omusundi & Co. filed his Submissions on 3/03/2023 and lastly, the 4th Respondent through her Advocates Messrs Munene & Co. filed her Submissions on 1/03/2023.

Applicant's Submissions

18. Counsel for the Applicant submitted that they wrote to all Counsel on record informing them of the Court's Orders and imploring them to advise their clients to comply with the same, the order was also extracted and served upon all Counsel via email, Counsel for the 4th Respondent wrote back implying that the orders would not be complied with, to date other than clause (a) of the order the Respondents



have failed to comply with the orders which have neither been reviewed nor set aside and are still valid and in force.

19. He submitted that contempt of Court is conduct or action that defies authority of Court. He quoted Black's Law Dictionary 9th Edition on the definition thereof and stated that Section 5 of the *Judicature Act* confers jurisdiction on the superior Courts to punish for contempt of Court and contempt is conduct that impairs the fair and efficient administration of justice. He relied on the decisions in the cases of *Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 Others* [2014] eKLR, *Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & Another* [2005] KLR 828 and *T. N. Gadavarman Thiru Mulpad V Ashok Knot and Another* [2006] 5SCC.
20. Counsel further submitted that on 12/05/2022 the Court issued a raft of Orders and directions to be complied, the Orders are unambiguous and specific on what each party was to do, Counsel for the 3rd Respondent was present and also held brief for the 1st and 2nd Respondents as well as Counsel for the 4th Respondent, the Respondents were therefore aware of the existence of the Orders, out of abundance of caution the Orders were also made known to the Respondents' Counsel twice - once by Counsel for the Objector and by Counsel for the Applicant. On the issue of notice of Court Orders to litigants who are represented by Counsel, he relied on the case of *Shimmers Plaza Limited Vs National Bank of Kenya Ltd* [2015] eKLR and submitted that the said decision should put to rest the contention of the 1st Respondent on lack of personal service.
21. Counsel further submitted that contrary to clauses (c) and (d) of the Court orders, the 1st and 2nd Respondent have neither provided a comprehensive financial account for the administration of the estate nor paid into Court the rental income received from the date of their appointment as Administrators to the present date including cash held in the estate's bank accounts to facilitate distribution to the widows in keeping with their life interest in the estate, contrary to clauses (e) and (f) of the Orders the 3rd and 4th Respondents have not paid into Court the rental income and other income derived from Plot Number Eldoret Municipality/Block/4/84 including the rent paid by Caltex Oil (Kenya) Ltd and Total Kenya Ltd for the last 20 years, the 1st and 2nd Respondents have refused to release the Death Certificate to the newly appointed Administrators despite being asked to do so, this is despite the 2nd Respondent no longer being an administrator pursuant to the Court's directions and the 3rd and 4th Respondents thus continue to benefit from the use of resources including rental income obtained from Eldoret Municipality/ Block/4/84 to the exclusion of the rest of the beneficiaries.
22. He further submitted that the defence by the Respondents in not complying with the Orders seems to be that they either do not agree with the Ruling or are unable to comply. He cited the decision in *Econet Wireless Kenya Ltd* (supra) and submitted that this is an abuse of the process, parties cannot cherry pick on what orders to comply with and which ones not to. A party ought to comply with orders however unpalatable to them they might be, the fact that there is an appeal notwithstanding as long as the orders remain in force. If unable to comply a party is at liberty and ought to go back to Court and explain the difficulty.
23. Counsel also cited the decision in *Republic v County Chief Officer, Finance & Economic Planning, Nairobi City County (Ex-parte David Mugo Mwangi* [2018] eKLR. He submitted that continued non-compliance and defiance of the Court orders almost 1 year down the line smacks of continued contempt.
24. With regard to the challenge raised that the application is pre-mature or frivolous, Counsel argued that an application for contempt is ripe as soon as the orders that need to be complied with are made and this is one of the reasons why contempt applications ought to be disposed of first so as to serve the ends of justice and not merely to placate the Applicant. He cited the decisions in *Republic v County Chief*



Officer, Finance & Economic Planning, Nairobi City County Ex-parte Stanley Muiruri and Republic v County Government of Kitui Ex parte Fairplan Syatems Limited [2022].

25. With regard to the alleged misjoinder of parties, Counsel submitted that the same is a red herring, the Respondents have sufficiently been described both in the title of the application and in the Affidavit by the Applicant where the alleged acts of contempt have been described and attributed to a specific individual. He submitted that the issue of misjoinder would therefore not arise in the circumstances.
26. Regarding the appropriate punishment to be meted out in the case of a finding of contempt, Counsel left that to the discretion of the Court but hastened that the Respondents should be ordered to purge their contempt before grant of further audience by the Court. He submitted that denial of audience until contempt is purged is not unconstitutional as alleged by the 4th Respondent. He cited the decision in *Hadkison v Hadkison* [1952] 2 ALL ER 567.

1st and 2nd Respondents' Submissions

27. Counsel for the 1st & 2nd Respondents submitted that by the said Orders of 12/05/2022 the Court directed that each house of the widows nominate one representative for appointment as Administrators, it is admitted by the Applicant that she was then duly appointed as one of the Administrators pursuant to the Orders, on 14/06/2022 Counsel for the Objector wrote to all Counsel on record informing them of the Orders and informing them to advise their clients to comply with the same, although it is also claimed that the Order was also extracted and served upon all Counsel on record via email, the email addresses are not identified, it is not averred that the Order was served on any party alleged to be a contemnor, it is claimed that on 26/07/2022 the Court made orders for monthly payments of Kshs 10,000/- be paid to each of the 5 widows, the Applicant falsely claims that this has not been done, no specific orders have been attributed to the 1st Respondent as having been breached, all parties have complied with all orders, on 18/07/2022 he handed over all titles to his Advocates M/S Chebii & Co. to hold them in trust, he has never received a single shilling deemed to be income payable to the estate, he fully responded to the letter from M/S Murgor & Murgor Advocates purporting to claim that he earned any income on behalf of the estate, to the best of his client's knowledge the estate did not earn any rental income, a large part of the estate had been given out inter vivos as at the date of the deceased's death, each donee is in control, they deny being served with the Court Order with any specificity and submits that his clients have not received any penal notice.
28. With regard to the specificity of the orders, Counsel submitted that the orders as per the Ruling were not transited into the order that was allegedly served to the lawyers by email. He relied on the holding in *Kihoto Munyaka Building v David Mwangi Gitau & 9 Others* [2013] eKLR where Odunga J, held that "..... where committal is sought it must be made clear what the Defendant is alleged to have done and that is breached".
29. He submitted further that the Application falls far short of the standard of proving contempt which must be beyond reasonable doubt, the Applicant has come before this Court casually claiming that a letter was written informing the Lawyers to advise their clients to comply, Court orders speak for themselves, they must be properly extracted and served on each particular party, in the instant cause there is no specificity as to the order breached, there is no order that was served, it has not been proved that the issue of the Penal Notice was brought to the attention of the Respondents, the law is that before any person is committed for contempt the orders themselves must have been served, in the instant application it is claimed that the orders were served by email but the details are not given. He relied on the case of *Priscillah Wanja Kariuki v James Kiongo Kibui & Another* [2014] eKLR.



30. Counsel further submitted that by the Applicant's own admission the persons served were the parties' lawyers, the service was bad, the Applicant's averment that the order was served on the Lawyers by email renders the entire contempt application null and void, a contempt of Court application must confirm service and Penal Notice, these are absent. He cited the decision in *Sam Nyamweya & 3 Others v KPLL & 2 Others* [2015] eKLR.
31. In conclusion, Counsel submitted that the present contempt proceedings are not specific, it is not clear what each of the contemnors was required to do, the orders were not personally served, there is no Affidavit of Service in the file, there is no evidence that the emails reached the Respondent or that the lawyers interpreted the orders to their clients and there is no proof of service. He prayed that the Application be dismissed with costs.

3rd Respondent's Submissions

32. Counsel for the 3rd Respondent submitted that the Application is defective and incompetent for want of form and compliance as stipulated under Order 1 of the Civil Procedure Rules, by the Ruling of 11/05/2022 4 people were appointed as Administrators, the Applicant has disregarded the said orders and improperly described the parties to this suit, for instance Enid Cheptanui Murgor is described as an Objector instead of an administratrix, He cited the decision in *Apex International Ltd and Anglo Leasing and Finance International Finance Ltd v Kenya Anti-Corruption Commission* [2012] eKLR.
33. On whether the 3rd Respondent acted in contempt of the Court, Counsel cited the decisions in *Woburn Estate Limited v Margret Basford* [2016] eKLR and *Sheila Cassat Issenberg & Another v Anthony Machatha Kinyanjui* [2021] eKLR and submitted that the power to punish for contempt is discretionary and should be used sparingly, the 3rd Respondent is not in contempt as he has not collected any rent nor performed any administrative duties as alleged by the Applicant, neither the [*Law of Succession Act*](#) nor any other written law recognizes any other person other than the duly appointed administrator(s) or personal representative(s) to act for and on behalf of the deceased intestate estate, the Applicant has alluded that the 3rd Respondent has failed to remit rent collected from plot No. Eldoret Municipality Block 4/84 and yet has failed to produce any evidence to show that the property earns rent, the 3rd Respondent has no power or authority over the estate with respect to suing for the estate, managing, collecting and or distributing any moveable and immovable property and/or in any way obligated to produce any statement of accounts and or any document concerning administration of the estate and reports on the deceased's treatment and physical status 20 years prior to his death, such duties are conferred by law to the 1st and 2nd Respondents who are the only known administrators of the estate.
34. Counsel submitted further that the Applicants both of whom were appointed as Administrators on 11/05/2022 have not properly nor at all undertaken their obligatory duties under Section 82 of the [*Law of Succession Act*](#), they have failed to administer the estate of as required of them, the Applicant is therefore misguided in claiming that the 3rd Respondent has failed to produce all financial accounts of the estate. In regard to allegations of intermeddling, Counsel submitted that the Applicant has failed to demonstrate precisely how the 3rd Respondent has intermeddled with the estate of the deceased, it is trite and cardinal principle of law that he who alleges existence of particular facts must prove them.

4th Respondent's Submissions

35. On the nature of contempt of Court proceedings and the standard of proof, Counsel relied on the holding in the case of *Sheila Cassat Issenberg* (supra). He argued that the Applicant is not only required to meet the higher burden and standard of proof in the quasi-criminal contempt of Court proceedings



but also must establish to the satisfaction of the Court that the three elements of civil contempt of Court have been met, the elements were expounded in the above case in which the Supreme Court of Canada cited the case of *Carey V Laiken* [2015] SCC 17 with approval. He cited the 3 elements as that; the order alleged to have been breached “must state clearly and unequivocally what should and should not be done”, the party alleged to have breached the order must have had actual knowledge of it and must have intentionally done the act that the order prohibits or intentionally failed to do the act that the order compels.

36. Counsel argued that the standard of proof and the three essential elements of civil contempt have not been met in the instant cause for the following reasons;
 - a. The order to pay into Court income/rent paid by Caltex Oil Kenya Ltd and Total Kenya Ltd for the last 20 years cannot be complied with as the 4th Respondent never received any income/rent.
 - b. The 4th Respondent is not acting mala fides in any alleged non-compliance as she is incapable of complying.
37. Counsel urged the Court to review the 4th Respondent’s Application dated 25/05/2022 seeking stay of execution pending appeal and leave to appeal awaiting directions from this Court, he urged the Court to exercise its discretion to dismiss this instant application and give direction on the Application seeking stay and leave to appeal without the threat of contempt of Court and the 4th Respondent has an arguable appeal. To buttress his argument, he cited the case of *Michael Sistu Mwaura Kamau V Director of Public Prosecutions & 4 Others* [2018].
38. With regard to allegation of intermeddling with the estate of the deceased, Counsel maintained that this is an allegation that is criminal in nature and that the Applicant has not provided any evidence to enable this Court mete out a punishment for intermeddling.

Analysis and Determination

39. I have carefully considered the application, response thereto, submissions by Counsel for the respective parties and the decisions cited. I must mention that the parties have raised numerous issues in this Application which in my humble view cannot be conclusively dealt with at this particular stage. This is so because what is before Court is simply the Application seeking to cite the Respondents for contempt of the Court.

Issues for Determination

40. In my view, the issues that arise for determination are the following:
 - a. Whether the Application is fatal for misjoinder of parties.
 - b. Whether the Respondents are in contempt of the Court orders issued on 12/05/2022.
41. I now proceed to analyse the said Issues.

a. Whether the Application is fatal for misjoinder

42. The 3rd Respondent has argued that the Applicant has improperly described the parties to this suit for the following reasons; Enid Cheptanui Murgor is described as an Objector whereas the Court vide its Ruling delivered on 12/05/2022 dealt with the issue of parties, the description of parties is a misjoinder and/or non-joinder since the estate ought to sue and be sued through its personal representatives and or administrators duly appointed in line with the Ruling. Counsel for the 3rd Respondent submitted



that the Application is defective and incompetent for want of form and compliance as stipulated under Order 1 of the Civil Procedure Rules, by the Ruling of 11/05/2022, 4 people were appointed as Administrators, the Applicant has disregarded the said orders and improperly described the parties to this suit.

43. The effect of mis-joinder of parties in judicial proceedings was discussed by the Court of Appeal in *Republic vs Charles Lutta Kasamani & another ex parte Minister for Finance & Commissioner of Insurance as Licensing and Regulating Officers* [2006] eKLR where the Court stated as follows:

“ Suffice it to say that a defect in form in the title or heading of an appeal, or a misjoinder or non-joinder of parties are irregularities that do not go to the substance of the appeal and are curable by amendment ... This Court said so in *Dipak Panachod Shah & Another vs The Resident Magistrate Nairobi and the Attorney General - Civil Application NAI. 81/00(UR)*.

44. This position was reiterated in *Consolata Kihara & 21 Others vs The Director of Kenya Trypanosomiasis Research Institute* [2003] eKLR, where it was held as follows;

“ Having carefully studied the whole record on this file, I agree with Mr Akhaabi (for the applicants), that the issues raised by Mr Munene about joinder and misjoinder of parties, are not of significance to these proceedings, because no miscarriage of justice, or any form of injustice is alleged as a result of the choosing of parties to this litigation...”

45. As stated in the above case, I find that similarly in this instant case, the issue of misjoinder is not of significance to these proceedings since no prejudice or miscarriage of justice or any form of injustice has been alleged to have arisen as a result of the alleged misjoinder. It has also not been alleged that the substance of the reliefs sought by the Applicant cannot be realized merely because of the alleged mis-joinder. In any event, Article 159(2)(d) of *the Constitution* enjoins this Court to administer justice without undue regard to technicalities of procedure.

46. I therefore decline to entertain the allegation of misjoinder raised by the 3rd Respondent.

b. Whether the Respondents are in contempt of the Court orders issued on 12/05/2022

47. Contempt of Court is that conduct or action that defies or disrespects authority of Court. Black’s Law Dictionary 9th Edition defines contempt as follows:

“ 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 conduct interferes with the administration of justice.

48. Regarding the Contempt of Court law in Kenya, on 9/11/2018, Mwita J, in *Kenya Human Rights Commission vs. Attorney General & Another* [2018] eKLR, declared the entire *Contempt of Court Act* No. 46 of 2016 to be invalid for lack of public participation as required by Articles 10 and 118(b) of *the Constitution* and found that the said Act as enacted encroached upon the independence of the Judiciary.

49. Before enactment of the now invalidated Contempt of Act, Section 5 of the *Judicature Act*, Cap 8, Laws of Kenya was the only statutory basis with respect to the procedure for institution of contempt of Court proceedings. That Section provides as follows:



1. 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.
 2. An order of the High Court made by way of punishment for contempt of court shall be appealable as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the High Court.
50. As it is therefore, there is no specific statute that governs contempt of Court in Kenya. A party seeking recourse for contempt of Court proceeding would therefore have to fall back to the provisions of Section 3 of the [Judicature Act](#) which provides as follows;

“The jurisdiction of the Supreme Court, the Court of Appeal, the High Court, the Environment and Land Court, the Employment and Labour Relations Court and of all subordinate courts shall be exercised in conformity with—

- a) [The Constitution](#)
- b) subject thereto, all other written laws, including the Acts of Parliament of the United Kingdom cited in Part I of the Schedule to this Act, modified in accordance with Part II of that Schedule
- c) subject thereto and so far as those written laws do not extend or apply, the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th August, 1897, and the procedure and practice observed in courts of justice in England at that date

Provided that the said common law, doctrines of equity and statutes of general application shall apply so far only as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary.”

51. It is therefore generally agreed that in Kenya the law that governs contempt of Court proceedings is the English law applicable in England at the time the alleged contempt is committed. Section 5 of the [Judicature Act](#) imposes a duty on the High Court, the Court of Appeal and law practitioners to ascertain the applicable law of contempt in the High Court of Justice in England, at the time the Application is brought.
52. Rule 81.4 of the English Civil Procedure Rules (Amendment No. 3) Rules, 2020 provides for the requirements of a contempt application and provides that:
- (1) Unless and to the extent that the court directs otherwise, every contempt application must be supported by written evidence given by affidavit or affirmation.
 - (2) A contempt application must include statements of all the following, unless (in the case of (b) to (g)) wholly inapplicable—
 - (a) the nature of the alleged contempt (for example, breach of an order or undertaking or contempt in the face of the court);
 - (b) the date and terms of any order allegedly breached or disobeyed;
 - (c) confirmation that any such order was personally served, and the date it was served, unless the court or the parties dispensed with personal service;



- (d) if the court dispensed with personal service, the terms and date of the court's order dispensing with personal service;
- (e) confirmation that any order allegedly breached or disobeyed included a penal notice;
- (f) the date and terms of any undertaking allegedly breached;
- (g) confirmation of the claimant's belief that the person who gave any undertaking understood its terms and the consequences of failure to comply with it;
- (h) a brief summary of the facts alleged to constitute the contempt, set out numerically in chronological order;
- (i) that the defendant has the right to be legally represented in the contempt proceedings;
- (j) that the defendant is entitled to a reasonable opportunity to obtain legal representation and to apply for legal aid which may be available without any means test;
- (k) that the defendant may be entitled to the services of an interpreter;
- (l) that the defendant is entitled to a reasonable time to prepare for the hearing;
- (m) that the defendant is entitled but not obliged to give written and oral evidence in their defence;
- (n) that the defendant has the right to remain silent and to decline to answer any question the answer to which may incriminate the defendant;
- (o) that the court may proceed in the defendant's absence if they do not attend but (whether or not they attend) will only find the defendant in contempt if satisfied beyond reasonable doubt of the facts constituting contempt and that they do constitute contempt;
- (p) that if the court is satisfied that the defendant has committed a contempt, the court may punish the defendant by a fine, imprisonment, confiscation of assets or other punishment under the law;
- (q) that if the defendant admits the contempt and wishes to apologise to the court, that is likely to reduce the seriousness of any punishment by the court;
- (r) that the court's findings will be provided in writing as soon as practicable after the hearing; and
- (s) that the court will sit in public, unless and to the extent that the court orders otherwise, and that its findings will be made public.

53. Rule 81.5 deals with the manner of service of the application and provides that:

- (1) Unless the court directs otherwise in accordance with Part 6 and except as provided in paragraph (2), a contempt application and evidence in support must be served on the defendant personally.
- (2) Where a legal representative for the defendant is on the record in the proceedings in which, or in connection with which, an alleged contempt is committed—



- (a) the contempt application and evidence in support may be served on the representative for the defendant unless the representative objects in writing within seven days of receipt of the application and evidence in support;
- (b) if the representative does not object in writing, they must at once provide to the defendant a copy of the contempt application and the evidence supporting it and take all reasonable steps to ensure the defendant understands them;
- (c) if the representative objects in writing, the issue of service shall be referred to a judge of the court dealing with the contempt application; and the judge shall consider written representations from the parties and determine the issue on the papers, without (unless the judge directs otherwise) an oral hearing.

54. The Application before Court seeks that the Respondents be cited for contempt of this Court's order of 12/05/022 as already set out hereinabove.
55. 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. Due to the gravity of consequences that ordinarily flow from contempt proceedings, it is proper that the order be served and it must be clearly demonstrated that the person cited for contempt should have had personal knowledge of that order.
56. In this instant matter, although the Applicant contends that the Respondents were aware of the orders, I find that there is insufficient evidence to prove that the Respondents had personal knowledge of the orders. What is exhibited is correspondence between the respective Advocates. There is no Affidavit of service indicating that the Applicant served the orders upon the Respondents.
57. In order to find a person guilty of contempt there must be proof of wilful and intentional disobedience of a Court order. In Mahinderjit Singh Bitta – vs Union of India & Others 1A No. 10 of 2010 the Supreme Court of India stated as follows: -

“In exercise of its contempt jurisdiction the courts are primarily concerned with enquiring whether the contemnor is guilty of intentional and wilful violation of the order of the court, even to constitute a civil contempt. Every party is lis before the court and even otherwise, is expected to obey the orders of the court in its spirit and substance. Every person is required to respect and obey the orders of the court with due dignity for the institution.

58. The Applicant has submitted that the Respondents were aware of the orders because Counsel for the 3rd Respondent was present in Court and also held brief for Counsel for the 1st and 2nd Respondents as well as for Counsel for the 4th Respondent. However, there is no evidence that the Respondents were specifically made aware of the terms of the orders. Knowledge is a question of fact and for a person to be found guilty of contempt, he must be aware of the terms of the order. That is, he must know what the order required him or her to do or not to do but wilfully and deliberately disobeyed it. In *Katsuri Limited v Kapurchand Depor Shah* [2016] eKLR, citing *Kristen Carla Burchell v Barry Grant Burchell* (Eastern Cape Division Case No 364 of 2005), it was stated as follows:

“in order for an applicant to succeed in civil contempt proceedings, the applicant has to prove (i) the terms of the order, knowledge of the terms by the respondent, failure by the respondent to comply with the terms of the order.”

59. In view of the foregoing, I find that I cannot conclusively find that the Respondents were properly served with the orders, that they were aware of the terms and that they wilfully and deliberately



disobeyed the same. There is no sufficient evidence placed before this Court to prove that the Respondents were served or were made aware of the orders which they are alleged to have disobeyed. As aforesaid, for the Respondents to be held in contempt, the Applicant must sufficiently demonstrate that there was wilful disobedience of the orders.

60. For the foregoing reasons, this Court is not satisfied that sufficient evidence has been presented to demonstrate that the Respondents were served with the Orders and/or made aware of the terms thereof.
61. The Applicant also seeks that the Respondents be cited and punished for intermeddling with the estate of the deceased.
62. The law regarding intermeddling with the estate of a deceased person is well codified in the [Law of Succession Act](#). Section 45 thereof provides as follows:

- “(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.
- (2) Any person who contravenes the provisions of this section shall —
 - (a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and
 - (b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.”

63. In *Re Estate of M’Ngarithi M’Miriti* [2017] eKLR it was held that:

“Whereas there is no specific definition provided by the Act for the term intermeddling, it refers to any act or acts which are done by a person in relation to the free property of the deceased without the authority of any law or grant of representation to do so. The category of the offensive acts is not heretically closed but would certainly include taking possession, or occupation of, disposing of, exchanging, receiving, paying out, distributing, donating, charging or mortgaging, leasing out, interfering with lawful liens or charge or mortgage of the free property of the deceased in contravention of the [Law of Succession Act](#). I should add that any act or acts which will dissipate or diminish or put at risk the free property of the deceased are also acts of intermeddling in law. I reckon that intermeddling with the free property of the deceased is a very serious criminal charge for which the person intermeddling may be convicted and sentenced to imprisonment or fine or both under section 45 of the [Law of Succession Act](#). That is why the law has taken a very firm stance on intermeddling and has clothed the court with wide powers to deal with cases of intermeddling and may issue any appropriate order(s) of protection of the estate against any person.”

64. In this cause however, save for merely alleging that the Respondents have intermeddled with the estate of the deceased, the Applicant has not produced sufficient evidence to support the said assertions. In view thereof, this Court is unable to find that the Respondents have in fact intermeddled with the estate.



65. In view of my above analysis and findings, the conclusion becomes irresistible that the Applicant's Application dated 15/08/2022 does not satisfy the prerequisites for the Court to grant the orders sought.
66. Nevertheless, the Orders issued by H. Omondi J (as she then was) on 12/05/2022 could not have been issued in vain. What this Application has achieved is that by exhaustively responding to the Application and filing Replying Affidavits, the Respondents cannot now allege ignorance of the orders and the terms thereof. Court orders must be obeyed and the Respondents must now do what they were directed to do. If the Respondents genuinely were not aware of the terms of the orders, now they do.
67. I am alive to the fact that the Respondents have in responding to the Application, made some reference to their compliance with the orders or lack thereof but the explanations are not very clear, are spread out in the various Replying Affidavits and are not therefore presented in a structured and organized manner. I will therefore now direct the Respondents to file individual Affidavits before the Court giving a Report of how, in what manner and to what extent they have complied with the orders.
68. Needless to state, this Court shall not hesitate to take stern action against and impose appropriate penalties against any party that shall without reasonable cause, defy, ignore or disobey any orders by the Court in this matter. Under no circumstances shall this Court allow or accept its authority to be undermined. Let no party therefore try to test this Court's resolve to protect its authority. Such disobedience shall be swiftly and appropriately punished. The Respondents are therefore forewarned.

Final Orders

69. In view of above, I issue the following orders:
 - i. The Notice of Motion dated 15/08/2022 is hereby dismissed with no orders as to costs.
 - ii. However, each of the Respondents shall, within 45 days from the date hereof, file in this Court and serve upon all other parties, within the same period, individual Affidavits setting out, explaining and/or giving an account or Report of how, in what manner and to what extent each Respondent has complied with the Orders issued by H. Omondi J (as she then was) on 12/05/2022.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 28TH DAY OF APRIL 2023

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JOHN R. ANURO WANANDA
JUDGE

