



REPUBLIC OF KENYA



**In re Estate of Jackson Guto Nyaboga (Deceased) (Probate & Administration  
E007 of 2021) [2023] KEHC 3431 (KLR) (27 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3431 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAMIRA  
PROBATE & ADMINISTRATION E007 OF 2021**

**WA OKWANY, J**

**APRIL 27, 2023**

**IN THE MATTER OF THE ESTATE OF JACKSON GUTO NYABOGA--(DECEASED)**

**BETWEEN**

**NICK ABOKO OMARI ..... APPLICANT**

**AND**

**THOMAS MOMANYI GUTO ..... 1<sup>ST</sup> PETITIONER**

**GEORGE MACRIDS GUTO ..... 2<sup>ND</sup> PETITIONER**

**ALICE MOKEIRA ..... 3<sup>RD</sup> PETITIONER**

**MARY NYASUGUTA ..... 4<sup>TH</sup> PETITIONER**

**AND**

**MOSES NYABOGA GUTO ..... OBJECTOR**

**RULING**

1. The Applicant filed the application dated 25<sup>th</sup> October 2022 seeking orders that the 1<sup>st</sup> Respondent be held in contempt of court and that a mandatory order of injunction do issue compelling the 1<sup>st</sup> Respondent to demolish the permanent structures erected on LR No. Nyansiongo/Gesima Scheme/200 (hereinafter “the suit land”).
2. The Applicant further seeks orders that the 1<sup>st</sup> Respondent deposits, in court, all the proceeds of the sale of timber and logs harvested from the suit land.
3. The application is supported by the affidavit of the Applicant’s Advocate Mr. Nick Aboko Omari and is premised on the grounds that: -



- a. Vide orders given on 17<sup>th</sup> March, 2022, the honourable court issued preservative/injunctive orders over the Deceased's property in the following terms:

“The status quo prevailing to be preserved until 3<sup>rd</sup> May, 2022. For the avoidance of doubt none of the parties shall undertake any work on any part of the properties which constitute the Estate.”
  - b. Suffice to state, all the parties herein are fully aware of the orders given by the honourable court.
  - c. Regrettably, the 1<sup>st</sup> Respondent in open defiance to the court order proceeded to deposit additional material on the suit property after service of the court order.
  - d. Despite being cautioned by the Applicant's advocates, the 1<sup>st</sup> Respondent brazenly went ahead to erect a permanent structure on the Deceased's property.
  - e. In effect, the 1<sup>st</sup> Respondent has continued to intermeddle with the Deceased's estate in total disregard to the court's orders.
  - f. As things stand, the deceased's estate is at imminent risk of further interference by the Respondents who have demonstrated that they have no regard to the rule of law.
  - g. In the premises, it is pertinent for the honourable court to take remedial steps towards enforcement of its orders through the nearest police station and holding the Respondents fully accountable for their actions by way of committal to civil jail in addition to other measures such as demolition of the offending structure(s).
  - h. Unless the honourable court urgently intervenes, existing court orders will continue to be violated.
4. The 1<sup>st</sup> Respondent, opposed the application through his replying affidavit sworn on 16<sup>th</sup> January 2022 wherein he avers that his Advocate informed him of the court's orders of 17<sup>th</sup> March 2022. He adds that as at the time of the issuance of the said orders, he had already commenced construction works by depositing building materials and building a foundation on the suit land as he was heading into retirement. He avers that he complied with the court's orders until his elder brother, the 2<sup>nd</sup> Objector, approached him for trees and timber to construct a house and to clear the building materials on the site. He avers that based on the information and approach by the 2<sup>nd</sup> Objector, he proceeded to construct a house using the timber as he thought that the 2<sup>nd</sup> Objector had consulted his Lawyer for guidance on the issue of construction.
  5. He further states that the partial construction was not done deliberately in disobedience of the court order. He adds that he even appeared in court and confirmed the position after which he asked for forgiveness having been misled by the 2<sup>nd</sup> Objector. He states that he is keen on finalizing the succession case so that he can complete his retirement home on the suit land since all the other beneficiaries have already finished constructing their houses.
  6. The Interested Party, Moses Nyamboga Guto, also filed a replying affidavit dated 23<sup>rd</sup> March 2023 wherein he avers that he supports the application as he witnessed the 1<sup>st</sup> Petitioner depositing building materials and constructing a house on the suit land in disobedience of the court order barring any construction during the pendency of the succession cause.
  7. The Interested Party urges the court to take stern action against the 1<sup>st</sup> Petitioner for contempt of the court's orders of 12<sup>th</sup> May 2022. He denies the claim that he approached the 1<sup>st</sup> Respondent with a



proposal to fell timber or clear the construction materials from the suit land as alleged. He further states that besides himself and the 2<sup>nd</sup> Petitioner, no other beneficiary has put up any structure on the suit land and that the 1<sup>st</sup> Respondent's claim that he is the only one who is yet to construct a house is false. He accuses the Petitioners of lack of co-operation and for failing to build a consensus towards an agreement on amicable distribution of the deceased's estate.

8. Parties canvassed the application by way of written submissions wherein they reiterated the averments contained in their respective affidavits and the law and principles governing the granting of orders for contempt of court. I note that the following facts of the case were not disputed: -

a. That the suit land (Land Title No: Nyansiongo/Gesima Scheme/200) comprises of the Deceased's estate where the parties herein are beneficiaries.

b. That this court, differently constituted, issued conservatory orders on 17<sup>th</sup> March, 2022 in the following terms:

“The status quo prevailing to be preserved until 3<sup>rd</sup> May, 2022. For the avoidance of doubt none of the parties shall undertake any work on any part of the properties which constitute the Estate.”

c. That at the time of issuance of the above orders, the 1<sup>st</sup> Petitioner/Respondent had only deposited construction materials on the site.

d. That on 12<sup>th</sup> May, 2022, in the presence of the Parties' Advocates, the Court issued further orders as follows:

“No construction shall be carried out on any parcels of land which constitutes the estate until the matter herein is concluded, unless all the beneficiaries shall have given their prior written consent to such development.”

e. That all parties, the 1<sup>st</sup> Petitioner included were well aware of the court orders.

f. That notwithstanding the above orders, the 1<sup>st</sup> Petitioner/Respondent proceeded with construction on the suit land and continued erecting structures.

9. In *North Tetu Farmers Co. Ltd vs Joseph Nderitu Wanjohi* [2016] eKLR the court outlined the ingredients of contempt of court 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. In the instant case and as I have already stated, it was not disputed that the 1<sup>st</sup> Respondent was aware of the terms of the court orders of 17<sup>th</sup> March 2022 and 12<sup>th</sup> May 2022.



11. I have perused the proceedings of 12<sup>th</sup> May 2022 and I note that Mr. Nyambati Advocate was present when the said order was issued. The 1<sup>st</sup> Respondent does not deny that he was aware of the said order but explains that he was misled and betrayed by his brother, the Interested Party, who urged him to use the trees and timber that were lying on the ground to carry out the construction instead of letting it waste away. The 1<sup>st</sup> Respondent further explained that he was under the impression that the Advocates had vacated the impugned orders.
12. I have perused the full text of the court's orders of 12<sup>th</sup> May 2022 and I note that besides appointing the 3 Administrators of the estate of the deceased the court also issued clear orders for the preservation of the estate of the deceased as follows: -
  - “(2) The estate shall be preserved and conserved for the benefit of all the beneficiaries. It shall not be encumbered or alienated by any person.
  - (3) No third party shall intermeddle in the estate in any manner whatsoever.
  - (4) The beneficiaries may use the land for cultivation or as their residence, as is currently ongoing.
  - (5) No construction shall be carried out on any parcel of land which constitute the estate, until the matter herein is concluded, unless all the beneficiaries shall have given their prior written consents to such development.”
13. My finding is that the order of 12<sup>th</sup> May 2022 was clear and unambiguous on what was expected from the beneficiaries of the estate of the deceased. I further find that the 1<sup>st</sup> Respondent was aware of the said order having been issued in the presence of his Advocate on record.
14. The 1<sup>st</sup> Respondent does not deny that he constructed a house on the suit land at a time when the succession case had not been concluded and without the prior written consent of the other beneficiaries. I find that the Respondent's explanation that he was misled by his brother (the Interested Party) or that he was under the impression that the Advocates had vacated the subject order is a mere excuse which does not hold any water. I find that the 1<sup>st</sup> Respondent disobeyed the court order of 12<sup>th</sup> May 2022 and that he cannot escape the consequences of such disobedience.
15. The Applicant sought orders for the demolition of the house constructed on the suit land in disobedience of the court order. I however find that such an order would be too drastic and counterproductive considering that the protagonists in this case are brothers and that the land in question, in which they are all beneficiaries, belongs to their late father. The land is yet to be distributed to the beneficiaries.
16. The question that the court has to answer is; what would be the justice of demolishing the house if in the final end, after confirmation of grant, the 1<sup>st</sup> Respondent gets the exact same land where he has constructed the house? This is however a hypothetical question that does not necessarily connote that the 1<sup>st</sup> Respondent will eventually be entitled to the portion of land where the offending house currently stands. One can say that the 1<sup>st</sup> Respondent's actions were clearly intended to steal the match from the other beneficiaries by pre-empting the distribution of the estate.
17. The court finds that it will not be in the interest of justice to order for the demolition of the offending building at this point of the proceedings. The court is, however, only cautious not to do more damage to the parties and to the estate at this point in time when the estate has not been distributed. I hasten to add that the above finding on the issue of demolition goes with a rider that the said offending building will not in any way be a factor for consideration during the distribution of the deceased's estate. This



means that should the land in question, upon distribution be found to belong to a different beneficiary other than the 1<sup>st</sup> Respondent herein, then the said Respondent will not have any option but suffer the consequence of his disobedience through the demolition of all the structures he has erected on the land.

18. The Applicant also sought orders for the deposit of all the proceeds of the sale of timber and logs harvested from the suit land. I however note that the Applicant did not disclose/particularize the amount to be deposited in court and I therefore find that this prayer was not proved to the required standards.
19. In sum, I find that the 1<sup>st</sup> Respondent disobeyed the court's order of 12<sup>th</sup> May 2022 and I therefore find him guilty of contempt of court.
20. Consequently, I direct the 1<sup>st</sup> Respondent to appear in court on 4<sup>th</sup> May 2023 to show cause why he should not be punished for contempt of court.
21. It is so ordered.

**RULING DATED, SIGNED AND DELIVERED AT NYAMIRA VIA MICROSOFT TEAMS THIS 27<sup>TH</sup> DAY OF APRIL 2023.**

**W. A. OKWANY**

**JUDGE**

