



In re Estate of Karige Kihoro alias Karege Kihoro (Deceased) (Succession Cause E005 of 2022) [2023] KEHC 18210 (KLR) (25 May 2023) (Ruling)

Neutral citation: [2023] KEHC 18210 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
SUCCESSION CAUSE E005 OF 2022
FN MUCHEMI, J
MAY 25, 2023**

BETWEEN

HANNAH WAHU NGUNYA APPLICANT

AND

LYDIA MUTHONI NJOROGE RESPONDENT

RULING

1. This application dated 16th November 2022 brought under Section 1A, 1B and 3A of the [Civil Procedure Act](#), Sections 45 & 47 of the [Law of Succession Act](#) and Rule 49 of the Probate & Administration Rules seeks for the orders of contempt of court against the respondent.
2. The respondent opposed the application in his a Replying Affidavit sworn on 13th December 2022.

The Applicant's Case

3. The applicant deposes that the court gave a ruling on 22nd September 2022 directing that a joint account in the names of the applicant, respondent and Muchiri Karige be opened within 30 days from the ruling date and further that the rent collected from LR Nairobi/Block 251/425 and LR Nairobi/Block 251/315 to be deposited in the said account. The applicant states that the respondent has refused to cooperate with her in opening of the account despite being served with the orders of the court. Furthermore, the manager of Family Bank called the respondent regarding the opening of the account but she refused to go to the bank for that purpose. On 25/10/2022, a licensed court process server took the account opening forms to the respondent for her to sign but she refused to do so. The applicant contends that the respondent is wilfully ignoring court orders and frustrating the rest of family members.
4. The applicant further argues that the respondent has not appealed or made an application for review of the court orders of 22/09/2022..



The Respondent

5. The respondent states that the application is mischievous, vexatious an abuse of the court process. The respondent avers that it is not true that she has refused to cooperate with the other two in opening a joint account as directed by the court on 22nd September 2022. Further that she was never contacted by the manager of Family Bank and the process server who alleges to have served her with account opening forms in Nairobi is short of the truth for she states that she was in Nyahururu and not in Nairobi on the said date.
6. The respondent contends that she has changed advocates from T. W. Murage & Co. Advocates to Gori, Ombongi & Co. Advocates and she intends to have the orders issued reviewed. The respondent states that there is already another joint account and she requests for time to file an application to demonstrate to the court why the order earlier obtained should be set aside or reviewed. Alternatively, the respondent states that she is ready and willing to sign the said account opening forms as indicated in her advocates letter to the applicant's advocates.
7. The respondent in her further affidavit sworn on 16th February 2023 states that the rental income she raised was approximately Kenya Shillings Three Hundred Thousand (Kshs. 300,000/-) but she states that the amount was not consistent due to the economic vicissitudes and irregularity of tenants to occupy the houses and pay rent. The respondent further annexed a bundle of records showing how the rent collections have been used in paying for expenses from the date of the demise of the deceased to date.
8. The applicant in her further affidavit sworn on 5th April 2023 states that the respondent signed the bank forms and an account was opened at Family Bank which she deposited Kshs. 50,000/- only, which was less than the amount collected. Prior to the death of the deceased, the rental income collected by the respondent would be deposited in the deceased's Family Bank Account No. 041000000913 and some tenants would send their rent to the deceased's safaricom number 0722688179. Thus from the bank statement and the mpesa statements, the rent collected by the respondent is approximately Kshs. 400,000/-.
9. The applicant avers that after the death of the deceased, the respondent started collecting all the rent including the amount being sent to the deceased. The applicant argues that the respondent cannot account for any rent collected since the court order was made. In an attempt to account, the respondent filed an affidavit and lied that she pays the caretaker in Nyeri Wambugu Farm every month yet the applicant avers that she is the one who pays the caretakers from her own pocket after the respondent refused to pay and the property was being vandalized by unknown people. In support, the applicant annexed her mpesa statements to show that she pays the workers Kshs. 10,000/- per month. She further annexed an affidavit by Sumay Sandet Laizer, a caretaker in one of the plots in Wambugu Farm that belongs to the deceased to support her averments.
10. Furthermore, it was agreed by the parties during mediation that the rent collected was to maintain the Nyeri Wambugu Farm and the other house in Ruiru, which was the duty of the respondent.
11. The applicant further states that the houses in Wambugu Farm are incomplete and no one resides there and thus no income is generated from that property as is alleged and the applicants states that the respondent has not been paying income tax for the rent attracting very huge penalties that may lead to the auctioning of the deceased's properties. The applicant argues that the respondent has continued to waste the estate of the deceased and has vowed to leave nothing behind despite the court orders.



12. The respondent filed a Supplementary Affidavit on 25th April 2023 pursuant to the court's leave on 18th April 2023 and states that she ought not to be cited for contempt of court as she has fully obeyed the court orders dated 28th September 2022. Annexed to the affidavit is an audited account for the rent and other income collected from the deceased's assets from the date of the deceased till date. She has further annexed two banking slips from the rent collected and states that she has been faithfully depositing the rent collected.
13. The applicant filed a Further Supporting Affidavit dated 27th April 2023 and states that the respondent is misleading the court as she has only deposited Kshs. 150,000/- contrary to the Kshs. 350,000/- stated in her report as per the joint bank statement. Further, the applicant argues that the audited report is full of inconsistencies and the receipts attached are collected from the streets without any verification.
14. The applicant further reiterates that the respondent does not pay the Nyeri caretaker and other Nyeri bills and neither does she pay the rental income tax as it is not shown anywhere in her report. The respondent stated that she is paying Kshs. 150,000/- every month for school fees which is untrue. According to the applicant there are other beneficiaries in school and they need school fees which is not paid from the deceased's estate.
15. The applicant avers that she and other beneficiaries Kwame Kihoro and Stephen Mwangi have been bearing the costs of the estate from their pockets while the respondent continues to misappropriate the proceeds from the estate. Furthermore, the respondent frustrated the mediation agreement which she signed after taking part in it and which is on the court record.
16. The applicant reiterates that from the statement filed of the money that was being deposited in the deceased's mpesa and Family Bank cannot be accounted for by the respondents. Her report shows that the rent dropped drastically and all of a sudden people stopped paying rent and she did not inform the other beneficiaries for the action. As such, the applicant prays that the court finds that the audited report is an afterthought and is full of inconsistencies and the same ought not to be admitted in this application.
17. Parties disposed of the application by way of written submissions.

The Applicant's Submissions

18. The applicant relies on Section 5 of the *Judicature Act, Halsbury's Laws of England* (4th Edition, 9th re-issue page 33 para 52, *Black's Law Dictionary* 7th Edition and the case of *Sheila Cassatt Isenberg & Another vs Antony Machatha Kinyanjui* [2021] eKLR and submits that the court has powers to punish for contempt of court in order to uphold the authority and dignity of the court. The applicant further relies on Section 47 of the *Law of Succession Act*, Rule 73 of *Probate & Administration Rules* and submits that the court has the inherent powers to make such orders as may be necessary for the ends of justice.
19. The applicant refers to the case of *In the Matter of the Estate of George Amugune Lugadiru (Deceased) Milka Wangoi Kamau & Another vs Habby Misoga Lugadiru* [2014] eKLR and submits that the respondent deliberately and intentionally disobeyed the orders of 22nd September 2022 and ought to be cited for contempt. The applicant submits that the respondent was served with the court order on 4th October 2022 as indicated by the affidavit of service by the process server John M. Chere. The applicant avers that the process server was well known to the respondent and has been serving her with documents in the past in other applications. Additionally, the respondent was served with the bank opening forms for her to sign but she refused to do so. When the matter came up for directions on 20/12/2022, the respondent through her advocate informed the court that she is willing to obey the



court orders. The respondent lied to the court and was given time to comply with the said orders but she failed to do so. Moreover, the respondent did not file any application for review of the court orders and as such she has no reasons for non-compliance. As such, the applicant submits that the respondent was aware of the existence of the court orders but she chose to disobey.

20. The applicant argues that the respondent has failed to deposit the rent collected as was ordered by the court despite being given time to comply. The respondent has refused to account for the rent from the time the deceased died to date. The applicant submits that the deceased had twelve beneficiaries and yet the respondent is the only one benefiting from the rent that she is collecting. Moreover, the estate is in debt and the respondent does not pay the rental income taxes despite been aware of the same. The applicant thus relies on the cases of *Kristen Carla Burchell vs Barry Grant Burchell*, Eastern Cape Division Case No. 364 of 2005 and *Teachers Service Commission vs Kenya National Union of Teachers & 2 Others* [2013] eKLR and submits that court orders must be obeyed at all times in order to maintain the rule of law and good order.
21. The applicant submits that she has established all the elements of contempt of court and in the absence of any plausible reasons as to why the respondent should not be cited for contempt of court, the court should cite the respondent for contempt.

The Respondent's Submissions

22. The respondent submits that she has been tardy in fully observing the orders issued by the court but the same has not been intentional and has been occasioned by circumstances beyond her control. She explains that it has been a herculean task to gather all the pertinent documents to account for the usage of the income generated from the properties owned by the deceased.
23. The respondent cites the case of *Samuel M. N. Mweru & Others vs National Land Commission & 2 Others* [2020] eKLR and submits that she did not refuse or fail to obey the court order but only dallied due to circumstances beyond her control such as distance, availability of records and the need to hire a qualified professional to prepare a satisfactory audit report.

The Law

Whether the applicant has established any basis for the orders sought to be granted.

24. Section 5 of the *Judicature Act* provides:-

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.

25. This was observed by the Court of Appeal in the case of *Christine Wangari Chege vs Elizabeth Wanjiru Evans & Others* [2014] eKLR:-

“Though the Court of Appeal of England and Wales was established in 1875, some 92 years before the commencement of the *Judicature Act*, the Act in the cited Section 5 simply directs that this court like the High Court must make reference to the powers exercised by the High Court of Justice in England and not those exercised by its counterpart, the Court of Appeal of England and Wales.

26. It is a crime unlawfully and intentionally to disobey a court order. It is therefore the court's duty not to condone deliberate disobedience of its orders as the court does not make orders in vain. This principle



was enunciated in the case of *Sheila Cassat Issenberg & Another vs Antony Machatha Kinyanjui* [2021] eKLR where the court held that:-

The reason why courts punish for contempt is to uphold the dignity and authority of the court, ensure compliance with the directions of the court, observance and respect of due process of law, preserve an effective and impartial system of justice, and maintain public confidence in the administration of justice by courts. Without sanctions for contempt, there would be a serious threat to the rule of law and administration of justice. For a party to be cited for contempt, he must have violated and disobeyed an order that was directed at him.

27. Accordingly, in order to succeed in civil contempt proceedings, the applicant must prove the terms of the order; knowledge of these terms by the respondent; failure by the respondent to comply with the terms of the order. Upon proof of these requirements, the presence of willfulness and bad faith on the part of the respondent would normally be inferred, but the respondent could rebut this inference by contrary proof on a balance of probabilities. This was enunciated by Mativo J in *Samuel M. N. Mweru & Others vs National Land Commission & 2 Others* [2020] eKLR. Notably, as it was held in *Mwangi H. C. Wangondu vs Nairobi City Commission* Nairobi Civil Appeal No. 95 of 1998 and *Gatharia K. Mutikika vs Babarini Farm Ltd* [1985] KLR 227 the threshold of proof required in contempt of Court is higher than that in normal civil cases, and one can only be committed to civil jail or otherwise penalized on the basis of evidence that leaves no doubt as to the contemnor's culpability.
28. The applicant argues that the respondent was served with the court orders on 4th October 2022 and an affidavit of service of the process server, one John M. Chere was filed as proof of service. The process server indicates in his affidavit that he served the respondent with the said order at her residence on 4th October 2022. On further perusal there is an affidavit of service by the same process server sworn on 28th October 2022 which states that on 26th October 2022, he served the respondent with Family Bank account opening forms but she refused to sign. The respondent denies being served with the account opening forms or being called to the bank by the Manager of Family Bank. It is also denied by the respondent that she was served with the account opening forms. As this matter came up for directions on 20th December 2022, the respondent through her advocate informed the court that she is willing to obey the court orders and sought for more time which request was granted. Therefore, it is evident that this court issued the relevant order on 22nd September 2022 which the respondent was duly served. In her pleadings, the respondent remained silent on the issue of service of the order despite the fact that she told the court through her advocate that she was ready and willing to comply with the said orders before in court on 20th December 2022. The court then gave the respondent more time to comply.
29. To demonstrate that the respondent has willfully and blatantly contravened the said orders, the applicant argued that the respondent has failed to deposit the rent collected in the account and has further refused to account for the rent from the time the deceased died till date. The applicant further argued that the respondent is solely benefiting from the estate of the deceased at the expense of the twelve beneficiaries who were left behind by the deceased. The court directed that the respondent open the account within 14 days on 20/12/2022 when she asked for more time and slated the matter for compliance to 25th January 2023. On 25/1/2023, although the respondent had signed the forms and the account opened, she only deposited the sum of Kshs. 50,000/- and as per the applicant the respondent was receiving more than Kshs. 400,000/- in terms of rent. The respondent asked the court to be granted more time to enable her account fully following which the court granted her 10 days to fully comply and file evidence for purposes of accounting. The matter came up for compliance once more on 16th February 2023 and the respondent stated that she had complied with the orders and sought leave to file a further supplementary affidavit to attach the supporting documents. I have



perused the said affidavit dated 16th February 2023 and the respondent in an attempt to account for the rental income annexed handwritten notes showing how the collections have been used. It is not until 25th April 2023, that the respondent filed an audited report of the handwritten notes she had annexed to her affidavit dated 16th February 2023. I have perused the supplementary affidavit and the annexures hereto and noted that the respondent's conduct in this cause is very wanting. Despite being given two chances to deposit the rent in the bank account and file a detailed account, the respondent has failed to comply. Filing of the hand written accounts and further the audited accounts on 24th April 2023 without supporting documents for the rent collection and how the rental income was utilized confirms the applicant's allegation that the respondent has not been depositing the rental income in the bank account as directed, not even the sum of Kshs.300,000/- admitted by her as being received every month. It is also clear that the respondent only attempts to comply with the said orders when the applicant threatens to fix for hearing this contempt of court application. Moreover there is no record filed by the respondent on the rental taxes and expenses regarding the property from time to time.

30. It is my considered view that the respondent has willfully and deliberately failed to obey the orders of the court which she was well aware of from inception. The effect of the failure to obey the court orders has led to unwarranted wasting and misappropriation of the income of the deceased's estate income at the expense of the other eleven (11) beneficiaries.
31. It is my finding that the respondent is guilty of contempt of court and ought to be sentenced accordingly.
32. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 25TH DAY OF MAY, 2023.

F. MUCHEMI

JUDGE

Ruling delivered through video link this 25th day of May 2023.

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