



REPUBLIC OF KENYA



**In re Estate of Wanyama Saratuki (Deceased) (Succession Cause
19 of 2008) [2023] KEHC 22981 (KLR) (29 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22981 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
SUCCESSION CAUSE 19 OF 2008
REA OUGO, J
SEPTEMBER 29, 2023
IN THE MATTER OF THE ESTATE OF WANYAMA SARATUKI
AND
CHRISTINE SIKHOYA WANYAMA
GEORGE NANDOKHA WANYAMAPETITIONERS/APPLICANTS
AND
JOHN MUCHAAZI WANYAMA.....1ST PETITIONER/RESPONDENT
FLORENCE KHAWAKA WANYAMA.....3RD PETITIONER/RESPONDENT**

RULING

1. Christine Sikhoya George (1st Applicant) and George Nandokha Wanyama (2nd applicant) have filed a chamber summons dated the 28th February 2023 against John Muchaazi Wanyama (1st Respondent) and Florence Khwaka Wanyama (2nd Respondent). They seek the following orders against the 1st and 2nd Respondents;
 - a. Spent
 - b. Spent
 - c. That the honourable court be pleased to consider criminal charges against John Muchaazi Wanyama 1st petitioner/ respondent and Florence Khwaka Wanyama the 4th widow for contempt order of this honourable court and threatening other beneficiaries.
 - d. That upon granting prayers (b) this honourable court be pleased to order John Muchaazi Wanyama and Florence Khwaka Wanyama to reimburse monthly rental income from plot No. 377 Bungoma Town and Plot No. 7 Chepkube Market that has not been accounted for to date.
2. The application is supported by the joint affidavit of the applicants dated the 28th February 2023 and 7th July 2023. They state as follows in brief ; they are joint administrators with John Muchasi



Wanyama and Caroline Kituyi Wanyama. That the John Muchasi ,2nd administrator and his brothers are derailing the conveyance process in the subject succession by destroying property developed on other widows' portions of agricultural land North Malakisi/ North Wamono/620/35.0882 acres for the criminal suit in Sirisia Magistrates Court. That the 2nd administrator John and his brother have filed a petition at the Magistrate's court at Sirisia a court subordinate to this court, seeking an injunction on the execution of the High Court grant. That John and Florence are creating unnecessary tension among the beneficiaries of the deceased by threatening them with death. That they even went to TV Magharibi and publicized inaccurate information about the ongoing succession with the intention of raising unwarranted public uproar. That the 4th widow has refused to surrender the portion of Plot No.377 Bungoma Town and the rental income arising from the said portion to her co-widows as granted by this court. That the administrators cannot execute the conveyance of the estates as reflected in the certificate of confirmation of grant unless the outstanding sum of Kshs. 96,000/- in arrears of municipal rates for Plot No. 377 Bungoma owed to Bungoma County Revenue Office, Kshs. 50,000/- on Plot No.8 Chepkube, Kshs. 50,000/- on Plot No. 7 Mayekwe and pending bills of Kshs. 252,000/- owed to Geomatics Services Limited are cleared.

3. The application was opposed. The respondent relied on the affidavits dated the 6/6/23 and 12/7/2023 sworn by Florence Khwaka. She states that she has not been involved with John Muchaazi to destroy any property or create unnecessary tension to threaten them with death. She has not been to Magharibi as alleged. That at the time the court issued the order to have rent deposited on the account the tenants refused her to collect monies hence she cannot account for what she has not collected as the applicant's wrote to them to pay at the bank. That the portion she occupies is what the court awarded her. That the court has already released the Kshs.500,000/- to the County Revenue Office without prof and without involving the 4th house which forms part of the estate. That the court dealt with the issue of distributing funds without even involving the administrator of the 4th house. that the application by the applicants is bad in law, defective and ought to be struck off. That on the 4th July 2023 the applicants went to her premises to evict her from the premises. That she is not the administrator of the estate and the applicants keep harassing her.
4. Oral submissions were made during the hearing of the current application. I have carefully considered them. The applicants seek that this court consider criminal charges against John Muchaazi Wanyama and Florence Khwaka Wanyama. This order cannot be granted by this court. If at all a party has committed a criminal offence the proper avenue for the applicants is to report it to the relevant authorities for investigations and action. If the administrator or beneficiary issued threats then let the applicants take it up with the relevant authorities for investigations and action.
5. On the issue of contempt of court orders. The applicants have filed a chamber summons. The application is not brought under section 5 of the *Judicature Act* which is the current law that governs contempt proceedings. Justice Odunga in the case of *Alfred Mutua v Boniface Mwangi* [2022] eKLR held as follows ;

‘Therefore, the law that governs contempt of court proceedings is the English law applicable in England at the time the contempt was committed. The procedure in the High Court of Justice in England was considered in detail by the Court of Appeal in Christine Wangari Gachege vs. Elizabeth Wanjiru Evans & 11 Others [2014] eKLR. In that case the Court recognised that the only statutory basis for contempt of court law in so far as the Court of Appeal and the High Court are concerned is section 5 of the *Judicature Act*.



15. Under 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.

16. 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.
17. Rule 81.7 then deals with directions for hearing of contempt application and provides that:
- (1) The court shall give such directions as it thinks fit for the hearing and determination of contempt proceedings, including directions for the attendance of witnesses and oral evidence, as it considers appropriate.
 - (2) The court may issue a bench warrant to secure the attendance of the defendant at a directions hearing or at the substantive hearing.
 - (3) The court may not give any direction compelling the defendant to give evidence either orally or in writing.
18. Rule 81.8 then deals with hearings of such applications and provides that:
- (1) In accordance with rule 39.2, all hearings of contempt proceedings shall, irrespective of the parties' consent, be listed and heard in public unless the court otherwise directs.
 - (2) Advocates and the judge shall appear robed in all hearings of contempt proceedings, whether or not the court sits in public.
 - (3) Before deciding to sit in private for all or part of the hearing, the court shall notify the national print and broadcast media, via the Press Association.
 - (4) The court shall consider any submissions from the parties or media organisations before deciding whether and if so to what extent the hearing should be in private.
 - (5) If the court decides to sit in private it shall, before doing so, sit in public to give a reasoned public judgment setting out why it is doing so.
 - (6) At the conclusion of the hearing, whether or not held in private, the court shall sit in public to give a reasoned public judgment stating its findings and any punishment.
 - (7) The court shall inform the defendant of the right to appeal without permission, the time limit for appealing and the court before which any appeal must be brought.



- (8) The court shall be responsible for ensuring that judgments in contempt proceedings are transcribed and published on the website of the judiciary of England and Wales.
6. The guidelines by Justice Odunga are clear and I am in agreement with Mr. Kituyi that the application for contempt orders is incompetent. There is no specific application for contempt orders against the respondents, the applicants have failed to follow the procedure as stated in bringing contempt proceedings against a party. I decline to grant the said orders.
7. Lastly in the affidavit dated 7th July 2023 the applicants allege that the 2nd administrator has collected rent to the tune of Kshs. 5,500,000/- from the estates of the deceased. That the court should order John Muchaazi Wanyama and Florence Khwaka to account for the said rent. I have noted that John has not responded but Florence did. She denies collecting the rent and states that the rent is being deposited in the bank. There are annexures by Florence that show that some tenants were directed to pay rent to Diamond Trust Bank, see 'FKW-d'. An allegation has been made by the applicant but is not sufficiently supported by any evidence for this court to order for the said accounts to be rendered in court as sought. The period in issue, the specific plots generating, the rent and how much, need to be specified. Further I am unable to understand why the applicants are not directing their requests to the 4th administrator of the 4th house. She has a duty as an administrator to ensure that the estate of the deceased is properly administered as required in law.
8. I therefore find no merit in the application dated the 28th February 2023. It is dismissed. Each party to bear its own costs.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 29TH DAY OF SEPTEMBER 2023.

R.E.OUGO

JUDGE

In the presence of;

1st & 2nd Applicants -Present

John Muchaazi Wanyama . Absent

Florence Khwaka Wanyama – Absent

Okwaro C/A

