



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

SUCCESSION CAUSE NO. 2158 OF 1999

IN THE MATTER OF THE ESTATE OF WAINAINA IMEKE (DECEASED)

RULING

1. The background of this matter is well captured in this Court's ruling of 24.9.21 and it is not necessary to restate the same herein. Presently before me for consideration, is an application dated 21.4.21 in which the Applicant Martha Wanjira Njuguna seeks that:

1) Njenga Kibutha be and is hereby committed to civil jail for a period of six (6) months for blatant disobedience of this Court Order issued on the 9th day of February 2021.

2) Njenga Kibutha be and is hereby ordered to purge the contempt of continuing with construction of houses on Land Reference Number Karai/Karai/119 despite being restrained from continuing with the construction of the building and other activities by demolishing all the structures he has put up on the suit premises before and during the pendency of this suit and do clear all the debris from the suit land failing which he is hereby ordered to pay the four beneficiaries of the deceased herein to demolish the structures and cart away the debris.

3) The respondent do pay costs of this application.

2. The grounds upon which the Application is premised are that despite this Court issuing an order of injunction restraining the Respondent from dealing with the suit property and despite the said order being served upon him personally and upon his advocates, the Respondent has disobeyed the said order. He has continued in occupation of the land and construction and boasts how he will not stop doing so.

3. The Applicant averred that upon the demise of her father Wainaina Imeke, the deceased to whom the proceedings herein relate, the Respondent who is her paternal uncle is bent on stealing their father's land, the suit property. She accused the Respondent of invading the suit property and started construction in January 2021. She filed an application for injunction and other prayers and an injunction was issued on 9.2.21. In spite of the order which the Respondent termed as fake, the Respondent continued to build and has placed 4 night guards on site. She further accused the Respondent of threatening the deceased's family and has been speaking derogatively about the Court. The Applicant contended that the Respondent has acted with utmost contempt, by failing to obey the Court order and is deserving of punishment in order to restore the respect, dignity and honour of the Court.

4. Directions were given that submissions be filed and that the Respondent supplies the Court with a hard copy of his replying affidavit. The only submissions filed are those of the Applicant while the replying affidavit was not supplied to the Court as directed.

5. I have considered the Application and the supporting affidavit. I have also given due consideration to the Applicant's submissions and note that they reiterate the averments in the supporting affidavit.

6. The Application is expressed to be brought under Article 159 (d) (sic) of the Constitution of Kenya, 2010 and Sections 3(a)-(e), 4(1) (a) (2) 5(a) and (b) of the Contempt of Court Act, No. 46 of 2016.

7. The power of this Court to punish for contempt is provided for in Section 5 of the Judicature Act which provides:

(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 such power shall extend to upholding the authority and dignity of subordinate courts.

8. In 2016, Parliament bequeathed us with our own homegrown law on contempt of court by enacting the Contempt of Court Act in 2016. The Act was assented to on 23.12.16 and came into force on 13.1.17. However, on 9.11.18, the Contempt of Court Act was declared to be unconstitutional by the Court in Kenya Human Rights Commission v Attorney General & another [2018] eKLR. Mwita, J. stated:

Having considered the petition, the response, submissions, the constitution and the law, I am persuaded that sections, 30 and 35 of the Contempt of court Act are unconstitutional. I, however, find that the entire fails the constitutional test of validity for lack of public participation and for encroaching on the independence of the judiciary. Consequently and for the above reasons, this petition succeeds and I make the following orders.

1. A declaration is hereby issued that Sections 30, and 35 of the impugned contempt of court Act No 46 of 2010 are inconsistent with the constitution and are therefore null void.

2. A declaration is hereby issued that the entire contempt of court Act No 46 of 2016 is invalid for lack of public participation as required by Articles 10 and 118(b) of the constitution and encroaches on the independence of the Judiciary.

9. Since 2018, the Contempt of Court Act had been inoperative, and the Applicant ought to have been aware of this fact at the time of filing the present Application in April 2021. In her submissions, the Applicant urged the Court to overlook the error of bringing the Application under the inoperative Act and consider the Application on the basis of its inherent power. She sought solace in the inherent power of the Court under Section 3A of the Civil Procedure Act and further urged the Court to invoke the provisions of Article 159(2)(d) of the Constitution of Kenya, 2010.

10. This Court is aware that Article 159(2)(d) of the Constitution of Kenya, 2010 requires Courts to administer justice without undue regard to procedural technicalities. However, not all procedural deficiencies are to be overlooked by the Court under this provision. The procedural shortfall of bringing an application under a nullified law, cannot be remedied by Article 159(2)(d), as this goes to the jurisdiction of the Court. In Law Society of Kenya v Centre for Human Rights & Democracy & 12 others [2014] eKLR, the Supreme Court stated:

Indeed, this Court has had occasion to remind litigants that Article 159(2) (d) of the Constitution is not a panacea for all procedural shortfalls.

11. Further, it is trite law that a Court's jurisdiction is conferred and not inferred. In the case of Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR the Supreme Court succinctly stated:

A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.

12. A Court therefore, may only exercise that jurisdiction which has been conferred upon it by the Constitution, statute or both. Accordingly, filing an application under a law that has been nullified, is asking the Court to arrogate to itself jurisdiction that it does not have.

13. Odunga, J., had occasion to consider an application brought under the wrong provisions of law, in the case of Apa Insurance Company v Vincent Nthuka [2018] eKLR. The applicant therein, in an attempt to cure the deficiency, relied on the inherent jurisdiction of the Court as set out in Section 3A of the Civil Procedure Act. The learned Judge had this to say, and I concur:

As regards section 3A of the Civil Procedure Act, the provision simply reserves the Court's inherent jurisdiction. It must however be noted that the Court's inherent jurisdiction is not a substitute for the jurisdiction conferred upon the Court under the Constitution or by statute. The Court's inherent jurisdiction is a reserve upon which the Court draws to ensure the ends of justice are met and to prevent abuse of its process. As was held in Industrial & Commercial Development Corporation vs. Otachi [1977] KLR 101; [1976-80] 1 KLR 529, section 3A is not a panacea for all ills. It was therefore held in Elephant Soap Factory Ltd vs. Nahashon Mwangi & Sons Nairobi HCCC No. 913 of 1971 that the court will not invoke its inherent jurisdiction when there is an express provision dealing with the matter since the court may not nullify an express provision by invoking its inherent powers.

14. Following the nullification by the Court of the Contempt of Court Act in 2018, Section 5 of the Judicature Act remains in our statute books, as the law that gives this Court a general power to punish for contempt of Court. Accordingly, the Applicant ought to have moved the Court under the express provisions of Section 5 of the Judicature Act and not the provisions of the nullified Act. As found by Odunga, J., the Court will, in the circumstances, not invoke its inherent jurisdiction when there is an express provision dealing with the matter. The disregard by the Applicant of Section 5 of the Judicature Act, which confers jurisdiction upon this Court to punish for contempt, has resulted in a jurisdictional impediment, which has rendered the Application a non-starter.

15. Accordingly, I find and hold that the Application dated 21.4.21 is incompetent and the same is hereby struck out. This being a family matter, there shall be no order as to costs.

DATED, SIGNED AND DELIVERED IN IN NAIROBI THIS 25TH DAY OF FEBRUARY, 2022

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M. THANDE

JUDGE

In the presence of: -

..... **for the Applicant**

..... **for the Respondent**

..... **Court Assistant**