



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**SUCCESSION CAUSE NO 84 OF 1998**

**IN THE MATTER OF THE ESTATE OF EDWARD AKELO NYANGOR (DECEASED)**

**HARRISON OUMA AKELO.....1<sup>ST</sup> ADMINISTRATOR**

**VERSUS**

**ROBERT ACHAPA AKELLO.....OBJECTOR**

**AND**

**HERINE AKINYI AKELO.....2<sup>ND</sup> ADMINISTRATOR**

**EMMANUEL OMONDI.....3<sup>RD</sup> ADMINISTRATOR**

**RULING (2)**

**INTRODUCTION**

1. In his Notice of Motion dated and filed on 21<sup>st</sup> July 2021, the Objector sought for orders that the 1<sup>st</sup> Administrator, Harrison Ouma Akelo (hereinafter referred to as the “Contemnor”) be held in contempt of court for wilful disobedience of the court orders that were made on 20<sup>th</sup> October 2020, that upon being held in contempt he be jailed for a period of six (6) months for disobeying court orders or for such other period as this court may deem just.
2. He also sought that in the alternative to the 1<sup>st</sup> Administrator being jailed for six (6) months, the court do order the transfer of money from the proceeds of the rent held in the joint account by the three (3) former Administrators in Co-operative Bank Kisumu Branch, Account No. 01109766750400, Account Name Herine/Harrison/Emmanuel to the current Administrator Co-operative Bank Account Name Robert Akelo Achapa Account No 01109920794600. He also sought an order that the Contemnor be ordered to purge the contempt.
3. He swore an Affidavit in support of his application on 21<sup>st</sup> July 2021. He averred that he was the Administrator of the estate of the deceased and thus conversant with the issues arising in this matter. He contended that by a judgment of 20<sup>th</sup> October 2020, the court delivered and ordered the 1<sup>st</sup> Administrator to file a detailed statement of accounts. He pointed out that the 1<sup>st</sup> Administrator had failed to comply with the said orders six (6) months later and frustrated the former 2<sup>nd</sup> and 3<sup>rd</sup> Administrators from any transactions with respect to the rent collection and the joint account management.
4. He was categorical that he had no other way of enforcing the ruling (**sic**) against the 1<sup>st</sup> Administrator who had since declined to handover the management of the estate and refused to transfer the money from the rental proceeds to him as the current Administrator for further action despite having ceased to be an administrator. He was emphatic that the said orders were served upon the 1<sup>st</sup> Administrator.
5. He averred that if the 1<sup>st</sup> Administrator was not punished, his actions would continue to undermine the authority and dignity of the court which stood to be undermined and eroded in the eyes of right-thinking members of society who were likely to hold it in public ridicule and odium thereby defeating the administration of justice. He contended that it was therefore crucial that the 1<sup>st</sup> Administrator be held in contempt of court for disobedience of its orders of 27<sup>th</sup> October 2020 which had not been varied, set aside and/or altered and thus urged this court to grant the orders he had sought as it was in the interest of justice to do so.
6. In opposition to the said application, on 5<sup>th</sup> November 2021, the 1<sup>st</sup> Administrator filed Grounds of Opposition dated 4<sup>th</sup> November 2021. He contended that no order was issued by this court on the 20<sup>th</sup> October 2021 and that the applicant herein had never been appointed as an

administrator of the deceased's estate. He added that given the non-existence of an order dated 20<sup>th</sup> October 2021, there was nothing to purge. He was categorical that the application was wholly incompetent and an abuse of the process of court.

7. The Objector's Written Submissions were dated 10<sup>th</sup> January 2022 and filed on 19<sup>th</sup> January 2022 while those of the 1<sup>st</sup> Administrator were dated 10<sup>th</sup> November 2021 and filed on 11<sup>th</sup> November 2021.

8. This Ruling is based on the said Written Submissions which parties relied on in their entirety.

### **LEGAL ANALYSIS**

9. The Objector submitted that the reason why the courts punish for contempt of court was to safeguard the rule of law which was fundamental in the administration of justice. He added that a party who walked through the justice door with a court order in his hands had to be assured that the order would be obeyed by those to whom it had been directed.

10. He invoked the definition of 'contempt' in the Black's Law Dictionary (Ninth Edition) and placed reliance on the case of **Johnson vs Grant, 1923 SC 789 at 790** where the court stated that the law did not exist to protect the personal dignity of the judiciary or the private rights of the litigants and that it was not the dignity of the court which was offended but rather it was the fundamental supremacy of the law that was being challenged.

11. He asserted that the court went further and stated that a person knowing of an order of stay wilfully did something or caused others to do something to interfere with the stay was liable to be committed for contempt of court as such person had by his conduct obstructed justice.

12. He also placed reliance on the case of **Econet Wireless Ltd vs Minister of Information & Communication of Kenya & Another [2005] eKLR** where it was held that courts will not shy from their responsibility to deal firmly with proved contemnors amongst other cases which emphasised this fact.

13. He argued that judgment in this matter was delivered on the 21<sup>st</sup> October 2020 (**sic**) in the presence of the advocate representing him and the 1<sup>st</sup> Administrator herein. It was his contention that despite having full knowledge of the existence of the said court order, the 1<sup>st</sup> Administrator was yet to comply with the court order over a year later. He asserted that a court order is not a mere suggestion or an opinion or a point of view but a directive that is issued after much thought.

14. He added that orders must therefore be complied with and to see it any other way was to open the door to chaos and anarchy. He pointed out that if one was dissatisfied with an order of the court, the avenues for challenging it are also set out in the law and defiance was not an option. He asserted that the 1<sup>st</sup> Administrator made an application for stay of execution of the judgment delivered by Cherere J on 21<sup>st</sup> October 2020 and a temporary order for injunction to restrain him from dealing with the property L.R 1148/1059 pending appeal which was dismissed and thus there was no justification for disobedience of the orders.

15. He submitted that the order was served on the 1<sup>st</sup> Administrator's advocate who was also present on the 21<sup>st</sup> October 2020 when judgment was delivered. In this regard, he invoked the Halsbury's Laws of England (Fourth Edition) Volume 9 at page 37 and Order 52 Rule 3(1) of the England Supreme Court Practice Rules where the common thread was that no order would normally be issued for the committal of a person unless he had been personally served with the order. He argued that the 'general rule' and 'normally' in the said provisions were instructive as the import was that in the normal scheme of things personal service in matters of contempt was a requirement.

16. He pointed out that, however, if a man were to barricade himself or go into a bunker from where he issues communication to the effect that he in fact knew about the existence of a court order and did not obey it, the lack of personal service would not nullify an otherwise competent application for committal for contempt of court.

17. In this regard, he placed reliance on the case of **Basil Criticos vs Attorney General & 8 Others [2012] eKLR** where the court held that the law had changed and to the effect that knowledge superseded personal service and that where a party clearly acted and showed that he had knowledge of a court order, the strict requirement that personal service must be proved was rendered unnecessary.

18. He further relied on Order 5 Rule 8(1) of the Civil Procedure Rules which he stated took cognisance of the fact that personal service may not be achieved in some circumstances. He asserted that the 1<sup>st</sup> Administrator lived in Eldoret and had indicated that any document ought to be served on his advocate and having been served with the order, he was aware of the existence of the order.

19. He further placed reliance on the case of **Justus Wanjala Kisiangani & 2 Others vs City Council of Nairobi & 3 Others [2008] eKLR** where the court found that the respondents' advocates was present in court and hence the respondents therein therefore could not be heard to say that they were unaware of the existence of the said order requiring them to maintain status quo.

20.; He further argued that following the judgment of this court delivered on 21<sup>st</sup> October 2020, a Grant was confirmed and issued to the Objector dated 22<sup>nd</sup> October 2020. He stated that in the said judgment, the court excluded the 1<sup>st</sup> Administrator from proceeds of the rent since he had benefitted solely for over twenty (20) years in disregard of other beneficiaries and it was unfathomable that he was still the one fighting vehemently through several applications to this court to have control of the rental proceeds against the judgment of this court.

21. He was emphatic that the 1<sup>st</sup> Administrator was not the best person to be charged with the responsibilities of distributing the estate as the Trial Court had excluded him from and had since frustrated the whole process of sharing rental proceeds among the beneficiaries of the deceased.

22. He argued that the standard of proof in matters of contempt of court was well established in the case of **Mutitika vs Baharini Farm Limited [1985] KLR 229,234** where the court held that the standard of proof must be higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt. In the premises, he urged this court to grant his application as prayed and costs be borne by the 1<sup>st</sup> Administrator.

23. On his part, the 1<sup>st</sup> Administrator submitted that there were no proceedings that were undertaken by the trial court on 20<sup>th</sup> October 2020 and consequently no order was issued on the said date. He argued that in the absence of existence of an order made on the said date of 20<sup>th</sup> October 2020, the application was incompetent. He added that he needed not endeavour on the issue of service of the purported Order of 20<sup>th</sup> October 2020.

24. He further pointed out that at no point in time was the Objector appointed an administrator of the deceased's estate and that the judgement of the Court on 21<sup>st</sup> October 2020 did not remove and/or replace him and the 2<sup>nd</sup> and 3<sup>rd</sup> Administrators. He argued that the Objector's assertion that he was appointed an Administrator was not only illusory but wishful thinking.

25. He added that that was an ingenious way of the Objector trying to enrich himself out of the deceased's estate to the detriment of other beneficiaries given that the estate had not been distributed. He asserted that the Objector's application was a non-starter, lacking in merit and urged the court to dismiss the same with costs.

26. Right at the outset, this court wished to point out that the Objector's pleadings were full of typing errors as far as the date when the orders were granted was concerned. In his application, he sought for orders that the 1<sup>st</sup> Administrator be held of contempt of court for wilful disobedience of the court orders that were made on 20<sup>th</sup> October 2020. In his Written Submissions, he indicated the date as 21<sup>st</sup> October 2020. Notably, the impugned orders were for 21<sup>st</sup> October 2020 as was submitted by the 1<sup>st</sup> Administrator herein.

27. As the Objector submitted, 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 as was held in the case of **Mutitika vs Baharini Farm Limited** (Supra).

28. The power to punish for contempt is a discretionary one and should be used sparingly. This is because liberty of the subject is usually at stake and the applicant must prove willful and deliberate disobedience of the court order by the contemnor. Due to the gravity of consequences that ordinarily flow from contempt proceedings, it is proper that the order be served and the person cited for contempt should have had personal knowledge of that order and willfully disobeyed the order.

29. There cannot therefore be deliberate and willful disobedience, unless a contemnor had personal knowledge of the existence of that order and that he had deliberately and willfully disobeyed as was held in the case of **Econet Wireless Kenya Ltd vs Minister for Information & Communication of Kenya & Another** (Supra).

30. A perusal of the Judgment that was delivered by Cherere J on 21<sup>st</sup> October 2020 showed all the parties herein were represented by counsel at the time. When the matter was mentioned on 25<sup>th</sup> January 2021 as was directed by the learned judge, parties did not inform the court of the compliance of her orders. Instead, parties informed this court that there were two (2) pending applications to wit, the 1<sup>st</sup> Administrator's application dated 3<sup>rd</sup> November 2020 and the 2<sup>nd</sup> and 3<sup>rd</sup> Administrators' application dated 3<sup>rd</sup> November 2020 which had sought to rectify the Grant.

31. It was not clear why the Objector narrowed down on the 1<sup>st</sup> Administrator as the 2<sup>nd</sup> and 3<sup>rd</sup> Administrators were also required to file a detailed statement of account for the joint rent collection. In addition, there was no specific period within which this Statement of Account was to have been done.

32. Contempt proceedings are a serious undertaking because a court exercising this jurisdiction is minded to ensure the orderly functioning of society and the rule of law. On conviction, the alleged contemnor stands to lose his or her liberty. It should not, therefore, be taken lightly.

33. Whereas this court was satisfied that the 1<sup>st</sup> Administrator was aware of the orders of 21<sup>st</sup> October 2020, there was no evidence that he willfully and deliberately failed to comply with the same as the issue of compliance of the orders of 21<sup>st</sup> January 2021 and reiterated by the learned judge on 18<sup>th</sup> January 2021 were never taken up.

34. Taking into account the circumstances of this case and the material placed before court, this court was not satisfied that the Objector had proved his case against the 1<sup>st</sup> Administrator to the required standard.

#### **DISPOSITION**

35. For the foregoing reasons, the upshot of this court's decision was that the Objector's Notice of Motion application dated and filed on 21<sup>st</sup> July 2021 was not merited and the same be and is hereby dismissed. Costs of the application will be in the cause.

36. It is so ordered.

**DATED AND DELIVERED AT KISUMU THIS 25<sup>TH</sup> DAY OF APRIL, 2022**

**J. KAMAU**

**JUDGE**