



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei - J

SUCCESSION CAUSE NO. 83 OF 2013

IN THE MATTER OF THE ESTATE OF MUATHE NZYIMI MULOI (DECEASED)

TITUS MAINGI MUATHE.....1ST APPLICANT

GIDEON NZYIMI MUATHE.....2ND APPLICANT

VERSUS

BENSON MULWA KILONZO.....1ST RESPONDENT

ANN KAVEMBA KAULA.....2ND RESPONDENT

ONESMUS KITENYE KAULA.....3RD RESPONDENT

RULING

1. The Ruling relates to the application dated 27.10.2020 pursuant to section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules.

2. The Applicant sought the following orders:-

a) *Spent.*

b) *THAT the Respondents Benson Mulwa Kilonzo, Ann Kavemba Kaula and Onesmus Kitenye Kaula do attend court to show cause why they should not be imprisoned for contempt for flagrantly disobeying the order given by the honourable court on 23.4.2020 and issued on 7.5.2020.*

c) *THAT the costs of the application be provided for.*

3. The grounds of the application were set forth in the affidavit deposed by Titus Maingi Muathe where he averred that the respondents were served with the order issued on 7.5.2020 and in disobedience of the said order, they jointly and severally trespassed on parcel number **OKIA/NZUUNI/ 1391** and are actively cultivating on the same. Photos of the cultivation were annexed to the affidavit and marked TMM5 and TMM6.

4. In response to the application was an affidavit deposed by Benson Mwonga Kilonzo where he admitted being served with the ruling but denied the acts complained of by the applicant. He invited the court to visit the locus in quo so that it may be proven whether or not the portion belonged to the applicants.

5. The application was canvassed vide oral submissions. It was submitted by counsel for the administrators that the respondents had prepared the land for planting and they ought to show cause why they should not be sent to jail. The respondents denied the same and urged the court to visit the locus in quo.

6. Pursuant to the ruling of this court dated 17/12/2020, prayer number two in the contempt application was deferred to another date upon the court visiting the locus in quo as the court felt that it should proceed establish the truth on the ground first and as suggested by the

respondents and acceded to by the petitioners. On the 29th January, 2021 the court visited Kyenzenzi village in Makueni County land reference number. **OKIA/NZUUNI/ 1391** measuring about 0.80Ha as per the search certificate. The 1st petitioner and the 1st respondent gave evidence at the said locus in quo. The 1st petitioner reiterated the averments in their affidavit in support of the contempt application and maintained that the respondents had disobeyed the court order. The 1st respondent who testified on behalf of the rest of the respondents admitted that they were duly served with the order not to enter the land and proceeded to plough the land in dispute because it is their family land. He also confirmed that their family does not have the title to the land in question but that they have lodged an appeal to the minister which is pending determination and that the land registrar has placed a restriction on the register. It became obvious to the court at the locus in quo in the presence of the parties and their advocates that the Respondents had proceeded to cultivate and planted crops on the land despite the court order issued on 7th May, 2020. Clearly, the presence of crops on the disputed land is clear that there was disobedience of the court order since the orders were issued when the land had just been ploughed as per the photographs availed by the petitioners. It is therefore clear that the respondents are in contempt of the court. The respondents' claim that they had appealed a decision of the land adjudication committee to the minister is no excuse not to obey the court order. In any case, the issue of the existence of an appeal was dealt with by this court when determining the application for injunction dated 14/6/2019 vide its ruling dated 23/4/2020. Prudence would have demanded that the respondents should obey the order and come to court to challenge it. They did not do so but went ahead to plant crops in defiance thereof and hence they must be held to be in contempt.

7. From the foregoing, the issue for determination is whether the respondents are in contempt of court.

8. Section 5 of the Judicature Act is the law which guides the court when punishing for contempt of its orders. The said section provides as follows:

“(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 that power shall extend to upholding the authority and dignity of the subordinate courts.”

9. After the High Court declared Contempt of Court Act, 2016 as unconstitutional, the jurisdiction of the court to punish for contempt reverted to section 5 of the Judicature Act and the Common law. The courts must ensure that orders issued must be obeyed by those obliged to observe and in the event of default then the court has to punish the contemnors so as to uphold the dignity of the court and thus enhance rule of law. In the present case the respondents admitted being served with the order of injunction but still went ahead to plant crops on the disputed land and hence such defiant conduct amounts to contempt of court which warrants punishment. In the case of **Mutitika v Baharini Farm Ltd [1985] eKLR** the court held:

“A person who, knowing of an injunction or an Order of stay willfully does something or causes others to do something to break the injunction or interfere with the stay is liable to be committed for contempt of court as such a person has by his conduct obstructed justice”

Once a court finds the conduct of contemnors to be offensive to its authority and dignity, it must validate its dignity by imposing a fine or fixed sentence of imprisonment or both.

10. Contempt proceedings are known to be quasi criminal in nature and is a tool used by a civil court to ensure obedience to the courts orders and directions. Contempt of court consists of conduct which interferes with the administration of justice or impedes or prevents the course of justice.

11. Before the respondents can be cited as contemnors, there must be cogent evidence of disobedience of the court orders. In **North Tetu Farmers Co. Ltd v Joseph Nderitu Wanjohi [2016] eKLR** the court held:

“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.”

12. As noted above, 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. This is because liberty of the subject is usually at stake and the applicant must prove willful and deliberate disobedience of the court order, if he were to succeed. This was aptly stated in **Econet Wireless Kenya Ltd vs. Minister for Information & Communication of Kenya & Another [2005] 1 KLR 828** where Ibrahim J as he then was stated as follows: -

“It is essential for the maintenance of the rule of law and order that the authority and the dignity of our Courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a Court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or void”.

13. Again, in *T. N. Gadavarma Thiru Mulpad v Ashok Khot and Anor* [2006] 5 SCC, the Supreme Court of India also emphasized on the dangers of disobeying court orders, thus:

“Disobedience of this Court's order strikes at the very root of the rule of law on which the judicial system rests. The rule of law is the foundation of a democratic society. Judiciary is the guardian of the rule of law. Hence, it is not only the third pillar but also the central pillar of the democratic State. If the judiciary is to perform its duties and functions effectively and remain true to the spirit with which they are sacredly entrusted to it, the dignity and authority of the Courts have to be respected and protected at all costs. Otherwise, the very corner stone of our constitutional scheme will give way and with it will disappear the rule of law and the civilized life in the society. That is why it is imperative and invariable that Court's orders are to be followed and complied with.”

14. In *Gatharia K. Mutikika v Baharini Farm Limited* [1985] KLR 227, that:

“A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be proved satisfactorily.... It must be higher than proof on a balance of probabilities, almost but not exactly, beyond reasonable doubt. The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit criminal cases. It is not safe to extend it to offences which can be said to be quasi-criminal in nature.

However, the guilt has to be proved with such strictness of proof as is consistent with the gravity of the charge... Recourse ought not to be had to process of contempt of court in aid of a civil remedy where there is any other method of doing justice. The jurisdiction of committing for contempt being practically arbitrary and unlimited, should be most jealously and carefully watched and exercised with the greatest reluctance and the greatest anxiety on the part of the judge to see whether there is no other mode which is not open to the objection of arbitrariness and which can be brought to bear upon the subject... applying the test that the standard of proof should be consistent with the gravity of the alleged contempt... it is competent for the court where contempt is alleged to or has been committed, and or an application to commit, to take the lenient course of granting an injunction instead of making an order for committal or sequestration, whether the offender is a party to the proceedings or not.”

15. The Court of Appeal confirmed this position in *Wildlife Lodges Ltd vs. County Council of Narok and Another* [2005] 2 EA 344 (HCK) where the Court expressed itself as follows:

“It was the plain and unqualified obligation of every person against or in respect of whom an order was made by a Court of competent jurisdiction to obey it until that order was discharged, and disobedience of such an order would, as a general rule, result in the person disobeying it being in contempt and punishable by committal or attachment and in an application to the court by him not being entertained until he had purged his contempt. A party who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it...It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid – whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question. That the course of a party knowing of an order which was null or irregular, and who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it existed it must not be disobeyed...If there is a misapprehension in the minds of the defendants as to the reasonable meaning of the order, then the expectation of them is that they would have made an application to the court for the resolution of any misunderstanding and this would have been the lawful course...In cases of alleged contempt, the breach for which the alleged contemnor is cited must not only be precisely defined but also proved to the standard which is higher than proof on a balance of probabilities but not as high as proof beyond reasonable doubt...The inherent social limitations afflicting most people in a developing country such as Kenya have the tendency to restrict access to the modern institutions of governance, and more particularly to the judiciary which is professionally run, on the basis of complex procedures and rules of law. Yet, this same Judiciary is generally viewed as the impartial purveyor of justice, and the guarantor of an even playing ground for all, a perception which ought to be strengthened, through genuine respect for the courts of justice, and through compliance with their orders. Consistent obedience to court orders is required, and parties should not take it upon themselves to decide on their own which court orders are to be obeyed and which ones overlooked, in the supposition that this oversight will not impede the process of justice...Justice dictates even-handedness between the claims of parties; and if it be the case that the plaintiff/applicant has not been accorded a level playing ground for the realization of its economic activities, a matter that of course can only be established through evidence in the main suit, then the court ought to provide relief, by applying the established principles of law, one of these being the law of contempt.....”

16. Applying the test that the standard of proof should be consistent with the gravity of the alleged contempt, in the present case the terms of the court order is not in dispute. Knowledge of the order is not disputed. What is contested is the alleged disobedience. This court during its locus in quo visit duly noted that Respondents jointly and severally trespassed on parcel number **OKIA/NZUUNI/ 1391** and are actively cultivating on the same. The respondents seemed to seek refuge in an appeal they have lodged with the minister over the land matter and a restriction placed on the registrar by the land registrar yet they confirm that the land is registered in the name of the deceased. I am not persuaded that such gave the respondent the licence to disobey the court order. It is instructive that the respondents did not see it fit to approach the court for clarification once they received the court order. Their conduct smacked of open defiance which the court cannot countenance. The explanation tendered by the respondents is not plausible and that the applicants have proved their case against the respondents beyond the threshold of proof. In the premises, I find the Respondents are in contempt of the court order and must be punished accordingly.

17. In the result, it is my finding that the Petitioners' application dated 27/10/2020 has merit. The same is allowed in terms of prayers 2 and 3. The Respondents are directed to appear in court on the 18/10/2021 for purposes of mitigation and thereafter sentencing.

It is so ordered.

Dated and delivered at **Machakos** this 27th day of **September, 2021**.

D. K Kemei

Judge