



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

SUCCESSION CAUSE NO. 99 OF 1997

IN THE MATTER OF THE ESTATE OF REUBEN

JONES KIAMBUTHI alias JONES REUBEN KIAMBUTHI (DECEASED)

LUCY WANJIKU KYAMBUTHI.....APPLICANT

VERSUS

PETER NGUGI KIAMBUTHI.....1ST RESPONDENT

JOHN MBURU KABAA KIAMBUTHI.....2ND RESPONDENT

RULING

(1) Before this Court for determination is the Notice of Motion Application dated **29th November 2019** by which the Applicant **LUCY WANJIKU KYAMBUTHI** seeks the following orders:-

“1. Spent.

2. THAT this honourable court be pleased to cite respondents PETER NGUGI KIAMBUTHI and JOHN MBURU KABAA KIAMBUTHI herein for contempt of the court order issued on 25th April 2018 by Lady Justice Muigai and commit them to civil jail for a period not exceeding six (6) months for disobeying the order in issue.

3. THAT this honourable court be pleased to order and compel the Respondents PETER NGUGI KIAMBUTHI and JOHN MBURU KABAA KIAMBUTHI to adhere to the orders issued on 25th April 2018

4. THAT the Directorate of Criminal Investigations, Kiambu and or OCS Kikuyu Police Station do oversee the compliance of the orders issued by Lady Justice Muigai on 25th April 2018.

5. THAT the honourable court grants any other order or further orders of the honourable court geared towards protecting the dignity and authority of the honourable court deemed expedient in the circumstances.

6. THAT costs be provided for.”

2. The Application was premised upon **order 52 of the Rules of the Supreme Court of England and Section 5 of the Judicature Act (Cap 8), Laws of Kenya, sections 1A, 1B and 3 of the civil Procedure Act, Sections 63 (c) and (e), Civil Procedure Act, Order 40 Rule 3 of the Civil Procedure Rules and Sections 5, 27 (b) (e) (f) (h) (k) and 28 of the contempt of court Act, Section 36, High Court (organization and Administration) Act, and all other enabling provisions of the law.** The Application was supported by the Affidavit of even date and further supporting affidavit dated **2nd June 2021** both sworn by the Applicant.

3. The **1st Respondent PETER NGUGI KIAMBUTHI** opposed the application through his replying affidavit dated **1st April 2021**.

4. The **2nd Respondent JOHN MBURU KABAA KIAMBUTHI** filed a Replying Affidavit dated **4th April 2021** in opposition to the application. It is important at this point to note that vide the Notice of withdrawal dated **2nd June 2021** the Applicant withdrew in its entirety the application against the **2nd Respondent JOHN MBURU KABAA KIAMBUTHI**. The matter therefore proceeded as against the **1st**

Applicant **only**.

5. The application was canvassed by way of written submission. The applicants filed written submissions dated **2nd June 2021** whilst the 1st Respondent relied on his written submission dated **15th July 2021**.

BACKGROUND

6. This succession cause concerns the estate of **REUBEN JONES KIAMBUTHI** alias **JONES REUBEN KIAMBUTHI** (hereinafter the Deceased) who died on **16th November 1994**. The deceased is said to have died testate having left a written Will dated **23rd August, 1994**. The Deceased was survived by the following persons:

- (i) Margaret Wambui Kyambuthi – widow
- (ii) Peter Ngugi Kiambuthi – son
- (iii) Jones Lawrence Kinyoyia - son (now deceased)
- (iv) Richard Njoroge Kiambuthi - son
- (v) John Mburu Kabaa Kiambuthi - son
- (vi) Moses Kinuthia Kiambuthi – son (now deceased)
- (vii) Lucy Wanjiku Kyambuthi – daughter

7. Following the demise of the Deceased the widow **Margaret Wambui Kiambuthi** and **Peter Ngugi Kyambuthi** (son) who were named as executors in the written Will obtained a grant of Probate of Written Will dated **22nd April 1997**. The said grant was duly confirmed and a certificate of confirmed grant dated **11th July 1997** was issued by the High Court.

8. Thereafter the Applicant herein **Lucy Wanjiku Kyambuthi** and **Richard Njoroge Kyambuthi** (now deceased) filed summons dated **3rd July 2017**, seeking Revocation/Annulment of the Grant issue in this matter. Hearing of that summons for Revocation of Grant commenced before **Hon Lady Justice Muigai** on **30th May 2018**. However, the hearing was not concluded as the Hon Judge was transferred to another division of the High Court.

9. The genesis of this application are orders which were made in this succession cause by Hon Lady Justice Muigai on **17th April 2018** which orders read as follow –

“1. The Estate of the deceased Jones Reuben Kiambuthi shall be preserved under section 45 LSA Cap 160 pending the hearing and determination of the application for revocation of grant.

2. Lucy Wanjiku Kiambuthi, the applicant shall remain on the suit property LR 2828 until hearing and determination of the application of revocation of grant.

3. The matter of the contested suit properties, assets that comprise the estate of the deceased including LR 2828 shall be determined by Deputy Registrar Family Division summoning the Land Registrar Kiambu to provide green cards/hereditary/background of the suit properties;

(a) LR 2828

(b) Dagoretti/Kinoo/1838

(c) Dagoretti/Kinoo/1837

(d) Dagoretti/Kinoo/T384/25

(e) Dagoretti/Kinoo/878

4. If they are part of the deceased estate and available for distribution or not.

5. The matter shall be mentioned within 30 days for the Land Registrar to provide the said information to court.

6. The *staus quo* be maintained until 30th May 2018 at 11.00 am.

7. The court will read and compile notes of the court file.”

10. The Applicant submits that the 1st Respondent has knowingly and maliciously failed to obey the above orders hence the application seeking to have the 1st Respondent cited and punished for contempt.

Analysis and Determination

11. I have carefully considered the present application, the Affidavit in reply as well as the written submissions filed by both parties. The only question for determination is whether the 1st Respondent is in contempt of the court orders.

12. The Applicant submits that contrary to the orders issued on **17th April 2018** for perseverance of the estate of the Deceased, the 1st Respondent has proceeded to subdivide the Deceased property. That the 1st Respondent has demolished structures and erected new structures on the estate property. That he has fenced off and created new boundaries, evicted tenants and re-allocated property belonging to the estate.

13. The Applicant alleges that the 1st Respondent has threatened to evict her from the property in which she is residing (being **LR NO. 2828**) in blatant disregard of the orders directing that she remain thereon pending the hearing and determination of the summons for revocation of grant. That the very safety of the Applicant and other legitimate heirs to the estate is being threatened.

14. The Applicant avers the estate of the Deceased stands to suffer irreparable harm unless the 1st Respondent is stopped from his wanton destruction of the estate property.

15. The 1st Respondent opposed the Application. He submits that the orders of **17th April 2018** were never served upon him personally. That on **30th May 2018** the matter was again mentioned before Justice Muigai and no application was made for extension of said orders and no orders reserving the *status quo* were made by the court. As such, it is the position of the 1st Respondent that the subject orders lapsed on **30th May 2018**.

16. The 1st Respondent asserts that most of the properties forming the estate have already been sold or sub-divided by the beneficiaries and new owners, and therefore said properties cannot be said to form part of the estate. He alleges that the 1st Applicant sold off her own inheritance and thereafter moved into their mother's house. That on **2nd November 2018** his mother requested him to assist her to remove the Applicant from said house. The 1st Respondent further alleges that the Applicant has not come before the court with clean hands as she did not reveal to the court that she had already sold off her own inheritance, thus she does not merit the exercise of the court's discretion in her favour.

17. The 1st Respondent states that the Applicant has occasioned him financial loss by writing to the **National Lands Commission**, the **Kenya National Highways Authority** and the **National Oil Corporation** to block payment due for the compulsory acquisition of land. That the Applicant has also blocked the 1st Respondent access to financing from banks by putting restrictions on his parcels of land. He states that the estate of the Deceased has been fully distributed and that this application is nothing more than a furtherance of the Applicant's personal vendetta against him as he has always been protecting their mother against the Applicant's schemes. The 1st Respondent submits that the present application is a mere sideshow and urges the court to dismiss the same in its entirety and to award him costs.

18. The 1st Respondent firstly raises the issue that though the application refers to orders made on **25th April 2018** there were no orders made in this matter on **25th April 2018** and therefore the application is defective in nature. I have perused the court record and confirm that indeed no orders were made in this matter on **25th April 2018**. The orders which were cited by the Applicant were actually issued by **Hon Justice Muigai** on **17th April 2018**. Thus, there is clearly an error in the date cited as when the orders in question were made.

19. Such an error in my view is not fatal to the application. To err it is said is human. The Applicant has cited in the application the orders which she is referring to. It is clear from the record that said orders were actually made on **17th April 2018**. The 1st Respondent himself has conceded to this. **Article 159 (2) (d)** of the **Constitution of Kenya 2010**, exhorts courts to administer substantive justice **without undue regard to procedural technicalities**. In the circumstances, I find that the error in the citation of the date of the subject order is a technicality which this court will overlook as both parties are very clear which orders are being referred to.

20. It is trite that courts do not make orders in vain. Any party to whom a court order is addressed is obliged to obey said order whether he agrees with it or not.

Section 5 or **Act No 460, 26** provides that:

“5 Every superior court shall have power to

(a) Punish for contempt of court on the face of the court.

(b) Punish for contempt of court; and

(c) Uphold the dignity and authority of subordinate courts”.

21. The only remedy available to a party who is dissatisfied with an order issued by the court is to seek a review of said order or to appeal against the same. But for as long as court order remains valid it is binding on all parties. To suggest otherwise would lead to disorder and mayhem in society.

22. In the case of **ECONET WIRELESS KENYA LIMITED – VS- MINISTER FOR INFORMATION AND COMMUNICATION OF KENYA & AUTHORITY**[2005] eKLR Hon Justice Ibrahim (as he then was) states 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 which an order is made by court of competent jurisdiction, to obey it unless and until the 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 the order believes it to be irregular or void. (emphasis)”

23 Likewise in the case of **T.N. Gadavarman Thiru Mulpad v Ashok Khot and anor** [2006] 5 SCC, the **Supreme Court of India** in emphasizing the dangers of disobeying court orders held as follows: -

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 cornerstone of our Constitution 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. (own emphasis)

24. I therefore find that the orders issued by **Hon Justice Muigai** on **17th April 2018** remained binding on all the parties to the cause unless and until the same were set aside and/or lapsed. Proceedings for contempt of court are quasi criminal in nature. If convicted of contempt a contemnor stands to be jailed therefore suffering a deprivation of their personal liberty.

25. For this reason, the standard of proof required against an alleged contemnor is higher than the standard of proof required in an ordinary civil case. Before a finding of contempt can be made, there must be a demonstration of **willful** and **deliberate** disobedience of a courts order.

26. In **GATHARIA K. MUTIKIKA – VS BAHARINI FARM LTD** [1985] KLR 227 it was held 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 heard to process 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.” (own emphasis)

27. In the light of the gravity of the personal consequences that would ordinarily flow from a finding of contempt, the law requires proof that the order in question was brought to the attention of the alleged contemnor as proof that he/she had personal knowledge of said order.

In **OILFIELD MOVERS LTD – VS – ZAHARA OIL & GAS LIMITED** [2020]eKLR the court stated -

“It is important however that the court satisfies itself beyond any shadow of a doubt that the person alleged to be in contempt committed the act complained of with full knowledge or motive of the existence of the order of the court forbidding it. The threshold is quite high as it involves possible deprivation of a person’s liberty.....”

28. The applicant has alleged that the 1st Respondents lawyer was present in court when the orders of **17th April 2018** were made. She cites this as proof of the fact that the 1st Respondent had personal knowledge of said orders.

29. The 1st Respondent in his Replying Affidavit dated **1st April 2021** categorically denies ever having been personally served with the orders dated **17th April 2018** or indeed any other orders issued in this cause.

30. I have perused the proceedings of **17th April 2018**. There is an indication that a **Ms Wangui** Advocate was present in court holding brief for **Mr Kimani Gichuhi** for the Applicant. A **Ms Nakato** Advocate was indicated as present in court holding brief for **Mr Nyiha** for the Respondent. It is therefore clear that the subject orders were made in the presence of counsel for both parties.

31. However, the fact that the 1st Respondent's lawyer was aware of the order does not remove the need for personal service upon the 1st Respondent himself. There is no evidence and indeed it has not been alleged by the Applicant that the orders of **17th April 2018** were ever served **personally** upon the 1st Respondent. No affidavit of service has been annexed to this application, on evidence of personal service upon the 1st Respondent.

32. In order to find a person guilty of contempt there must be proof of willful and intentional disobedience of a court order. In **MAHINDERJIT SINGH BITTA – VS UNION OF INDIA & OTHERS 1A NO 100 OF 2010** the Supreme Court of India stated as follows: -

“In exercise of its contempt jurisdiction the courts are primarily concerned with enquiring whether the contemnor is guilty of intentional and willful violation of the order of the court, even to constitute a civil contempt. Every party is lis before the court and even otherwise, is expected to obey the orders of the court in its spirit and substance. Every person is required to respect and obey the orders of the court with due dignity for the institution (own emphasis)

33. In order to prove willful and deliberate disobedience of a court order; it must be shown that said court order was brought to the attention of the alleged contemnor by way of personal service.

In **Katsuri Limited v Kapurchand Depor Shah [2016] eKLR**, citing **Kristen Carla Burchell v Barry Grant Burchell (Eastern Cape Division case No. 364 of 2005)**, it was stated that ***“in order for an applicant to succeed in civil contempt proceedings, the applicant has to prove (i) the terms of the order, knowledge of the terms by the respondent, failure by the respondent to comply with the terms of the order.”***

34. The Applicant claimed that copies of the order were plastered all over the suit premises. This in my view does not amount to personal service as there is no proof that the 1st Respondent went to the suit premises and caught sight of said orders.

35. All in all, I find that given the absence of proof of personal service upon the 1st Respondent, he cannot be said to have willfully disobeyed said orders. The power to punish for contempt is a discretionary power, which ought to be exercised sparingly. In **CAREY – VS LAIKEN**---- it was held that: -

“a court’s outrage might be treated as just so much bluster that might ultimately dampen the role and authority of the very judicial power it seeks to protect. The court’s contempt power should be used cautiously and with great restraint. It is an enforcement power or last resort rather than first resort”. (own emphasis).

36. The applicant and the 1st Respondent are siblings. From their affidavits it is clear that some sort of power struggle is going on between the two. Unfortunately, much judicial time and resources have been wasted by prosecuting this application for contempt, instead of moving directly to the hearing of the summons for revocation. I find no merit in the present application and in the premise, I dismiss in its entirety the notice of motion dated **29th November 2019** and direct that each party pay its own costs.

37. This is a **1997** matter. Since **2017**, the summons for revocation has not been determined. In order to expedite the case I direct that parties now take dates for hearing of the summons for revocation of Grant dated **3rd July 2017**.

DATED IN NAIROBI THIS 15TH DAY OF OCTOBER, 2021.

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MAUREEN A. ODERO

JUDGE