



REPUBLIC OF KENYA

THE HIGH COURT OF KENYA AT NYAHURURU

SUCCESSION CAUSE NO. 01 OF 2019

IN THE MATTER OF THE ESTATE OF IBRAHIM KIMAMO MUNGE (DECEASED)

BEATRICE MURINGI KARIUKI.....OBJECTOR/APPLICANT

-VERSUS-

RUTH WANJIKU MUTAHI.....1ST PETITIONER/RESPONDENT

JOSEPH MUTHAHI KARIUKI.....2ND PETITIONER/RESPONDENT

RULING

1. The Applicant herein through an Application dated 20th January, 2021 sought the following orders:
2. That Ruth Wanjiku Mutahi, the 1st Petitioner be cited for contempt of court order granted on 18th April, 2013 and be committed to jail for a period of 6 months and/or her properties be attached and sequestered for a period the court may deem fit or be subjected to any other punishments that the court may deem fit and just under the circumstances.
3. That any distribution of the deceased's estate done pursuant to the grant of letters of administration and certificate of confirmation issued on 23rd June, 2009 and 3rd February, 2019 respectively be nullified and the register for *L.R Nyandarua/Mawingo Salient/663* be reinstated with the name of the deceased as its sole and absolute proprietor.
4. That the costs of this summons be paid by the 1st Petitioner.
5. The application is premised on the grounds set forth on the supporting affidavit of even date sworn by the Applicant. in a nutshell, the Applicant deponed that the 1st Petitioner should be cited for contempt because despite being aware that the grant of letters of administration and certificate of confirmation issued on 23rd June, 2009 and 3rd February, 2019 respectively had been suspended vide court order, she went ahead and proceeded to execute the said documents and caused *LR Nyandarua/ Mawingo Salient/663* to be registered in her name, sub-divided it and sold the same to third parties.

OBJECTOR'S/APPLICANT'S SUBMISSIONS:

6. The Applicant submitted her intention to abandon part of prayer no.2 to the extent that she will not pursue the prayer for the register of *LR Nyandarua/Mawingo Salient/ 663*, the suit parcel herein to be reinstated with the name of the deceased as its sole and absolute proprietor as such a prayer can only be handled by an Environment and Land Court.
7. It was asserted that by summons dated 18th April 2013, the Applicant sought for revocation of the grant of letters of administration intestate and certificate of confirmation issue in *Nyahuru PMCC No. 42 of 2019*. In the same summons the Applicant sought for interim orders and on 18th April 2013, the court issued interim orders.
8. The Applicant averred that from the said orders that the aforementioned grant and certificate of confirmation were suspended and the Petitioners were restrained from distributing the deceased's estate in terms with the certificate of confirmation dated 10th February 2010 pending the hearing of the application or further orders of the court.
9. It was the Applicant's submission that the Petitioners were served with the said court orders which were extended by consent on 25th July 2013 and on 31st October 2013 they were confirmed by consent pending hearing of the summons for revocation. That despite being aware of the said orders, the 1st Petitioner proceeded to use the grant of letter of administration and certificate of confirmation to transfer the suit parcel.

10. The Applicant asserted that the transfer by transmission was registered on 19th February 2015 and therefore it was evident that at the time the 1st Petitioner put in motion the said transfer, the orders of 18th April 2013 were in force. She emphasized that the 1st Petitioner thus disobeyed the orders suspending the grant and certificate of confirmation and further disobeyed the orders restraining her from distributing the deceased's estate using the suspended grant and certificate of confirmation.

11. It was the Applicant's assertion the 1st Petitioner deliberately and intentionally disobeyed the orders of 18th April 2013 and prayed that she be cited for contempt. She contended that the 1st Petitioner has not given plausible reasons as to why she should not be cited for contempt.

12. Reliance was placed on the cases of *Simmers Plaza Limited vs National Bank of Kenya Limited [2018] eKLR* and *North Tetu Farmers Co. Ltd vs Joseph Nderitu Wanjohi [2016] eKLR* which sets out the elements to be proved to make the case for civil contempt. It was her submission that the Applicant has met the above elements as gains the Petitioner.

13. Further reliance was placed on *Simon Kipleting Kemei & another vs Kiptanui Joshua Kemei; Wildred Kipkotum Tirop (Interested Party) [2020] eKLR* and *Re Estate of Domenico De Masi (Deceased) [2020] eKLR*.

14. In addition, the Applicant prayed that the court nullifies the said transfer as it was done in total disobedience of the court orders which nullification will assist the Applicant to institute a suit before the environment & land court and seek to reinstate the suit parcel.

15. Lastly, they prayed for the summons to be allowed with costs.

1ST PETITIONER'S SUBMISSIONS:

16. The 1st Petitioner submitted that the issue for determination include:

- *Whether the court has jurisdiction to grant the prayers sought in so far as they relate to cancellation of regards to the suit parcel?*
- *Whether the 1st Petitioner is in contempt of court orders issued on 18th April 2013?*
- *Whether the court should grant the Objector/ Applicant's prayers?*

17. On the first issue, the 1st Petitioner submitted that the court lacks jurisdiction to grant the prayers sought in so far as they relate to cancellation of entries in regards to the suit parcel as it falls under the scope of the Environment and Land Court. Reliance was placed on *Samuel Kamau Macharia vs KCB & 2 Others, Civil Application No. 2 of 2011* and *Section 13(2) of the Environment and Land Court Act*.

18. On the second issue, the Applicant denied any allegations of acting in contempt on the grounds that she was not made aware of the same pursuant to annexure "BMK 5" of the Applicant's application which is an affidavit service by the process server **paragraph 2** which explicitly states that:

"He executed service on 1st June 2013 of copies of certificate of urgency, summons for revocation and/or annulment of grant and grant of letters of administration intestate and certificate of grant annexures dated 18th April 2013."

19. The 1st Petitioner contended that no mention of the said orders being served upon the 1st Petitioner is referenced in the said affidavit. Furthermore, committal to civil jail for contempt is quasi-criminal and tugs proof required is of a higher standard than in civil cases.

20. Reliance was placed on *Gatharia K. Mutikika vs Baharini Farm Ltd [1985] eKLR*. The 1st Petitioner asserted that the Objector has not discharged her burden of proof as she did not adduce any other evidence to prove that the said orders were served or that the 1st Petitioner was aware of the said orders.

21. Further the 1st Petitioner relied on *Samuel vs National Land Commission & 2 Others [2020] eKLR* and submitted that she was not aware of the said orders and such cannot be held in contempt.

22. It was the 1st Petitioner's submission that an order ceases to take effect once it is discharged or lapses thus the orders issued on 8th April 2013 were interim and temporary in nature and given that they were never renewed thus the orders lapsed on 2nd July 2013.

23. On the third issue, the 1st Petitioner averred that granting of the prayers set forth by the Applicant shall constitute grave injustice and be prejudicial to third parties. That in her viva vice evidence and cross examination she alluded to the fact that she disposed of the parcel property to third parties to offset a SFT loan amongst others.

24. The 1st Petitioner contended that it will be a great injustice to grant the prayers as they encroach to interests vested in 3rd parties that have not been joined to the suit and that the said entries include titles already purchased by bona fide purchasers for value without notice of the pending suit or said orders and this received good titles.

25. Reliance was placed on *Falcon Global Logistics Co. Limited v Management Committee of Eldama Ravine Boarding Primary School*

[2018] eKLR and Section 80 of the Land Registration Act.

26. In conclusion, the 1st Petitioner invited the court to prevent her committal to civil jail on account of misconceived false accounts reiterated by the Objector who has failed to discharge her burden of proof. She beacons the court to down its tools in so far as it lacks jurisdiction to cancel title entries referenced by the Objector and urges the court should dismiss the application dated 20th January 2021.

ANALYSIS AND DETERMINATION:

27. First and foremost, I shall dispense with the question of jurisdiction. It is well established that jurisdiction is everything and without it the court must down its tools. In the famous words of Nyarangi, J.A. (as he then was) in the often cited case of The Owners of Motor Vessel Lilian "S" vs. Caltex Oil (Kenya) Ltd [1989] KLR 1:

"Jurisdiction is everything. Without it, a court has no power to take one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending the evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

28. As cited by the 1st Petitioner in Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Ltd & 2 Others, Application No. 2 of 2011, the Supreme Court pronounced that:

"A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court 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. We agree with counsel for the first and second Respondents in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it, is not a matter of mere technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings."

29. The 1st Petitioner submitted that the court lacks jurisdiction to grant the prayers sought in so far as they relate to cancellation of entries in regards to the suit parcel as it falls under the scope of the Environment and Land Court. On the other hand, the Applicant submitted on her intention to abandon part of prayer no.2 to the extent that she will not pursue the prayer for the register of LR Nyandarua/Mawingo Salient/ 663, the suit parcel herein to be reinstated with the name of the deceased as its sole and absolute proprietor as such a prayer can only be handled by an Environment and Land Court.

30. The prayer sought by the Applicant is that any distribution of the deceased's estate done pursuant to the grant of letters of administration and certificate of confirmation issued on 23rd June 2009 and 3rd February 2019 respectively be nullified and the register for L.R Nyandarua/Mawingo Salient/663 be reinstated with the name of the deceased as its sole and absolute proprietor.

31. Given that the Applicant expressly abandoned part of her prayer to have this Court register of LR Nyandarua/Mawingo Salient/ 663, the suit parcel herein to be reinstated with the name of the deceased as its sole and absolute proprietor via the submissions dated 27th September 2021. It is therefore clear that the Applicant has conceded that part of her prayer must fail, in the premises I find that this Court will entertain the subject matter of the remaining part of that prayer which is: - that any distribution of the deceased's estate done pursuant to the grant of letters of administration and certificate of confirmation issued on 23rd June 2009 and 3rd February 2019 respectively be nullified.

32. That being the case, his court shall proceed to determine the rest of the application on merit.

33. The Halsbury's Laws of England (4th Edition (9th Re-Issue), Pg. 33, para 52.) defines civil contempt as follows;

"...disobedience to process is a civil contempt of court to refuse or neglect to do an act required by a judge or order of the court within the time specified in the judgment order requiring a person to abstain from doing a specified act, or to act in breach of an undertaking given to the court by a person, on the faith of which the court sanctions a particular course of action or inaction..."

34. While Black's Law Dictionary 7th Edition defines contempt as follows;

"The failure to obey a court order that was issued for another party's benefit. A civil contempt proceeding is coercive or remedial in nature. The usual sanction is to confine the contemnor until he or she complies with the court order."

35. The court in Milka Wangoi Kamau & another v Habby Misoga Lugadiru [2014] eKLR citing the case of Ringera and 2 others vs. Muite and 10 Others HCC at Nairobi, Civil Suit No. 1330 of 1991, the Learned Judge reiterated that the main salient features of disobeying court are:

- *The contemnor must be aware of the existence of the court order.*
- *There must be an existing court order capable of being disobeyed.*
- *Breach thereof must be proved*

36. Admittedly civil contempt matters have civil inclination but also have clear criminal implications and therefore the evidence brought

forth before the court must be so strong due to the risk of depriving the contemnor of his/her liberty. The threshold required is not just on a balance of probabilities but at committal proceedings the threshold may be that required in criminal proceedings i.e. beyond reasonable doubt. In *Milka Wangoi Kamau & another v Habby Misoga Lugadiru [supra]* it was held that:

“As much as civil contempt is an aspect of civil litigations it has got criminal implications/ inclinations and hence its threshold is not merely founded on balance of probability but at times it must be proved beyond reasonable doubt. Therefore, the committal law is to the effect that the standard of proof required at committal proceedings is the criminal standard”

37. The applicable standard of proof, is above a balance of probabilities, given the criminal connotations of contempt proceeding. In *Mutitika vs Baharini Farm Ltd [1985] KLR 229, 234*, the Court of Appeal made this clear thus:

“...In our view the standard of proof in contempt proceedings must be higher than proof on the 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, in criminal cases. It is not safe to extend it to offence which can be said to be quasi- criminal in nature.”

38. *Section 5 of the Judicature Act* confers jurisdiction on the superior courts to punish for contempt. That section provides that:

(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 subordinate courts.

(2) An order of the High Court made by way of punishment for contempt of court shall be appealable as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the High Court.

39. In *Sheila Cassatt Issenberg & another v Antony Machatha Kinyanjui [2021] eKLR*, the court stated that:

“The reason why courts punish for contempt is to uphold the dignity and authority of the court, ensure compliance with directions of the court, observance and respect of due process of law, preserve an effective and impartial system of justice, and maintain public confidence in the administration of justice by courts. Without sanctions for contempt, there would be a serious threat to the rule of law and administration of justice. For a party to be cited for contempt, he must have violated and or disobeyed an order that was directed at him”

40. Accordingly, because of the gravity of consequences that ordinarily flow from contempt proceedings, it is pivotal that the order be served and the person cited for contempt should have had personal knowledge of that order. The order alluded to in the instant case is the temporary order suspending the grant of letters of administration and certificate of confirmation issued on 18th April 2013.

41. To demonstrate that the 1st Petitioner was in contempt, the Applicant deposed that on 1st June 2013, the 1st Petitioner was served with the said summons for revocation together with the said court order, and on 25th July 2013 the said orders were extended by the court in presence of the parties. Further, the Applicant annexed the copy of the affidavit of service marked as ‘*BMK/5*’. I have perused the court file and indeed there is a court order to that effect was issued on 18th April 2013.

42. On further perusal, the affidavit of service sworn by Joseph Thumbi Nganga, a process server dated 11th June 2013 indicates that on June 2013, he received copies of certificate of urgency, summons for revocation and/or annulment of grant, affidavit in support of summons for revocation of grant and grant of letters of administration intestate and certificate of confirmation of a grant annexures dated 18th April 2013 from Nderitu Komu & Co. Advocates with instructions to serve the Petitioners herein. That on the same day at 12.30pm at J.C. Village, Kabatini Location in Bahati District, Nakuru County, he personally served the Petitioners with the aforesaid documents, which they accepted his service but declined to sign on the return copies.

43. From the foregoing, I am unable to find evidence that the 1st Petitioner was indeed served with the court order as the same is not mentioned in the annexed affidavit of service which only mentions copies of certificate of urgency, summons for revocation and/or annulment of grant, affidavit in support of summons for revocation of grant and grant of letters of administration intestate and certificate of confirmation of a grant annexures dated 18th April 2013. The Applicant did not point out to any affidavit of service that they may have filed to demonstrate that the Respondent was served with the particular court order. Consequently, I am unable to determine from the above that the 1st Petitioner was indeed served with the court order or was aware of the order which she is said to have deliberately disobeyed.

44. However, the Applicant also pointed out that the said orders were extended by consent on 25th July 2013 before both parties and that on 31st October 2013 they were confirmed by consent pending hearing of the summons for revocation in the presence of both parties. I have perused the court record on both days and the record appears to be silent on the extension of the court orders by consent on the aforesaid dates. Further, the court seems not to have sat on 31st October 2013. (The same may need further interrogation due to handwriting legibility).

45. In my view, from the analysis; it is apparent that the Applicant has not met the salient ingredients in proving the act of contempt against the 1st Petitioner.

46. As regards the second prayer, it is my finding that having established that the 1st Petitioner was unaware of the court order, the alleged transactions may be said to have been made in good faith and therefore at this point, this court is unable to nullify the distribution of the deceased’s estate done pursuant to the grant of letters of administration and certificate of confirmation issued on 23rd June 2009 and 3rd

February 2019 respectively in respect to the suit parcel.

47. In the result, it is my finding that the Objector/Applicant's application dated 20th January 2021 lacks merit. Thus the court makes the following orders;

i. The application is ordered dismissed with no order as to costs.

Dated, Signed and Delivered at NYAHURURU this 18th day of November, 2021.

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CHARLES KARIUKI

JUDGE