



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

SUCCESSION CAUSE NO. E006 OF 2021

IN THE MATTER OF THE ESTATE OF ELIAS NKONGE MWIANDI (DECEASED)

FLORENCE NTUE NKONGE.....ADMINISTRATOR/APPLICANT

VERSUS

DANIEL KOBIA NKONGE RESPONDENT

R U L I N G

1. This cause relates to the estate of Elias Nkonge Mwiandi who died on 27th March 2021. The Applicant is the widow of the deceased, while the Respondent is the son to the Applicant and the deceased. The applicant has obtained a grant of letters of administration *ad colligenda* for the purpose of collecting and presenting the estate of the deceased.
2. Before this court is the summons application dated 27th October 2021. The said application is premised on the grounds on the face of it and it is supported by the affidavit sworn by Florence Ntue Nkonge on 27th October 2021. The application seeks for the following orders:
 - i. THAT the Respondent Daniel Kobia Nkonge be committed to civil jail for a period not exceeding six months or any other such period that the court may deem fit to order for being in contempt of court orders issued by this honourable court on the 25th day of August 2021.
 - ii. THAT the Respondent Daniel Kobia Nkonge be ordered to surrender to the Administrator/Applicant a sum of Ksh 2,100,000 being the amount of rent collected from the estate of the deceased for the months of April 2021 to October 2021.
 - iii. Costs of this application be provided for.
3. The Applicant contends that the deceased owned several properties which are developed with rental houses and which generate a monthly income of Ksh 300,000/= for the family. The Applicant further contends that since the demise of the deceased, tenants staying in the deceased's properties have been duped to pay rent to the Respondent who allegedly has been illegally collecting rent to date and does not account for anything.
4. In response to the application, the Respondent filed two affidavits, both sworn on 9th December 2021. One of the affidavits is sworn by the Respondent in which he admits that there are several properties from which he collects rents from. He however contends that the rental income he collects belong to him and his brother, Charles Mwenda Nkonge.
5. The other affidavit in response to the application is Daniel Ndubi Mwiandi. He depones that the deceased gifted the Respondent and Charles Mwenda some properties and that the Applicant intends to disinherit her sons what rightfully belongs to them.
6. On 22nd November 2021, this court gave directions that the application be heard by way of *viva voce* evidence and the same was set down for hearing on 15th December 2021. On the said hearing date, neither the Respondent nor his advocate on record appeared in court to argue their position against the application.
7. On the other hand, the Applicant's advocate, Mr. Muthomi, was present in court and it was his submission that the application should be allowed in terms of prayers no. 1 and 2 for the reason that the Respondent has admitted to the fact that he has been collecting rent from properties which belong to the deceased.
8. This court has a duty in principle to look at what the application is about and what it seeks. It is not automatic that for any matter where a party failed to show up the court will as a matter of course grant the sought orders. It therefore behoves this court to be satisfied that prima facie, with no contention, the application is meritorious and the prayers may be granted. I will therefore proceed to determine the merits of

the application based on the evidence tendered by the parties.

Analysis

9. Section 5 of the Judicature Act and which gives the High Court power to punish for contempt of court in order to uphold the authority and dignity of courts. **Section 47 of the Law of Succession Act** provides that the High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient while **Rule 73 of the Probate and Administration Rules** provides that inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

10. Court orders must be obeyed at all times in order to maintain the Rule of Law and good order. While discussing the importance of the Rule of Law and compliance with court orders, the Constitutional Court of South Africa in the case of **Kristen Carla Burchell vs Barry Grant Burchell, Eastern Cape Division Case No. 364 of 2005** stated as follows:-

“Compliance with court orders is an issue of fundamental concern for a society that seeks to base itself on the rule of law. The Constitution states that the rule of law and supremacy of the Constitution are foundational values of our society. It vests the judicial authority of the state in the courts and requires other organs of state to assist and protect the courts. It gives everyone the right to have legal disputes resolved in the courts or other independent and impartial tribunals. Failure to enforce court orders effectively has the potential to undermine confidence in recourse to law as an instrument to resolve civil disputes and may thus impact negatively on the rule of law.”

11. 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 they are to succeed.

12. For the instant application to succeed, the Applicant must prove the terms of the order; knowledge of the terms of the order by the Respondent; and failure by the Respondent to comply with the terms of the order. [See the persuasive case of **Republic v Attorney General & another Ex parte Mike Maina Kamau [2020] eKLR**].

13. Upon proof of these requirements the presence of willfulness and bad faith on the part of the Respondent would normally be inferred, but the Respondent could rebut this inference by contrary proof on a balance of probabilities. [See **Kristen Carla Burchell vs Barry Grant Burchell (supra)**]

14. In this case, it is not in dispute that the deceased owned several properties which are developed with rental houses which generate some income. It is also not in dispute that letters of administration Ad Colligenda Bona of the deceased's estate were granted to the Applicant on 25th August 2021 limited to the collection and preservation of the estate.

15. The Applicant contends that in blatant disregard to the said order, the Respondent has continued to collect rent from the properties forming part of the deceased's estate without any authority and without accounting for the money collected. It is for this reason that the Applicant prays that Respondent be ordered to purge the contempt by being committed to civil jail and by being ordered to surrender the sum of Ksh. 2,100,000/= being the amount of rent collected from the deceased's estate for the months of April 2021 to October 2021.

16. This court does not condone the deliberate disobedience of its orders or shy away from its responsibility to deal firmly with proved contemnors. It is however trite that a court order is binding on the party against whom it is addressed. It is also trite that he who alleges must prove.

17. In this case, the applicant alleges that the properties of the deceased generate an income of Kshs. 300,000/=. The Applicant has however not produced any evidence to substantiate the alleged income generated from the properties. The Applicant has also not produced any evidence to show that the alleged income is being collected by the Respondent. The only evidence that has been produced are copies of certificates of official search for land parcels no. Karingani/Ndagani/1746 and Ntima/Igoki/1900 which only prove that the said properties belong to the estate of the deceased. While alleging that she wrote all the tenants asking them to pay rent to her accounts and also wrote to the Respondent asking him to stop collecting rent, the Applicant did not tender any proof of such notification to the Respondent or the said tenants. For this reason, it is my view that prayer no. 2 of the application fails.

The applicant obtained a limited grant, *Ad Colligenda Bona* Limited to the purpose only of collecting, getting and receive the estate and doing such things as may be necessary for the preservation of the same and until further representation be granted. Emphasis added. It should be noted that the applicant has obtained a limited grant. She has not been appointed as the administrator of the estate of the deceased. A limited grant is different from a grant of Letters of Administration Intestate. The fact that she has obtained a limited grant does not mean that she is an administrator. The **Law of Succession Act (Cap 160 Laws of Kenya)** at **Section 82 (a) & (b)** stipulates the powers of an Administrator. It provides:-

“Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers-
(a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arise out of his death for his estate;

(b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best”

It follows that for the applicant to institute any proceedings, she must be the administrator of the estate of the deceased. Alternatively, the

limited grant must specifically state that it is for the purpose of filing a suit or proceedings. The Fifth schedule under **Law of Succession Act** provides for Grant for special purposes. **Rule 12 of the Probate and Administration Rules** provides for application for a Limited Grant. The grant made to the applicant was limited as observed above and she cannot go outside that limit.

18. I also note that the applicant wants rents to be paid direct to her accounts. The supporting affidavit shows that there are several other beneficiaries. As such despite her having obtained a limited grant, the rents as she has alleged belong to the estate of the deceased subject to the distribution to all the beneficiaries. It is therefore my view that she ought to have obtained a consent from the beneficiaries on how the rent would be collected and how it would be preserved. Certainly it is not supposed to be deposited in her accounts. My view is that it should be deposited in an account in her name and one other beneficiary with the consent of all the beneficiaries. The applicant has moved with haste without putting in place the process of collecting the rent that would provide a proper accountability for the said rent.

19. I have stated that the rent is alleged to belong to the estate because of the averments by the respondent that the rent does not belong to the estate and that the applicant has not disclosed material facts to the court. Based on these it is premature to say that the respondent is in contempt of court as there is a dispute which can only be resolved in the main succession cause to determine whether the rent forms part of the estate of the deceased.

20. I note that the Respondent did not sign the consent to the making of the grant of letters of administration and has therefore only been introduced to this cause by virtue of the present application. It is therefore my view that the act by the Respondent cannot be termed as contempt of court for disobedience of court orders in the absence of proof that the said orders were served on the Respondent. In any case, if the Applicant is to be believed that she wrote to the tenants, then the tenants should also be faulted for disobeying the court orders despite being notified of the same.

The applicant has deponed that the respondent threatened her when she enquired about the issue and she reported the matter at Chuka Police Station. A perusal of the annexures does not show any OB. The same for the threat to kill the process server at the paragraph 14 of her affidavit. This averment is hearsay and can only be based on falsehoods as there is no affidavit of the process server on the record or of the advocate.

21. It is further my view that this application would have been ripe for granting contempt orders against the Respondent had the Applicant moved the court to order the Respondent to stop collecting rent and an order for Respondent to deposit the rent in a certain account. This would give the respondent an opportunity to be heard on the matter. In the circumstances, I opine that the Applicant has failed to prove to the requisite standard that the Respondent is in contempt of the orders issued by this court on 25th August 2021.

Conclusion

22. The upshot of the foregoing, is that the application dated 27th October 2021 is not merited. I dismiss the application.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 20TH DAY OF DECEMBER 2021.

L.W. GITARI

JUDGE

20/12/2021

The ruling has been read out in open court.

L.W. GITARI

JUDGE

20/12/2021