



In re Estate of Wanaki Mutonga Wanjiku aka Wanaki Mungai (Deceased) (Probate & Administration 399 of 2010) [2021] KEHC 370 (KLR) (16 December 2021) (Ruling)

Neutral citation: [2021] KEHC 370 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
PROBATE & ADMINISTRATION 399 OF 2010
MW MUIGAI, J
DECEMBER 16, 2021**

BETWEEN

MIRRIAM MUTHONI NJENGA MUNGAI APPLICANT

AND

JOSEPH MUNGAI MUTONGA 1ST RESPONDENT

JOHN MBUGUA MUNGAI 2ND RESPONDENT

RULING

COURT RECORD

1. Wanaki Mutonga Wanjiku aka Wanaki Mungai died on 10th June 2006 vide Death certificate serial No. 148982.
2. Joseph Mungai Mutonga and John Mbugwa Mungai petitioned for letters of administration and annexed the following documents:
 - a) The Death Certificate of Death Certificate No 148982 - Wanaki Mutonga Wanjiku aka Wanaki Mungai who died on 10th June, 2006 aged 88 years old and it was issued at Machakos District.
 - (a) The Chief's letter dated 2nd June, 2010 confirming the list of beneficiaries left behind by the deceased.
3. The Deceased left the following heirs/beneficiaries surviving him:
 - (1) Joseph Mungai Mutonga
 - (2) Edward Gaturu Mungai
 - (3) John Mbugua Mungai
 - (4) Teresia Nyathira



- (5) Andrew Nganga Mungai
4. The Deceased left behind property known as Machakos/ Kitanga/35.
 5. The Grant of letters of Administration was issued on 19th May, 2011 by Hon. P. Kihara - J (as he then was) to Joseph Mungai Mutonga and John Mbugua Mungai.
 6. The Summons for Confirmation was filed on 2nd April 2013. Consent to Confirmation of Grant dated 25th March, 2013 was duly signed by the some of the beneficiaries with the proposed mode distribution of the estate.
 7. The Certificate of Confirmation of a grant was issued on 15th July, 2013 by Hon. B. Thuranira – J.Machakos /Kitanga/35 was to be registered in the names of administrators Joseph Mungai Mutonga & John Mbugua Mungai to be registered in their names and to hold in trust for other beneficiaries; namely; Edward Gaturu Mungai, Teresia Nyathira, Wangare Gichuhi Mungai & Andrew Nganga Mungai.
 8. The Summons for revocation /annulment of the grant was filed on 21st May 2020 by Mirriam Muthoni Njenga Mungai because it is alleged the grant was obtained fraudulently as the Administrators concealed from Court that James Njenga Mungai was one of the sons of the deceased and entitled to a share of the deceased's estate.
 9. The respondents ganged up against their late brother's family, demolished their home and evicted them from the land and left them destitute.
 10. The Administrators filed rectification of grant in court on 7th November, 2016 and an affidavit was annexed showing how the property known as Machakos/Kitanga/35 would be shared among the heirs/beneficiaries and now included the widow of the deceased brother and son of the deceased.

REPLYING AFFIDAVIT DATED 16TH NOVEMBER 2020

11. The Administrators deposed that the Applicant herein is indeed the granddaughter of the deceased person by dint of her father, one James Njenga Mungai who is our deceased brother.
12. That in response to paragraph 4 of the Applicant's supporting affidavit, the Respondents stated that in our society it is the responsibility of the extended family to help take care of the elderly and the sick and thus the same does not automatically entitle the care giver form benefiting from the deceased's estate.
13. That the allegations made by the applicant in Paragraph 6 are not true and that to the best of the Respondents knowledge, the house in the deceased's homestead has never been demolished.
14. That their deceased brother benefited from their deceased mother's estate vide a gift bequeathed to him in the form of a parcel of Land No. 83 which is situated in Kitale.
15. That the Applicant and her siblings are only entitled to benefit from their deceased father's estate.
16. That before the death of the Respondents' brother James Njenga Mungai, the Applicant herein was already married and was living with her husband.
17. That since the applicant is not a dependant of the deceased person she did not quality as a beneficiary of the estate in question.
18. That the exclusion of the Respondents' deceased brother as a beneficiary in these proceedings is non-consequential since he was sufficiently catered for during the lifetime of their deceased mother.



19. That the Applicant had agreed to unconditionally withdraw her summons for revocation herein. The withdrawal dated 7th June 2020 has not been revoked, rescinded/set aside and therefore it stands.

NOTICE OF MOTION dated 24th June 2021

20. That an order do issue citing the Respondents in contempt of court for non-compliance of Court Orders issued on 2/06/2020.
21. That this Court issues the Respondents with a notice to show cause why they should not be committed into civil jail for non-compliance of the Court orders.
22. The application is based on the following grounds:
- (i) That an injunction was granted by this Court on 2/06/2020 restraining the respondents herein either by themselves, agents and any other person claiming under them from selling, subdividing, alienating, disposing off and/or any other wa interfering with land parcel Machakos/Kitanga/35 or any other plots emanating from any purported sub-division or therefore which form part of Machakos/Kitanga/35.
 - (ii) That the said order was served upon the Respondents and the respondents Advocate, Musyoka Kimeu & Co. Advocates on 2/06/2020.
 - (iii) That the Respondents have failed and/or neglected to comply with the said order and have proceeded to sell a piece of the suit land to other persons.

REPLYING AFFIDAVIT DATED 16TH JULY, 2021

23. That the application is scandalous, frivolous, vexatious and as such an abuse of the court's process.
24. That the averments by the Applicant are baseless, misleading, misinformed and hence made to vex the Respondents unfairly.
25. That the Respondents are strangers and non-parties to the allegations of contempt made in the instant application as the Applicant has clearly and explicitly indicated under paragraph 4 of the supporting affidavit that the right party to pursue is one Edward Gaturu Mungai.
26. That the allegation of threat to life to the Applicant is untrue and baseless as we have been living and interacting amicably with the Applicant further noting that she is our niece and therefore we are not capable of such primitive behaviour.
27. That its prima facie clear that we have been wrongly enjoined in this Application and contempt proceedings as the right party to pursue is one Edward Gaturu Mungai.
28. That without prejudice to the foregoing, the applicant has not attached any documents such as a sale agreement to show any sale or disposition by ourselves nor attached any photographic evidence to proof the activities of sub-divisions or developments.
29. That this instant application offends the mandatory provisions of the law as there is nothing to adjudicate between the Applicant and ourselves in the intimated contempt proceedings as we have been wrongly enjoined in the proceedings.
30. That we are law-abiding citizens, well acquainted with the laws of the land and we are aware that the grant in our father's estate is coming up for confirmation on the 25/10/2021 therefore on our part we have kept the estate intact pending the said confirmation.

SUBMISSIONS



APPLICANT'S SUBMISSIONS

31. The Applicants submits that the Edward Gaturu Mungai is a beneficiary of the estate by virtue of being a son to the deceased and a brother to the Respondents herein and therefore qualifies as someone claiming under them and she further submits that the Respondents being the representatives of the estate had a duty to ensure that the estate is preserved and that all the beneficiaries comply with the court orders to avoid intermeddling with the estate and were well aware of the court orders and that they were wanted severally of their lack of compliance and so the contempt is deliberate.
32. The Applicant states that there are essentially four elements that must be proved to make the case for civil contempt.
 - (a) the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the respondents;
 - (b) The Respondents had knowledge of or proper notice of the terms of the order.
 - (c) the respondents have acted in breach of the terms of the order; and
 - (d) the Respondents conduct was deliberate.
33. A court order is binding on the party against whom it is addressed and until set aside remain valid and is to be complied with. Article 159(1) of the *constitution* provides that judicial authority is derived from the people and vests in, and shall be exercised by, the court and tribunals established by or under the Constitution. Under Article 10(1) of the Constitution the national values and principles of governance in the article bind all state organs, state officers, public officer and all person whenever any of them (a) applies or interprets the constitution; (b) enacts, applies or interprets any law; or (c) makes or implements public policy decisions. Under clause (2) (a) of the same Article the national values and principles of governance include the Rule of Law.
34. The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed 'deliberately and mala fide' A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe he/she is entitled to act in the way claimed to constitute the contempt. In such a case good faith avoids the infraction. Even a refusal to comply that is objectively unreasonable may be bona fide (through unreasonableness could evidence lack of good faith).
35. these requirements – that is the refusal to obey should be both wilful and mala fides, and that unreasonable non-compliance, provided it is bona fide, does not constitute contempt – accord with the broader definition of the crime, of which non-compliance with civil orders is a manifestation. They show that the offence is committed not be mere disregard of a court order, but by the deliberate and intentional violation of the court's dignity, repute or authority that this evinces. Honest belief that non-compliance is justified or proper is incompatible with the intent.

RESPONDENTS SUBMISSIONS

36. The application was premised on grounds inter alia that the Respondents have failed to or neglected to comply with the said order since Edward Gaturu Mungai who is beneficiary of the estate has sold one acre of the suit land to one Mr. Mutungi. That neighbours and the Area chief are aware of the sale and have occasionally seen Edward Gaturu Mungai and Mr. Mutungi together with other unknown person on the suit land taking measurements.
37. It is stated that the rule of evidence is clear the "he who alleges must prove." The maxim has been grounded in law under Section 107 of the *Evidence Act*. The trial court in *M'bita Ntiro -vs- Mbae*



Mwirichia & another [2018] eKLR reiterated the above proposition as the same was enunciated by Justice Majanja in *Evans Otieno Nyakwana –vs- Celophas Bwana Ongaro [2015] eKLR* when he said that “... as a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. that is the purport of Section 107 (1) of the Evidence Act (Chapter 80 of the law of Kenya), which provides:

“ 107 (1) whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exists...”

38. Furthermore, Section 109 of the Evidence Act provides for Proof of particular fact and in particular it provides that “the burden of poof as to any particular fact lies in the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of fact shall lie on any particular person.”
39. In the application, the applicant specifically points out one Edward Gaturu Mungai for being in contempt of court, but nonetheless no particular of actual reference has been made to the Respondents herein for being in contempt whatsoever.
40. It is clear that the Respondents have bene wrongly enjoined in these contempt proceedings for the reason that the right part to pursue is one Edward Gaturu Mungai as indicated under Paragraph 4 & 5 of the Applicant’s supporting affidavit.
41. The Respondents cited the following cases:
 - (i) *Wildlife Lodges Limited –vs- County Council of Narok and Anor [2005] 2E.A 344 (HCK).*
 - (ii) *Sheilla Cassatt Issenberg and Another –vs- Antony Machatha Kinyanjui [2021] eKLR.*
 - (iii) *Gatharia K. Mutikika –vs- Baharini Farm Limited [1985] KLR 227*
42. The Respondents based their case under Order 1 Rule of the *Civil procedure Rules*, 2010.

DETERMINATION

43. The Court considered the application, pleadings and submissions by parties. The issue before Court is whether, the Respondents should held in contempt of court orders of this Court of 2/06/2020 and committed to civil jail.

In *North Tetu Farmers Co. Ltd v Joseph Nderitu Wanjobi [2016] eKLR* the Court observed;

Section 5 of the [Judicature Act](#) which 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 subordinate courts.

In *Econet Wireless Kenya Ltd vs Minister for Information & Communication of Kenya & Another 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 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."

44. The Court orders must be obeyed until and unless set aside, varied reviewed or successfully appealed against. However, the orders must be clear and succinct and enforceable. The implementing party is duly served with the order or has knowledge of the order if the party participated in the proceedings that culminated to the impugned Court order.
45. Although the contempt of Court proceedings is civil in nature, it is well established that an Applicant ought to prove the elements beyond reasonable doubt, at least higher than the standard in civil cases. The fact that the liberty of the Respondents could be affected means that the standard of proof is higher than the standard in civil cases. It is incumbent on the Applicant to prove that the defendants' conduct was deliberate in the sense that he or she deliberately or willfully acted in a manner that breached the order.
46. This Court on perusal of the Court file found the following comments and directions by the Trial Judge Hon. D.K. Kemei;
 - a) On 25th May 2020, the Trial Judge declined to grant conservatory orders as the applicant [was] yet to establish legitimacy to the estate of the deceased.
 - b) The Trial Judge granted the impugned interim orders after the Respondent filed response to the Application of 19th May 2020.
 - c) The Trial Judge on 8th March 2021 directed the summons for revocation of 19th May 2020, to be canvassed by viva voce evidence.
 - d) From the pleadings on record there are pertinent issues to be determined at trial, the Applicant's claim to the deceased's estate, if her late father was bequeathed gift inter vivos by allocation of land in Kitale and whether the alleged sale of the suit property has taken place or not and if so if the Respondents/Administrators are liable for contempt or Edward Gaturu Mungai one of the beneficiaries, and is not joined in the Summons for revocation application, is liable.
47. From the above issues highlighted, the Court finds the contempt of Court application is premature at this stage, with the pending issues for determination during the hearing, the Court order of 2/06/2020 is a conservatory order to maintain status quo and preserve the estate of the deceased pending hearing and determination of application(s) and not to determine rights of the parties.

DISPOSITION

1. The application of 24th June 2021 for contempt of Court is dismissed with costs.
2. The temporary /interim orders of 2/6/2020 shall remain in force pending hearing of Summons for revocation application through viva voce evidence.
3. The parties' shall file and exchange Witness Statements before hearing is scheduled
4. Further mention in the New Term 2nd February 2021.

DELIVERED SIGNED & DATED IN OPEN COURT ON 16TH DECEMBER 2021 (VIRTUALLY)

M.W. MUIGAI

JUDGE

