



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 148 OF 1997

IN THE MATTER OF THE ESTATE OF MUSAU MWANIA *Alias* MOSES MUSAU MWANIA (DECEASED)

AND

BENSON WAMBUA MUSAU

RICHARD MWANIA MUSAU

KIOKO MUSAU.....PETITIONERS

AND

CHRISTOPHER MUSYOKA MUSAU1ST ADMINISTRATOR/APPLICANT

MUTYANGO MUSAU2ND ADMINSTRATOR/RESPONDENT

LILIAN MUSAU3RD ADMINSTRATOR

RULING

1. The first administrator herein filed a Chamber Summons dated 26/08/2019 under Section 7 of the Law of Succession Act Rule 73 of the Probate and Administration Rules and any other enabling provisions of the law seeking the following reliefs:-

(a) (Spent)

(b) That Mutyango Musau, the 2nd Administrator herein do show cause why he cannot be punished for contempt of court for failing to comply with this Honourable court's orders dated 19/10/2017.

(c) That Mutyango Musau do deposit the sum of Kshs.400,000/= received by him as rent from Manara Company limited into the estate's interest earning bank account immediately or be committed to prison for contempt of court for a period not exceeding six (6) months.

(d) That the costs be paid by the 2nd Administrator/Respondent.

2. The application is supported by the affidavit of the 1st administrator/Applicant sworn on even date wherein he made several averments *inter alia*: that vide this court's ruling dated 19/10/2017 the 2nd administrator/Respondent was ordered to release a sum of Kshs.400,000/= received by him as rent from one of the tenants and have the same deposited into an interest earning account in the joint names of the administrators within 45 days; that the Respondent failed to comply with the said order; that a demand notice was sent to the Respondent and his advocates to no avail; that respondent's defiance is in contempt of court and he should be cited and punished accordingly.

3. The application was vehemently opposed by the 2nd Administrator/Respondent vide a replying affidavit sworn on 17/09/2019. The Respondent raised several issues *inter alia*; that the application is actuated by malice, spite, ill will or improper motive and intended to vex; that he was unable to release the rent proceeds from Manara company limited as he had already paid the same to the County Government of Machakos being outstanding plot rates; that he did this for the benefit of the estate as he paid an extra sum of Kshs.39,340/= from his own pocket; that the estate did not suffer any loss through any act or omission on his part; that he has never been personally served with the alleged demands as he could have tendered the requisite explanation as to how the sum of Kshs.400,000/= had been expended for the benefit of the estate; that the three administrators later organized for a valuation of the property which confirmed the Respondent's efforts on its improvement; that it would be unfair to be punished for actions which have benefitted the estate of the deceased. The other parties opted not to participate in the application as it did not touch on them.

4. Parties agreed to canvass the application vide written submissions. However it is only the Applicant's Advocates submissions that are on record. It was submitted that in view of the effect that the contempt of court Act No. 46 of 2016 has been declared unconstitutional vide **Nairobi H/Court Constitutional Petition No.87 of 2017 Kenya Human Rights Commission –vs- The Attorney General & Another [2018] eKLR** the court should now revert back to Section 5 of the Judicature Act in order to punish for contempt. It was also submitted that the court can rely on section 3A of the Civil Procedure Act on the 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. It was also submitted that the 2nd Administrator/Respondent and the advocate were well aware of the court order dated 19/10/2017 and since the Respondent does not deny receiving the sum of Kshs. 400,000/= from Manara company Limited as rent and having failed to deposit the same into an interest earning account as ordered then he is in contempt and ought to be punished. Learned counsel urged this court to reject the explanation offered by the Respondent as the same flies in the face of the record.

5. I have considered the application together with the rival affidavits. I have also considered the submission presented by counsel for the Applicant. It is not in dispute that this court vide a ruling dated 19/10/2017 ordered the Respondent herein to release monies received by him as rent from Manara Company limited and to have it deposited into an interest earning account in the names of the administrator's within 45 days from the date of the ruling. It is also not in dispute that the Respondent does not deny having received the said monies from Manara Company limited. It is also not in dispute that the Respondent did not release the said monies or have them put into the account as directed. It is also not in dispute that the Respondent has rendered an explanation as to why he did not comply with the order. That being the position, I find the issue for determination is whether the Respondent is in contempt of the orders dated 19/10/2017.

6. The jurisdiction of the court to punish for contempt is meant to ensure that the court's decisions and directions are obeyed and enforced and this will enhance public respect and the maintenance of law and order in the society. In 2016 parliament enacted the Contempt of Court Act No. 46 of 2016 which was to deal with processes relating to punishing contemnors for contempt of court and vide section 38 thereof repealed section 5 of the Judicature Act. This was the position until 2018 when the said Act was declared unconstitutional vide **Constitutional Petition No.87 of 2017 Kenya Human Rights commission –vs- the Attorney General & Another [2018] eKLR**. It would seem that following the said declaration courts would revert to Section 5 of the Judicature Act which was the reservoir of contempt of court proceedings in the past and 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 if 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”.

In England the contempt of court Act 1981 and Rule 81 of the Civil Procedure (Amendment No.2) Rules of 2012 is the prevailing law and hence the same shall guide contempt of court proceedings in this country. Every court in Kenya is vested with inherent power to punish for contempt of its processes. This enables the courts to maintain their dignity and authority in the eyes of the public. Article 159 (1) of the Constitution provides that judicial authority is derived from the people and vests in and shall be exercised by the courts and tribunals established by or under the constitution. Article 160 of the constitution provides for the independence of the judiciary. The authority of the courts and dignity of their processes are maintained when their orders are obeyed and respected. In order to avoid anarchy in the country it is proper and prudent for all persons and entities effected by court orders to obey the same. This will entrench the rule of law and democracy in the county. In the case of **Hon Martin Nyaga Wambora and Another –vs- Justus Kariuki Mate and Another [2014] eKLR** the court held that the duty to obey the law by all individuals and institutions is cardinal in the maintenance of rule of law and administration of justice.

Mrs Nzei learned counsel for the Applicant has urged me to cite the Respondent for being in contempt of the order dated 19/10/2017 which was as follows:-

“Robert Mutyango Musau is hereby ordered to release monies received by him as rent from Manara Company Limited and which is to be deposited into an interest earning account in the names of the Administrators within the next 45 days.”

The Respondent in his replying affidavit confirms having received the sum of Kshs.400,000/= from Manara Company Limited but ended up using it in paying outstanding plot rates and ended up paying an extra 39,340/= from his pockets. He added that this was done prior to the court order and he believes that the estate did not suffer any loss through any act or omission on his part. He finally averred that he had never been served personally with the alleged demand and that he had never been served personally with the alleged demand and that had he been served he would have rendered the explanation as to how the sum of 400,000/= had been expended for the benefit of the estate.

Looking at the explanation offered by the Respondent together with the documents annexed to his replying, I find the same to be plausible and believable. The copies of payment receipts is proof that payments were made towards rates charges. I also note that the Respondent and the Applicant together with the 3rd Administrator held a meeting on 4/07/2017 and one of the agenda items was to do with adoption of lease agreement over the property in which the rent had been paid to the respondent. If this was the case then it is obvious that the three administrators must have discussed a range of issues including the issue of the particular rent payment. What emerges from this is that the three administrators had been discussing several matters regarding the administration of the estate. Indeed the 1st administrator/Applicant was present in that meeting when matters relating to six properties of the estate were discussed. The issue of the rent of 400,000/= was not discussed during that meeting and that had it been an issue then it should have been addressed alongside the adoption of the lease agreement.

It is therefore quite clear that the Applicant and the other administrator were well aware of the fact that the Respondent had used the rent proceeds to pay plot rates. It is instructive that the 3rd administrator who was present during the meeting has not sworn an affidavit in support of the application and this lends credence to the Respondent's claim that the application has been

brought in bad faith and for an ulterior purpose. Having been presented with the rate payment receipts the Applicant has brushed that aside by dismissing it as not material in the circumstances of the present application and can only be entertained after the Respondent pays the Kshs.400,000/= as ordered. I find the applicant's stand point to be rather rigid in the sense that the Respondent cannot be expected to give that which he does not have as he has already spent the money by clearing plot rates and has even incurred an extra cost of Kshs.39,340/=. Despite such a genuine explanation from the Respondent the Applicant still wants the Respondent behind bars so to speak. The Applicant is rather fixated on having the Respondent punished and nothing less than that. I find it would be harsh and unfair to cite the Respondent for being in contempt since the explanation he has presented is plausible in my view. In any case the Respondents action benefitted the estate and not himself as no money went into his needs. It also transpired that he has incurred an extra cost of Kshs 39,340/=. If he did all this for the benefit of the estate, I do not see any reason whatsoever why he should be held to be in contempt of the court order. Citing the Respondent for contempt in the circumstances is not appropriate as it will polarize the much needed unity and amity among the administrators who are expected to work in unison and forbear one another as they carry out the task of administering the estate

for the benefit of the beneficiaries. The order of 19/10/2017 had directed that the rent proceeds be deposited into an interest earning account in the joint names of the administrators. Even though the Applicant blames the Respondent for not remitting the Kshs.400,000/= as directed, he himself does not present evidence of steps taken towards actualizing the said order by way of preparation of bank account opening forms. The Applicant did not perform any task on his part as he has not annexed any copies of account opening forms and now wants to blame the Respondent wholly for any shortcomings as regards the said court order. I have no reason to doubt the Respondent's explanation and proceed to find that he has not disobeyed the court order dated 19/10/2017. I am inclined to accept the Respondent's claim that the Applicant is just out to vex him for no apparent reason.

7. It is noted that the order dated 19/10/2017 had directed the Administrators to file summons for confirmation of grant within 90 days. However, there has been marked delay over the same by the Applicant herein who is the 1st Administrator. It is not in doubt that this is a fairly old matter having been lodged in 1997 and ought to be finalized as a matter of priority so that the beneficiaries and any interested parties get to know their fate regarding the distribution of the estate. All the parties herein had been ready to proceed with the confirmation and protests but instead of the 1st Administrator/Applicant herein leading the way by setting down the matter for the confirmation hearing, he has sprung up with the present application. I find the application is nothing but a delaying tactic to the prejudice of the other parties anxious to have this matter with a chequered history brought to conclusion.

8. In the result, it is my finding that the 1st Administrator/Applicant's application dated 26/08/2019 lacks merit. The same is ordered dismissed with no order as to costs. The 1st Administrator/Applicant is now directed to proceed and set down the matter for the hearing of the summons for confirmation of grant and protests as a matter of priority.

It is so ordered.

Dated and delivered at **Machakos** this **22nd** day of **April, 2020**.

D. K. Kemei

Judge