



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**SUCCESSION CAUSE NO. 346 OF 1998**

**IN THE MATTER OF THE ESTATE OF ONYANGO RAWAYA - DECEASED**

**GAUDENSIA SINO WANJAWA.....OBJECTOR/APPLICANT**

**-VERSUS -**

**NALA GEKE.....PETITIONER/RESPONDENT**

**RULING**

The application dated 21<sup>st</sup> August 2019 is for the committal to civil jail, of the Respondent, **NALA GEKE**, on the grounds that he is in contempt of court.

1. The Applicant, **GAUDENSIA SINO WANJAWA**, requested this court to have the Respondent committed to civil jail for a period of six (6) months, or for such period as the court may deem appropriate.
2. In the alternative, the Applicant requested this court to impose a fine of Kshs 2,000,000/= against the Respondent.
3. The order which the Respondent is alleged to have failed or refused to obey was issued on 23<sup>rd</sup> January 2003.
4. The particular complaint directed against the Respondent was that he had failed or refused to surrender the Title Deed for **L.R. NO. NORTH GEM/MALUNGA/927** to the Land Registrar Siaya.
5. By his replying affidavit the Respondent first asked the court to strike out the application because it was incompetent and bad in law.
6. In any event, said the Respondent, the suit property had at all material times been in the possession of his family members.
7. The Respondent said that his late father, **JEREMIA GEKE**, had allowed the deceased, **ONYANGO RAWAYO**, to stay on a portion of the suit property. That step was taken in the year 1949.
8. However, according to the Respondent, Jeremia Geke had only allowed Onyango Rawayo to stay on the parcel of land for the duration of his life.
9. Perhaps the Respondent did not appreciate the contradiction between his contention regarding the possession of the suit property. On the one hand, he deponed that the said property was at all material times in the possession of the family of Jeremia Geke; whilst on the other hand he acknowledged that the said Jeremia Geke had given a portion of the said land to Onyango Rawayo.
10. The Respondent instituted proceedings at the Magistrate's Court Siaya, seeking grant of letters of administration of the Estate of the Late Onyango Rawayo.
11. The said proceedings were instituted in the year 1996, which was 21 years after the death of the said Onyango Rawayo.
12. In his replying affidavit, the Respondent conceded that his said action was misguided.
13. When the Applicant became aware that the Magistrate's Court, Siaya, had issued a Certificate of Confirmation of Grant to the Respondent, she sought the revocation of the same.

14. Although the Respondent has deponed that he was not present in court on the date when the court revoked the Grant, he conceded that he did become aware of that order.

15. Immediately the Respondent became aware of the Orders in question, he lodged an appeal to challenge the revocation of the Grant.

16. He told the Court that the appeal was eventually dismissed for want of prosecution.

17. Following the Respondent's express acknowledgement, on oath, that he not only became aware of the Order, but also that he had unsuccessfully lodged an appeal against the said order, this court finds that the Respondent had an obligation to obey the orders.

18. The Respondent submitted that **Section 63 (c)** of the **Civil Procedure Act**, (which had been invoked by the Applicant), had no relevance to the matter before me. The said Section provides as follows;

**“To prevent the ends of justice from being defeated, the court may, if it is so prescribed**

**(c) Grant a temporary injunction and in case of disobedience commit the person guilty thereof to prison and order that his property be attached and sold.”**

19. I am in agreement with the Respondent, that in so far as the order in issue herein was not a temporary injunction, **Section 63 (c)** of the **Civil Procedure Act** was not relevant to the matter before me.

20. The Applicant had also invoked **Section 6 (c)** of the **Contempt of Court Act, 2016**.

21. In the case of **KENYA HUMAN RIGHTS COMMISSION Vs ATTORNEY GENERAL & ANOTHER, CONSTITUTIONAL PETITION NO. 87 OF 2017**, Mwita J. declared the entire **Contempt of Court Act** as invalid, for lack of public participation as required by **Article 118 (b) of the Constitution**, and also because the said statute was deemed to be encroaching on the independence of the Judiciary.

22. Accordingly, I find that the court could not be expected to found orders on an application based upon a statute which had been declared unconstitutional.

23. Nonetheless, the repeal of the **Contempt of Court Act** does not imply that persons against whom courts had granted orders, can now not be punished for contempt of court. Even prior to the enactment of that statute, courts had legal authority to hold to account any persons who disobeyed court orders.

24. As the statute was repealed, and because it is within it that the previous statutory provisions were indicated as having been repealed; it follows that from 9<sup>th</sup> of November 2018, (when Mwita J. delivered his judgment), the status reverted to what it was prior to the enactment of the **Contempt of Court Act**.

25. In other words, the repeal of that statute did not leave a vacuum.

26. In the administration of justice, the centrality of the place of the law governing contempt of court was so fundamental, that it would be an absolute disaster to contemplate the absence of legal authority to punish those who wilfully disobey orders of the court.

27. In **TEACHERS SERVICE COMMISSION Vs KENYA NATIONAL UNION OF TEACHERS & 2 OTHERS [2013] eKLR** the Court held as follows;

**“The reason why courts will punish for contempt of court then is to safeguard the rule of law which is fundamental in the administration of justice. It has nothing to do with the integrity of the Judiciary or the court or even the personal ego of the presiding Judge. Neither is it about placating the Applicant who moves the court by taking out contempt proceedings. It is about preserving and safeguarding the rule of law. A party who walks through the Justice door with a court order in his hands must be assured that the order will be obeyed by those to whom it is directed.**

**A court order is not a mere suggestion or an opinion or a point of view. It must therefore be complied with and it is in the interest of every person that that remains the case. To see it in any other way is to open the door to chaos and anarchy, and this Court will not be the one to open that door. If one is dissatisfied with an order of the court, the avenues for challenging it are set out in the law. Defiance is not an option.”**

28. In this instance, the Respondent lodged an appeal to challenge the order in question. By so doing, he must be deemed to have been fully aware that until and unless the order he was challenging were vacated, he had a duty to obey them.

29. And following the dismissal of his appeal, the Respondent cannot be permitted to litigate afresh, by challenging the orders in issue.

30. On 23<sup>rd</sup> January 2003, the court revoked the Grant of Letters of Administration of the Estate of **ONYANGO RAWAYO**, which had been issued to the Respondent on 28<sup>th</sup> October 1996, and which had been confirmed on 12<sup>th</sup> June 1997.

31. The learned Judge expressly ordered the cancellation of the Transfer of **L.R. NO. NORTH GEM/MALUNGA/927**, which was then in

favour of the Respondent.

32. By granting those orders, the court demolished the foundation upon which the Respondent had built his claim of ownership of the suit property. The Respondent has no legitimate basis for occupying or using the suit property.

33. But I also find that there was no explicit order directing the Respondent to surrender the title document bearing his name.

34. Nonetheless, the failure to surrender the title whose transfer had been cancelled by the court, is a hurdle in the path towards the issuance of a title document to the person who has already been adjudged to be the rightful proprietor.

35. The Respondent informed the court that on 3<sup>rd</sup> August 2016, the cancellation order was registered against the title. The Green Card exhibited by the Respondent shows that the transmission of title, which was conducted pursuant to the Grant that had been issued to the Respondent, had also been revoked.

36. Therefore, as the Respondent acknowledged in his submissions, that the title document held by him is no longer valid.

37. However, I hasten to add that it is not the registration of the order which rendered the title invalid; it was the orders made by the court on 23<sup>rd</sup> January 2003 that rendered the title invalid.

38. The Overriding Objective of the orders made on 23<sup>rd</sup> January 2003 was to divest the Respondent of any claims to the ownership of the suit property.

39. In order to enable the divestiture be completed, so as to give effect to the Order in issue, I now order that the Respondent shall within the next **SEVEN (7) DAYS** from today, surrender the original title document to the learned Deputy Registrar of this Court.

40. The court will assign a date when the case will be mentioned, so as to ensure compliance.

41. Finally, each party will meet his or her own costs of the application dated 21<sup>st</sup> August 2019. I so order because although the Respondent has not been cited for contempt, the application has yielded an order which will give effect to the actualization of the orders made on 23<sup>rd</sup> January 2003.

**DATED, SIGNED and DELIVERED at KISUMU This 27<sup>th</sup> day of July 2020**

**FRED A. OCHIENG**

**JUDGE**