



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**SUCCESSION CAUSE NO. 138 OF 2013**

**IN THE MATTER OF THE ESTATE OF THE LATE WANYUGI GICHARU (DECEASED).**

**MARGARET MWERU.....APPLICANT**

**VERSUS**

**ESTHER WAITHERERO KIARIE.....1ST RESPONDENT**

**BERNARD WANYUGI GICHARU.....2ND RESPONDENT**

**RULING.**

1. On the **7th September 2016**, the Court (Hon. Justice Ndungu Judge) gave the Applicant, *Margaret Mweru an Ex-parte injunctive Order restraining the Respondents, Esther Waitherero and Bernard Wanyugi, the widow and son of the deceased respectively of the Late George Gicharu Wanyugi, by themselves, their agents or servants from entering, disposing, charging or in any manner interfering with the suit properties; LR NO. Elburgon/Arimi/Ndoshwa Block 1/132 (Ngwataniro) and Elburgon/Turi Block 23 (HighField) pending interparties hearing of the application dated 6/9/2016.*

2. I have perused the court proceedings since the 7/9/2016. The said order was extended over and over by the judicial officers who handled the matter, culminating with my order of extension of the interim injunctive orders on the 3/6/2020.

To that extend, I find and hold that there is, on record, a valid court order of interim injunction binding upon the Respondents.

3. The above order emanated from the Applicant's application by **Notice of Motion dated 6/9/2016, brought under Provisions of Order 40 Rule 1,2,3 of the Civil Procedure Rules and Sections 3, 3A, and 63 (c) of the Civil Procedure Act, Cap 21 Laws of Kenya.**

4. The gist of the application before me is that the respondents are in total disobedience of the court orders as stated by the applicant that;

**1) Despite the court order they have sold and or leased parcel Elburgon/Turi Block 23 (Highfield) where a third party has put up a house.**

**2) That the respondents have been taking prospective buyers to parcel Elburgon/Arimi/Ndoshwa Block 1/132 (Ngwataniro) in total disobedience of the existing court orders.**

5. **And** therefore sought **Orders that;**

**a) Spent**

**b) The Honorable court be pleased to put into civil jail the Respondents for disobeying the said court orders. The applicant swore the affidavit in support of the application on the 27/3/2019.**

6. In opposing the application, the respondents filed a **Preliminary Objection** dated 21/6/2019 and filed on the 27/6/2019 together with a list of authorities, stating that;

**a) That the application as brought before the court is bad in law and should be struck out in limine**

**b) That the applicant purports to rely on the provisions of the contempt of court Act 2016, an Act which was declared unconstitutional and as such the application as brought is ban in law**

*c) That the court lacks the jurisdiction to hear and determine the said application brought by the applicant.*

*d) That the prayers sought by the applicant are such that if granted would result to loss of liberty of the respondents and as such demands a higher threshold that the applicant has not met.*

*e) That the order which the applicant purports that the respondents disobeyed lapsed and this entire cause had been listed for dismissal for want of prosecution.*

*f) That the applicant's application dated 27/3/2019 is therefore bad in law, an abuse of the court process and should be dismissed with costs to the Respondents.*

7. Both parties filed written submissions to urge their respective positions on the application.

#### **8. The Applicant's Case.**

There is no contestation as to service of the court orders dated 7/9/2016 upon the respondents.

Likewise, there is no submission by any of the parties that the said court order was either set aside, varied or vacated. It is therefore valid and in place.

9. The applicant's position is that despite the existence of the court order the respondents have purported to sell part of parcel Elburgon/Turi Block 23 (Highfiedl) and Elburgon Turi Block 23 (Turi) to some third party who, as deposed in the affidavit in support of the application, has moved in and constructed temporary structures exhibited as (MMiii).

10. It is further the applicant's position that the respondents have been sending prospective buyers to the suit properties in disregard and disobedience of the court orders. By the above cited disobedience of the court order by the respondents, the court is urged to punish them by placing them in civil jail.

#### **11. The Respondents case.**

It is contained in the preliminary objection which I have reproduced under paragraph six (6) above.

The Respondents further submits that upon the death of the **Late George Gicharu Wanyugi**, they filed a **Succession Cause Nakuru Succession Cause NO. 58 of 2013 – In the Matter of the Estate of George Gicharu Wanyugi (Deceased)** and listed the same suit properties which were then registered in the names of the deceased before his death, and annexed copies of certificates of title in his names.

12. It is further the respondent's case that the letters of administration in the cause were issued to the Respondents on the 22/7/2013 and a certificate of confirmation of grant issued on the 3/10/2014, and upon that basis, the respondents transferred the two suit land parcels into their names, upon which title deeds were issued.

13. It is further submitted that after barely three months, the Applicant, a daughter of the deceased filed this Succession Cause (No.138/2013) in respect of the **Late Wanyugi Gicharu who died on the 22/12/1983** who is the Respondent's father in law and grandfather, respectively, of the 1st and 2nd Respondents, claiming that it was the late Wanyugu Gicharu who was the legal owner of the suit properties, and that the **Late George Gicharu Wanyugi** illegally and fraudulently obtained the title to the suit properties without filing any succession cause.

14. It is further averred that the applicant filed a suit, **Nakuru Civil Case No. 37 of 2009** against the **Late George Gicharu Wanyugi** challenging ownership of the suit properties but the defendant died during the pendency of the suit on the 16/7/2010 and that, since then, the applicant has not prosecuted the said suit, nor brought in the Respondents who are the legal administrators of the **Late George Gicharu Wanyugi**.

15. By the above, the Respondents submit that the question of illegality and fraudulent acquisition of the suit properties by the Late George Gicharu Wanyugi is a matter of **the Environment and Land Court, not the High Court** which they submit, lacks jurisdiction to handle; and therefore, unless a competent court (meaning the ELC) establishes the illegal and fraudulent acquisition of the suit properties by the late George Gicharu Wanyugu, the certificates of titles in favour of the Respondents remain valid, and urged for dismissal of the application.

16. I have considered the parties' submissions against the above backdrop.

#### **Analysis and determination.**

17. The Estate in issue is that of the **Late Wanyugi Gicharu**. The Applicant is the personal representative of the Estate, having been granted Letters of Administration on the 19/6/2013. The two suit properties were listed and confirmed as assets of the deceased despite the title deeds to the two properties having been registered in the names of the **Late George Gicharu Wanyugi**.

18. The applicant filed the succession cause after the respondents obtained registration of the two land parcels in their favor as administrators of the **Late George Gicharu Wanyugi in High Court Succession Cause No. 58 of 2013**.

19. The applicant submits that the **Late George Wanyugi Gicharu** obtained registration of the suit parcels fraudulently. I agree with the Respondents submission that, as that was allegedly done before his death, it is a matter for the Environment and Land Court to determine the

matter of ownership of the land parcels; and indeed, the applicant had filed a suit in being HCCC NO. 37 of 2009. The status of the said case has not been disclosed to this court by the applicant.

20. Nevertheless, this court has no jurisdiction to interrogate the matter of ownership the suit properties as to do so would be to grant itself jurisdiction which emanates only from legislation, the Constitution or both – **Samuel Kamau Macharia & another Vs. KCB & another (2012) e KLR.**

21. The Order of 7/9/2016 was issued by Ndungu J, Exparte, restraining the respondents from interfering in any manner with the suit properties. There is no evidence on record whether the Application from which the Order was issued and dated 6/9/2016 was ever heard interparties. I have seen an application by the Respondents dated 20/9/2016 seeking for orders to set aside or vary the said exparte orders. Likewise, there is also no indication whether or not this application was ever heard.

None of the parties volunteered any information to this court why the two applications have remained in the court file unheard, for close to three years, up to the 6/7/2019 when the present application was filed.

22. **Under the circumstances, should the Respondents be cited for contempt of court orders?**

23. **Contempt of Court is defined at Section 4 (1) (a) of the Contempt of Court Act, 2016 as to include Civil contempt** which means willful disobedience of any judgment, decree, direction or other process of a court or willful breach of an undertaking given to court – **Kenya Human Rights Commission Vs. AG & another (2018) eKLR.**

24. The Supreme Court in the decision **Board of Governors, Moi High School Kabarak & another Vs. Malcom Bell, (2013) eKLR** held that the superior courts have the power to punish for contempt of court, to uphold the dignity and authority of the court.

However, for the Court to punish for contempt, it must be satisfied that personal service of the court order has been effected upon the respondent and that the respondent has willfully disobeyed the court order.

25. **Article 159 of the Constitution** recognizes the judicial authority of courts and tribunals established under the constitution. Decisions of courts and the tribunals must not only be respected and obeyed, but also be complied with in order to enhance public confidence in the Judiciary and the preservation of the rule of law and constitutional democracy. This can only be achieved when court orders are obeyed and respected – **Kenya Human Rights Commission (Supra).**

26. The Respondents have submitted that the **Contempt of Court Act No. 46 of 2016** upon which the application is based was declared unconstitutional in the case **Kenya Human Rights Commission (2018) e KLR (Supra)**. I agree that is so, but that does not leave the court with no alternatives to punish for willful disobedience of court orders, because as observed in the **Teachers Service Commission Vs. Kenya National Union of Teachers & 2 Others (2013) e KLR,**

*“The reasons why courts will punish for contempt of court is to safeguard the rule of law which is a fundamental in the administration of justice. It has nothing to do with the integrity of the judiciary or the court or even 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 safeguard the rule of law”, cite in the case in Re Estate of Hesborn Shimei Nyongo (deceased) 2019 e KLR.*

27. Upon declaration that the **Contempt of Court Act NO. 46 of 2016 unconstitutional**, (Mwita J, on 9/11/2018) in **Constitutional Petition No 87 of 2017, Kenya Human Rights Case (2018) e KLR (Supra)**, the Courts were not orphaned; they have reverted back to other legislation that operated before the enactment of the 2016 Contempt of Court Act, to avoid a lacuna in the enforcement of Court’s Orders, as its responsibility for the maintenance of the law.

28. This is the English law on **Committal for Contempt of Court Orders under Rule 81.4 of the English Civil Procedure Rules**, which deals with breach of judgments, orders or undertakings, applied by virtue of **Section 5(1) of the Judicature Act** that provides:

*“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”.*

29. Presently, this is the operative legislation in our Jurisdiction. The above position was reiterated by the **Court of Appeal in Christine Wangari Gachege Vs. Elizabeth Wanjiru Evans & 11 Others (2014) eKLR.**

30. The application under interrogation is based on the 2016 Contempt Act. That in itself does not make it incompetent for that reason only. The merits of the application are paramount as citing a wrong or nonexistent legislation is not fatal, but a technicality that is curable under **Article 159 (2) (d) of the Constitution.**

31. The Court of Appeal in the **Christine Wangari Case (Supra)** pointed out that leave/permission is not required where the committal proceedings relate to a breach of a judgment, order or undertaking, and further proceeded to observe that **“a court without contempt powers is not a court”.**

32. **Respondents in Contempt of the 7/9/2016 Court Order?**

The test is whether the alleged disobedience was committed deliberately and willfully. For the applicant to succeed, she must prove the terms of the court order and knowledge of the same by the respondents. This is not in dispute. The respondents were at all material times represented by their Advocate and soon after service of the court order, the Respondents moved to court, by their application dated 20/9/2016, less than two weeks to seek an order to vary/set aside the order.

As I stated earlier, it is not clear whether the application to vary the orders was ever heard.

33. In response to the application, the Respondents opted to file the preliminary objection, which is based on points of law only in line with the case, *Mukisa Biscuit Manufacturing Co. Ltd Vs. West End Distributors Ltd (1969) EA, 696*. The court in the case held that;

*“---a preliminary objection consists of a point of law which has been pleaded---which if argued as a preliminary point may dispose of the suit--- it is a pure point of law which if argued on the assumption that all the facts pleaded by the other side are correct---”*

34. It is instructive that the respondents did not deny the disobedience of the court order, nor the acts of disobedience as averred in the applicant’s affidavit in support of the application.

Having the above in mind, and there being no denial by any affidavit or otherwise of the set of facts stated by the applicant, I come to the unavoidable finding and conclusion that the Respondents, being aware and having full knowledge of the order of the court, willfully and deliberately decided to disobey the said court order of the 7th September 2016, and therefore are in contempt of the said court order.

35. It matters not that the court order may be incorrect, irregular, invalid or obtained by misrepresentation of facts by the opposite party to the court, or that the order is not palatable to the respondent. So long as the court order has not been set aside, varied or reviewed, the respondents, by each of them were and are obligated to obey the same. In *Refrigeration and Kitchen Utensils Ltd Vs. Gulabchand Shah & another, Civil Application NO. 39 of 1990*, the court held that

*“A party who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it--- it would be dangerous to hold that suitors, or their solicitors, could themselves judge whether an order was null or valid – whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question--- he should apply to the court that it might be discharged. As long as it exists it must not be disobeyed.*

**For the foregoing, I find and hold that the Respondents, by each of them are in contempt of the temporary order of injunction dated 7/9/2019.**

#### **36. Punishment for Contempt of Civil Court Orders.**

The applicant prays for an Order of Committal to Civil jail of the respondents for disobedience of the court order.

For a court to allow its orders to be disobeyed at will and not punish the offenders would be to tread the road towards anarchy.

**Section 5 (1) of the Judicature Act** grants the court powers to punish for contempt. Further, **Section 63 (c) of the Civil Procedure Act** provides for punishment for contempt of court orders.

37. I have stated earlier that the actions by the respondents in disobedience of the court order have not been controverted by any replying affidavits, submissions or otherwise. They are therefore assumed to be true and correct, and indeed, exhibits attached to the applicant’s affidavit clearly show that there has been construction of houses on the suit property.

The standard of proof in contempt matters is well settled. It is higher than proof on a balance of probabilities, but not beyond reasonable doubt, somewhere in between. This is so as it is of a criminal nature.

38. An order for committal to civil jail curtails a party’s liberty to movement as it is of a criminal character, as rightfully submitted by the respondents.

Being contempt of a temporary order of injunction, the provisions of

**Order 40 Rule 3 of the Civil Procedure Rules** come in to play as well as the holding by the Court of Appeal in *Christine Wangari Gachege Case (Supra)* that

*“---the only statutory basis of contempt of court law in so far as the Court of Appeal and the High Court are concerned is Section 5 of the Judicature Act. In addition, Section 63(c) of the Civil Procedure Act provides that a disobedience of an order of temporary injunction will attract punishment in the form of imprisonment or attachment and sale of the contemnor’s property”.*

#### **39. Rule 3((1) provides;**

*“ in case of disobedience, or breach of any such terms, the court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached and may also order such person to be detained in prison for a*

term not exceeding six months unless in the meantime the court directs his release.’’

The above provision is however not of a mandatory nature. The court has discretion to vary the penalty upon considering the circumstances of each particular disobedience and the extend of the contempt.

I have carefully considered all relevant factors. I am sufficiently satisfied that the respondents knowingly and willfully disobeyed the court orders made on the 9th September 2016.

Consequently, I allow the applicant’s application dated 27/3/2019. The Respondents, Esther Waitherero Kiarie and Bernard Wanyugi Gicharu are hereby ordered and directed to jointly pay a fine of ksh. 200,000/= within 30 days of this ruling. In default they shall be committed to civil jail for a period of 30 days.

40. For reasons stated in the body of this ruling, the parties are directed to set down their respective applications for hearing within the next 60 days, and in the alternative, to set down the succession cause for hearing so as to resolve the family dispute in the shortest time possible.

41. Costs of the application shall be borne by the respondents.

**Orders accordingly.**

**Delivered, Signed and Dated electronically at Nairobi this 20th Day of August, 2020.**

**J.N. MULWA**

**HIGH COURT JUDGE**