



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT EMBU**

**SUCCESSION CAUSE NO 515 OF 2012**

**IN THE MATTER OF THE ESTATE OF JEREMIAH NGIRI KIBATI**

**alias JEREMIAH NGIRI (DECEASED)**

**DOUGLAS KIRUNYU MWANGI MATHENGE.....1<sup>ST</sup> APPLICANT**

**KAHARERI BURI KARUGU.....2<sup>ND</sup> APPLICANT**

**JOSIAH KINYUA MUCHINA.....3<sup>RD</sup> APPLICANT**

**VERSUS**

**EFUREITH IRIMA MUGO.....RESPONDENT**

**R U L I N G**

**A. Introduction**

1. This application dated 15/10/2019 seeks for orders: -

- i. That the petitioner/respondent do show cause why she should not be committed to civil jail for a period of six (6) months for being in contempt of the court in regard to orders issued on 18/09/2019;
- ii. That the petitioner/respondent be arrested and be committed to civil jail for a period of six (6) months for being in contempt of the said court orders.

2. The application is premised on the grounds on the face of it and further supported by the affidavit of the 1<sup>st</sup> applicant Douglas Kirunyu Mwangi Mathenge the first applicant. In a nutshell, the applicants' case is that the respondent filed a consent in court on 29/08/2016 wherein she was restrained from interfering and/or dealing in any way with land parcels Nos. Mbeere/ Kirima/4878-4901 pending the hearing of the application for revocation. The said consent was adopted as a court order on 12/10/2016 and served upon the respondent the OCS Kiritiri Police station as well as the respondent's advocate. Despite the respondent being aware of the said orders, she trespassed the said land parcels, started cultivating, excavating and interfering with the land parcels. As such, the respondent was disrespectful and disobedient of the court orders and thus she should show cause why she ought not to be committed to civil jail for six months and that it was imperative that she should be committed to civil jail.

3. The respondent herein opposed the application and wherein she deposed to the effect that she was the sole beneficiary of the estate of her deceased father and that at the time of confirmation of her father's estate, she inherited LR. Kiambere/Kirima/733 and which she sub-divided to Kiambere/Kirima/4878-4901 and that she had been born and brought up on LR. 733. At the time of the demise of her father, she was growing crops and grazing on the land parcel and thus it was her source of livelihood. Further that after the consent was entered into on 12/10/2016, she had strictly adhered to the same but at the time of the said consent, it had been agreed that the applicants would dispose of their application for revocation in a timely manner.

4. However, it is three (3) years down the line and no steps have been taken to prosecute the said application. That the applicants only extracted the consent order on 18/09/2019 and which was after about three (3) years and at the time she was served, she had already prepared the land in question and planted crops on the land. Further that the applicants caused the respondent together with her husband and a third party to be arrested and locked up at Kiritiri police station on alleged disobedience of the orders of this court and were only released after this court intervened. That in the circumstances the applicants ought to use the court order in good faith and not to harass them yet they are not interested in prosecuting their application. As such she prayed that the application be dismissed with costs and further that the consent be set

aside and further that the pending application be heard on priority basis.

5. Pursuant to the leave granted by this court, the applicant filed a further affidavit wherein he deposed that the respondent filed the succession and obtained the grant secretly despite being aware that the said parcel was a subject of litigation in Embu ELC Case No. 32 of 2015 and proceeded to sub-divide the suit land into 14 plots being Mbeere/ Kirima/4878-4901 and which suit had been concluded in favour of the applicants. Further it was deposed that the orders did not have an agreement on the way of the disposal of the application for revocation of grant and that there were other pending applications in relation to the suit land. It was deposed further that it was not true that the respondent had been in occupation or cultivating the suit land until she was served with the orders and that the respondent had admitted having been in contempt by stating that she had already prepared the suit land for planting and that no cause has been shown why the respondent should not be arrested and committed to civil jail.

6. The application was canvassed by way of written submissions wherein the parties herein submitted in support of their respective position.

### **B. Issues for determination**

7. I have considered the pleadings filed herein and the rival written submissions by the parties. The issues for determination are: -

- i. Whether the respondent is guilty of contempt of court.
- ii. Whether she should be committed to civil jail in the event she is found guilty.

### **C. Analysis of the law and determination**

8. This application was brought under the provisions of Section 1A, 1B, 3 and 3A of the Civil Procedure Act and Order 40 of the Civil Procedure Rules. It is trite law that in proceedings under the Law of Succession Act, the provisions of the Civil Procedure Act and Civil Procedure Rules do not apply for the reason that the Law of Succession Act is *sui generis* with its own unique and special procedures which regulate probate proceedings. The only provisions of the Civil Procedure Rules which apply are provided for under Rule 63 of the Probate and Administration Rules. Otherwise in other instances the rules provided under the Law of Succession Act apply. (See **Josephine Wambui Wanyoike -vs- Margaret Wanjiru Kamau & Another [2013] eKLR**). These provisions are basically Orders V, X, X1, XV, XV111, XXV, XL1V, and XL1X. In the current Civil Procedure Rules 2010, these Orders deal with service of summons, interrogatories, discoveries, inspection, consolidation of suits, summoning and attendance of witnesses, affidavits, review and computation of time.

9. I further note that pursuant to Rules 49 as read together with Rule 59 of the Probate and Administration Rules, a party ought to move this court by way of summons supported if necessary by affidavit but not by way of a Notice of Motion.

10. The application was brought under rules which are not within what is allowed by Rule 63 of the Probate and Administration Rules and further in the wrong form.

11. However, under Article 159(d) of the Constitution which obligates this court to dispense justice without undue regards to procedural technicalities. This court is further obligated (by the provisions of Section 47 of the Law of Succession Act) to entertain any application and determine any dispute under the Law of Succession Act and pronounce such decrees and makes such orders therein as may be expedient. Under Rule 73 of the Probate and Administration Rules this court is empowered to invoke its inherent power and to make such orders as may be necessary for the ends of justice to meet.

12. In my view, despite the defects and omissions noted above, this court may proceed to determine the instant application on its merits. This will be in furtherance of its duties in exercise of its inherent powers to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them (See **Kenya Power & Lighting Company Limited -vs- Benzene Holdings Limited t/a Wyco Paints [2016] eKLR**).

13. In the instant case, the applicant sought for orders that the respondent do show cause why she should not be committed to civil jail and further that the respondent be committed to civil jail for six (6) months for contempt of court.

14. The Court of Appeal in **Abdi Satarhaji & Another v Omar Ahmed & Another [2018] eKLR** defined contempt in the following terms:  
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**“Contempt of court is constituted by conduct that denotes willful defiance of or disrepute towards the court or that willfully challenges or affronts the authority of the court or the supremacy of the law; whether in civil or criminal proceedings.”**

15. The court in emphasizing the need to obey court orders held as follows: -

**“It is the plain and unqualified obligation of every person against, or in respect of, whom an order is made by a 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 even void.”**

16. Obedience of court orders ensures that the rule of law, good order and due administration of justice is maintained and that it is not optional. *The Court of Appeal further in **Fred Matiang'i the Cabinet Secretary, Ministry of Interior and Co-ordination of National Government v Miguna Miguna & 4 others [2018] eKLR** held that no court should take lightly allegations of contempt of court. That when courts issue orders, they do so not as suggestions or pleas to the persons at whom they are directed. Court orders issue ex cathedra, are*

*compulsive, peremptory and expressly binding. It is not for any party; be he high or low, weak or mighty and quite regardless of his status or standing in society, to decide whether or not to obey; to choose which to obey and which to ignore or to negotiate the manner of his compliance.*

17. In the instant case, the applicant's case is that the respondent being aware of the orders of the court and which orders were pursuant to a consent recorded in court trespassed the land parcels that were subject of the order. As such, it was the applicant's case that the respondent was disrespectful and disobedient of the court orders ought to show cause why she should not be committed to civil jail. However, in response to the application, the respondent deposed to the effect that she had been using the suit land even prior to the demise of her father and after the demise, she filed for letters of administration and after which she sub-divided the land into various parcels. She further deposed that she had complied with the court order but the applicants delayed in prosecuting the application for revocation of grant which they had filed in court. Further that the applicants took time before they extracted and served the orders and by the time of service thereof, she had already prepared the land for planting. She further deposed to the effect that she was using the land as a source of her livelihood and as used the land as such.

18. The applicant must establish whether the respondent was aware or had knowledge of the orders subject of this application and whether she has willfully disobeyed the said orders? If the two questions are in the affirmative, the court will proceed to determine punishment ought to be meted upon the respondent.

19. In contempt proceedings it is trite law that proof must be made beyond the standard in civil cases as contempt is quasi-criminal. The burden of proof lies on the applicant. In the case of **Gatharia K. Mutikika –v- Balian Farm Ltd (1985) KLR 27**, it was held as follows:

**“The courts take the view that where the liberty of the subject is, or might be involved in breach for which the alleged contemnor is cited must be precisely defined. A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be satisfactorily proved...it must be higher than proof on a balance of probabilities, almost but not exactly, beyond reasonable doubt.”**

20. In **Abdi Satarhaji & another v Omar Ahmed & another (supra)** the court while quoting with approval the decision in **Shimmers Plaza Limited vs. National Bank of Kenya Limited [2015] eKLR** held as thus: -

**“.....Willful disobedience of a court order cannot be imputed against a party who has no knowledge of the order in question. Perhaps that is why this Court in the Shimmers Plaza Limited case rendered itself as follows:**

**“It is important however that the court satisfies itself beyond any shadow of a doubt that the person alleged to be in contempt committed the act complained of with full knowledge or notice of the existence of the order of the Court forbidding it. The threshold is quite high as it involves possible deprivation of a person's liberty.....”**

21. Therefore, the applicant in an application for contempt must prove beyond peradventure that the respondent is guilty of contempt in that she was aware of the orders but willfully disobeyed the said orders. Further the power to commit for contempt is one to be exercised with great care. An order committing a person to prison for contempt is to be adopted only as a last resort and in clearest of cases. (See the persuasive decision in **Sutton Holdings Limited v Abdulahi Omar Said [2020] eKLR** - C.K Yano J).

22. As to whether the respondent was aware or had knowledge of the orders, the Court of Appeal in **Abdi Satarhaji & another v Omar Ahmed & another (supra)** in appreciating importance of serving the order upon the party alleged to be in contempt held as that service (of the order) is integral in contempt proceedings as it connotes the knowledge and/or notice of the order in issue by the person served and as such, willful disobedience of a court order cannot be imputed against a party who has no knowledge of the order in question.

23. The affidavit of service filed indicates that the respondent declined to sign the orders and directed that it be served upon her advocates. The parties did not apply for the cross examination of the process server as to the service of the orders. Further, the respondent did not dispute that a consent was recorded and adopted by the court as an order of the court. What she deposed was the delay by the applicants to comply with the agreement as to prosecuting the said application. The order was further served upon the respondent's advocates on record. As the court held in **Abdi Satarhaji & another v Omar Ahmed & another (supra)** (paragraph 24) knowledge of orders by a party's counsel suffices as knowledge and notice of the said orders by the said party. I come to the conclusion that the respondent had knowledge of the orders that were subject of this application.

24. In regard to the issue of disobedience of the orders, I have perused the court record and I note that the consent which was adopted by the court had an effect of temporary orders restraining the respondent by herself, her agents and/or servants from developing, carrying out construction, trespassing and/or interfering in any way with the land parcels Nos. Mbeere/Kirima/4878- 490 and further from charging, transferring, alienating or dealing in any way with the said land parcels.

25. However, the respondent deposed in reply to the application to the fact that she was the sole beneficiary of the estate of her deceased father and that upon inheriting LR. Kiambere/ Kirima/733 she sub-divided the same into Kiambere/Kirima/ 4878-4901. Further that she had been born and brought up on the LR. 733 and even at the time of the demise of her father and she had crops on the land and was grazing there and grazing on the land parcel and thus it was her source of livelihood. And further that she had strictly adhered to the same but at the time of the said consent, it had been agreed that the applicants would dispose of their application for revocation in a timely manner and which agreement the applicants had failed to honour. She further stated that at the time of being served with the order, she had already prepared that land and planted crops on the parcels of land in issue.

26. The respondent somewhat admitted having trespassed on the suit land and prepared the same for planting and which act was in violation of the consent recorded in court. The respondent deposed that she had obeyed the orders of the court but her actions were necessitated by the

failure on the part of the applicant to prosecute the application for revocation of the grant. The applicant in his supplementary affidavit deposed to the effect that it was not true that the respondent had been in occupation or cultivating the suit land until she was served with the orders. As such, the applicant was not using the land until she was served with the court orders. In fact, a reading of the supporting affidavit clearly indicates that the acts being complained of by the applicant took place on 18/09/2019. As such I opine that from the record that the acts which precipitated the instant application occurred from the said date and the respondent having religiously complied with the said orders.

27. However, by the reasons that the respondent had admitted having prepared the land for planting, and which act in my opinion is trespassing and interfering with the suit properties and which act was against the express provisions of the consent order.

28. The respondent deposed to the effect that the applicants had delayed in prosecuting their application for revocation of grant issued to her and further that she was old and could not survive on begging and as such she had to cultivate so as to feed herself. However, it is my opinion that when it comes to obeying a court order, the persons bound by the said orders must obey the same notwithstanding that the same is 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 Respondent was and is 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.**

29. The respondent admitted as to having prepared the land for planting which amounts to trespassing and interfering with the suit land. The respondent was aware of the orders which were issued by the court and proceeded to willfully and deliberately disobey the said court orders. I therefore find the respondent guilty of contempt of court in regard to the orders issued on 12/10/2016.

30. The applicant prays for an order of committal to civil jail of the respondents for disobedience of the court order. I note that the application herein was brought pursuant to the provisions of Order 40 Rule 3 for contempt of the temporary injunctive orders. The said Rule 3 provides that:

**“In cases of disobedience, or of 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.”**

31. Section 63(c) of the Civil Procedure Act buttresses this as it 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.

32. The above provisions are 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. In **Abdi Satarhaji & another v Omar Ahmed & another (supra)**, the court held as follows in regards to the recourse available to a court when faced with an application for contempt of court: -

**“.....[3] Whenever a court is faced with an application for contempt it has a duty of determining first, whether the party accused of disobedience of the court order is indeed guilty of willful disobedience of its order. See the Indian Supreme Court’s decision in Ram Kishan vs. Sir Tarun Bajah & Others – Contempt Petition No. 336 of 2013. Thereafter, if it finds such a party is in contempt of a court order, it exercises its discretionary power to mete out a suitable punishment within the prescribed parameters.....”**

33. In the instant case, the respondent deposed to the effect that she decided to get into the land after waiting for so long for the applicants to prosecute the application for revocation of grant. It was not a term of the consent orders that the application filed by the applicant was to be fast-tracked although the respondent is entitled to expeditious disposal of the same. Any party in a case can fix a pending application for hearing even if it was filed by the opposite party. The respondent would have taken the responsibility to do so but not to violate the court orders.

34. The respondent further deposed to the effect that she had always been in occupation of the suit land and the same was the source of her livelihood and which fact was never disputed by the applicants. The respondent annexed photographs of the activities she had been carrying out on the said land. I have perused the court records and it is clear that there is an application dated 28/07/2018 and despite directions having been given as to how the same ought to proceed in court, the applicants therein have never moved the court. In my opinion, the only time the issue before this court can be conclusively determined is upon determination of the said application for revocation of grant. In my considered opinion, punishing the respondent for contempt of court in the manner the applicant has proposed, will not resolve the issue at hand and it is likely to promote bitterness between the parties. Despite there being court orders the respondent ought to have complied with the conduct by the applicant of not prosecuting the application for revocation of grant seems to be in bad faith and meant to delay the determination of this cause. The applicant did not explain the reasons for delaying prosecution of his application.

35. In the consent orders notwithstanding, I hereby grant the following orders: -

**a. That the respondent is hereby fined Kshs. 20,000/= in default one (1) month imprisonment for contempt of court.**

**b. That the applicants herein are directed to fix the summons for revocation of grant for hearing within thirty (30) days in default of which the said application will be dismissed for want of prosecution and the consent orders automatically vacated.**

**c. That no other interlocutory application will be filed in this cause without the permission of the court.**

**d. That each party to meet their own costs.**

36. It is hereby so ordered.

**DELIVERED, DATED and SIGNED at EMBU this 19<sup>th</sup> day of October, 2020.**

**F. MUCHEMI**

**JUDGE**

Ruling delivered through video link in the presence of Mr. Ombati for the Applicant and Ms. Muriuki for Ithiga for the Respondent