



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HC P&A NO. 23 OF 2018

(Formerly Machakos High Court Succession Cause No. 678 of 2014)

IN THE MATTER OF THE ESTATE OF NGUI MUA (DECEASED)

NICODEMUS MUA MAKAU.....ADMINISTRATOR/APPLICANT

-VERSUS-

KAMULA WAMBUA NGUI.....1ST RESPONDENT

ALEXANDER NGUI MUTUNGI.....2ND RESPONDENT

RULING

INTRODUCTION

1. The Application for determination is dated 13/11/2018 and was filed under certificate of urgency. It is brought under Article 50 of the Constitution of Kenya 2010, Sections 1A, 1B and 3A of the Civil Procedure Act Cap 21 Laws of Kenya, Order 45(1) and 51(1) of the Civil Procedure Rules 2010 and all other enabling provisions of the law.
2. It seeks the following orders;
 - a) *Spent.*
 - b) **That** this Honorable Court be pleased to set aside the Ruling dated 25th September, 2018 delivered by Hon. Justice D.K Kemei.
 - c) **That** the Administrator be granted an opportunity for mitigation.
 - d) **That** costs of the Application be provided for.
3. The Application is premised on the grounds on the face thereof and a Supporting Affidavit sworn by the Applicant on 13/11/2018.
4. The gist of the Application is that the Applicant was never afforded an opportunity to mitigate after being cited for contempt.
5. In opposition of the Application, the 1st Respondent swore a Replying Affidavit on his behalf and on behalf of the 2nd Respondent on 11/12/2018.
6. A brief background of this matter is that on 08/12/2016, the Hon. Justice D.K Kemei issued an order for reconstruction of Machakos P&A file No. 111 OF 2013 and the Administrator/Applicant was required to supply the Court with copies of the documents in his possession for purposes of the said reconstruction.
7. The Administrator/Applicant was served with the said order but did not comply and upon the Court being satisfied that he had full knowledge of the order, proceeded to cite him for contempt. Consequently, he was sentenced to serve six months imprisonment or pay a fine of Kshs. 200,000/=.
8. The Application was canvassed by way of Written Submissions which I have duly considered.

THE SUBMISSIONS

9. Relying on the Supreme Court of Kenya decision in **Francis Karioko Muruatetu & Anor –Vs- Republic (2017) eKLR** the Applicant submits that the right to mitigation of a person facing criminal punishment is fortified under the right to a fair hearing.
10. Further, he submits that contempt proceedings are *quasi*-criminal in nature with penal consequences which include arrest and taking away the right to liberty of the contemnor.
11. As such, the Court must accord the contemnor the right to mitigate as a means of advancing and promoting the spirit of Article 49 of the Constitution.
12. He also submits that he had previously instructed the firm of J.M. Mutinda & Co. Advocates which was being operated by Mutinda Joseph Muinde as a sole proprietorship.
13. That the firm has been inactive since 2014 because the Advocate is deceased. Owing to the said death, the Applicant maintains that he is still unable to comply with the orders directing him to provide documents to reconstruct the file.
14. The Respondents' response is simply that this Court lacks jurisdiction to sit on appeal in a matter decided by a Court of parallel jurisdiction.
15. They also submit that contempt proceedings are *sui generis* with unique procedures and as much as mitigation is a right, failure to be allowed to mitigate does not invalidate a contempt order.
16. Further, they submit that the issues raised in this Application were canvassed in a previous Application and the Applicant is misleading the Court to engage in a repeat exercise.
17. According to them, the Application is an attempt to subvert the cause of justice and is only aimed at slowing the substantive matters before the Court.
18. Having looked at the Application, the Replying Affidavit, the Rival Submissions as well as the entire record, the only issue for determination is whether this Court should entertain the Application.

WHETHER THE COURT SHOULD ENTERTAIN THE APPLICATION

19. The Applicant wants this Court to set aside a ruling issued by the High Court in Machakos.
20. The effect of such an order in my view would be to vacate the finding of the Court in light of the fact that nothing else will be pending on the subject matter.
21. On the other hand, he seeks to be afforded an opportunity to mitigate which essentially means that he does not dispute the finding that he was indeed in contempt of Court orders. There is an evident contradiction.
22. Be that as it may, this Court is of parallel jurisdiction with the Court that made the ruling and as rightly submitted by the Respondents, entertaining the Application will be tantamount to sitting as an appellate Court.
23. Having been aggrieved by the ruling, the Applicant should have moved to the next level as per the hierarchy of Courts in Kenya.
24. Article 164(3) of the Constitution is clear that the Court of Appeal has jurisdiction to hear appeals from the High Court.

CONCLUSION

25. In sum the court finds that, the instant Application is misconceived and makes the following orders;
 - i. The Application be and is hereby by struck out.***
 - ii. Costs to the Respondents.***

SIGNED, DATED AND DELIVERED THIS 21ST DAY OF FEBRUARY, 2019 IN OPEN COURT.

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HON. C. KARIUKI

JUDGE