



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**(CORAM: CHERERE -J)**

**SUCCESSION CAUSE NO.815 OF 2010**

**IN THE MATTER OF THE ESTATE OF HESBON SHIMEI NYONG'O (DECEASED)**

**BETWEEN**

**PROF. PETER ANYANG' NYONG'O.....1ST PETITIONER/RESPONDENT**

**NYOGOY NYONG'O BLOCH.....2ND PETITIONER/RESPONDENT**

**AND**

**KENNETH ODHIAMBO OKUDHE.....1<sup>ST</sup> APPLICANT**

**GEOFFREY OMONDI NYO.....2ND APPLICANT**

**AND IN THE MATTER OF APPLICATION**

**BETWEEN**

**KENNETH ODHIAMBO OKUDHE..... APPLICANT**

**AND**

**PROF. PETER ANYANG' NYONG'O.....1ST PETITIONER/RESPONDENT**

**NYOGOY NYONG'O BLOCH.....2ND PETITIONER/RESPONDENT**

**RULING**

**Introduction**

1. In a judgment dated 11<sup>th</sup> October, 2018, this court issued the following orders:

1) The letters of administration issued to PROF. PETER ANYANG' NYONG'O and NYAGOY NYONG'O BLOCH on 8th November, 2011 and the Certificate of Confirmation of Grant issued on 9th July, 2014 to PROF. PETER ANYANG' NYONG'O; MRS. MARY OWITI; MRS. SUSAN MUDHUNE; MRS. ESTHER NYONG'O and DR. MARY NYAGOY NYONG'O be and are hereby revoked

2) KENNETH ODHIAMBO OKUDHE is hereby appointed as a co-administrator of the Estate of the deceased HESBON SHIMEI NYONG'O jointly with PROF. PETER ANYANG' NYONG'O and DR. MARY NYAGOY NYONG'O. The Deputy Registrar of this court is directed to ensure issuance of letters of administration in their joint names forthwith

3) PROF. PETER ANYANG' NYONG'O; MRS. MARY OWITI; MRS. SUSAN MUDHUNE; MRS. ESTHER NYONG'O and DR. MARY NYAGOY NYONG'O are hereby directed to, within 45 days from today's date, render and file in court an account of the deceased's estate from 9th July, 2014 when the Certificate of Confirmation of Grant was issued to them

4) The appointed co-administrators **PROF. PETER ANYANG' NYONG'O; DR. MARY NYAGOI NYONG'O and KENNETH ODHIAMBO OKUDHE** are directed to within 60 days from today's date, proceed to apply for confirmation of the grant in accordance with the provisions of the law after ascertaining and determining all persons and their respective beneficial entitlement to the estate

5) The court record shows that this court's effort to have this matter settled amicably was not given due consideration by the petitioners. This would have entitled the applicants to costs of this application but this being a succession matter, there will be no order as to costs.

### Application

2. The Applicant claims that the foregoing orders have not been complied with and by a Notice of Motion dated 19<sup>th</sup> December, 2018 and filed on even date brought under various provisions of the Constitution, the Judicature Act, the Civil Procedure Act, Civil Procedure Rules, the Contempt of Court Act and Probate and Administration Rules seeks the following orders **THAT**:

1) **This Honourable Court be pleased to issue an order compelling the Administrators to deposit onto a joint interest earning account all proceeds collected from the deceased's properties**

2) **That the Respondents and MARY OWITI be committed to civil jail for a period not exceeding six months for their disobedience and contempt of the court order made on 11<sup>th</sup> October, 2018**

3) **Any other that the court may deem fit to grant**

4) **Costs be provided for**

3. The application is based on grounds among others that the Respondents and others have disobeyed the court order issued on 11<sup>th</sup> October, 2018.

4. The application is supported by an affidavit sworn by the Applicant on 19<sup>th</sup> December, 2018 in which he reiterates the grounds on the face of the application.

5. The Respondents opposed the application on the basis of a replying affidavit sworn by the 2<sup>nd</sup> Respondent on 1<sup>st</sup> April, 2019 and filed on 5<sup>th</sup> April, 2019 in which she avers that she has the authority of the 1<sup>st</sup> Respondent to respond to the application. The Respondents argue that this court's order made on 11<sup>th</sup> October, 2018 is the subject of **CIVIL APPLICATION NO. 110 OF 2018** where they are seeking stay of this court's order. Respondents also argue that they filed a Notice of Appeal and draft memorandum of appeal on 16<sup>th</sup> and 31<sup>st</sup> October, 2018 respectively and that the appeal will be rendered nugatory if the orders sought are issued.

6. I have considered the application in the light of the affidavits on record and annexures thereto. The Contempt of Court Act was declared unconstitutional in the case of **Kenya Human Rights Commission -v- Attorney General & Another [2018] eKLR, Constitutional Petition No. 87 of 2017** and for that reason Section 5 of the Judicature Act and section 36 of the High Court (Organization and Administration) Act are the legal framework for this Court to punish for contempt.

7. The essence of the power to punish for contempt is to ensure that the dignity and authority of courts is maintained. Obedience to court orders is to ensure that there is law and order. In the Scottish case of **STEWART ROBERTSON VS HER MAJESTY'S ADVOCATE, 2007 HCAC63, Lord Justice Clerk** stated that:

**"contempt of court is constituted by conduct that denotes willful defiance of or disrespect 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"**

8. In the case of **BOARD OF GOVERNORS MOI HIGH SCHOOL KABARAK VS MALCOLM BELL & ANOTHER, (Supreme Court PETITION NOS 6&7 OF 2013,** the Supreme Court of Kenya described the power to punish for contempt as a power of the court **"to safeguard itself against contemptuous or disruptive intrusion from elsewhere"** and identified that power as one of the indisputable attributes of the court's inherent power without which power, protection of citizens' rights and freedoms would be virtually impossible thereby reducing the courts of law to futile institutions spewing forth orders in vain.

9. In the case of **Econet wireless Kenya Limited Vs minister for information & Communication of Kenya & Another,** the court stated as follows;

**"It is essential for the maintenance of the rule of law and order that the authority and the dignity of our courts are upheld at all times. The court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against or in respect of whom, an order is made by the 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 void."**

10. Similarly, in the case of **Teachers Service Commission Vs Kenya National Union of Teachers & 2 others (2013) eKLR,** the court observed that;

**“The reasons 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 safeguard the rule of law”**

11. Evidently, the foregoing authorities demonstrate that contempt of court is frowned upon for the reason that it is not about protecting judges’ feelings, egos or dignity but to safeguard the rule of law and to assure a party who walks through the justice door with a court order in his hands that the order will be obeyed by those to whom it is directed. (See **Sam Nyamweya & 3 others v Kenya Premier League Limited & 2 others [2015] eKLR**).

12. The above authorities speak to my mind that any person seeking an order to punish for contempt of court has a duty to prove the contempt beyond reasonable for the reason that **“A contempt of court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved showing that when the man was asked about it, he told lies. There must be some further evidence to incriminate him.”** (See **Bramblevale Ltd [1970] CH 128 at P. 137 where Lord Denning Master of Rolls**).

13. To that end, the court has a duty to satisfy itself that each stage and step of the procedure is scrupulously followed and observed and more particularly that Respondents are aware of the existence of the court order. Courts have slowly and gradually moved from the position that service of the order along with the Penal Notice must be personally served on a person before contempt can be proved. (See The Court of Appeal decision of **Justus Kariuki Mate & Another Vs Martin Nyaga Wambora & Another**).

14. Courts have reiterated that knowledge of a court order suffices to prove service and dispenses with personal service for the purposes of contempt proceedings. (See **Basil Criticos Vs Attorney General & 8 Others (2012) eKLR** and **Shimmers Plaza Ltd Vs NBK (2015) eKLR**).

15. Whereas there is no evidence of personal service of the order, the fact that the respondents have filed an application to stay the order and a memorandum of appeal demonstrates that they are cognizant of the existence of the said order. There is however no evidence of service or knowledge of existence of court orders by **MRS. MARY OWITI; MRS. SUSAN MUDHUNE and MRS. ESTHER NYONG’O** .

16. From the averments in the replying affidavit, the Respondents do not deny disobeying the court order. They justify their disobedience on the ground that they have filed **CIVIL APPLICATION NO. 110 OF 2018** seeking stay of this court’s order and the filing of a Notice of Appeal and draft memorandum of appeal.

17. This court appreciates that it is the Respondents right to challenge this court’s orders if they are aggrieved. However, the filing of the application for stay and notice of appeal cannot operate as a stay nor does it give the respondents the right to act in willful defiance unless and until that order is discharged.

18. From the above analysis of the issues raised herein, I make the following orders:

**1) PROF. PETER ANYANG’ NYONG’O and NYOGOY NYONG’O BLOCH, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have by their conduct been contemptuous of the orders of this Court and are convicted accordingly.**

**2) It is hereby ordered that the said Respondents personally appear before this Court on 28<sup>th</sup> May, 2019 at 11.00 am for sentencing and further orders.**

**3) In default of their appearance the Court will proceed to mete out appropriate sentences their absence notwithstanding.**

**DATED AND DELIVERED IN KISUMU THIS 23<sup>rd</sup> DAY OF May 2018**

**T. W. CHERERE**

**JUDGE**

**Read in open court in the presence of-**

**Court Assistant - Felix**

**For Petitioners - Mr Musabe**

**For Applicants - Mr Achura/Mr Mugumya**