



**REPUBLIC OF KENYA**

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

**P & A NO. 109 OF 2003**

**VERONICA NJERI.....APPLICANT**

**VERSUS**

**ANNA WAMBOI MWANGI.....RESPONDENT**

**RULING**

1. The Applicant moved this court vide an application under a Notice of Motion seeking for orders inter alia that: -

a. This committal application be certified as urgent and be heard on priority basis.

b. The Honourable court do find *Anna Wamboi Mwangi* the Respondent/Contemnor herein liable for punishment for having flagrantly disobeyed and being in contempt of court order issued on the 31<sup>st</sup> day of October, 2016 in Eldoret high Court Probate & Administration Cause No. 109 of 2013 in the matter of the Estate of Suleiman Mwangi Muiruri (Deceased); Veronica Njeri vs Anna Wamboi Mwangi and consequently she be committed to civil jail for a period not exceeding six (6) Months.

c. The Respondent herein be denied any audience herein until she purges the disobedience and contempt of the said Court Order.

2. The said application is based on the grounds that the consent order dated 27<sup>th</sup> September, 2016 was served upon the Respondent who has flagrantly disobeyed the court order aforesaid by failing to deposit the original title deed for ELDORET MUNICIPALITY BLOCK 21(KINGONGO) 2497 with the advocates representing parties in this cause.

3. The Respondent/contemnor has not deposited the original title deed to date in blatant disregard of the court order hence it is clear inference that her contempt is continuing.

4. That it is imperative that the contemnor be punished as a lesson to her and other persons with a penchant for disobeying court orders.

5. The applicants in their submissions submitted that vide a consent order dated 27/09/2016 it was agreed that the Respondent, her agent John Muiruri do deposit land title deed in respect of ELDORET MUNICIPALITY BLOCK 21(KINGONGO)/297 and any other document related to the said parcel of land with the advocates within 14 days from the date of the order.

6. The Respondent has to date totally refused to honour the consent as specified in the consent order in which part (d) had express term that in default of the Respondent depositing the title deed execution was to issue.

7. The applicant prays that the Respondent be punished by way of civil jail for a period not exceeding six months and also be denied any audience until she purges the disobedience and contempt of the court order of 31<sup>st</sup> October, 2016.

8. The Respondent on their part submitted that the orders sought are pursuant to a consent order dated 27<sup>th</sup> of September 2016 and adopted and/or issued by the court on 31.10.2016 which read that: -

*‘...the Petitioner/Respondent herein and her agent, especially John Muiruri and or any other party holding title are hereby ordered to deposit the original title deed known as ELDORET MUNICIPALITY BLOCK 21 (KINGONGO)/2497 or any other document related to this parcel of land with the advocates representing the parties herein within 14 days from the date hereof.’  
And that in default execution to issue.*

9. That land parcel No. **ELDORET MUNICIPALITY BLOCK 21 (KINGONGO)/2497** forming part of the Estate of Suleiman Mwangi Muiruri had already been transferred to HASSAN HAMISI RAMADHANI at the time the consent order was adopted.

10. They further submitted the said parcel of land had already changed hands to another person namely JOHN MUIRURI making the consent order obsolete.

11. For one to be found guilty of contempt, there must be wilful and deliberate disobedience of the court order which lacks in the present case.

12. It's not disputed that the subject matter now in dispute and the status quo therefore pertaining as and when the orders were issued became obsolete as soon as they were issued as the suit parcel of land had exchanged hands and the Respondent was not the custodian of the title deed.

13. That contempt proceedings are quasi criminal in nature whose standard of proof must at all times be beyond reasonable doubt. One must prove the following ingredients: -

- a. That the terms of the order or injunction or undertaking were clear and unambiguous and were binding on the Respondent/Defendant.
- b. That the Respondent/Defendant had knowledge of or proper notice of the terms of the order.
- c. That the Respondent/Defendant has acted in breach of the terms of the orders.
- d. That the Respondent/Defendant's conduct was deliberate.

14. That the Applicant has not met the threshold meant to prove contempt of court orders and which orders can only be issued in the clearest of circumstances.

15. Lastly, that it has not been demonstrated what the status quo was prior to the issuance of the order and the Respondent cannot possibly disobey what does not apply to her.

16. Section 4(1) of the *Contempt of Court Act, 2016* defines contempt as:

***“wilful disobedience of any judgment, decree, direction, order or other process of a court or wilful breach of an undertaking given by a court.***

***To prove contempt, it must be proved that; the contemnor was aware of the court order or rule which was violated, that the contemnor was able to comply with the order and that the contemnor failed to do so.”***

In the case of **SAM NYAMWEYA & OTHERS –V- KENYA PREMIER LEAGUE LTD AND OTHERS [2015] EKLK** Lord Justice Clerk stated that:-

***“contempt of court is constituted by conduct that denotes wilful defiance of or disrespect towards the court or that wilfully challenges or affronts the authority of the court or the supremacy of the law, whether in civil or criminal proceedings.”***

17. The standard of proof in matters of contempt of court is well settled. It must be higher than proof on a balance of probabilities, almost but not exactly beyond reasonable doubt.

18. Although the proceedings are civil in nature, it is well established that an applicant must prove the elements almost beyond reasonable doubt, to at least a higher standard than the standard in civil cases. This is so as the sought for orders aim to curtail the respondent's liberty.

19. It is incumbent on the applicant to prove that the defendant's conduct was deliberate in the sense that he or she deliberately or wilfully acted in a manner that breached the order.

20. The prayer sought is for committal for contempt. 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 given only as a last resort.

21. From the Court record, the pleadings and able submissions by Counsel for all parties, it is not disputed that the impugned orders are valid Court orders in Succession Proceedings pertaining to suit property ELDORET MUNICIPALITY BLOCK 21(KINGONGO)2497 which is part of the deceased's estate.

22. It is also not disputed that the parties entered into a consent and were all aware of the terms of it. What is in dispute is whether at the time of signing and adopting the consent as an order of the court, land parcel No. ELDORET MUNICIPALITY BLOCK 21(KINGONGO)2497 had already been transferred to a third party.

23. There is no evidence tendered before court by either party showing the status of the land as at the time of the consent. The Respondent alleges that at that time the suit land had been transferred to HASSAN HAMISI RAMADHANI who later transferred it to JOHN MUIRURI.

24. In **Peter K. Yego & Others vs Pauline Nekesa Kode Nakuru HCCC No. 194 of 2004** the court recognizing that contempt of court is criminal, held that it must be proved that one has actually disobeyed the court order before one is cited for contempt. The applicant in a

application for contempt must prove beyond peradventure that the respondent is guilty of contempt.

**25.** The High Court of South Africa in the case of *Kristen Carla Burchell vs Barry Grant Burchell Eastern Cape Division Case No. 364 of 2005* held that in order to succeed in civil contempt proceedings, the applicant has to prove **(i) the terms of the order, (ii) Knowledge of these terms by the Respondent, (iii). Failure by the Respondent to comply with the terms of the order.**

**26.** Upon proof of these requirements the presence of wilfulness and bad faith on the part of the Respondent would normally be inferred, but the Respondent could rebut this inference by contrary proof on a balance of probabilities.

**27.** In this case there is a probability that the said parcel of land changed hands and the alleged contemnor was not in a position to produce the original title deed as ordered. In that case she cannot be said to be in contempt. The application therefore fails with costs to the Respondent.

**S. M GITHINJI**

**JUDGE**

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 29TH DAY OF OCTOBER, 2019.**

In the presence of:-

Mr. Ombole for the petitioner absent

Mr. Juma holding brief for Mr. Kimani for the Respondent

Ms Abigael - Court clerk