



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 2548 OF 2000

IN THE MATTER OF THE ESTATE OF NDIYEINE OLE SIMEL (DECEASED)

ELIZABETH NAISOI SOIKAN.....1ST APPLICANT

FRIDAH MELLAU SOIKAN.....2ND APPLICANT

VERSUS

PAUL SALAU NTIYOINE.....1ST RESPONDENT/CONTEMNOR

JEREMIAH SIRONET NTIYOINE.....2ND RESPONDENT/ CONTEMNOR

RULING

1. The deceased Ndiyeine Ole Simel died intestate on 5th September 1991. His son Samson Soikan subsequently died leaving two daughters, the applicants herein. The respondents are sons of the deceased. A grant of letters of administration intestate was made to the respondents on 21st July 2001 and confirmed on 19th November 2002. In the confirmation the administrators distributed the estate and gave each applicant 10 acres of Kajiado-Olchoro-Onyore/1712. The applicants were minors. The 1st respondent was registered to hold 10 acres in trust for the 1st applicant until she was of age while the 2nd respondent was registered to hold 10 acres in trust for the 2nd applicant until she was of age.

2. Through the applications dated 22nd June 2015 and 24th August 2015 the applicants sought that the trusteeship be terminated for the respondents to surrender the respective parcels to them. This was because the respondents had refused and/or neglected to give them the parcels, and were instead offering 5 acres each. The respondents gave various reasons for being unable to give the full 10 acres each. On 18th July 2016 the court allowed the application and ordered the 1st respondent to immediately transfer 10 acres to the 1st applicant, and the 2nd respondent to immediately transfer 10 acres to the 2nd applicant.

3. The applicants filed the present application dated 26th February 2018 seeking orders that:

- a) the court be pleased to commit to civil jail the 1st and 2nd respondents for a period of six months for disobeying the court orders given on 18th July 2016 or for such other period and impose such fine as this court may deem fit and just to grant;
- b) the court be pleased to direct the 1st respondent and 2nd respondent to purge the disobedience and to immediately comply with the orders of this court given on 18th July 2016; and
- c) the court be pleased to grant such directions and other or further orders as it may deem fit to grant geared towards protecting its dignity and authority.

The application was based on the grounds that by a ruling given on 18th July 2016 this court ordered the respondents to immediately transfer 10 acres each held on trust to the applicants; that at all times the respondents were represented by counsel who were aware of the court ruling and were further served with the order by the applicants for compliance; that since 18th July 2016 the respondents have never shown and transferred the 10 acres each to the applicants as ordered; and that it was clear that the respondents had no intentions of complying with the said orders hence this amounts to contempt on the face of the court and is therefore punishable summarily.

4. The application was supported by the affidavit of Fridah Mellau Soikan dated 26th February 2018 and the affidavit of Eizabeth Naispoi Soikan dated 2nd July 2018. They stated that the respondents had not purged the contempt by disobedience of the court orders directing them to surrender 20 acres forthwith; that the 1st applicant signed transfer documents in respect of her share of 10 acres held in trust by the 1st respondent; that the 2nd applicant's 10 acres had not been addressed to date by the 2nd respondent; that there was an alleged family meeting held at Sultan Hamud which was a gimmick by the respondents conspired to portray that there was an attempt to settle the matter; and that the issue of non-existence of 10 acres had been settled by the court in review application.

5. The application was opposed by the respondents through the replying affidavit of Jeremiah Sirone Ntiyoine dated 28th May 2018. He stated that contrary to the assertions in the application, they had never deliberately refused to comply with the court orders issued on 18th July 2016; that in the quest of seeking compliance with the directions of this court and further to foster a harmonious resolution the family had a meeting on 16th April 2018 in which the applicants participated and it was agreed that the ten acres of land be transferred to the respondents jointly in addition to the three rental stores located in Kiserian town; that the meeting was called in good faith and with all intentions of an amicable resolution and the respondents fully participated in the meeting and their wishes were fully accommodated; that consequently, transfer forms to transfer four and a half acres have so far been signed by only the 1st applicant as the 2nd applicant has since indicated that she has no national identity card to effect the transaction; that the remaining five and a half acres are part of the land that has since been subdivided and the title is to be issued in the near future to facilitate transfer of the same to the applicants; that it was unanimously agreed that the five and a half acres be transferred to the applicants immediately after subdivision; that they had never refused or neglected to distribute the said land to the applicants only that the applicants were insisting on acreage that was non-existent considering that their late father had sold off seven acres and three acres had been utilized to build family business premises to benefit all the beneficiaries including the applicants; and that they were willing to fully comply with the court's directions and urged the court to consider the resolutions passed at the family meeting in an effort to bring resolution to this matter.

6. It is the unqualified obligation of every person against or in respect of whom an order has been made by a court of competent jurisdiction to obey it unless and until the order is discharged (**Hadkinson –v- Hadkinson [1952]AC 285**). The defendant must be shown to have been aware of the order, and there has to be proof of disobedience or violation of the order (**William Sapuro Kimanaa –v- National Bank of Kenya Limited & Another, HC (Milimani) CC No. 1933 1999**).

7. Applications for contempt are quasi-criminal in nature as the defendant risks going to jail, and this is why the standard of proof is higher than the balance of probabilities, and almost, but not exactly, beyond reasonable doubt (**Mutitika –v- Baharini Farm Ltd [1985]KLR 227**). Because of the serious implication of disobedience of court orders, recourse ought not be had to the process of contempt in aid of civil remedy where there is any other method of doing justice.

8. For the jurisdiction of the court to be properly invoked the order complained of must be clear and the exact date of the contempt shown especially where there is no evidence of personal service and the affidavit of service is not part of the application (**Margaret Ogwenko Okoth –v- Gabriel Onyango Wade & Another [2005]1KLR 399**). The application must state exactly what the alleged contemnor did or omitted to do which constituted a contempt of court with sufficient particularity to enable him meet the charge (**Republic –v- Commissioner of Lands & Others ex parte James Kiniya Wachira Alias James Kiniya Gachiri, HC Misc. No. 149 of 2002 NBI**). Lastly, the slightest ambiguity to the order can invalidate an application for contempt.

9. I note that through the orders of 18th July 2016 the court ordered the 1st respondent to immediately transfer 10 acres to the 1st applicant, and the 2nd respondent to immediately transfer 10 acres to the 2nd applicant. Both respondents were aware of the orders. It is for that reason that they filed an application for review of the said orders, which application was dismissed by this court through the ruling of 29th March 2017. The respondents have explained the reason for their non-compliance as the unavailability of the 20 acres. This issue has previously been dealt with by the court in the ruling of 18th July 2016 and 29th March 2017 and the respondents ordered to ensure they give the applicants their share of 10 acres each as stipulated by the certificate of confirmation of grant. The decision of this court on this matter has not been challenged on appeal, or successfully reviewed. The respondents are therefore under an obligation to comply with the court direction and transmit the 10 acres to each applicant.

10. The 2nd respondent filed proceedings of a family meeting held on 16th April 2018 at Ole Nkanjaoi home at Sultan Hamud whose intention was to resolve this dispute. According to the respondent, the 1st applicant attended. It was discussed and agreed that, to settle the matter, the applicants would get in all 10 acres (instead of 20 acres); that of the 10 acres a title deed for 4 ½ acres was ready and its transfer was signed by the 1st applicant; and the balance of 5½ acres was to be transferred at a later date. The 2nd respondent was to sign the transfer of the 4½ acres but had no identity at the time. The respondents' case was that the application was an unnecessary change of heart on the part of the applicants.

11. There is no dispute that the 2nd applicant did not attend the meeting there was nothing to show that she was being represented in the meeting the 1st applicant. She denied that she was party to the said arrangement the 1st applicant stated that she attended the meeting and that the transfer she was signing was for 10 acres from the 1st respondent. She stated that the notice of the meeting was by the family to deny her what was due to her which was 10 acres. The applicants stated in their joint supplementary affidavit that during the family meeting all other members got their entitlements. It was the two who were being excluded from satisfying the orders of the court.

12. I have looked at the notes of the meeting, the affidavit of the 2nd respondent and the affidavit of their applicants. It is clear that the respondents know they have to each surrender 10 acres but have so far shown extreme reluctance in fulfilling the obligation. The meeting at Sultan Hamud was intended to enable them escape from this obligation. There was no deal. I find on the part of the applicants to accept lesser acreage.

13. In the final analysis, I allow the application dated 26th February 2018. I find that the applicants have proved as required that the respondents were aware of the court order but have deliberately disobeyed it. I find the respondents jointly guilty of contempt of court. I direct them to appear before the court on **30th January 2019** to show cause why they should not be punished in accordance with the law.

14. Cost of the application shall be borne by the respondents.

DATED and SIGNED at NAIROBI this 27TH day of NOVEMBER 2018.

A.O. MUCHELULE

JUDGE

DATED and DELIVERED at NAIROBI this 28TH day of NOVEMBER 2018.

ALI-ARONI

JUDGE