



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**MISC. CIVIL APPLICATION NO.51 OF 2016**

**IN THE MATTER OF: AN APPLICATION UNDER SECTION 5 OF THE -JUDICATURE ACT CAP 8 LAWS OF KENYA AND ORDER 52 OF THE RULES OF THE SUPREME COURT OF ENGLAND**

**AND**

**IN THE MATTER OF: THE KADHI'S COURT ACT CAP 11 LAWS OF KENYA**

**AND**

**IN THE MATTER OF: MSA KADHI'S COURT SUCCESSION CAUSE NO.202 OF 2012**

**FIRDAUS MUSA ABDULKARIM**

**VERSUS**

**N A & 3 OTHERS**

**N A.....APPLICANT**

**VERSUS**

**FIRDAUS MUSA ABDULKARIM**

**JOSEPH MASHA SHADRACK T/A MBODZE ENTERPRISES.....RESPONDENTS**

**RULING**

The application dated 6.10.2016 seeks the following orders:-

- (a) The respondent, FIRDAUS MUSA ABDULKARIM be committed to prison for a maximum period of 6 months for contempt of Court orders issued on the 16<sup>th</sup> March, 2016.**
- (b) The respondent be ordered to refund all the monies collected**
- (c) Costs**

The application is supported by the statement of N A and his affidavit sworn on 22<sup>nd</sup> September, 2016. The respondent filed a replying affidavit on 23<sup>rd</sup> March, 2017.

Mr. Khatib, Counsel for the applicant submitted that the Kadhi's Court issued its judgement on the dispute. On 10.3.2016 an order was issued that Moses Osoro collect the rental income. The order was served upon the respondent on 16.5.2016. The respondent went ahead and appointed a different agent to collect the rent contrary to the orders of the Court. The appointment of the different agent is in contempt of court. Moses Osoro used to collect the rent even before the deceased passed on. While the application has been pending, the respondent has been collecting the rent.

Mr. Bwire, Counsel for the respondent, opposed the application. Counsel contends that before the deceased's death, two agents used to collect the rent namely Moses Osoro and Moses Masha who trade as Mbodza Enterprises. While the case was running before the Kadhi's Court, the two agents were collecting the rent. It is the agents who enter into agreement with the tenants. The respondent did not instruct Moses Masha to collect the rent. It is submitted that although the Court order directed Moses Osoro to collect the rent in his personal capacity, a company by the name Guinness Development & Housing Company limited is the one collecting rent. This company is distinct from Moses Osoro.

It is further submitted for the respondent that the respondent was not served with the Court order. She only became aware of the order when those proceedings were filed. The respondent has eight children and when Moses Osoro was not paying her money for upkeep, she filed an application before the Children's court for payment of school fees. The application was granted by the Children's Court.

From the pleadings by both parties, it is agreed that on 10.3.2016 the Honourable Kadhi issued orders in the following terms:-

- 1. The Respondent is hereby restrained from collecting rent from all the properties of the estate.**
- 2. Moses Osoro is hereby appointed to collect rent from all the properties of the Estate.**
- 3. Moses Osoro shall pay to the beneficiaries their respective shares.**
- 4. Moses Osoro shall file regular statements with the court.**

When the application was filed, those who were to be committed for contempt of Court were the respondent and Joseph Masha Shadrack. Mr. Khatib informed the Court that they no longer wished to pursue the application against Joseph Masha Shadrack. I have noted that the respondent annexed rental receipt issued by Guinness Company Limited in April 2016 while the applicant annexed receipts issued by Mbodza Enterprises for between March and June, 2016. The receipts issued by Mbodza enterprises indicate that Firdaus Musa is the Landlord while those issued by Guinness Development and Housing Company Ltd gives the name of Mohamed Nassor as the landlord.

The respondent admit that the Kadhi's Court ordered Moses Osoro to collect the rent. She denies having instructed Mbodza Enterprises to collect the rent. It is submitted that Mbodza Enterprises used to collect the rent even before the death of the deceased. The contempt proceedings were initiated in September 2016. I do find that it is quite possible that Mbodza enterprises used to collect the rent before the Kadhi issued the orders on 10.3.2016. It is clear to me that some tenants continued to pay the rent to Mbodza enterprises. There is the affidavit of John Kombe, a licenced process server, who avers that on 16<sup>th</sup> May, 2016, he served Mr. Masha with the orders issued by the Kadhi in relation to the collection of rent. The respondent was served on 17<sup>th</sup> May, 2016. Mbodza enterprise issued a receipt dated 4.6.2016. There is no other receipt issued by that agent after June, 2016. There is a receipt issued on 7.7.2016 in the names of Firdaus Musa. Its not clear whether it is the respondent who issued that receipt in her own capacity as a beneficiary of the estate.

Contempt of Court proceedings are quasi criminal in nature. Once the allegations of contempt are proved, the contemnor is punished by the court. It is not the intention of the court to punish alledged contemnors where the facts of the case do not establish outright defiance or disobedience with court orders. The respondent believed that Moses Osoro was collecting the rent but was not paying her share of the estate. That is why on 13<sup>th</sup> May, 2016, the respondent filed Children case No.15 of 2016 before the Kilifi Court seeking school fees. If the respondent was collecting the rent directly, she would have paid the school fees for her children directly instead of seeking orders before the children court.

From the pleadings herein, I do find that it is not established that the respondent is in contempt of court. Had the applicant listed the matter before the Kadhi for proper directions to be given to both agents and the respondent, the current application could not have been filed. I do find that the prayer to commit the respondent to six (6) months imprisonment for contempt of Court has not been proved.

In view of the fact that Mbodza Enterprises collected the rent after the Kadhi's orders were issued, I do order that the said agent remit the rent he collected to Moses Osoro within thirty (30) days hereof. Mbodza Enterprises to file its report as to how much rent it collected before it stopped collecting the rent. The collected rent to be paid to Moses Osoro. If any part of the rent was paid to any beneficiary, the report to state so. Moses Osoro shall take into account what was paid by Mbodza Enterprises and deduct from future payments to the concerned beneficiary. It is hereby further ordered that neither the respondent nor Mbodza Enterprises should collect rent from the deceased's estate.

In the end, apart from the above orders, I do find that the application dated 6.10.2016 lacks merit and the same is hereby dismissed. Each party to meet his/her own costs.

**Dated and Signed at Marsabit this..... day of ..... 2017**

**SAID CHITEMBWE**

**JUDGE**

**Dated, Signed and Delivered at Malindi this 20<sup>TH</sup> day of JUNE, 2017**

**WELDON KORIR**

**JUDGE**