REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 490 OF 1995

IN THE MATTER OF THE ESTATE OF ARNEST NJOROGE KIARIE also known as ERNEST MUKUHA KIARIE (DECEASED)

RULING

1. The two applications for determination are dated 17th October 2016 (the first application) and 17th January 2017 (the second application).

2. The first application was filed on 19th October 2016. In it the applicants seek the committal of the first respondent to civil jail for disobedience of an order made herein on 22nd July 2016, which had ordered the first respondent to surrender a property (Dagoretti/Kangemi/783) to the administrators, to render accounts, not to intermeddle with the said property and not to collect rent from the said property. The applicants' case is that despite the respondents being served with the court order there has been no compliance therewith, for Dagoretti/Kangemi/783 has not been surrendered, accounts have not been rendered and the respondents persist with intermeddling with the property. The documents drawn in support of the application are a notice of application for leave dated 17th October 2016; a single paragraph verifying affidavit sworn on 17th October 2016 and a statement dated 17th October 2016.

3. The first respondent reacted to the application vide a replying affidavit sworn on 16th January 2017. He contends that the ruling, the basis of the subject orders, was based on misconceived information and that he had instructed his advocates to appeal the same. He asserts that he was not served personally with the order and penal notice. He further asserts that the contempt application was not valid as it had not been served on the Attorney-General.

4. That reply elicited a response from the applicants, who swore an affidavit on 7th April 2017, filed herein on 13th April 2017. They give a detailed background to the various events in the matter to date. There is also on record another affidavit drawn at the instance of the applicants by Victor Nyambu on 28th January 2017 and filed herein on 13th April 2017. He claims to be a tenant on Dagoretti/Kangemi/783, paying rent to the first respondent.

5. I have carefully perused through my record, I have not come across an application dated 17th January 2017. I will therefore make no determination with respect to it.

6. The application of 17th October 2016 seeks committal of the first respondent to civil jail for contempt of court. The application is founded on the allegation that the first respondent had been served personally, as is required in cases of this nature, with the order that he is alleged to have disobeyed. However, I do note that the applicants provided no proof whatsoever of the alleged personal service. The affidavit drawn and sworn in support of the said application is a one paragraph affair, which has no averments at all touching on the alleged orders and service thereon. An interlocutory application ought to be founded on affidavit evidence. None has been availed in this case. All there is a verifying affidavit, purporting to verify the statement filed in support of the application. However, the said statement is not on oath, yet the factual basis of the application ought to be in an affidavit.

7. There is ample case law that civil contempt proceedings are quasi-criminal in nature. The foundation for this is that the sanctions available include loss of personal liberty or sequestration (or attachment) of private property, which are criminal in nature. That then calls for observance of due process in cases where a person is prosecuted in civil proceedings for contempt of court. The stipulated process must be

fully complied with. No one should be condemned through a flawed process.

8. I have carefully looked at the documentation lodged in the application before me. I note that the applicants did not obtain leave before purporting to prosecute the first respondent. Secondly, the affidavits put on record in support of the application have not exhibited any proof of service of the order said to have been disobeyed. No doubt due process has not been followed.

9. On the issue of service of the order in question, I need to add that the same is the *raison d'etre* of these proceedings. There can be no disobedience of an order without knowledge that the order existed or had been made. It is incumbent on an applicant seeking to have another punished for contempt of an order to demonstrate that the order existed and that the alleged contemnor had knowledge of it. Knowledge would ideally be by way of service of the order personally on the alleged contemnor or on grounds that he was present when the order was made and therefore aware of its existence. All these can only be brought out in an affidavit deposing to those facts. The applicants have not made any depositions as to these facts.

10. I am not satisfied that a proper basis has been laid for me to call into aid the coercive sanctions provided for contempt of court. I do not find any merit in the application dated 17th October 2016 and I do hereby dismiss the same with costs.

DATED, SIGNED and DELIVERED at NAIROBI this 29TH DAY OF SEPTEMBER, 2017.

W. MUSYOKA

JUDGE