

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

HCCA NO. 3 OF 2015

(FORMERLY MERU HCA 64 OF 2010)

FRIDAH MUKWANJAGI..... ..APPELLANT

VERSUS

JOSES MUCHIRI NTHIRI.....RESPONDENT

(An Appeal from Ruling of P.NGARE –PM made on 8/9/2010 in Chuka Principal Magistrate’s Court Succession Cause No. 19 of 2003)

RULING

1. Before me is a Summons taken out in Chambers dated 14th May, 2015 by the Respondent. It is brought under Rules 63 and 73 of the Probate and Administration Rules. The same seeks that the Appellant be committed to Civil jail for disobedience of the Court order made on 3/9/2013. In the alternative, the Respondent has sought that the Appellant do account or deposit an amount of Kshs.400,000/- being the cumulative rent that she was ordered to deposit in court from 1/10/2013. The grounds upon which the application was grounded was on the face of the Summons and the Supporting Affidavit of Joses Muchiri sworn on 14th May, 2015.
2. It was alleged that on 3rd September, 2013, this Court, **Makau J**, ordered the Appellant to deposit all the rent derived from plot No. C56 “C” in Chuka market in Court or a joint bank account; that the order was to take effect on 1st October, 2013; that the Appellant has been collecting rent of approximately Kshs.20,000/- per month but has todate not deposited any sum as ordered; that the amount todate has arisen to Ksh. 400,000/- and the Appellant has made no effort to comply with the said order. Mr. Kariuki holding brief for Mr. Muriuki, Learned Counsel for the Respondent/Applicant, submitted that the subject order was made in the presence of Counsels for all the parties; that the order was further served upon the Appellant on 25th November, 2015 as per the Affidavit of Service of Jackson Muriithi Robert sworn on 25 November, 2015; and that since there was personal knowledge of the order, it was wrong for the Appellant to continue to be in breach of the subject order. Counsel therefore urged that the application be allowed.
3. The Appellant filed a Replying Affidavit sworn by herself on 29th May, 2015 in opposition to the Application. She denied having ever been served with the order of 3rd September, 2013. She contended that she has been using the proceeds of the rent collected from the premises to pay school fees for the children of the deceased. The Appellant urged the Court to rather hear the entire appeal rather than entertain the subject application. Although the Appellant was in Court on 25th November, 2015 when the date of 1st February, 2016 for the hearing of the application was given, she never attended Court on the said date for hearing. Further, on 30th November, 2015, the firm of B.G. Kariuki & Company, Advocates for the Appellant were duly served with the hearing date of 1st February, 2016. They also did not appear at the hearing. Having been satisfied with the contents of the Affidavit of Service of Ken Muriuki sworn on 1st February, 2016 which showed that the hearing notice had been properly received by the Appellant’s Advocates, the Court allowed the application to be argued ex-parte which Mr. Kariuki Advocate did as already stated.
4. I have considered the Affidavits on record and the submissions of Learned Counsel. It is not in dispute that an order was made on 3rd September, 2013 by **Makau J**. directing the Appellant to deposit in Court the rent from the premises known as Plot No. C 56 “C” Chuka market. The

record shows that the said order was made in the presence of Mr. Lekona for the Appellant and Mr. Muriuki for the Respondent. Further, there is an Affidavit of Service sworn by Jackson Murithi Robert on 25th November, 2015 wherein he has sworn that he effected service of the said order upon the Appellant on 25/11/2015 but the Appellant threatened him with death. In view of these two pieces of evidence, which is not contradicted, the contention by the Appellant that she has never been served with the order cannot hold. I agree with Mr. Kariuki that the law of contempt of court has since 2012 moved away from personal service to personal knowledge. Where an order is made in the presence of a party's Advocate, it is no longer necessary to effect service of the order upon a party. See the case of **Shimmers Plaza Ltd v. National Bank of Kenya Ltd [2015] e KLR** wherein the Court of Appeal upheld this position that is obtaining in England. Accordingly, I do hold that the Appellant is presumed to have had knowledge of the order through her Advocate. In any event, she has not denied that on 25/11/15 she was served with the order but declined to receive the same as sworn to by Jackson Murithi Robert in the aforesaid Affidavit of Service.

5. Having found that the Appellant knew the terms of the order, the next issue is whether she is in breach thereof. Her explanation is that she has been utilizing the funds in paying the fees for the children of the deceased. That may be so but she should have returned to court and applied for the variation of the order. The court would have been sympathetic to the cause of the children of the deceased if a proper application was made before it. Deciding not to obey the order and utilizing the funds as the Appellant felt fit is in my view contemptuous of the order of the Court. No good reason, in my view has been given why the order of 3/9/13 has not been complied with to date. Court orders are not made in vain. They are to be complied with.
6. Accordingly, I am satisfied that the application is meritorious. I will allow the application in terms of prayer number 2 and direct that the Appellant do within 21 days of the date of service of this order to file in court an account on the funds so far collected from the premises known as plot No. C 56 "C" Chuka market from 1/10/2013 to date. In default, the Appellant shall be required to deposit in court the rent so far collected from the said premises. The costs of the application is awarded to the Respondent in any event.

It is so ordered.

Dated and Delivered at Chuka this 25th day of February, 2016

A.MABEYA

JUDGE

Court:

Ruling Read in open Court in the presence of parties

A.MABEYA

JUDGE