



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
SUCCESSION CAUSE NO. 733 OF 2007

IN THE MATTER OF THE ESTATE OF JOSPHAT MUSAU MUKUVA (DECEASED)

REBECCA NTHAMO MAKAU.....APPLICANT

VERSUS

THOMAS KILONZO MUSAU.....1ST RESPONDENT

PETER MUKUVA MUSAU2ND RESPONDENT

RULING

The Application

The Applicant has moved this Court through an application by a Notice of Motion dated 10th April 2015, in which she is praying for the following orders:

1. The Respondents namely Thomas Kilonzo Musau and Peter Mukuva Musau be found in contempt of the Order of Justice B. Thurania Jaden on 18th July 2014.
2. The said Respondents be arrested and committed to prison for a term not exceeding six(6) months.
3. The Respondents not to be heard by the court until they purge their contempt.
4. The court be pleased to issue other or such further orders in respect of the said contempt as may be necessary for the ends of justice to be met.

The application is based on the grounds that on 18th July 2014, the Thurania Jaden J. made *inter alia* an order that:

“A temporary injunction is hereby issued against the respondents Thomas Kilonzo Musau and Peter Mukuva Musau from disposing off the estate of Josphat Musau Mukuva (deceased) pending hearing interpartes.”

Further, that certified copies of the above order were personally served upon the Respondents, and that despite the order the Respondents went on to dispose most of the deceased properties. It was urged that it is essential for the court to commit the contemnors to jail to compel obedience of the court order. Finally, that it was important for the application to be allowed and the contemnors punished as their breach of the order had caused the Applicant great prejudice and hardship.

The Applicant filed a supporting affidavit sworn on 10th April 2015 wherein she listed the properties alleged to have been sold by the Respondents and the purchasers of the same as follows:

- | | |
|--------------------------------------|--------------------------|
| a. Plot No. 64 Yatta | Mr.Njuguna |
| b. Athi River/Athi River block 5/356 | BonfaceLawi |
| c. Nairobi Block 118/383 | Moses Mwangi |
| d. Matungulu/Kyaume/1643 | Musyoka Mususya |
| e. Mbiuni/Ulaani/332 7 826 | Loko Mulevu |
| f. MukaaMukuu farmers | Fr.Fidelis Nzuki Mutwota |
| g. Ndalani/Ndalani Block 1/1129 | Eunice Rhoda Mbula |
| h. Kangundo/ Mbilini/879 & 880 | Mwikali Mutisya |
| i. Motor vehicle KRP 539 | Kasyoki Musyimi |

The Response.

The 1st Respondent filed a replying affidavit sworn on 5th May 2015 in response to the application on behalf of the Respondents. He averred that the application was frivolous and an abuse of court, and that the Respondents have never been served with the court orders issued on 18th July 2014. He noted that the Applicant had not annexed a copy of the said court order or a return of service of the said court order. He deponed that the Respondents had not disobeyed any court orders nor had they sold any asset of the deceased Josphat Musau Mukuva. He gave a detailed account of the ownership status of the various properties alleged to have been sold by the Respondents.

The Respondents Advocates, F. Katunga & Company Advocates filed submissions dated 24th November 2015. Therein they argued that the respondents were served with the application dated 10/4/2015 on 30/5/2015 but the applicant did not annex the alleged court order issued on 18/7/2014 to the application. They reiterated that they had not disobeyed any court's order in the course and were not in contempt of court. They further reiterated the ownerships of the disputed properties as averred in the Respondent's affidavits.

The Issues and Determination

I have read and carefully considered the pleadings and submissions made herein. There are three issues before the court for determination arising from the pleadings and submissions highlighted in the foregoing. The first is whether there was personal service of the orders issued by the court on 18th July 2014 on the Respondents . Secondly, if there was such service, whether the Respondents are culpable for contempt of court. The last issue is if the 1st Defendant is found culpable, whether the Applicant can be granted the remedies sought.

A brief summary of the law applicable to these issues is as follows. Order 40 Rule 3 of the Civil Procedure Rules provides for the consequences of breach of an order of injunction, and states that in cases of disobedience, or of breach of any such terms, the court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the court directs his release.

The substantive law that applied to contempt of Court proceedings at the time of the Applicant's Notice of Motion is the English law on committal for contempt of court by virtue of section 5(1) of the Judicature Act which provides that:

“The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate courts.”

The applicable English Law in this respect is Part 81 of the English Civil Procedure Rules of 1998 as variously amended, which part repealed in most part the Rules of the Supreme Court that previously applied, including Order 52 and parts of Order 45 of the Rules of the Supreme Court. The law on the personal service of court orders is now found in Rule 81.8 of the English Civil Procedure Rules. The said

rule provides that unless the court dispenses with service, a judgment or order may not be enforced by way of an order for committal unless a copy of it has been served on the person required to do or not do the act in question. Rule 81.6 of the English Civil Procedure Rules specifically provides that the method of service shall be personal service, which is effected by leaving the order with the person to be served.

Rule 81.9 (1) of the English Civil Procedure Rules of 1998 is also clear that a judgment or order to do or not do an act may not be enforced unless there is a prominently displayed a warning to the person that disobedience to the order would be a contempt of court punishable by imprisonment, a fine or sequestration of assets. Under sub-rule (2) of the said Rule, it is only in the case of an undertaking to do or not to do an act which is contained in a judgment or order where the notice of penal consequences may be dispensed with.

This Court notes that Kenyan courts have also held that personal service of orders and a penal notice is a requirement in contempt of court proceedings, and reference is made to the Court of Appeal decisions in **Nyamogo & Another v Kenya Posts and Telecommunications Corporation, (1994) KLR 1**, and **Ochino & Another v Okombo & 4 others (1989) KLR 165** in this respect.

Coming back to the facts of the present application, no affidavit of service attesting to the personal service on the Respondents of the order alleged to have been disobeyed was availed by the Applicant, and upon a perusal of the court record, there is no such affidavit of service was found. I therefore find that that as the Respondents were not personally served or shown to be personally aware of the orders issued by the court on 18th July 2014, they cannot be found culpable of disobeying the same or for contempt of court.

The prayers sought in the Applicant's Notice of Motion dated 10th April 2015 are accordingly declined for the foregoing reasons and the Applicant shall meet the costs of the said Notice of Motion.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 15th day of March 2016.

P. NYAMWEYA

JUDGE