



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**SUCCESSION CAUSE NO. 400 OF 1993**

**IN THE MATTER OF THE ESTATE OF WAWERU NJOROGE GATHUNGU - (DECEASED)**

**NJENGA GETHAE.....APPLICANT/OBJECTOR**

**VERSUS**

**MARY WANJIRU CHEGE.....1<sup>ST</sup> RESPONDENT/PETITIONER**

**RUTH NYAMBURA CHEGE.....2<sup>ND</sup> RESPONDENT/PETITIONER**

**JACKSON Z. NDUNGU KIARIE.....3<sup>RD</sup> RESPONDENT/PETITIONER**

**RULING**

1. The Notice of Motion dated 14<sup>th</sup> April, 2016 was filed under **Section 5** of the **Judicature Act, Cap. 8, Order 22 Rule 29 (1)** and **Order 51** of the **Civil Procedure Rules** and **Section 3A** of the **Civil Procedure Act, Cap. 21**. The applicants seeks the following orders-

**(a) that the honourable court be pleased to order that Njenga Gethae be committed to civil jail for contempt of court orders issued by this court;**

**(b) that an order of eviction be issued against Njenga Gethae/ his agents or servants from trespassing on Land Reference Nyandarua/Lisaku/136 which he has been leasing to third parties;**

**(c) that the OCS Ol Jororok Police Station to implement the orders that will be issued; and**

**(d) that the costs of this application be provided.**

**Background**

2. The suit property **Land Reference Nyandarua/Lisaku/136**, is part of the estate of the deceased herein. By a judgment delivered on 19<sup>th</sup> January, 2000, the court found that the deceased was survived by two beneficiaries, his wife Cecilia Wambui Mbugua and his brother Harun Chege Gathungu (both deceased).

3. The Grant of Letters of Administration that had been issued to the Respondent and 4 others on 20<sup>th</sup> April, 1995 was revoked on the basis that they had no legitimate claim to the estate of the deceased. Harun Chege and Cecilia Wambui were appointed as administrators of the estate of the deceased. The

court further ordered that the widow would acquire a life interest in the estate. Upon her death, the property would devolve to the brother of the deceased, Harun Chege or the administrators of his estate should he predecease the widow.

4. The application to review this judgment was declined by Hon. Wendoh J on 7<sup>th</sup> March 2014 who affirmed the finding that the Respondent had not shown an interest in the estate which is recognized by law. The Respondent subsequently lodged an appeal against this finding. By the ruling that was delivered on 13<sup>th</sup> November, 2014, the court stayed execution of the grant over a portion measuring 4.4 acres which the court found would be the share that the Respondent would be entitled to should the appeal succeed and he is found to be an heir of the deceased. The court ordered that the remaining 17.6 acres be released to the Applicants who are the administrators of the estate of Harun Chege.

5. Thereafter, the applicants filed an application dated 19<sup>th</sup> May, 2015 seeking eviction orders against the respondent, together with mesne profits for the rent he had been receiving from the tenants to whom he had leased the property. The application was settled by the parties, who recorded the following consent which I reproduce hereunder *verbatim*-

- a) That the Respondent to surrender 17 acres to the Applicants.**
- b) The surveyor to go to the land in question within 30 days thereon.**
- c) That the Respondent to give vacant possession or on before 15<sup>th</sup> January, 2016.**
- d) That the Applicants to take steps to file confirmation of the grant herein.**
- e) That the costs of surveying to be shared pro-rata (in the ratio of acreage).**

6. The consent was adopted by the court on 27<sup>th</sup> October, 2015 and the order issued on 29<sup>th</sup> January, 2016.

### **The applicants' case**

7. The present application now seeks to commit the applicant to civil jail for failing to comply with the above orders of 27<sup>th</sup> October, 2015. This application was filed pursuant to the leave granted on 21<sup>st</sup> March, 2016. It is instructive at the time the orders were issued counsel for all the parties were present. Before leave was granted, the Respondent was allowed fourteen (14) days within which to comply with the orders unconditionally.

8. The argument of the applicants is that the Respondent has failed to comply above orders, notwithstanding that he was personally served with a copy of the same and a further copy served upon his counsel on record. Instead and with complete disregard of them, he has proceeded to plough the entire parcel of land and is intending to plant crops.

### **The Respondent's case**

9. In his Replying Affidavit sworn on 20<sup>th</sup> April, 2016, the Respondent acknowledges that he is aware of the court orders and the requirement that he should surrender 17 acres of the suit property to the Applicants. He argues that he is possession of 5.6 acres of the property which he has leased to third parties. The remaining 12.35 acres is currently in possession of his nephew Benjamin Mathu who has leased it to 7 tenants.

10. The Respondent explained that he has since informed his tenants of the orders and warned them against planting on the suit property. He stated that he was ready to refund tenants all the rent paid this year if they vacated. They have however refused to evacuate from the property insisting that they can only do so if expressly told to vacate by the court through a letter. It was his case that he was willing to

abide by the orders of court and has tried to advise the tenants to vacate.

### **Analysis and determination**

11. The parties relied on their pleadings and did not make any further submissions. The issue for determination in this application is whether the respondent has willfully refused to comply with the orders of the court.

12. The Respondent did not dispute knowledge of the consent orders nor did he intimate that they were made by his counsel without his full knowledge or instruction. He also did not dispute that he has not complied with these orders. His argument is that he is unable to comply with the orders firstly because he does not have control over the larger portion of it. He alleges that his nephew Benjamin is in possession of that land and has leased it to third parties.

13. Throughout these proceedings, the Respondent represented that he was in occupation and possession of the parcel of land the entire parcel of land. In his application for stay of execution of the grant, he asked the court to grant stay on the grounds that if the grant is enforced, he would be evicted from the suit land where he resides with his family. It was by the ruling to this application that the court allowed him to retain 4.4 acres, but ordered him to surrender the rest to the applicants. The Respondent did not indicate that he would be unable to comply on the ground that he was not in possession of the larger portion.

14. Further when the application for eviction orders was made, he gave an undertaking that he would cede the 17.6 acres of land to the applicants. Had he attempted to comply with the conditions of stay, he would have indicated the difficulties with compliance at this stage and sought further directions of the court. By his conduct he represented that he was in control of the entire parcel of land and that all persons who are in occupation, are doing so with his consent, knowledge and under his direction. I therefore find the allegation that he cannot comply with the orders in regard to a certain portion which is in possession of an independent party to be untrue.

15. The second explanation given by the Respondent was that he had "advised" the tenants to whom he had leased the property to vacate and not to carry out any cultivation. However, he did not annex any notices to vacate that he had issued to this end. I note that the orders for him to surrender the 17.6 acres were issued in November, 2014, the consent orders were entered on 27<sup>th</sup> October, 2015, and the application for leave to institute contempt proceedings was filed on 2<sup>nd</sup> March, 2016. This was sufficient time for the Applicant to take steps including institute legal proceedings to recover possession of the suit premises. It is not plausible that the tenants have retained possession throughout this period, without his consent.

16. In the end, I find that the respondent has been evasive and that his explanations were afterthoughts which were displaced by his overall conduct and the overall evidence presented. The respondent has no intention of complying with the conditions of stay or the consent order by delivering vacant possession of the suit premises to the applicants. For the above reasons I find that the respondent is guilty of contempt of the court orders that were issued on 27<sup>th</sup> October, 2015.

17. Therefore, I make the following orders:

- a) That the Respondent be committed to civil jail for six (6) months for contempt of court;
- b) that an order of eviction to issue against Njenga Gethae/his agents or servants from Land Reference Nyandarua/Lisaku/136;
- c) that the OCS, OI Jororok Police Station provide security during the implementation of the above eviction order;
- d) that the Respondent to bear the costs of this application.

**Dated, Signed and Delivered at Nakuru this 16th day of June, 2016.**

**A. K. NDUNGU**

**JUDGE**