

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 987 OF 2008

IN THE MATTER OF THE ESTATE OF IDDI MALAMBU HASSAN (DECEASED)

RULING

1. The application for determination is the Motion dated 31st March 2014. It seeks an order that the respondents, Dr. Ali Kolela Montet and Hassan Iddi Malambu be cited for contempt of the court's orders made on 22nd March 2012, and committed to civil jail for a period not exceeding six (6) months.
2. The affidavit in support of the application was sworn by the first applicant, Yussuf Shaaban Leposo, on 31st March 2012. He avers that this court made an order on 22nd March 2012 restraining the respondents from transferring or dealing with land belonging to the estate. The order was subsequently served on the respondents. The respondents are accused of leasing out the subject property to third parties despite the said court order.
3. Attached to the affidavit is the formal order extracted on 12th April 2012 from the order made on 22nd March 2012 by GBM Kariuki J. The substantive order is in No. 2 which reads as follows:-

'2.THAT the Administrators be and are hereby temporarily restrained from selling, offering for sale, disposing, transferring and in any other manner interfering with all those parcels of land known as.

Ngong/Ngong/44325,Ngong/Ngong/44326,Ngong/Ngong/44327,Ngong/Ngong/44328,Ngong/Ngong/44329,Ngong/Ngong/44330, Plot No. LR NO. Ngong/Ngong/6048, Plot No. LR NO. 14088 Scheme 305 Ngong, Plot LR No. 305/342 Scheme 305 Ngong, Plot No. 393 Ngong, Plot No. Ngong/Ngong/5048, Plot No. 399 Kibiko Trading Centre, Plot No. 40 Bul Bul Market, Plot No. 43 Bul Bul Market and any other parcel of land excised from all that parcel of land previously known as LR No. Ngong/Ngong/27038 or any other property belonging to the deceased upto 26th June 2012.'

4. There is on record copy of an affidavit of service sworn on 21st June 2012 by a process server indicating that the order was served on the first respondent, Dr. Ali Kolele Montet and on the respondents' advocates. There is copy of a letter from Gathaiya & Associates, Advocates dated 24th March 2014, addressed to Hassan Lepose, one of the applicants, in respect of Ngong/Ngong/62378, at the behest of a person who claimed to be owner thereof. There is also copy of a letter dated 27th January 2013 addressed to whom it may concern, from the 2nd respondent, talking about subdivision of land, without identifying the land to be subdivided.
5. The response to the application is vide an affidavit sworn by the second respondent. He states that the respondents do not contest the making of the order in question, nor its service. They however deny the allegations made against them with relation to them disobeying the said orders. He asserts that they have always obeyed the said orders.
6. Directions were given on 25th January 2016 that the said application be disposed of by way written submissions. Both parties have complied with the directions and file their respective written submissions, complete with authorities that they rely on.
7. The respondents do not contest the fact that the order was made and that it was served on them. Their

case is that they have not been in disobedience of it. What I have therefore to determine is whether the said order has been disobeyed by the respondents.

8. The order barred the respondents from selling, offering for sale, disposing of, transferring or in any manner interfering with the parcels of land in question. What the applicants should have sought to demonstrate is that the respondents have disobeyed the order by either selling, offering for sale, disposing of, transferring or interfering with the same in any manner. Have the applicants done so? In the effort of proving the alleged disobedience the applicants have displayed two documents. There is the letter from Gathaiya & Associates, Advocates which refers to Ngong/Ngong/62378. The property referred to in that letter is not listed in the order, and the applicants have not made an effort to connect it to the estate of the deceased, or, at least, to the assets listed in the order. There is also the letter from the second respondent which talks about subdivision of property. Unfortunately, the said letter does not at all refer to the estate of the deceased, and does not mention any of the assets listed in the order.

9. I am not satisfied that there is any material upon which I can find that the respondents have disobeyed the order in question. It was incumbent on the applicants to prove that there was disobedience of the court order. There is no such proof. The two documents placed in evidence are vague and have nothing in them that connects them to the estate and the order alleged to have been disobeyed.

10. Contempt of court is a criminal offence. Burden of establishing the same is higher than in civil cases. Lord Denning made the point in *Bramblevale Ltd* (1970) Ch. 128, when he stated-

‘A contempt of court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved showing that when the man was asked about it, he told lies. There must be some further evidence to incriminate him.’

11. It cannot be said that contempt of court has been established in the instant case beyond reasonable doubt. Even if I were to apply the standard of proof required in civil cases, on a balance of probability, it would still not pass. My conclusion is that the offence of contempt of court has not been established. The application dated 31st March 2014 is wholly without merit. It ought to be dismissed. I hereby dismiss the same with no order as to costs.

12. I note that the estate comprises of property situated within the Ngong area of Kajiado County, consequently I hereby direct that the matter be transferred to the High Court of Kenya at Kajiado for final disposal.

DATED, SIGNED and DELIVERED at NAIROBI this 25TH DAY OF NOVEMBER, 2016.

W. MUSYOKA

JUDGE