REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

SUCCESSION CAUSE NO. 1748 OF 2012

IN THE MATTER OF THE ESTATE OF JOHN NG'ANG'A NJOROGE- (DECEASED)

RULING

1. The Motion dated 30th May 2013 seeks the committal to civil jail for a period not exceeding six (6) months of Simon Ng'ang'a Njoroge, Geoffrey Kungu, Joseph Maina Ng'ang'a, Paul Mwangi Ng'ang'a and Peter Kimani Ng'ang'a. It is alleged that the said persons are in contempt of an order made by GBM Kariuki J on 20th December 2012.

2. Leave to bring the contempt proceedings was given on 14th May 2013 on an application dated 14th May 2013. The application dated 14th May 2013 was accompanied by a notice to the registrar, a statement and a verifying affidavit. It was ordered that the substantive motion be filed within 14 days, hence the Motion dated 30th May 2013 and filed in court on 30th May 2013.

3. According to the statement dated 14th May 2013, the court had on 20th December 2012 made a limited special grant to the applicant with a view to preserving the estate and to access title documents relating to the assets of the estate. There was also an order of the same date restraining the respondents from managing the estate or collecting rent in the estate and vesting the responsibility of collecting rent on the applicants. The said order together with a penal notice were allegedly served on the respondents. The respondents are said to have failed to comply with the order of 20th December 2012.

4. The affidavit in verification of the statement was sworn on 14th May 2013 by the first applicant, Ruth Wangari Ng'ang'a. She depones that after the order was made on 20th December 2012, numerous requests and reminders were made to the respondents to comply with the terms of the order, but the respondents failed, refused and neglected to do so.

5. Several documents are attended to the verying affidavit of 14th May 2013. There is an affidavit of service sworn on 18th March by Felix Omondi Owino, a process server. He attests to having served copy of a citation to accept or refuse letters of administration intestate, issued by the court on 21st February 2013, on the respondents. The said citation was purportedly served on 14th March 2013 on the advocates for the respondents. There is also a copy of the formal order dated 3rd January 2013 as extracted from the ruling of 20th December 2012. There is a letter from the advocates for the applicants to the advocates for the respondents dated 9th January 2013. It alleges that the ruling dated 20th December 2012 was delivered in the presence of the respondents. It is alleged that both the respondents and their advocates were well aware of the contents of the said orders. The respondents are accused of disobeying the orders. There is a letter dated 31st December 2012 from the advocates from the respondents to the tenants in

respect of Plots No. 198, 316, 319 and 340 Ngei Huruma advising them to disregard letters that had been addressed to them by the advocates for the applicants and an estate agent supposedly on the orders of 20th December 2012 on the grounds that the court order had not been served on the tenants.

6. I note that the Motion dated 30th May 2013 is accompanied by a supporting affidavit and a statutory statement. This was unnecessary. Once leave is granted, the Motion filed on the strength of the order granting leave should be based on the statutory statement, and the affidavit verifying it, filed together with the Chamber Summons for leave. The Motion dated 30th May 2013 should have been predicated upon the statutory statement dated 14th May 2013 and the verifying affidavit supporting it sworn on 14th May 2013. For that reason I shall disregard the supporting affidavit sworn on 30th May 2013 and the statutory statement dated 30th May 2013.

7. The respondents have replied to the application vide an affidavit sworn on 1st July 2013 by Paul Mwangi and Geoffrey Kungu. They deny disobeying the court order of 20th December 2012. They deny further that they vowed to disobey the court order.

8. It was directed on 17th June 2014 that the application dated 30th May 2013 be disposed of by way of written submissions. Both sides have filed written submissions. The applicant's submissions were filed on 7th July 2014, while those by the respondents were filed on 19th September 2014.

9. The law on contempt proceedings in civil cases is fairly notorious. The proceedings are quasi-criminal in nature for they have a penal element. Upon contempt of court being established the contemnor is liable to lose his liberty or his property as punishment. For that reason rules of procedure have to be strictly complied with. The standard of establishing disobedience of court orders is above that required for ordinary civil cases and is slightly below proof beyond reasonable doubt.

10. The prerequisites are that the order alleged to have been disobeyed ought to be brought to the attention of the person alleged to have disobeyed it. The law requires that the formal order should be extracted and served personally on the person meant to comply with or obey it. It is further required that the order served ought to carry an endorsement called a penal notice, that in the event of non-compliance there would be penal consequences. The other requirement is that the manner of the non-compliance with the order must also be clearly set out in the application.

11. The task before me is to determine whether the prerequisites set out above have been met. Firstly, was there service of the order made on 20th December 2012 on the respondents? The applicants allege that there was indeed due service of the order. There is attached to the affidavit sworn on 14th May 2014, a copy of an affidavit of service purportedly to establish service of said order. The said affidavit makes no reference at all to the order of 20th December 2012. Instead the said affidavit of service talks of service of a citation issued by the court on 21st February 2013. Clearly, there was no personal service of the orders made on 20th December 2012 on the respondents.

12. In the correspondence exchanged between the advocates attached to the affidavits, it would appear that the applicants' counsel is conscious to the fact that the order was not served personally, and therefore the assertion that the orders were made in the presence of the respondents and therefore they were aware of the orders and bound to comply with them. It is also asserted that the advocates were aware of the orders and ought to have ensured that they were complied with.

13. The handwritten record before me is silent on the event of the delivery of the ruling on 20th December 2012. There is a typed copy of the ruling of 20th December 2012 attached to the application dated 30th May 2013. The handwritten endorsement at the tail end of the ruling is to the effect that the same was delivered on 20th December 2012 by Muchemi J. on behalf of GBM Kariuki J in the presence of Mr. Mathenge for Mr. Mbiyu for the respondents and Mr. Wasonga for Ms. Machio for the applicants. The endorsement is silent on the presence of the respondents at the event of the delivery of the ruling. Their

counsel was not personally in court but another advocate held his brief. There is no record that the said counsel communicated with the respondents to make them aware of the orders. There is therefore scant evidence that the respondents were made aware of the orders. There is therefore scanty evidence that the respondents were aware of the orders made on 20th December 2012.

14. As stated above, cXivil contempt proceedings are quasi – criminal in nature. The strict rules of procedure must therefore be followed. There are penal consequences for non-compliance with court orders. The alleged contemnor should not only be aware of the existence of the order allegedly disobeyed, an extract of the formal order must be placed in his hands so that he can have no excuse that he was unaware of the existence of the orders. Being in attendance in court when the ruling is delivered is not enough. As lay persons, the respondents may not fully grasp what might have transpired in court. They need the formal order in their hands in order for them to read it and digest its contents, and, if need, be to take advice from their counsellors. Equally, the fact that their advocate was present in court at the delivery of the ruling is neither here nor there. Such attendance does not mean that the purport of the ruling has been brought to the respondent's attention by their advocate.

15. The second question is whether the extracted formal order served on the respondents had the penal consequences warning or notice endorsed on it. The order in question in this case was never served personally on the respondents and therefore this question is largely irrelevant in the circumstances. I have noted that the copy of the order of 20th December 2012, extracted on 3rd January 2013 and attached to the application dated 14th May 2013, does not carry the penal notice. So if indeed the said order was served on the respondents, then it was served without the penal notice.

16. The importance of the penal notice cannot be gainsaid. It bears repeating that contempt proceedings are quasi-criminal in nature. A party served with a court order that requires him to act in a particular way, or not to so act, must also warn him of the consequences of not complying with the order or disobeying it. This has its basis in the principle of legality in criminal law. Warsame J. dealt with it in *Karanja & others –v- Republic* (2011) 2 EA 164, where it was stated that if an accused person were to be prosecuted, tried, convicted and perhaps imprisoned for doing or failing to do something, he or she ought to be able, without difficulty, to find out what it is that he must not do on pain of criminal penalty. It was also observed that one of the functions of the criminal law is to discourage criminal behaviour, and one cannot be discouraged if he does not know and cannot reasonably discover what it is that he should not do.

17. The third question is whether the alleged breaches of the order in question have been established. In other words, it must be established that the applicants have disclosed the acts of disobedience that the respondents are accused of. The misdemeanours the respondents are accused of are addressed in paragraph 10, of the affidavit sworn on 14th May 2013, to verify the statutory statement.

18. The said paragraph 10 states as follows-

> "***That I am aware that that we had obtained an order of access to title documents of the estate and its preservation and non-interference of the same against the respondents in the succession cause herein. After numerous requests and reminders the respondents have failed, refused and neglected to comply with the terms of the said order allowing us to preserve the estate and to access the title documents."***

19. The above averment does not indicate the dates when the alleged requests were made and whether the requests were specific on the title documents that the respondents were required to make available to the applicants. The averment is vague on the respondents' actual crime or wrong-doing.

20. The applicants have attached two letters from their advocates addressed to the respondents' advocates. They are dated 9th January 2013 and 11th March 2013. None of the two letters requests the respondents to avail title documents relating to the assets of the estate and none of them even reflects the land references of the property in question. Again, the letters are vague, and, in my opinion, none of them makes what may be said to be a request that the respondents could be expected to respond to.

21. As these proceedings are quasi-criminal in nature, it is imperative that a fair amount of evidence should marshalled to establish a quite strong case of disobedience of a court order. A party should not be condemned of quasi-criminal conduct on flimsy and vague evidence. Standard of proof in cases of this nature is high. The evidence of disobedience placed before me comes nowhere near the threshold for such cases.

22. In the end I come to the inevitable conclusion that the application dated 30th May 2013 lacks merit. It is amenable to dismissal, and I hereby dismiss it with costs.

23. To move this matter forward, I direct that the matter be mentioned on a date to be given at the registry on priority for directions on compliance with the orders of 20th December 2012.

DATED, SIGNED and DELIVERED at NAIROBI this 23rd DAY OF January 2015.

W. MUSYOKA

JUDGE