



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
SUCCESSION CAUSE NO. 131 OF 2013
IN THE MATTER OF THE ESTATE OF M'TURUCHIU
M'MWIRICHIA.....DECEASED
AND
JOYCE KABITI M'TURUCHIU.....PETITIONER

R U L I N G

1. The petitioner/applicant through a Notice of Motion pursuant to Section 5(1) of the Judicature Act (Cap.8) Laws of Kenya, Order 53 Rule 2(2) of the Rules of the Supreme Court of England 1965, Section 3A of the Civil Procedure Act sought for the orders that an order of committal be made against the respondent to prison for such period as this Honourable Court may deem fit and just, and any other order deemed expedient in the circumstances.
2. The application is based on the grounds on the face of the application. That on 20th August, 2013 the court made preservative orders of asset forming the estate being land No. Kibirichia/Mboroga/817 pending hearing and determination of the suit, that despite the respondent being served with the court's order he has failed and/or refused to comply and persists in such refusal and has continued intermeddling with the deceased estate.
3. The application is supported by the applicant's affidavit sworn by Mr. Otieno Willy Calvine, an Advocate for the applicant. The Counsel reiterates the grounds on the face of the application and annexes affidavit of service marked "OWCI" and alludes to the fact that the respondent has refused to comply with the court's order by cutting down trees and ploughing on suit land causing applicant irreparable harm and damage and attached photographs in support marked "OWC2". The annexed affidavit of service by Baylon Mutahi Advocate starts by stating he is a licensed Process Server. He depones that on 7/10/2013 at 1.45 p.m he served court's order issued on 4/10/2013. The order extracted is dated 30th September, 2013.
4. The respondent is opposed to the application. The respondent averred that he is a beneficiary being a grandson to the deceased, pointing out the land quoted by the applicant as Kibirichia/Mboroga/1817 is wrong as the right land is Kibirichia/Kibirichia/817. He avers he has built a permanent house on the suit land. The respondent avers he was served with papers on 31/10/2013. He termed the photographs exhibited on the damage to have been made by the applicant while he was arrested so as to fix him.
5. The court on 9/6/2014 pending determination of this application and another made an order

directing the Executive Officer to visit the locus and file a report on whether there is a boundary in respect of the portions in occupation by the parties and whether the respondent is interfering with the petitioner's side or portion. The Executive Officer visited the locus and made a report dated 19th June, 2014 which I will refer to later in my ruling.

6. I have considered the application, affidavits in support and in opposition, the extracted order, affidavit of service and the issue for consideration is whether the applicant met conditions for issuing orders for contempt of court.
7. The court's order was issued on 28th August, 2013 under prayer NO. 2 of the application for preservation of the deceased estate pending hearing and determination of the application. The orders were confirmed on 30/9/2013. The affidavit in support of the application was drawn by Otieno Willy Calvine an Advocate in conduct of this suit. He has in his affidavit not on his personal knowledge stated what the respondent did in disobeying court's order nor has he disclosed the source of his information that the respondent has refused to obey the court's order. The Counsel should not have sworn an affidavit on matters of facts but instead should have left the same to his client; otherwise such affidavits by an Advocate acting for parties is based on hearsay or on speculation. It is not believable that the applicant who is familiar with facts of her case should let an advocate who has no personal knowledge of the events or idea of what is happening at the ground swear an affidavit in support of a serious application as this one.
8. The affidavit of service is sworn by Baylon who claims to be an Advocate yet in paragraph 1 of his affidavit of service he only refers to himself as a licensed Process Server. One wonders whether Baylon Mutahi is an Advocate or a Process Server. This causes doubts on his alleged service of the court order. He is alluding to serving an order issued on 4/10/2013. The Advocate in his supportive affidavit has not stated when and what the respondent did in disobeying the court's order but has made a general allegation that the respondent cut down trees and ploughed on the suit land. The respondent has denied having disobeyed court's order. The Executive Officer's report dated 9/6/2014 on scene visit on 17/6/2014 indicated the portion occupied by the petitioner and respondent respectively are separated by Napier grass boundary which the Executive Officer observed had not been interfered with. The applicant alleged the respondent crossed over the fence in 1994. The conclusion reached by the Executive Officer was that there is no recent interference with anyone's occupation if any it must have been in 1994 which is hard to ascertain on the ground.
9. In an application for contempt of court to be successful the applicant is required to serve personally the extracted order upon the respondent and which order must be endorsed with penal notice. In the case of **OCHINO & ANOTHER V OKOMBO & 4 OTHERS CIVIL APPEAL NO. 36 OF 1989** the learned Judges of Court of Appeal observed as follows:-

"The power to deal with contempt of court is provided for under Section 5 of the Judicature Act(Cap.8) and Order 39 (2)(b) (now Order 40) of the Civil Procedure Rules. We have to follow the procedure and practice in England. As we read the law, the effect of the English provision is that as a general rule, no order of court requiring a person to do or to abstain from doing any act may be enforced (by committing him for contempt) unless a copy of the order has been served personally on the person required to do so or abstain from doing the act in question. The copy of the order served must be endorsed with notice informing the person or whom the copy is served that if he disobeys the order, he is liable to the process of execution to compel him to obey it(emphasis is mine).
10. The applicant herein has failed to demonstrate that the extracted order was endorsed with Penal notice informing the respondent that if he disobeyed the court's order he would be liable to the process of execution to compel him to obey the court's order. The order served in actual fact was not endorsed with penal notice as required. In addition to the above the Executive Officer's report on the scene visit on 17/6/2014 shows that there was no recent interference with any of the party's occupation and if there was an interference it must have been in 1994 which was hard to ascertain

on the ground. The applicant did not make any affidavit to show if there was any disobedience of the court's order was in what nature, and when. The application as it stands, in my view is made out of malice, is frivolous and vexatious and is otherwise an abuse of the court process.

11. In view of the conclusion I have come to I find the applicant's application to be without any basis, it is without merits and have no alternative but to dismiss the applicant's application dated 31st October, 2014 with costs.

DATED, SIGNED AND DELIVERED AT MERU THIS 22ND DAY OF JANUARY, 2015.

J. A. MAKAU

JUDGE

DELIVERED IN OPEN COURT IN THE PRESENCE OF:

- 1. Mr. Otieno C for applicant***
- 2. Mr. Muthamia for the respondent***
- 3. C/clerk Penina/Mwenda***

J. A. MAKAU

JUDGE