



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**SUCCESSION CAUSE NO. 317 OF 2011**  
**ESTATE OF JUMA SWALEH KATAKA (DECEASED)**  
**AMINA JUMA SWALEH.....APPLICANT**  
**VERSUS**  
**AMANI JUMA SWALEH.....RESPONDENT**

**RULING**

1. By an Application Notice dated 5<sup>th</sup> December 2014, the applicant **Amina Juma Swaleh** who is also a co-applicant with her joint administrator in pending Summons under section 45 of the Law of Succession Act and Rule 49 of the Probate and Administration Rules to restrain the respondent, **Amani Juma Swaleh** one of the beneficiaries, for intermeddling with the estate of the deceased in the Succession Cause herein seeks the committal of the said respondent for contempt of Court.
2. The applicant alleges that the respondent has in breach the orders of the court for temporary injunction made on 9<sup>th</sup> May 2014 and further orders made on the 9<sup>th</sup> October 2014 for the maintenance of status quo and for the cessation of construction on the suit premises pending the hearing and determination of this matter continued with the construction on the suit property. Photographic evidence of the alleged construction is attached to the application.
3. The respondent states that by the time the orders were served upon him he had already commenced construction. He disputes the accuracy of the photographs with respect to the dates stamped on them and contends that the dates were printed to show that he had been in contempt.
4. Both parties prayed that the court visits the site of the disputed property to ascertain the truth or otherwise of the allegations of the breach of the court orders. See paragraph 12 of the replying affidavit of the alleged contemnor and the submissions made in court by both counsel – Mr. Kiragu for the Applicant and Mr. Waithera for the respondent.
5. The powers of the court on an application for contempt of court for breach of its orders are set out in the ***Halsbury's Laws of England*** as follows:

“**104. Other remedies.**”

***The court may, in its own discretion, grant an injunction, in lieu of committal or sequestration, to restrain the commission or repetition of a civil contempt. The court may in lieu of any other***

*penalty require the contemnor to pay the costs of the motion on a common fund basis. In a doubtful case, the court may, instead of proceeding for contempt, grant an order requiring the defendant to state whether he has complied with an undertaking. **If an order of mandamus, a mandatory order, injunction or judgment or order for the specific performance of a contract is not complied with, the court may, besides or instead of proceeding for contempt, direct the act to be done by some person appointed for that purpose.***

- See **Halsburys Laws of England**, 4<sup>th</sup> Ed Vol. 9 pp. 62-63, para. 104.

6. Under Order 40 rule 10 of the Civil Procedure Rules, the court has power to inspect a suit property in the following terms:

“10. (1) The court may, on the application of any party to a suit, and on such terms as it thinks fit—

(a) make an order for the detention, preservation, or **inspection of any property which is the subject-matter of such suit**, or as to which any question may arise therein;

(b) for all or any of the purposes aforesaid authorise any person to enter upon or into any land or building in the possession of any other party to such suit; or

(c) for all or any of the purposes aforesaid authorise any samples to be taken, or any observation to be made, or experiment to be tried, which may seem necessary or expedient for the purpose of obtaining full information or evidence.”

7. I consider that since the issue of the disputed property is a matter of succession of the estate herein, the final distribution of the estate is the goal that the court should seek to achieve in accordance with its duty to foster expedited administration and distribution of an estate of a deceased person under section 73 of the Law of Succession Act, which provides as follows:

**“73. Duty of court to give notice to holder of grant to apply for confirmation**

*The court shall within one year from the date of any grant of representation, give notice to the holder of the grant to apply for confirmation thereof.”*

The administrator is then under a duty under section 83 (1) (i) of the Act to render accounts of due administration as follows:

*“to complete the administration of the estate in respect of all matters other than continuing trusts and if required by the court, either of its own motion or on the application of any interested party in the estate, to produce to the court a full and accurate account of the completed administration.”*

8. The applicant is a joint administrator with one of her brothers of the Estate of the deceased herein and the respondent is a beneficiary, and the grant was confirmed on 4<sup>th</sup> November 2013 for the distribution, in accordance with specified ratios, of the Estate of the Deceased shown to comprise the suit property only but said to measure five (5) acres.

9. In the circumstances, I consider it appropriate in this case to visit the site to inspect the suit property and determine the issue of alleged construction by the respondent in disobedience of the court order and, more significantly, to progress the suit towards the final settlement of the succession dispute herein. The court will make the visit on a date and time to be fixed in consultation with the parties.

10. In the meantime, pursuant to its power under the contempt of court jurisdiction, the court makes an order of injunction restraining the respondent **Amani**

**Juma Swaleh** from proceeding any further with the construction on the disputed property pending hearing and determination of the succession proceedings herein.

11. The matter will be mentioned on the 5<sup>th</sup> February 2015 for purposes of fixing a suitable date for the site visit.

**DATED SIGNED AND DELIVERED THIS DAY OF 15<sup>TH</sup> JANUARY 2015.**

**EDWARD M. MURIITHI**

**JUDGE**

In the presence of: -

Mr. Kiragu for the Applicant

Mr. Waithera for the Respondent

Mr. Mbiu Court Assistant.