REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

Succession Cause No. 36 of 2002

IN THE MATTER OF THE ESTATE OF EVANSON NGUTI KAMANDA (DECEASED)

JACINTER WANJIRU NGUTI …..... APPLICANT

VERSUS

SARAH WANJIRU …..... RESPONDENT

RULING

Before the court for determination is the Notice of Motion dated 30th June, 2014 brought under Rule 73 of the Probate and Administration Rules.

The Applicant, Jacinter Wanjiru Nguti is the surviving administratrix of the deceased's estate. On 29th May, 2014, the court gave her the powers as the only person entitled in law to collect rents from Lincoln Hotel and Kaptagat Building which remain as the only undistributed assets of the estate. In that order, the Respondent Sarah Wanjiru was restrained from collecting any rents from the said premises.

According to the Applicant, the Respondent has since disobeyed that order by breaking into the premises (Lincoln Hotel) and renting the Kaptagat building to strangers. This alleged act of disobedience of the Respondent precipitated the application herein.

The orders sought therefore are that the Respondent, Sarah Wanjiru be committed to civil jail for a period of six months for blatantly disrespecting the aforesaid court orders. It is also sought that she refunds all the monies she has illegally collected since 29th May, 2014 which is the date the court issued the orders.

The grounds upon which the application is premised are as follows:-

(i) This Honourable Court issued orders on 29th May, 2014 restraining the respondents and other intermeddlers from interfering with the collecting of rent proceeds and/or managing the estate of the late NGUTI KAMANDA.

(ii) The ruling/order was read and issued in the presence of all the parties herein and both counsels.

(iii) That despite efforts by the administratrix to secure the estate and collect all rent proceeds as ordered by court the respondent has acted with impunity by breaking into the premises and renting out premises at both Lincoln Hotel and Kaptagat house.

(iv) That efforts have been made to make her respect court orders but all in vain.

(v) that the administratrix has even sought the police assistance for criminal committed in the premises forming part of the estate but the police are reluctant to act saying it is an issue pending in court.

(vi) Court orders are not given in vain and there is need to protect the interest of the estate.

It is further supported by the affidavit of Jacinter Wanjiru Nguti, the Applicant herein sworn on 30th June, 2014 which further expounds the grounds on which the application is premised. The Applicant reiterates that on her part, she has faithfully administered the estate and given account of all the proceeds she has collected from therein.

The Respondent, Sarah Wanjiru Karisho swore a Replying Affidavit on 18th July, 2014 in opposition to the application. She concedes she was and is aware of the court's order issued on 29th May, 2014 and denies disobeying it. She states that the Applicant's Replying Affidavit is riddled with falsehoods and unsubstantiated allegations and that no evidence has been tendered to show disobedience on her part. She states that it is the Applicant who has disobeyed the court order by not giving a true account of what she has collected in the months of June and July, 2014 as ordered by the court.

Prior to the filing of this application it was alleged by both the Applicant and the Respondent that a son of the deceased, one Paddy Karanja was illegally administering the estate. The court then required him to account for any benefits he may have acquired through rents. After the court delivered its ruling of 29th May, 2014, the said Paddy conceded that he would abide with the court orders and respect that the Applicant is the only legally recognized administratrix of the estate.

At the time of hearing of the application, learned Counsel Mr. Kibii for the Applicant demonstrated the acts of disobedience by referring to paragraphs 4, 5, 6 and 7 of the supporting affidavit as follows:-

Paragraph 4: That on 27th June, 2014 the Respondent broke the padlocks and damaged the doors to the premises.

Paragraph 5: That the Respondent collected the rent of the premises that she broke.

Paragraph 6: That on 26th June, 2014, the Respondent went to Kaptagat house, took control of the empty houses and rented them to strangers.

Paragraph 7: That the applicant reported the matter at Central Police Station, Eldoret but no action was taken by the police.

He also referred to various annextures as follows:-

Annexture JW.1 (a) – A cheque deposit slip dated 9th June, 2014 of Ksh. 298,279/= showing that the Applicant deposited that amount in the joint account.

Annexture JW.3 – A letter to the Applicant's counsel notifying them of the Applicant's acts of contempt.

Mr. Chemwok, learned counsel for Paddy Karanja submitted that his client had already handed over Lincoln Hotel despite the fact that he had spent Ksh. 1.3 Million renovating it. He stated that his client witnessed the Respondent breaking into the building. He submitted that the Respondent had not countered her acts of disobedience of the court order.

Learned counsel, Mr. Mukabane for the Respondent submitted that the application was incompetent. That it did not adhere to Section 5 (1) of the Judicature Act.

He submitted that the alleged acts of disobedience of the court order were not substantiated and proved. He referred the court to the case of **MITITIKA -VS- BAHARINI FARM LTD (1985) KLR, 227** to the

effect that the standard of proof in a contempt case is higher than on a balance of probabilities. In this respect tangible acts of contempt ought to have been shown/demonstrated. He further submitted that Paddy Karanja was conniving with the Respondent as he chose to file a Replying Affidavit when the application was not against him.

In rejoinder, Mr. Kibii submitted that as was held in the case of **MITITIKA -VS- BAHARINI FARM**, a contempt holds if the Respondent knew of he existence of the court order. In the instant case the Respondent knew of the existence of the order and what it entailed but blatantly disobeyed it.

He submitted that the Applicant, in the supporting affidavit gave the Police Occurrence Book (O.B) number vide which the criminal acts committed by the Respondent were reported. That the Applicant also wrote a letter of protest in protesting the Respondent's acts of contempt.

It is important that I mention that after Paddy Karanja filed his Replying Affidavit (sworn on 17th July, 2014), the Applicant's counsel, Mr. Mukabane applied to cross-examine him on its contents.

The cross-examination was conducted on 30th July, 2014. The examination focused on the management of Lincoln Hotel, one of the assets comprising the estate. Paddy Karanja stated that he does not personally manage the hotel. That it is managed by Metro Cosmo Company and his duty is limited to the supervision of the company. He stated that he manages a dry cleaner situated within the hotel but the same is part of the family business. He said that it does not currently operate. He stated that the padlock to the door of the dry cleaner was broken into and it is the padlock he referred to in his affidavit that was broken by the Respondent.

In re-examination by his counsel, he stated that he learnt from the watchman that the padlock had been broken. He stated that the Respondent also broke a second padlock of a door leading to the salon. He stated that the latter door had been locked by Metro Cosmos Company on account of default of paying rent.

I have considered the entire application, the respective Replying Affidavits and submissions made by the respective advocates. The main issue for determination herein is whether the Respondent has disobeyed the court order that was given on 29th May, 2014. For purposes of clarity and reference herein in this ruling, it is prudent that I duplicate the said order. It reads as follows:-

"1. That only the legally appointed administratrix Jacinter Wanjiru Nguti shall henceforth collect all the rents both from Kaptagat Building and Lincoln Hotel.

2. That the said Jacinter Wanjiru Nguti shall be depositing all the collected rents into the joint account already opened in the joint names of R. K. Limo & Company Advocates and Gicheru & Company Advocates.

3. That Jacinter Wanjiru shall, on a monthly basis give an account of all the deposited rents to the other beneficiaries through their appointed advocates.

4. That both Sarah Wanjiru and Paddy Karanja are hereby restrained from further collecting rents from Lincoln Hotel. In this respect counsel for Jacinter Wanjiru shall write a letter to the respective tenants and serve them with this order.

5. That Sarah Wanjiru will continue to occupy one of the two- bedroomed houses at Kaptagat Building. Likewise, Paddy Karanja shall also, in the meantime, continue to occupy only three (3) rooms at Lincoln Hotel.

6. That parties shall fix this cause for distribution of the estate as soon as is practically possible, subject to availability of a date in the court diary.

7. That each party shall bear its own costs of this application."

The order was issued pursuant to Summons dated 9th December, 2013 by the Applicant herein who sought orders that she be allowed to solely administer the estate and deposit all the proceeds in the already opened bank joint account in the names of the advocates for the Applicant and the Respondent.

Contempt of court in this context may be defined in terms of Civil Contempt. The Halsbury's Laws of England defines civil contempt as follows;

"...disobedience to process is a civil contempt of court to refuse or neglect to do an act required by a judge or order of the court within the time specified in the judgment order requiring a person to abstain from doing a specified act, or to act in breach of an undertaking given to the court by a person, on the faith of which the court sanctions a particular course of action or inaction..." (See Halsbury's Laws of England, 4th Edition (9th Re-Issue), Pg 33, para 52.)

While Black's Law Dictionary 7th Edition at pg 313 defines contempt as follows;

"The failure to obey a court order that was issued for another party's benefit. A civil contempt proceeding is coercive or remedial in nature. The usual sanction is to confine the contemnor until he or she complies with the court order.

So then, what constitutes contempt?

The Case Law

In *Hadkinson Vs. Hadkinson (1952) 2 All ER 567 at pg 569* where it was held as follows;

*"**A party who knows of an order, whether null and void, regular or irregular, cannot be permitted to disobey it…it would be most dangerous to hold that the suitors or their solicitors could themselves judge whether an order was null and void, whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question, that the course of a party knowing of an order which was null and irregular and who might be affected by it was plain. He should apply to the court that it might be discharged. As long as it existed, it must not be disobeyed..."***

In *Mutitika vs. Baharini Farm Ltd [1985] KLR* 227 at pg 230 and 233 the learned judges Hancox, Nyarangi JJA and Gachuhi Ag JA,

"The principle propounded in re Maria Annie Annie Davis [1889] 21 QBD 236, and 239, that 'Recourse ought not be had to process of contempt in aid of a civil remedy where there is any other method of doing justice. The observations of the latter Master of the Rolls in the case of Re Clement seem much in point: 'It seems to me that this jurisdiction of committing for contempt being practically arbitrary and unlimited, should be most jealously and carefully watched, and exercised, if I am say so, with the greatest reluctance and the greatest anxiety on the part of judges to see whether there is not other made which is not open to the objection of arbitrainess, and which can be brought to bear upon the subject. I say that a judge should be most careful to see that the cause cannot be mode of dealing with persons brought before him. On accusations of contempt should be adopted. I have myself had om many occasions to consider this jurisdiction, and I have always thought that, necessary though it be, it is necessary only in the sense in which extreme measures are sometimes necessary to preserve men's rights, that is, if no other pertinent remedy can be found. Probably that will be discovered after consideration to the true measure of the exercise of the jurisdiction' must be born in mind... we draw attention to the following passage from the 3rd Edition of Oswald on Contempt at pg 16

The court, however, has power to retrain by injunction threatened contempts. It is competent for the court where a contempt is threatened or has been committed, and on application to commit, to take the lenient course of granting an injunction instead of making an order for committal or sequestration, which the offender is a party to the proceedings or not"

In the case of Teachers Service Commission V Kenya National Union Of Teachers & 2 Others [2013] **e**

KLR Ndolo J observed that:-

"38. The reason why courts will punish for contempt of court then is to safeguard the rule of law which is fundamental in the administration of justice. It has nothing to do with the integrity of the judiciary or the court or even the personal ego of the presiding judge. Neither is it about placating the applicant who moves the court by taking out contempt proceedings. It is about preserving and safeguarding the rule of law."

In ***Shah & Another t/a Lento Agencies vs. National Industrial Credit Bank Ltd, [2005] 1 KLR 300,*** the learned Njagi J. relied on various English authorities and delivered himself extensively as hereunder;

On relying on the decision in ***Hadkison vs Hadkinson,*** supra, the learned judge at pg 305 observed as follows;

"Pausing there for a while, it seems that unless and until a Court order is discharged, it ought to be obeyed. A question that immediately arises is this-what happens between the making of the orders and the date of the discharge? Simple logic dictates that as long as the orders are not discharged, they are valid. And since they are valid, they should be obeyed., in observance,not in breach. That being the case, it seems to me that the only way in which a litigant can obtain a reprieve from obeying a court order before it is discharged is by applying for and obtaining a temporary stay. As long as the order is not stayed, and is not yet discharged, then a litigant who elects to disobey it does so at the pain of committing a contempt of court".

The Learned Judge at pg 306 further observed as follows;

"While acknowledging that the general principle governing matters of contempt of court is that set out in Gordon V. Gordon (supra) , the court in HADKINSON v. HADKINSON (supra) further said that there exist exceptions to that general principle. Continuing with his speech at p.570, Romer L.J. said-

"… One of such exceptions is that a person can apply for the purpose of purging his contempt, and another is that he can appeal with a view to setting aside the order on which his alleged contempt is founded…" The defendant does not come within any of these exceptions. However, after summarising the history of the rule through the ecclesiastical courts to the modern times, Denning, L.J., said, at pp 574-575-

"…It is a strong thing for a court to refuse to hear a party to a cause and it is only to be justified by grave considerations of public policy. It is a step which a court will only take when the contempt itself impedes the course of justice and there is no other effective means of securing his compliance… I am of opinion that the fact that a party to a cause has disobeyed an order of the court is not of itself a bar to his being heard, but if his disobedience is such that, so long as it continues, it impedes the course of justice in the cause, by making it more difficult for the court to ascertain the truth or to enforce the orders which it may make, then the court may in its discretion refuse to hear him until the impediment is removed or good reason is shown why it should not be removed."

The Learned Judge at pg 307 continued and reiterated as follows;

"At the risk of repeating myself, the learned Lord Justice made it clear that it is not every matter of defence which entitles a person in contempt to be heard. He said at p.705- "I do not for one moment suggest that it is every matter of defence which entitles a person in contempt to be heard. For instance, if an order has been made in the exercise of the discretion of the court, and someone who thinks himself oppressed by that order appeals, saying that the court has exercised its discretion wrongly, that person if he is in contempt, cannot be heard to say anything of the sort until he has purged its contempt. Gardstin v. Gardstin [1865] 4 SW. & Tr. 73, is an instance of that kind.

If this proposition is anything to go by, and if the orders complained of were made, as I think they

were, in exercise of the court's discretion, then the defendant should not be heard to complain. His Lordship then continued "But when you come to an order which it is suggested may have been made without jurisdiction, if, upon looking at the order one can see that that is the ground of the appeal, it seems to me that such a case has always been treated as one in which the court will entertain the objection to the order, though the person making the objection is in contempt…"

In the case of ***Bell vs. Tuhoy & Another (2002) 3 All ER 975 Pg 981, para 22,*** the honourable learned judge Neuberger opined as follows;

"That an order made by a judge of unlimited jurisdiction, for instance in the High Court must be obeyed, and failure to observe it can amount to contempt of court, however irregular it might be unless and until it is reversed or set aside". (see Bell vs. Tuhoy & Another See also Issacs vs. Robertson (1984) 3 All ER 140 at 142-143,(1985)AC 97 at 101-103)

As much as civil contempt is an aspect of civil litigations it has got criminal implications/inclinations and hence its threshold is not merely founded on a balance of probability but at times it must be proved beyond reasonable doubt. Therefore the committal law is to the effect that the standard of proof required at committal proceedings is the criminal standard. In the case of ***Ringera and 2 others vs. Muite and 10 Others HCC at Nairobi, Civil Suit No. 1330 of 1991,*** the honourable court shed light on the criminal aspect of the civil contempt when it reiterated that;

"...indeed contempt proceedings take on the feature of criminal proceedings in most aspects. So there are important things to be considered in this connection. This has been alluded to in case law and treaties..."

In the foregoing case the court reiterated further as follows;

"...where contempt proceedings are placed before a court for hearing quite a number of legal issues and principles come to the fore e.g. existence of the orders that ought to be obeyed or executed, service, proof of breach, penalties etc. these aspect of fact in committal for contempt proceedings includes fairly basic issues: e.g were court orders in existence; did the defendant(s) know of them; were they indeed breached..." (See Ringera & 2 Others vs. Muite & 10 Others, ibid.)

In applying the law on contempt of court in the Ringera case, the judge relied on the following principle;

'...the power of committal clearly touches upon the liberty of the subject and to the extent the jurisdiction may be regarded as 'quasi-criminal...' the greatest restraint and discretion should be used by the court in dealing with the contempt of court...' (see Ringera vs, Muite ibid. See also Alridge & Eady: 'The Law of Contempt' 1987, paragraph 8-07, as cited in Ringera, IBID)

As noted in the Ringera Case, the main salient features of disobeying court are:-

1. The contemnor must be aware of the existence of the court order.

2. There must be an existing court order capable of being disobeyed.

3. Breach thereof must be proved.

In the present case, the existence of the court order alleged to have been breached is not disputed. All that the Respondent alludes to is that she has not disobeyed it all.

So, was the order capable of being breached? The answer is in the definite affirmative. It was framed in express and straightforward terms. Besides, even the Respondent herself concedes that she understood it, save that she has not disobeyed it. In this regard, I must delve into the issue as to whether the acts of disobedience were proved by the Applicant.

As rightly submitted by learned counsel Mr. Mukabane, the prove of the acts of disobedience is mandatory. And the evidence tendered thereof must be so strong because there lies the risk of depriving the contemnor of his/her liberty.

In the case of **MITITIKA -VS- BAHARINI FARM LTD (1985) KLR, 227**, **(Supra)** the Court of Appeal sitting in Nairobi held;

"The standard of proof in contempt proceedings must be higher than proof on a balance of probabilities, and almost, but not exactly, beyond reasonable doubt as it is not safe to extend the latter standard to an offence which is quasi-criminal in nature. The guilt of a contemnor has to be proved with such strickness of proof as is consistent with the gravity of the charge."

The Applicant referred the court to the particulars of the breach of the order to the averments contained in paragraphs 4, 5, 6 and 7 of her supporting affidavit. They are;

- breaking of a padlock

- collecting rent of the house the Respondent broke into at Lincoln hotel

- renting houses at Kaptagat building to strangers.

Interestingly, she did not provide any iota of evidence demonstrating that the padlock was broken into or the names of the tenants from which the rent was collected, or any receipts issued pursuant to receiving the alleged rent. Evidence of breakage would have been provided by a mere photograph. Although she alluded that she reported the matter to the Police Station, that is not sufficient evidence of existence of such information. She ought to probably have shown the content of that O.B number or even called a police officer to confirm the existence of such a complaint.

On the face of it, all what the Applicant alluded to as consisting the breach of the order was mere allegations. Those allegations were not proved and/or substantiated. The court cannot rely on them as sufficient evidence to hold the Respondent to be in contempt of the court.

I do however concur with learned counsel, Mr. Kibii that court orders are not made in vain. They must be obeyed by all and sundry, the mighty and the lowly, notwithstanding that either may not agree with it as there are avenues to ventilate any disagreement(s). And of course the simple explanation to this is that the rule of law and the dignity of the court must be upheld. These tenets were well enunciated by learned Mabeya, J. in the case ***Africa Management Communication International Limited v Joseph Mathenge Mugo & another [2013] eKLR, H.C at Nairobi, Milimani Law Courts,*** *Civil Case No. 242 Of 2013*, the learned judge Mabeya J, stated thus;

"I have considered the Affidavits on record, the submissions of counsel and authorities relied on. I propose first to deal with the prayer for contempt and committal. Black's Law Dictionary (Ninth Edition) defines contempt of court as:-

"Conduct that defies the authority or dignity of a court. Because such conduct interferes with the administration of justice, it is punishable usually by fine or imprisonment."

As early as 1778, Chief Justice McKean of the United States, when dealing with a case of a party in Civil litigation who refused to answer interrogatories is noted to have stated:-

"Since however, the question seems to resolve itself into this, whether you shall bend to the law, or the law shall bend to you, it is our duty to determine that the former shall be the case." (The History of contempt of Court (1927) P 47)

In Johnson Vs Grant (1923) SC 789 at 790 Clyde L J noted:-

"The phrase 'contempt of court' does not in the least describe the true nature of the class of offence with which we are here concerned.... The offence consists in interfering with the administration of the law; in impending and perverting the course of justice..... it is not the dignity of court which is offended – a petty and misleading view of the issues involved, it is the fundamental supremacy of the law which is challenged." (Emphasis mine).

...

I am of the same persuasion. The reason why power is vested in courts to punish for contempt of court is but to safeguard the rule of law which is fundamental in the administration of justice. The law of contempt has evolved over time in order to maintain the supremacy of the law and the respect for law and order. As it was in the time of Chief Justice McKean in 1778, so it is today that courts have a duty to ensure that citizens bend to the law and not vice versa. Indeed, if respect for law and order never existed, life in society would be but short, brutish and nasty. It is the supremacy of the law and the ultimate administration of justice that is usually under challenge when contempt of court is committed. This is so because, a party who obtains an order from Court must be certain that the order will be obeyed by those to whom it is directed. As such, the obedience of a court order is fundamental to the administration of justice and rule of law. A court order once issued binds all and sundry, the mighty and the lowly equally without exception. An order is meant to be obeyed and not otherwise."

In essence, whereas this court has the power to punish a party for contempt of a court order as envisaged under Section 5 (1) of the Judicature Act, Cap 8, Laws of Kenya, it is my view that there is no substance or material for which the Respondent can be punished for. That is to say, that the acts constituting the disobedience were not proved.

In the end, I find that the Applicant has failed to meet the threshold of the requirement of the orders she seeks. At this juncture then, I hold that it has not been proved that she unlawfully collected any rent in flagrant disobedience of the court order. The application must therefore fail. The same is dismissed with costs in the cause.

It is so ordered.

DATED and **DELIVERED** at **ELDORET** this 30th day of September, 2014.

G. W. NGENYE - MACHAIRA

JUDGE

In the presence of:-

Miss Kiptanui holding brief for Kibii for Applicant

Mr. Mukabane for the Respondent

Mr. Cheserem holding brief for Chemwok for Paddy Karanja