



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

SUCCESSION CAUSE NO. 284 OF 2009

**IN THE MATTER OF THE ESTATE OF GEORGE AMUGUNE LUGADIRU
(DECEASED)**

BETWEEN

MILKA WANGOI KAMAU 1ST PETITIONER/APPLICANT

LYDIAH MMBONE AMUGUNE 2ND PETITIONER/APPLICANT

VERSUS

HABBY MISOGA LUGADIRU RESPONDENT

RULING

Before me for determination is the Summons to commit the Respondent to civil jail dated 22nd February, 2013. The Applicants Milka Wangoi Kamau and Lydia Mmbone Amugune are the Petitioners herein. The Respondent herein is Habby Misonga Lugadiru. The application is brought under Rule 73 of the Probate and Administration Rules. It is intended that he (Respondent) be committed to civil jail for a period not exceeding six months.

The application is premised on the following grounds:-

- (a) THAT the Court issued an order on 9th July and Habby Misoga Lugadiru was supposed to surrender motor vehicle KBE 405E together with the logbook to the Petitioners herein.**
- (b) THAT the Respondent herein did release the motor vehicle but has adamantly refused to release the logbook.**
- (c) THAT the order was duly endorsed with a notice of penal consequences and was personally served to the Respondent.**
- (d) THAT despite several reminders the Respondent has failed to release the logbook.**
- (e) THAT on the 19th December, 2012, the court issued an order granting leave to institute contempt of court proceedings against the Respondent.**
- (f) THAT on the 20th of December, 2012, the order was duly served upon the Respondent.**

The Respondent in opposing the application swore a Replying Affidavit on 7th June, 2013. In a nutshell it is deposed that he is not in a position to surrender the log book as ordered by the court

because the same was deposited with a company by the name Westwind Limited as a security for a loan advanced to the deceased's estate.

The application was disposed of by way of filing written submissions. Those of the Applicants are dated 9th May, 2014 and were filed on the same date. They argue that the Respondent was served with the court order directing that he releases the log book to motor vehicle registration No. KBE 405E which bore a penal notice on the risk of him being prosecuted for failure to obey it.

It was submitted that the Respondent consented to the conditions set out in the order. That the agreement binding the logbook as a security for a loan was entered by the Respondent without the consent of the Applicants. That in any case, that agreement is fictitious as the Respondent did not raise the issue that the logbook was a security on 9th July, 2012 when it was ordered that he releases the same.

The submissions from the Respondent are dated 16th April, 2014. He stated that he was not in a position to release the logbook as it was being held by the creditor as security for a loan advanced to the estate. He agrees to having consented to the order entered on 4th July, 2012, but that his hands are tied by the fact that he does not hold the logbook.

I now take the following view of the application.

2.3 Contempt of Court.

2.3.1 Definition

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.

2.3.2 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 Mutika 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 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 arbitrariness, 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 his 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)

In *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.

“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 impeding 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.”

2.4 Determination

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 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 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 contemtor 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.

Again, the evidence brought forth before the court must be so strong due to the risk of depriving the contemtor of his/her liberty.

In the instant case, it is alleged that although the Respondent released the motor vehicle he deliberately failed to release its log book. Apparently, the order subject of this application was obtained with the consent of all parties, hence existence of the order cannot be disputed.

The order was subject of court proceedings for 12th July, 2012 before the Hon. Justice F. Azangalala. The court recorded as follows:-

“The consent dated 4th of July, 2012 is adopted as an order of the Court.”

The consent referred to by the court is in the court record dated and filed on 4th July, 2012 part (b) of the same reads:-

“Habby Misoga Lugadiru to immediately surrender motor vehicle KBE 405E together with the log book, duly signed transfer form, copies of ID Card and PIN to the new administrators.”

It appears the Respondent did not explain to the administrators on time the handles he was encountering in not releasing the log book. In an apparent disclosure of what he was averring, he deponed as follows in his Replying Affidavit.

“14. That, on the 30th day of April, 2012, the company management of Westwind Limited demanded for log book of vehicle No. KBE 405E as security for repayment of the loan.

15. That, I discussed with my Co-Petitioner and she gave me a go ahead to deposit the log book with the company's management.

16. That, everything we did together was on trust for the benefits of the estate of the deceased and we saw no need of committing our discussions and decisions in writing.

25. That, I also handed over the lorry to the Applicant and informed them that now that they had taken over the lorry, they should arrange to clear the amount which I was paying on behalf of the Estate of the deceased.

27. That, the debt was being paid for the proceeds of the lorry.

28. That, the original log book cannot be paid before the debt is cleared.

30. That, I am surprised that they are claiming that, I wanted to sell the lorry and have refused to hand over the log book while they have the lorry, I have signed transfer and I have explained where the original log book is.”

In an attempt to counter what the Respondent deposed, the Applicant only made submissions in the following words:-

“The allegations contained in the Respondent's affidavit are an afterthought and should

be disregarded. The Respondent's annexure marked '9b' was signed by the Respondent alone without involving the Applicant herein which was illegal. The Respondent pledged the log book as security on 30th April, 2012 but this issue was not raised by the Respondent on 9th July, 2012 when the order for the release of the log book was issued. It is our submission that the said agreement is fictitious and meant to defraud the beneficiaries of the estate of George Lugadiru."

The immediate foregoing assertions by the Applicants do not in any way rebut or dislodge the deposition on oath by the Respondent. My deduction from what the Respondent has averred on oath is that, at all material times when the log book was forwarded to the estate creditors, the Applicants were aware about it. And they were not only aware but also consented to the arrangement. They cannot now turn around and back-stab the Respondent.

So then, even if this court were to find that the orders for the release of the log book existed which they do any way, they are orders which as at now are not capable of being executed because the log book does not exist per se. That is to say it is not in the hands of the Respondent. The Applicants are guilty in their way of orchestrated the process of the Respondent's inability to obey the orders. As such, it is my view that the Respondent cannot be held as having disobeyed the said orders.

It is also important to note that the orders as recorded had no time frame within which they were to be executed. The Respondent was only required to "*immediately*" released the log book.

According to Oxford Advanced Learners Dictionary, the word immediately is defined at page 749 as "without delay". The order was issued on 12th July, 2012. It is now two years since the said order was issued. By all standards, the delay has been exhibited. However at the time this order was being issued, the Respondent was not in possession of the said log book. The log book had been deposited as security for the loan taken for the benefits of the deceased's estate and hence it was in custody of the said creditor, Westwind Limited.

It is clear that this fact was within the knowledge of all parties though it was not brought to the attention of the court. This is so because, the Respondent swears that:-

"That, I discussed with my co-petitioner and she gave me go ahead to deposit the logbook with the company's management. That everything we did together was on trust for the benefits of the estate of the deceased, and we saw no need of committing our discussions and decisions in writing....." (See paragraphs 15 and 16 of the Replying Affidavit)

In view of the foregoing, it follows therefore that the words 'without delay' are now relative. They are relative to the extent that, unless the logbook is redeemed from the creditors, it cannot be released. The period within which it can be redeemed is purely in the hands of the estate beneficiaries. In the premises it is my humble opinion that the Respondent is not in contempt of the said court order due to its ambiguity.

Finally, let me mention something about penalties for contempt of court. In **BELL -VS- TUHOY & ANOTHER (2002) 3 All ER (Supra)** at page 984, paragraph 33, Lord Denning had this to say;

"..... that committal is as last resort and is only appropriate in exceptional cases whenever there is a reasonable alternative available instead of committal to prison that alternative must be taken"

From my analysis of facts preceding this application, it is evident that both parties agreed on what befell the Applicants. The best approach is that the Applicants should round up the interested parties in the estate, organize on repayment of the loan and pay it off after which the log book shall be released to them.

In the result, the application is dismissed with each party to bear its own costs.

DATED and **DELIVERED** at **ELDORET** this 25th day of September, 2014.

G. W. NGENYE - MACHARIA

JUDGE

In the presence of:

Mr. Kimani for the Petitioners/Applicants

Mr. Wamboba holding brief for Andambi for the Objector/Respondent