



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**SUCCESSION CAUSE NO. 397 OF 2005**

**IN THE MATTER OF THE ESTATE OF LIVINGSTONE MUKUNYA MURIU – (DECEASED)**

**RULING**

1. The Motion dated 16<sup>th</sup> May 2014 is premised on Order 52 rule 3(2) of the Rules of the Supreme Court of England. It seeks committal to civil jail of Benson Mugo Mukunya for a period of six (6) months for contempt of court.
2. Leave to initiate the Motion for contempt of court orders was granted on 28<sup>th</sup> April 2014. The application for leave is dated 24<sup>th</sup> March 2014 and was filed in court on the said date. It was supported by a statutory statement of even date and an affidavit sworn by the applicant on 24<sup>th</sup> March 2014.
3. The applicant's case is that orders were made on 8<sup>th</sup> March 2011 by Kimaru J. prohibiting the respondent from doing certain acts. The respondent was allegedly notified of the orders through his counsel when the latter turned in court later after the orders had been made. There is also a letter on record allegedly authored by the respondent addressed to counsel for the applicant which is exhibited as evidence of the fact that the respondent was aware of the making of the said orders. He is said to have violated the terms of the orders by transferring certain properties to himself, he has offered some properties for sale, he has also cut down a fence, among others.
4. The respondent has responded to the application vide an affidavit sworn on 18<sup>th</sup> April 2014. He asserts that he was not served with the orders made on 8<sup>th</sup> March 2011 nor with any other prohibiting orders. He states that his letter which the applicant has attached to her affidavit clearly states that he had not been served with the said order even though he had heard about it. In any event, he says the orders are general in nature and do not refer to him nor to the property in question.
5. The *sine qua non* for grant of the orders sought is proof of service of the order in question and of breach thereof. It has to be established that there was personal service of the order. This means that the exact terms of the order in question must be brought to the attention of the person from whom compliance is required. The importance of that is that the person must know what is exactly required of them by the order. The best way of ensuring that the said terms are properly communicated to the person is by requiring his personal service. If there is proof of service, it must in the second place be established that the person has actually violated the order while aware of its exact terms. The emphasis is that the person ought to know the specific terms of the order. It is not enough that he knows that in general terms that such an order exists.
6. From the material before me, it is plain that the respondent was never served personally with the order. Its specific terms were not brought to his attention. The affidavit in support of the application does not state that the said order was extracted and served personally on the respondent. No affidavit of service is exhibited. The applicant merely avers that the respondent was notified of the order through his counsel, who was verbally informed of its making. She also relies on a letter where the respondent appears to say that he is aware of the making of some orders on the material date, but states that the specific order was never served on him or on his advocates. The service limb of the application no doubt has not been satisfied.
7. If there was no service of the order, the issue of violation or breach or disobedience thereof should not arise. Even if I were to find that there was personal service of the order, I am not satisfied that there is sufficient proof of the alleged breach of it. It has been alleged there were transfers of some assets.

Transfer of property, especially immovable property, is a documented process. It is easy to obtain proof of transfer. On offer to sell some of the assets, again no evidence has been provided. Documentary proof would have sufficed. If not, affidavits from the persons alleged to have received such offers or at least their names ought to have been mentioned and specific dates given as to when such persons visited the property for reviewing purposes. On cutting down of fences, photographic evidence would have been good proof.

8. It is imperative for parties who seek to have other parties cited for contempt of court to appreciate that the proceedings of that kind are quasi – criminal in nature. They carry grave penal consequences, such as loss of liberty and property. They are therefore attended by stringent conditions.

9. Without saying more, I have come to the conclusion that the application dated 16<sup>th</sup> May 2014 is not meritorious. It cannot be granted on the basis of the material that has been placed before me. I have no option but to dismiss it, and I do hereby dismiss the same costs with costs to the respondent.

**DATED, SIGNED and DELIVERED at NAIROBI this 11<sup>th</sup> DAY OF December 2014.**

**W. MUSYOKA**

**JUDGE**

**No appearance of both advocates for the parties.**