



REPUBLIC OF KENYA

High Court at Eldoret

Succession Cause 10 of 1985

IN THE MATTER OF THE ESTATE OF KAMAU GICHUI (DECEASED)

LEAH MUKAMI GICHUHI PETITIONER

VERSUS

MONICAH WAMBUI KAMAU OBJECTOR

RULING

The Objector's Notice of Motion filed and dated 28th June, 2012 was brought under Section 1A, 1B, 3A and 63 (c) of the Civil Procedure Act, Order 40 Rules 3 of the Civil Procedure Rules and all other enabling provisions of the law. The two main prayers are as follows:-

1. That the Respondent be and is hereby compelled to deposit in court certificates of lease over land parcels number Eldoret Municipality Block 6/95 and Eldoret Municipality Block 14/5 being the property of the estate of Kamau Gichuhi (deceased) and earlier ordered on 14th July, 2011 by the Honourable Court.
2. The Respondent be and is hereby committed to civil jail for a period not exceeding six (6) months for contempt of court.

The grounds upon which the application is brought are set out as follows:-

1. The Applicant came to court vide the application dated 11th February, 2011 for orders that the Respondent do deposit certificate of leases over land parcel numbers **ELDORET MUNICIPALITY BLOCKS 6/95 and 14/5** in court pending the hearing and determination of the application and further pending the distribution of the estate.
2. The Honourable court heard the said application on inter-parties hearing and determined it vide its ruling delivered on 4th June, 2011 ordering that the lease certificates to **ELDORET MUNICIPALITY BLOCK 6/95 and BLOCK 14/5** being the property of the estate of **KAMAU GICHUHI** (deceased) be deposited in court pending the distribution of the estate.
3. The said orders were extracted and served upon the Respondent who is in possession of the lease certificates to **ELDORET MUNICIPALITY BLOCK 6/95 and 14/5**.
4. The orders issued by the Honourable Court have never in any way ceased to be in force.
5. The Respondent has, since the time the orders were issued, never complied and/or obeyed the court.

6. The effect of the orders issued on 4th July, 2011 was for dispensation of justice, equity, fairness and lawful distribution of the deceased estate in regard to the land parcels.
7. The said order was duly endorsed with a notice of penal consequences.
8. Despite the court order the Respondent had adamantly and blatantly ignored to deposit the lease certificate to court.
9. The actions and/or lack of any by the Respondent is openly and flagrantly disregard of the court order amounts to gross disobedience and undermine of a lawful court order the due process of the court of law.
10. The said actions deserve to be punished severely in order to uphold the dignity of this Honourable court and the law.

It is further supported by the affidavit of the Objector sworn on 28th June, 2012. The gist in the depositions contained in this affidavit is that the Respondent/Petitioner has adamantly and without colour of justification refused to obey court order issued on 5th August, 2011, that either the Respondent/Petitioner or her counsel are in possession of the Certificate of Lease ordered to be deposited in court and that it is only fair and just that the Petitioner be ordered to deposit the same in court and be committed to jail for disobeying court orders.

The application is opposed vide a Replying Affidavit sworn by the Petitioner on 9th July, 2012. She depones that she never had possession of the original Certificates of Lease in respect of the two plots Eldoret Municipality Block 6/95 and 14/5 respectively and so she is not in a position to avail them, that it is within the knowledge of the Objector that the original Certificate of Lease in respect of Eldoret Municipality Block 6/95 was deposited with the firm of Kibichiy and Company Advocates, that by consent order recorded on 16th October, 1985 before Hon. Justice V. V. Patel, as he then was, the parcel Eldoret Municipality Block 14/5 had been sold to third parties as at 1985, that the proceeds of sale of this plot No. 14/5 was shared out among herself (Petitioner), the Objector and one Njoroge Gichuhi, that she has never been served with any order and that vide a Certificate of Confirmation of grant issued on 17th February, 1997, she was granted exclusive ownership of Eldoret Municipality Block 14/5.

The Objector in countering the Replying Affidavit has sworn a Further Affidavit on 18th July, 2012. She depones that the Petitioner's assertion that she has never been in possession of the Certificates of Lease is not true and court, in delivering its ruling leading to the orders for which the Petitioner is allegedly in contempt had considered this fact, that when the court gave the orders that the Certificates be deposited in court, it took into account that M/s. Kibichiy & Co. Advocates were in possession of the said Certificates of Lease, that the Petitioner was indeed served with the order, that the consent order has been superceded by the order that relates to this application and that the Petitioner is intent on defeating the dignity and due process of the court.

A Further Replying Affidavit is also sworn and filed by the Petitioner on 11th February, 2013 in which she reiterates that parcel Eldoret Municipality Block 6/95 does not exist and that the Certificate of Title was surrendered to the Ministry of Lands way back in 1987, that the Certificate of Lease in respect of Eldoret Municipality Block 6/95 was deposited with the law firm of Kibichiy and Company Advocates on 17th March, 2009 with the consent of both parties for purposes of sub-division and that in effect, the matter has been fully settled out of court and so the Objector is estopped from re-opening it.

The application was canvassed before me on 18th February, 2013. Counsel for the respective parties made oral submissions which I have carefully considered.

It is noted that leave of court to file those contempt proceedings was granted on 9th July, 2012 in the application dated 19th January, 2012. It is contested by the Petitioner that she was ever served with the order, the subject of this application. Whether or not counsel for parties have exchanged correspondence in respect hereof, service of the order must be demonstrated. Such service must be accompanied by the

Penal Notice warning the party being served of the consequences of non compliance with the order.

I have seen the affidavit of service sworn by Vincent Otieno Ogutu a court Process Server on 17th October, 2011 the same shows that personal service of the order was effected on the Petitioner on 18th October, 2011 at her own building adjacent to Jogoo Building within Eldoret town. Although she contests such service while denying knowledge of the Process Server, no request was made by her counsel to call the process for purposes of cross examination of the Process Server. Without any evidence in the contrary, I hold that proper service of the order was effected upon Leah Mukami Gichuhi, the Petitioner/Respondent herein.

The order was dated 4th June, 2011 and issued on 5th August, 2011. Below it is a “Notice of Penal Consequences” in the words that:-

“ unless you fully comply with it you will be committed to civil jail for a period of time not exceeding six (6) months for contempt of court”

Hence the Petitioner is well aware of consequences of non compliance with the order.

The order read as follows:-

- (a) The Certificate of Lease over land parcel numbers **ELDORET MUNICIPALITY BLOCK 6/95** and **ELDORET MUNICIPALITY BLOCK 14/5** be and is deposited in court pending the hearing and determination of this application thereafter pending the distribution of the estate herein.
- (b) The Certificate of Confirmation of a Grant issued on 17th February, 1997 and 28th October, 1997 be and is hereby set aside, cancelled and expunged from the record.
- (c) That a proper confirmation of a grant be and is issued in terms of the consent order made herein by the Honourable Justice V. V. Patel on 16th October, 1985.

The orders were issued pursuant to hearing of application by the Objector dated 11th February, 2011 in which she sought three main prayers, namely, that Certificate of Lease over land parcel numbers Eldoret Municipality Block 6/95 and Eldoret Municipality Block 14/5/ be deposited in court pending the hearing and determination of the application and thereafter pending the distribution of the estate, that the certificates of confirmation of grant issued on 17th February, 1997 and 28th October, 1997 be set aside, cancelled and expunged from the record and that a proper Certificate of Confirmation of grant be issued in terms of the consent order entered herein by the Honourable Justice V. V. Patel on 16th October, 1985.

The application was canvassed before Hon. Justice F. Azangalala and ruling delivered on 4th July, 2011, from which the subject order was extracted.

Taking into account the submissions made before me, it is imperative to determine whether or not the orders issued were capable of being effected. If the answer is in the negative, it will settle the application and if in the affirmative, court proceeds to issue orders sought accordingly. I am alive to the fact that court cannot give orders in vain and will also not give orders which are not capable of being executed. In **WAFULA OUMA KUTORO -VS- JEREMIAH ODULI OMA CIVIL APPEAL NO. 3 OF 2003 e KLR** which sentiments of the High Court are persuasive to me, court noted:-

“It is well settled principle by the law that courts of law do not issue orders in vain. The orders issued must be capable of execution”

“..... The order issued by the Senior Resident Magistrate's Court by way of adoption cannot be executed because the title which the order affected no longer exists.”

“..... where the decision is incapable of execution it is the duty of a court to send the decision back for reconsideration to confirm with the law”.

In respect of parcel number Eldoret Municipality Block 14/5, as latest as 7th February, 2013 the Ministry of Lands, the District Land Officer, Uasin Gishu confirmed that this Plot was sub-divided in 1987 resulting in numbers 355 – 371. The letter by the District Land Officer is addressed to M/s. Njuguna & Company Advocates in reply to theirs dated 22nd January, 2013 by which the latter had requested for the release of the Certificate of Title thereof. The letter is annexed to the Further Affidavit of the Petitioner as LM.1.

Pursuant to the ruling of the court of 4th July, 2011, a fresh Certificate of the Confirmation of a Grant was issued on 26th July, 2012, in the terms of the consent order recorded before Hon. Justice V. V. Patel on 16th October, 1985.

A look at the schedule of distribution numbers 1 & 3 on this Certificate show that this plot was to be distributed in the following manner:-

1. Two acres and all the improvements thereon to Leah Mukami Kamau.
2. The rest of the acres which had not been sold as at 16th October, 1985 or to be sold and the balance of the proceeds of the purchase price thereof to be shared equally between the two widows.

Therefore, it is clear that even as at 16th October, 1985 when the consent order was recorded, court recognized that, indeed a portion of this plot had been sold by the 16th October, 1985. As such it was in order for the parties beneficiary entitled to this plot to distribute the property accordingly. This progressed on very well as statement of account dated 11th February, 1986 on how the proceeds were expended is annexed to the Replying Affidavit as “LMG.2”.

In the ruling of 4th July, 2011, the court recognized one pertinent issue. That the position of this parcel was not clear. When I read through the ruling it is clear that parties did not disclose to court that the parcel had already been sold out. Even then, the terms of the consent order recorded before Hon. Justice V. V. Patel attests that it was to be distributed accordingly. That is exactly what has happened. A reversal of this status is not possible. Accordingly, the Petitioner is not in a position to hand over the Lease Certificate in respect of this parcel of land.

As regard Eldoret Municipality Block 6/95, the consent order shows that it was to be distributed in the following manner:-

- 1. Leah Mukami Kamau – to get half share of the front shop.**
- 2. Monicah Wambui Kamau – Half share of the front shop and all the residential quarters at the back thereof.**
- 3. The loan of Ksh. 540,000/= plus interest chargeable on the said loan which was taken by Njoroge Gichuhi for which loan Eldoret Municipality Block 6/95 was charged to be paid by Njoroge Gichuhi and no other loan should be taken on the said property without the consent of the two widows.**

It is contended by the Objector that the issue of the Certificate of Lease of Plot 6/95 being with M/s. Kibichiy & Co. Advocates was ruled on in the court's ruling dated 4th July, 2011. That therefore the petitioner cannot rely on this assertion as a basis not to release the Certificate of Lease. I have read the ruling and indeed, similar issues were raised before the Judge, but the court did not clearly come up with a conclusion of who it found was in possession of the same. The basis upon which its release was ordered was on recognition that this plot was part and parcel of the deceased estate and that the distribution was still ongoing.

I cannot sit on appeal of my contemporary Judge's ruling; but facts presented before me clearly show that, as well this Lease Certificate is not in the hands of the Respondent and that indeed the Objector is seized of this knowledge. Sample this for instance, attached to the Replying affidavit of the Petitioner is a

joint letter dated 17th March, 2009 written and signed by both the Petitioner and the Respondent to M/s. Kibichiy & Company Advocates. Reference of the letter is – **ELDORET MUNICIPALITY/BLOCK 6/95**. In part it reads:-

“We confirm that you liase with M/s. Integrity Property Consultants (Att: David Mutesh) who will undertake survey, beaconing, physical planning, mapping and all other related arrangements to facilitate official/formal sub-division of the property into two equal portion for transfer by you to each of us accordingly.

We confirm that the title hitherto with you further to P&A proceedings be retained by your office for the above purpose”.

No further evidence is required to demonstrate that the Petitioner is not in possession of this title/Certificate unless the contrary is proved by the Objector. I find it hypocritical and in bad faith for the Objector to request for this title yet she is part and parcel of the process that enabled M/s. Kibichiy & Co. Advocates to retain it. The Objector should in effect have requested the court to direct the orders on M/s. Kibichiy & Company Advocates.

In essence it is not possible to compel the Petitioner to purge a contempt for which none was committed. If I were to find that she was contemptuous, I would then address myself as to whether the right procedure which must be strictly adhered to was followed – See **CHILTERN DISTRICT COUNCIL -VS- KEARIE (1985) 1 WLR, 619** and **JACOB ZEDEKIAH OCHINO & ANOTHER - VS- GEORGE AURA OKOMBO & 4 OTHERS, CIVIL APPEAL NO. 36 OF 1989.** The strict adherence to procedure is of essence bearing in mind that the proceedings are of a criminal nature and a person is likely to be sent to jail.

In the upshot, I uphold the Petitioner's submissions. Parties should go back to the drawing board, revisit the ruling that gave rise to the orders that are subject of this application, or even record a consent based on the current status of the two parcels of land.

In the result, the application is dismissed as lacking in merit. Each party shall bear its own costs of this application.

DATED and DELIVERED at ELDORET this 20th day of March, 2013.

G. W. NGENYE – MACHARIA

JUDGE

In the presence of:

Mr. Omusundi for the Objector/Applicant

Mr. Mwinamo for the Petitioner/Respondent