



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Succession Cause 813 of 2009

IN THE MATTER OF THE ESTATE OF KULIENTA NASHERO OLE KOPPAI – (DECEASED)

RULING

The application for determination is that dated 18th October 2012. It is premised on **Section 5(1)** of the Judicature Act, **Sections 1A, 3, 3A and 63(e)** of the Civil Procedure Act and Order 52 rules 2 and 3 of the Rules of the Supreme Court of England, 1999. The application seeks committal orders against one Daniel Munei ole Kupai for disobeying an order of this Honourable court made on 8th May 2012.

Paul Pololet ole Kupai Kulienta has sworn an affidavit to support the application. He describes himself as an administrator and beneficiary of the estate of Kulienta Nashero ole Koppai who died on 7th October 1982. Grant of letters of administration were made to him jointly with Daniel Munei ole Kupai and Oloishuro ole Kupai. The three administrators are surviving sons of the deceased, and so are Laimoi ole Kupai and Lemondoi ole Kupai. The grant was confirmed on 26th May 2010. He avers that he obtained orders on 5th April 2012 restraining the administrators of the estate from interfering with a property known as Kajiado/Lorngusua/3 which formed part of the estate. He accuses the respondent, David Munei Ole Kupai, of disobeying the said order by way of cutting down or felling trees in the subject land. He avers that the respondent was in court when the orders were made. After the orders were made the applicant, through counsel, extracted the orders and served the formal order on the respondent and his lawyers. The respondent was also allegedly served with a penal notice.

I have carefully perused the record in this matter. I note that after grant made on 27th July 2009, the administrators jointly applied for confirmation of grant by their summons dated 22nd February 2010. The children surviving the deceased were listed in the confirmation of application as:

- (a) Paul Pololet ole Kupai Kurenta
- (b) Oloishuro ole Kupai
- (c) Lemondoi ole Kupai
- (d) Larmoi ole Kupai
- (e) Daniel Munei ole Kupai

The estate was expressed as comprising of one asset – Kajiado/Lorngusua/3. It was proposed that the estate be divided into three portions, commensurate with the three houses, representing each of the three wives of the deceased. Each house was apportioned 1/3 of the estate. This means the asset, Kajiado/Lorngusua/3 nos to be shared equally between the three houses. This translated to apportionment as follows:-

- (a) Daniel Munei ole Kupai 1/3
- (b) Oloishuro ole Kupai 1/3
- Larmoi ole Kupai

The confirmation application was allowed and the grant made on 27th July 2009 was confirmed along those lines on 26th July 2010. A certificate of confirmation of grant of even date was issued.

On 18th September 2011, James Kioi Muhuri, describing himself as a purchaser of a portion of the Kajiado/ Lornigusua/3, lodged a summons in court, dated 16th September 2011, seeking an injunction to restrain alienation or subdivision of the said property. He also sought rectification of the certificate of confirmation of grant to accommodate him as a beneficiary. He alleged to have had bought the property on 20th June 2008 from the administrators/beneficiaries/heirs of the estate. The application was never argued but the court on 2nd October 2011 described it as void and on 1st November 2011 as dead in the water. It would appear that for all practical purposes the application dated 18th September 2011 has been abandoned.

On 10th April 2012, an application dated 5th April 2012 seeking similar orders of injunction and rectification was filed in court, this time by Paul Pololet ole Kupai Kulienta. He is one of the administrators. He accused this co-administrators of the estate, Daniel Munei ole Kupai and Oloishuro ole Kupai of the same acts that James Kioi Muhuri had accused the administrators of in his application dated 16th September 2011, hence the injunction orders sought. He also sought to have the certificate of confirmation of grant rectified so as to distribute the estate between the five sons of the deceased equally instead of splitting the estate equally between the three houses of the deceased, and also so as to provide for James Kioi Muhuri. The similarity between the two applications is striking and so is the fact that the applicants in both applications are represented by the same law firm, Wamuyu Omung'ala & Co. Advocates.

On 10th April 2012, the application dated 5th April 2012 was placed before Ochieng J, who ordered maintenance *status quo* till 24th April 2012. The *status quo* orders were extended to 8th May 2012, by Mugo J. On 8th May 2012 Mugo J granted interim orders in terms of prayer 2 of the application to last until the hearing date to be fixed at the registry within 14 days. Hearing date was fixed for 20th June 2012, on which date it was directed that the application be disposed by way of affidavits and written submissions. Further directions were given on 24th July 2012. The interim orders granted on 8th May 2012, which were to last until the hearing date to be fixed at the registry, were not extended on 20th June 2012.

The effect of the interim orders made on 8th May 2012 was to restrain Daniel Munei ole Kupai and Oloishuro ole Kupai from subdividing, alienating, disposing of, distributing or offering for sale or in any way dealing with Kajiado/Lornigusua/3. The order made in the presence of Omung'ala for the applicant and Mr. Mboche for the respondents. The record is silent on whether the parties themselves were in court.

A formal founded on the proceedings of 8th May 2012 was extracted on 11th May 2012. There is no record to show whether or not the formal order extracted on 11th May 2012 was served on the respondent. I have carefully perused through the record and I have not seen an affidavit of service relating to service of order made on 8th May 2012 and extracted on 11th May 2012.

On 19th October 2012, the applicant lodged the Motion, the subject of this ruling, seeking committal of Daniel Munei ole Kupai to prison for such period as the court may decide fit for disobeying the order made on 8th May 2012. He is alleged to have felled trees in the subject land. It is alleged that the lawyer for the respondent was in court when the orders were made and that the order was extracted and served on the respondent's lawyers. It is not indicated when these acts of waste were committed; there is just a mention of 22nd August 2012.

The Kenyan law on the court's jurisdiction in contempt of court proceedings is stated in **Section 5(1)** of the Judicature Act, Cap 8, Laws of Kenya.

The provision states that:-

“(1) The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice of England and the power shall extend to upholding the culture of and dignity of subordinate courts”.

The effect of this provision is that the procedural law governing civil contempt proceedings is to be found in the contemporary English law of civil contempt. At present this is set out in Orders 45 and 52 of the Rules of the Supreme Court of England. The application dated 18th October 2012 is founded on, among others, Order 52 of the rules of the Supreme Court Practice of England of 1999.

The procedure set out in Orders 45 and 52 of the Rules of the Supreme Court of England was summarized by Sargon J in **Awadh vs Marumbu**(2004) 1 KLR 454. The applicant must seek leave by making an *ex parte* application supported by a statement setting out the name and description of the applicant, description and address of the person sought to be committed and the grounds on which his committal is sought. The statement must be accompanied by a verifying affidavit. Notice of the application must be given to the Registrar of the High Court of the intent to file the application a day before the application is actually lodged in court. Once filed the application is placed before a judge who may grant leave for the filing of the substantive application. Where leave is granted, the substantive application, taking the form of a Motion, should be lodged in court within 21 days. In **Ingolo -vs- Kenya Sugar Board and Others**(2007) 1 EA 92, Wendoh J. held that an application for leave to commence contempt proceedings ought to be modelled along the same lines as a judicial review application. Leave must be sought in a summons. A notice has to be served on the registrar not later than the preceding day of the filing of application.. The affidavit has to be accompanied by a statement and a verifying affidavit . Leave is granted on the Chamber Summons, after which the applicant files a Motion, based on the statement and verifying affidavit filed contemporaneously with the Chamber Summons application for leave. I wish to add that the statement and affidavit must specify in detail the alleged breaches of the court order.

One of the principal prerequisite of a contempt application is service of the order allegedly breached and notice of penal consequences. As a general rule, before a person is punished for contempt it must be established that he was served personally with a copy of the order in question and the said order must be endorsed with a notice informing the person upon when the order is served that if he disobeys the order there would be penal consequences. This is so because contempt of court, as stated by Lord Denning Deving in **Re Bramblevale Limited** (1970) Ch 128, is an offence of a criminal character. The statement and affidavits filed in support of the application must provide facts to demonstrate service of the said order and notice of penal consequences.

Has the applicant complied with the procedure set out in Orders 45 and 52 of the Rules of the Supreme Court of England, and which is restated in **Awadhi -vs- Marumbu** and **Ingolo -vs- Kenya Sugar Board and others**? It would appear that the applicant has not complied with the procedure. The applicant did not file a Chamber Summons seeking leave to bring contempt proceeding. No notice was given to the Registrar of the High Court. No leave was obtained before the filing of the substantive Motion. Secondly, the order alleged to have been breached was never served personally on the respondent as required. The record talks of service on his lawyers, but such service is not personal service the person alleged to have breached the order.

Thirdly, the Motion does not indicate the exact dates when the alleged acts of disobedience were committed. This is important taking into account that the order was only valid from the 8th May 2012 when it was made and the 20th June 2012 when it lapsed after the court failed to extend it. The order made on 8th May 2012 states:

“(3) Interim orders in terms of prayer 2 are hereby granted to last until the hearing date which shall be taken at the registry within 14 days”.

The hearing date was fixed on 18th May 2012 for 20th June 2012. The interim orders were to last till 20th June 2012 when the matter was to be heard. The orders ought to have been extended on 20th July 2012. They were not, so they elapsed.

Forth, the order that was allegedly violated stated as follows when extracted:-

***“ (3) That DANIEL MUNEI OLE KUPAI , PAUL POLOLET OLE KUPAI KURNTA and OLOISHURO OLE KUPAI as administrators of the estate of KULIENTA NASHERO OLE KUPAI through themselves, agents and/or servants or any other person be and are hereby temporarily restrained from subdividing, alienating, disposing of distributing, offering for sale or in any other way dealing with all that parcel of land known as LR No: KAJIADO/LORNGUSUA/3 forming part and parcel of the estate of the above named KULIENTA NASHERO OLE KOPAAI until the hearing date which shall be taken at the registry within 14 days.*”**

The Motion dated 18th october 2012 accuses the respondent of violating the order of 8th May 2012 by cutting/felling trees in the subject parcel of land. The question that arises is whether the felling or cutting down of trees are acts which violate the order of 8th May 2012. The acts restrained are:-subdividing, alienating, disposing of, distributing, offering for sale or in any other way dealing with the parcel of land in question. The ***“dealing with”*** must be read ***ejusdem generis*** with subdividing, alienating, disposing of, distributing and offering for sale. It must be an act relating to the land itself, and not to things standing on the land. Clearly, the acts complained of do not amount to a violation of the order made on 8th May 2012.

I need not say more. The Motion dated 18th October 2012 is wholly misconceived and without merit. I hereby dismiss it. Costs of the application are awarded to the respondent.

DATED, SIGNED and DELIVERED at NAIROBI this 19th DAY OF April, 2013.

W. M. MUSYOKA
JUDGE