



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAKURU**  
**SUCCESSION CAUSE NO. 96 OF 2000**

**IN THE MATTER OF THE ESTATE OF THE LATE RAHAB WANJIRU EVANS**

CHRISTINE WANGARI GACHIGI

& OTHERS.....PETITIONERS/ADMINISTRATORS

**VERSUS**

ELIZABETH WAMBUI & 8 OTHERS.....OBJECTORS/BENEFICIARIES

**RULING**

By a Notice of Motion dated 25th October 2012, the Applicant sought the following orders-

1. *that the application be heard ex-parte in the first instance and the same be certified as urgent,*
2. *that this Honourable Court be pleased to order that Elizabeth Wanjira Evans, Mary Wanjiku Gachigi, Lucy Wanjiku Ndungu, Fredrick Kimemia Kimani and Edward M. Oonge be detained in prison for a period of six months for disobeying the Order of injunction made by this court on 19th September 2012 and extended by the court on 1st October 2012,*
3. *that the contemnors bear the costs of this application.*

2. The application was supported by the Affidavit of Christine Wangari Gachigi and the Supplementary Affidavit filed on 7th December 2012. The Applicant, Elizabeth Wanjira Evans and Mary Wanjiku Gachigi (*hereinafter referred to as the 1st and 2nd Contemnors respectively*) are also co-administrators of the estate of the deceased, Lucy Wanjiku Ndungu and Fredrick Kimemia Kimani are Directors of a company known as Luziki Holdings Limited, which was enjoined as an interested party in this suit whereas Edward M. Oonge is the Counsel for the 5th Respondent.

3. The Applicant alleges that by an Application dated 18th September 2012, she sought orders of the court to remove the 1st and 2nd Contemnors as Administrators of the Estate of the deceased. She also sought for a temporary injunction to be issued restraining them from selling, alienating or transferring the assets of the Estate of the Late Rahab Wanjiru Evans (Deceased). The Application was heard ex-parte on 19th September 2012 when the following order was made-

***“that this honourable court be and is hereby pleased to issue an order of temporary injunction to restrain the Respondents, Elizabeth Wanjira alias Elizabeth Wanjira Evans and Mary Wanjiku Gachingi by themselves or through their agents, servants or assigns from intermeddling with any of the assets of the Estate of the late Rahab Wanjiru Evans and from transferring, leasing, charging, managing or in any other way alienating the said assets***

***particularly L.R No. 209/11540 and Title No. NAKURU MUNICIPALITY/BLOCK 4/258 pending the hearing and determination of this application.”***

4. The Application was to be heard inter-partes on 1st October 2012. The Applicant contends that despite having knowledge of the orders, the Contemnors acted in total disregard of the same and purported to sell one of the properties belonging to the deceased. She also accused the Contemnors of entering into a lease agreement wherein it was agreed that the Interested Party would be given an option to purchase the property should the same be offered for sale. It is pursuant to this agreement that the 1st and 2nd Contemnors instructed the firm of M/s Konosi & Company Advocates to advertise the property as being for sale.

5. The 1st Contemnor filed a Replying Affidavit sworn 8th November 2012 and written submissions dated 14th December 2012. She alleged that the application was fatally defective and denied having been served with a copy of the court order. She denied having disobeyed the orders of the court as alleged.

6. On her part the 2nd Contemnor filed a Replying Affidavit sworn on 5th November 2012 and written submissions filed on 3rd December 2012. She acknowledged knowing about the existence of the orders of 19.09.2012 but denied breaching or disobeying the orders in any way. She further contended that the acts complained of through exhibits No. CWG6 and CWG 7 took place on 2.04.2012 and 1.09.2012 before the orders were granted by the court. In addition, the 2nd Contemnor stated that her name does not appear in the letter of 5th October 2012 exhibit CWG8. Further the intended sale was for property known as L.R N.O 209/1140 whereas the land injuncted by the court was L.R 209/11540, and that there was no evidence that the exhibit 8 was written under the instructions of the 2nd Contemnor.

7. The 3rd and 5th Contemnors also filed Replying Affidavits sworn on 28th November 2012 and 27th February 2013 respectively where they have generally denied being in contempt of the injunctive court orders. Mr. Githui filed written submissions on 19th February 2012 for the Beneficiaries.

8. I have read the application, the affidavits sworn in support and against and all the submissions filed by the parties. The first issue for determination in this matter is which Orders are the subject of this application. The Applicant has cited several orders which the Contemnors allegedly disobeyed, and include the orders issued by the Court of Appeal in Civil Appeal No.144 of 2007 which was consolidated with Civil Appeal No. 233 of 2007. The Court of Appeal has the same powers under Section 5 of the Judicature Act to punish for contempt as are possessed by this court and is therefore capable of enforcing its orders. This court can only therefore deal with the order issued by it on 18th September 2012.

9. The second issue raised by the parties was in relation to service of the order of the court. The 2nd Contemnor was served personally but the 1st Contemnor was served through her Advocate M/s B.W. Mathenge & Company Advocates. The 3rd, 4th and 5th contemnors were also not served personally. Contempt of court is a quasi-criminal offence, and the general principle of law is that the contemnor be served personally with the application for contempt.

10. Halsbury Laws of England volume 9, 4th Edition at page 37 which deals with the necessity of personal service in the contempt of court proceedings provides as follows:-

***“As a general rule no order of the court requiring a person to do or abstain from doing any act may be enforced unless a copy of the order has been served personally on the person required to do or abstain from doing the act in question. In case of an order requiring a person to do an act the copy must be so served before the expiration of the time within which he was required to do the act”.***

11. This passage was cited in **Ochino & another v Okombo & 4 others** [1989] KLR 165 where the court added that-

***“As we read the law, the effect of the English provisions is that as a general rule, no order of court requiring a person to do or abstain from doing any act may be enforced (by committing him for contempt) unless a copy of the order has been served personally on the person required to do or abstain from doing the act in question. The copy of the order served must be endorsed with a notice informing the person on whom the copy is served that if he disobeys the order, he is liable to the process of execution to compel him to obey it.”***

12. It is clear from the above passages that personal service of the order sought to be enforced together with the penal notice is mandatory for the person accused of disobeying it to be cited for contempt. It is necessary so that the court can satisfy itself that the person knew of the terms of the order and chose not to comply with the terms therein. The order must be served on the party required to obey it and service on his Counsel does not constitute personal service as was held in **Kariuki & 2 others v Minister for Gender, Sports, Culture & Social Services & 2 others [2004] 1 588**. However, in the present case, there is evidence that all the alleged contemnors knew of the existence of the order. Indeed, the 1st contemnor filed an application dated 28th September 2012 by which she sought to have the injunctive orders discharged. The 3rd and 4th Contemnors filed an application dated 28th September by which they sought to be enjoined as parties to the suit on account of the injunctive orders as the same would substantially affect their interests. It is thus clear to me that although the parties were not served by the Applicant, they knew of the existence of the orders and clearly understood their terms. The question therefore is, can a party who chooses to disobey an order of the court hide behind the veil of not being personally served even when it is clear to the court that despite not being personally served, he knew of the existence of the order and the terms thereof but nevertheless acted in their disregard? The court in the case of **Gatimu Farmers Company v Geoffrey Kagiri Kimari & 3 others [2005] eKLR** was faced with a similar question and it held as follows-

***As is stated in Halsbury’s Law of England, 4th Edition Volume 9, paragraph 65;***

***“Where an order requires a person to abstain from doing an act, it may be enforced notwithstanding that service of a duly endorsed copy of the order has not been served, if the court is satisfied that, pending such service, the person against whom enforcement is sought has had notice of the terms of the order either by being present when the order was made or being notified of the terms of the order, whether by telephone, telegraph and otherwise.”***

Thus according to the court,

***“The most important aspect of obedience of an order of the court is knowledge. If a person becomes aware of an order of the court which binds him, he has no option but to obey it. Such person need not be a party to the suit.”***

13. I therefore find that in the present case, the 1st, 3rd, 4th & 5th Contemnors were not personally served with an endorsed copy of the order of injunction. However, there is irrefutable evidence that they knew of its existence and its terms and were therefore bound to obey it even though they were not party to the suit, they did not agree with the order or felt that it was unjust but upon being aware of the same they are expected to abide by them.

14. The third issue relates to the acts which the Applicant alleges were contemptuous and these are -

(a) Letter dated 2nd April 2012 addressed to Kinaro Kimaiga Ndubi Property Managers CWG 5 by which the Respondents marketed the suit property with a view to sell it.

(b) the Respondents purported to enter into a Lease Agreement by a letter dated 8th August 2012 for a term of 5 years. In the Lease Agreement the contemnors agreed to give the lessee the first option to purchase the property.

(c) a letter dated 5th October 2012 by which the 5th Respondent acting on the instructions of the Proposed Interested Party and with the concurrence of the 1st and 2nd Respondents purported to authorize the sale of the suit property at the market price of Kshs. 700 million.

15. The first 2 acts were committed before the order of injunction was issued by this court. They relate to the orders of stay that were made by the Court of Appeal and as I have already stated that court has powers to enforce its orders and the party aggrieved should apply to the said court and were done before the injunctive orders subject of this Ruling were issued. Therefore the alleged contemptuous act which is relevant to this Ruling is the 3rd act where it is alleged that the the 5th Contemnor acting on the instructions of the proposed interested party and with the knowledge and concurrence of the 1st and 2nd Contemnors purported to authorize the sale of the suit premises.

16. The suit premises was not sold, neither was the same transferred or leased as ordered by the court. By authorizing the sale of the suit premises, there is a clear intention to sell the property contrary to the court orders. The court punishes for an act committed and this has to be proven on therefore, even in an instance such as this. In finding this I am guided by the holding in **Balough vs. Crown Court at Albans [1974] 3 ALL ER 283** -

***“The admitted acts of B did not however amount to contempt or an attempt to commit contempt, assuming (per Stephenson L) that an attempt to commit contempt was an offence, for B's acts were merely preparatory acts falling short of contempt or an attempt to commit contempt; it was not contempt to plan or intend a contempt.”***

17. **Finally** it is not clear that M/s Konosi & Company Advocates the author of the said letter of 09.2012 was acting on behalf of the Contemnors as it is only stated that the said firm is acting on instructions of the beneficiaries. For a person to be cited for contempt, it has to be proved that they did commit the act complained of. In this particular case, the case against the contemnors has not been proved to the required standard.

In the circumstances I hold that having found that the act complained (inciting the letter) was not sufficient to constitute a contemptuous act punishable by this court. I find that the application dated 25/10/2012 has not merit and dismiss the same with costs.

There shall be orders accordingly.

**Dated, signed and delivered at Nakuru this 12th day of July, 2013**

**M. J. ANYARA EMUKULE**

**JUDGE**