



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Succession Cause 799 of 2009

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

EMMA WANJIKU NDUNGU (suing as the Administratrix of the estate  
of the late JAMES KAGETHE KAMAU and on behalf of TERESIAH  
WANJIKU KANGETHE .....APPLICANT

VERSUS

FRANCIS NJOROGE KAMAU

VERONICA WANJIRU NJUGUNA

NICHOLAS MUYA KAMU

JOSEPH KAMAU MUIGAI

BONIFACE NJUNGE KAMAU.....RESPONDENTS

R U L I N G

This is an application for committal to civil jail for contempt of court. It is brought by a Notice of Motion dated 24<sup>th</sup> February, 2012 and taken out under **Section 5** of the **Judicature Act** and **Order 52** of the **Rules of the Supreme Court of England**. The Applicant seeks orders that-

1. (spent)
2. This honourable court be pleased to order that the Respondents, being the Administrators of the deceased's estate, be committed to civil jail for contempt of court orders dated 14<sup>th</sup> April 2009.
3. This honourable court be pleased to issue such other orders as it deems just to grant against the Respondents for blatantly disobeying lawful orders issued on 14<sup>th</sup> April, 2009 by this honourable court.
4. That costs of this application be provided for.

The application is supported by the affidavit of Teresiah Wanjiru Kangethe, an interested party, and is premised on the Applicant's statement of facts dated 9<sup>th</sup> February, 2012; the affidavit verifying the statement dated 9<sup>th</sup> February, 2012 both filed in this court on the 15<sup>th</sup> February, 2012, and on the

following grounds, inter alia-

**(a) That the applicant filed Summons for Revocation of Grant issued and confirmed on 4<sup>th</sup> June, 2008 for the following reasons-**

**(a) That the proceedings at the Chief Magistrate's Court at Thika to obtain the Grant were defective in substance.**

**(b) That the Chief Magistrate's Court at Thika had no jurisdiction to issue the Grant in respect of the estate of Kamau Muigai (deceased)**

**(b) That Emma Wanjiku Ndungu, an interested party to the estate of Kamau Muigai (deceased) "all filed summons for Revocation of Grant" (sic).**

**(c) That pursuant to the said Emma Wanjiku Ndungu's summons for Revocation this honourable court issued orders on the 14<sup>th</sup> April, 2009 maintaining status quo of the deceased's estate pending determination of summons for Revocation.**

**(d) That at the time the orders were issued deceased's estate had not been disposed off to 3<sup>rd</sup> parties.**

**(e) That the said orders were duly served upon the Respondents.**

**(f) That despite the Respondents been served with the orders they proceeded in utter disregard and contempt of this court's orders by disposing the following properties comprising of the Deceased's estate.**

- LIMURU/RIRONI/218
- LIMURU/RIRONI/63
- LIMURU/ITONI/4487/4
- Plot No. 4953/472/THIKA TOWN

**(h) That the dignity of this honourable court must be maintained.**

At the hearing of the application, Mrs. Wambugu appeared for the Applicant; Mr. Thuku held brief for Mr. Gichigi for the Objector; Mr. Gathoga held brief for Mr. Joseph Kamau Muigai for one of the Respondents; and Mr. Muthomi for all the other Respondents. After considering the pleadings and the submissions of the respective counsel, I note that a synopsis of the statement of facts discloses that the basis of this application is the alleged disobedience of some court orders which were first made in 2009 and thereafter extended from time to time, and which directed that status quo in respect of the estate of Kamau Muigai (deceased) be maintained. In the statement of facts, it is further stated that the said interim orders were served upon the Respondents. However, this being an application for committal for contempt of court, it is not enough that the Respondents were served with the orders said to have been breached. The orders served should also have borne a Penal Notice warning of the consequence of disobedience. Unless the orders served on the Respondents were accompanied by such a notice, then they cannot form a basis for committal for contempt.

In her supporting affidavit sworn on 9<sup>th</sup> February, 2012 Teresiah Wanjiru Kangethe, the interested party, attests in paragraphs 5, 8, 9 and 10 as follows-

**"5. That I am advised by my Advocate on record that the said orders were extracted and served upon the Respondent. (Annexed hereto and marked as "TWK-4" is a copy of the Affidavit of**

Service).

8. That the above mentioned orders were extended from time to time (Annexed hereto and marked as “TWK-5” are copies of various orders).

9. That I am advised by my Advocate on record on the 4<sup>th</sup> October, 2011 that this honourable court did issue orders maintaining the status quo over the estate of the deceased pending determination of the summons for revocation (Annexed hereto and marked as “TWK-6” is a copy of the order).

10. That I am advised by M/s. Gichigi & Co. Advocates which information I verily believe that all orders aforesaid together with penal notices were duly served upon the administrators and all the beneficiaries.”

Three main points arise from these statements. Firstly, the deponent of the affidavit relies not on her personal knowledge, but on advice by her advocate. Secondly, her statement in paragraph 10 to the effect that “...all the orders aforesaid together with Penal Notices were duly served upon the administrators and all the beneficiaries” was also made on advice by an advocate. She has no personal knowledge of what was served. Thirdly and most importantly, the court has perused the annexures marked as “TWK-4”, “TWK-5” and “TWK-6”, and none of the orders therein attached bears any Penal Notice. Although “TWK-4” is an affidavit of service sworn by Naomi Florence Wanja Kamau, a duly authorized court process server. Although she attests to having received “copies of summons under certificate of urgency dated 9<sup>th</sup> April, 2009 and scheduled for inter partes hearing on 20<sup>th</sup> April, 2009, order dated 14<sup>th</sup> April, 2009, and copies of Penal Notice dated 14<sup>th</sup> April, 2009...” none of the orders attached carries any Penal Notice. For purposes of committal for contempt of court, these notices are non compliant for want of bearing any Penal Notice and cannot form the basis for committal to a civil jail.

Contempt proceedings are a delicate procedure which is jealously guarded. The consequences of contempt being penal, an applicant must show that he himself has complied with the procedural requirements. If such requirements are not strictly adhere to, the court will not grant a committal order for contempt. One of the requirements is that mere knowledge of all terms and directions of the court is not enough for the purposes of holding a party liable for contempt. It is not enough that those accused of contempt were privy to the orders which they are accused of breaching. It must be shown further that the alleged contemnors had been served with copies of the court order which carried a penal notice. In the case of NYAMODI OCHIENG NYAMOGO & ANOR v. KENYA POSTS AND TELECOMMUNICATIONS CORPORATION, Civil Application No. Nai 264 of 1993, it was held that mere knowledge of all the terms and directions of the court order is not enough for the purposes of contempt. This view had been previously held in the case of Jacob ZEDEKIAH OCHINO & ANOR v GEORGE AURA OKOMBO & OTHERS Civil Appeal No. 36 of 1989, in which it was held that no order requiring a person to do or refrain from doing an act may be enforced by contempt unless a copy of the order has been served personally and endorsed with a notice informing him that if he disobeys the order he is liable to the process of execution.

In the instant case, it has not been demonstrated that the above conditions were satisfied as no evidence has been tendered of any penal notice having been served on the alleged contemnors. Secondly, such notice should be served on the contemnors personally and not through their advocate(s). It is unfortunate that contemnors should escape liability for their transgressions on account of procedural lapses. However, committal proceedings being quasi criminal in nature, they attract more stringent requirements than the ordinary civil process.

For the above reasons, I am afraid that the Respondents cannot be liable for committal to a civil jail because the laid down procedure for committal for contempt was not meticulously observed. It may well be that this could be perceived as lenience on the part of the court while, unfortunately, it is a procedural lapse which is probably meant to safeguard the liberty of a citizen. It has not escaped the attention of this court that in the face of these stringent procedures, in the English case of MARIA ANNIE DAVIES

**[1989] 21 QBD 236 at 239**, it was observed that recourse ought not to be to a process of contempt in aid of a civil remedy where there is any other method of doing justice, and the jurisdiction of committing for contempt should be most jealously and carefully watched, and exercised with greatest reluctance and greatest anxiety on the part of the judges to see whether there is not other mode which is open to the objection of arbitrariness, and which can be brought to bear upon the subject.

By reason of the foregoing, this application fails and it is accordingly dismissed. However, since the contemnors are not that innocent, I decline to award them the costs of the application.

Orders accordingly.

**DATED** and **DELIVERED** at **NAIROBI** this 20<sup>th</sup> day of July, 2012.

**L. NJAGI**  
**JUDGE**