



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

SUCCESSION CAUSE NO. 147 OF 2010

IN THE MATTER OF THE ESTATE OF SILAS KAGINA GICHONI –DSD

CHRISTOPHER NDARU KAGINA APPLICANT

VERSUS

ESTHER MBANDI KAGINA 1ST RESPONDENT
TABITHA IKAMBA KAGINA 2ND RESPONDENT

RULING

The deceased Silas Kagina Gichoni died on 7th November 2008 and left 29 parcels of land and shares in various companies. He was survived by two widows Esther Mbandi Kagina and Tabitha Ikamba Kagina. They are the Respondents in this application. He left several children who include Christopher Ndaru Kagina who is the Applicant. The Respondents petitioned for Letters of Administration in High Court Succession Cause No.147 of 2010 and the Applicant cross-petitioned for the same. In High Court Succession Cause No. 147 of 2010 the Applicant petitioned for letters and the Respondents cross-petitioned. In an application dated 16th February 2011 the Applicant sought that the two petitions be consolidated. The application was allowed on 28th February 2011 following the consent of the parties through their advocates.

On 14th March 2011 the Applicant filed an application by way of summons seeking to restrain the Respondents from dealing or interfering with the properties in the estate. He also sought that the proceeds, profits and/or monies collected from properties in the estate be deposited into court until such time that the final distribution of the estate has been done. On 29th March 2011 the application came before Justice Warsame. The Applicant was represented by Mr. Mungai and the Respondents by Mr. Utuku. A consent order was recorded which, among other things, directed the Respondents to give kshs.10,000/= to the Applicant every month with effect from 5th April 2011 and thereafter every 5th day of subsequent months until the hearing and determination of the dispute. The record shows that counsel signed the consent order as did the Applicant and 1st Respondent. The 2nd Respondent was present.

Following leave, the Applicant filed the present application seeking to have the Respondents committed to prison for having failed to pay the amount as was ordered. In the supporting affidavit the Applicant swore that despite having extracted and served the order the Respondents had not paid the amount on the due dates, or at all. The application was served but did not elicit any response by way of a replying affidavit or grounds of opposition. During the hearing of the same, the Respondents were

represented by Mr. Nabutete. Counsel indicated that the Respondents had, subsequent to the consent order, filed an application to have the order reviewed and set aside on the basis that they had not instructed Mr. Utuku then on record for them to enter into the consent. The application was supported by a lengthy affidavit jointly sworn by the Respondents. It says, among other things, that the deceased had provided for the Applicant during his life time. Mr. Nabutete invited the court to consider this affidavit. However, it is clear that the affidavit supports their application to set aside the consent order and will be considered when that application will come for hearing. As matters stand, the present application is not opposed. Mr. Nabutete was at liberty to seek time to respond to the present application but did not make that election.

The result is that the averment by the Applicant that the consent order was entered into in the presence of the Respondents and their counsel has not been controverted. Also not controverted is the averment that the Respondents were subsequently served with a formally extracted order with a penal notice. I accept that evidence. The standard of proof in contempt proceedings is higher than proof on a balance of probabilities, and almost, but not exactly, beyond reasonable doubt. (*MUTITIKA –VS- BAHARINI FARM LTD [1985] KLR 227*).

The Respondents were under a duty, and under unqualified obligation, to respect the terms of the consent order. They were under a duty to pay to the Applicant Kshs.10,000/= every month with effect from 5th April 2011 and thereafter on every 5th day of each subsequent month. When they did not pay on 5th April 2011 a reminder was served on them on 6th April 2011. Leave was sought on 12th April 2011 and the application filed on 17th May 2011. Strictly, there was no payment for the months of April and May. That is Kshs.20,000/=. It is clear that the Respondents are challenging the consent order. However, until the order is set aside, discharged or stayed, the Respondents were under duty to obey it. Anything else would be to undermine the rule of law and to compromise the administration of justice.

I allow the application and find that the Respondents are in contempt. I ask that they show cause why they should not be punished as by law provided. Costs shall be paid to the Applicant.

DATED, SIGNED AND DELIVERED AT EMBU THIS 28TH DAY OF JULY 2011

**A.O. MUCHELULE
JUDGE**