



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

SUCCESSION CAUSE NO.2763 OF 2008

IN THE MATTER OF THE ESTATE OF DAMARIS NJERI KIMANI (DECEASED)

STEPHEN KIMANI

WAIGANJO.....APPLICANT

VERSUS

JAMLECK MWANGI KIMANI.....1ST

RESPONDENT

HELLEN WAKARINDI.....2ND

RESPONDENT

R U L I N G

1. What is before me is an Application dated 5th May 2011 by one, Hellen Wakarindi, seeking orders and specifically that;

“1. Ben Malesi of P.O. Box 14836-00100 Nairobi holder of Pin No.A001775685Z & Patrick Mbethi Kilundo of P.O. Box 14836-00100, Nairobi holder of Pin No.A003157514G, directors of Setmark Properties Limited, 1st and 2nd Defendants herein be committed to prison for such period as this Honourable Court may deem fit and just.

2. An order of refund with interest of all the money they have collected for twenty one (21) months.

3. An order directing the said Directors/Defendants to pay the Applicants/2nd Respondent all the outstanding arrears amounting to Kshs.183,000/- (One Hundred and Eighty three thousand Shillings only) up to [the] month of April 2011 with interest.

4. ***The cost of and/or occasioned by this Motion and for obtaining leave thereto be paid by the 1st and 2nd Defendants.***”

2. I see no Affidavit in support but the grounds relied on are the following;

“1. That by an order made by the Honourable Justice J. Gacheche on 27th July 2009, the learned Judge directed and ordered inter alia that the 1st and 2nd Defendants do pay a sum of Kshs.50,000/- (Fifty Thousand Shillings) for the rental collection of August 2009 and a sum of kshs.10,000/- till the case is determined.

2. That they deposit rental income on [a] monthly basis.

3. That the order was extracted by the Plaintiff in person who then served upon 1st Defendant Patrick Mbithi Kilundo on 5th August, 2009.

4. Notwithstanding the foregoing, the said Defendants have flagrantly disobeyed the entire order and have refused, neglected and/or otherwise failed to comply with same.

5. As a consequence thereof, the authority and dignity of this Honourble Court has been, and continues to be exposed to ridicule and disrepute.

6. The said Defendants are in willful and blatant contempt of the order.

7. It is in the interest of justice and for the purposes of upholding the dignity and honour of this Honourable Court that the orders sought herein ought to be granted.

8. The Applicant has no other means of enforcing the order.

9. Leave to commence committal proceedings was granted on 13th April, 2011.”

3. I have taken time to read the record in the matter and indeed on 27th July 2009, Gacheche, J. ordered as follows;

“1. ...

2. That the rental income for the following properties be collected by Setmark Properties Limited of P.O. Box 14836-00100 Nairobi and be deposited in court on monthly basis, with effect from 1st August 2009:-

(i) Plot No.949 held in Mwiki Company Limited and situated in Githurai 45.

(ii) *Plot No.113/381 held in Lucky Summer Estate Co. Limited situated in Pipe Line – Embakasi.*

3. That the fee payable to Setmark Properties Limited which shall not exceed the monthly collected income, shall be deducted from the sums so collected on a Quarterly basis.

4. That the parties do nominate 3 persons who shall if acceptable to court be the Administrators of the Estate.

5. That the 2nd Respondent do draw the sum of Kshs.50,000/- from Setmark properties Limited from the rental income of August, 2009 and thereafter a sum of Kshs.10,000/- per month until the application is heard and determined.

6. That whatever she will have drawn be set – off against her entitlement share of the Estate of the deceased herein.”

4. Reading the above order, it would seem that the Applicant’s complaint is that since Order number 5 has not been complied with, the Directors of Setmark Limited be committed to Civil Jail and the other orders set out elsewhere above be granted as well. She raised nothing new in submissions save to add, tearfully, that she was suffering and needed the money for her upkeep.

5. By a Replying Affidavit sworn on 24th May 2011, Patrick Mbithi Kilundo, a Director of Setmark properties deponed that his firm was appointed by this court to manage the estate of Damaris Njeri (deceased) on an unclear date but it became difficult to do so because of hostility from the deceased’s family. That their agent, Philomena Wanjiru, was chased away from plot No.949 at Mwiki and the action prompted a protest letter to the Registrar of this court dated 26th October 2009 further, some of the family members who were living as tenants on the deceased’s properties have refused to pay any rent.

6. Lastly, that all monies collected as rent were remitted to court and regular statements filed thereafter.

7. In submissions, Mr. Masika for the Applicant stated that the Application was premature as no statement of accounts was demanded before the orders for committal to Civil Jail was sought. Further, that the Applicant was not the only party affected by any orders made with regard to the estate and, in any event, the family of the deceased was wholly to blame for the inability of the estate agent to collect all rents due.

8. I have considered the Application and will quickly dismiss prayers 2 and 3 for reasons that they are wholly premature and, I say so because the cause before me began as a citation and I am actually surprised that before any person was granted Letters of Administration and before all assets and beneficiaries were ascertained, parties have spent the last three (3) years haggling over rents from the deceased’s properties. That process has flouted the procedures known to the Law of Succession Act whose purpose in fact is to “*define, consolidate the law relating to intestate and testamentary succession and the administration of estates of deceased persons.*” Part (vi) of the Probate and Administration Rules refers to citations generally and a citation was never meant to be a complete substitute to the formal process by which a grant is obtained and the estate administered according to law.

9. The Applicant, by seeking “*refunds*” of monies collected by the agent and by seeking certain payments to be made directly to her, is in effect seeking to establish her entitlement prematurely. I say this without forgetting that Gacheche, J. granted her certain monies from the estate but which monies will be taken into account during distribution. I have deliberately raised that pertinent issue because I cannot sit and purport to overturn that decision and aware that neither the Applicant nor any other party has sought to set aside or review the said order.

10. Turning to the substantive issue of contempt of court, I note that the Applicant, not aware of the process by which contempt is established, failed to attach to the application an Affidavit setting out;

(i) The persons to whom the order was served, by whom and when.

(ii) An Affidavit of Service by a competent person.

(iii) The order itself, with a penal order (the one reproduced above is the one on the record only) I see Mwangi Wangondu vs Republic C. A. No.95 of 1988.

11. That being the case it is difficult to establish what contempt was committed, if at all. Further, and even if I were to proceed to ignore the failure to follow procedure, I see no contempt committed by the Respondent. All monies collected as rent has been deposited in court and from the protestations by the Respondent, it has been a frustrating experience collecting all rents and the Applicant was party to those actions. The Respondent was appointed by this court and has written a letter dated 17th May 2011 seeking that its appointment be rescinded and an alternative manager appointed. The reasons for pulling out of the brief is because in previous reports to the court, it was indicated to court that the actions of the deceased's family were inhibiting the ability to discharge the court ordered duties. Such a party cannot be cited for contempt when the same Applicant who seeks committal orders has not denied being partly the cause of the frustrations of the alleged contemprior. I dare say this; the Applicant has appeared before me only twice but on both occasions, she was less than courteous and was pushy, emotional and continuously interrupted proceedings including storming into my Chamber with her child in tow on 20th June 2011 to demand "justice". None of her applications was before me for hearing on that day. I raise these issues not out of disrespect to the Applicant but to indicate that she has by her conduct showed that the Respondent's complaints and concerns are not idle. Contempt of court may lead to the imprisonment of the Respondents and so proof thereof must be beyond reasonable doubt – see Denning M.R. in Re Bramb Vale Ltd [1963] 3 ALL E. R. 1062. No such proof has been exhibited in this case.

12. In any event, on the law and facts, her Application dated 5th May 2011 is misguided and is dismissed without any order as to costs.

13. As for her Application dated 2nd June 2011, seeking enforcement of the orders of Gacheche, J. (above), I have already made certain orders in enforcement thereof and so her suffering in a financial sense may have been alleviated, somewhat.

14. Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 8TH DAY OF JULY, 2011

I. LENAOLA

JUDGE

CORAM

I. LENAOLA – JUDGE

David – Court Clerk

Applicant present

ORDER

Ruling duly read.

I. LENAOLA

JUDGE