



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Succession Cause 667 of 1984

IN THE MATTER OF THE ESTATE OF PAUL MUTHIANI MUSAU (DECEASED)

RULING

This Ruling relates to notice of motion dated 20.12.06 and filed the same day by Osoro Juma & Co. Advocates who described themselves as being for the 'Applicant'. The notice of motion application is stated to be brought under section 5 (1) of the Judicature Act, Cap. 8 plus section 3A of the Civil Procedure Act, Cap.21 and seeks the following orders:-

1. THAT this honourable court be pleased to grant leave to the 'Applicants/objectors' herein to institute contempt proceedings against the Respondent herein JOSEPH KAWINZI MUTHIANI who has refused and/or neglected to respect the Court's Order issued on 08.12.06 as he has interfered with the said Court Order.
2. THAT the Respondent herein JOSEPH KAWINZI MUTHIANI be forthwith committed to civil jail for any period that the Court may deem fit having breached and/or disobeyed the said Court order issued on 08.12.06.
3. THAT costs of this application be provided for.

The grounds upon which the application is based are:-

- a) THAT this Honourable Court issued an injunction restraining the respondent JOSEPH KAWINZI MUTHIANI from buying her daughter NTHENYA KAWINZI on the parcel of land known as Nguluni/Komoaraock/774 till the determination of the succession matter part-heard before Rawal, J.
- b) THAT the Court Order was issued by Justice Kubo on the 8th day of December 2006 and was served upon the Respondent together with the Penal Notice attached hereto, the Respondent proceeded to bury his daughter in total disregard, deviance and disobedience to the Orders of this Honourable Court.
- c) THAT the Respondent ought to be punished to realize that Court orders need to be respected and unless the Respondent is punished for failure to obey the Court Order his actions shall prejudice the applicant's position and contention before the Court.

The application is supported by the affidavit of ALEXANDER MUOKI MUTHIANI sworn on 20.12.06. The deponent of the supporting affidavit described himself as a grandson of the deceased herein; that he (deponent) is one of the 'Applicants/objectors' herein; and that he had authority to 'make' the affidavit on behalf of the others.

At the hearing of the application before me, learned counsel, Mr P.K. Osoro said he appeared for the applicants while learned counsel, Mr G.E.O. Oluoch said he appeared for the respondent.

Mr Osoro said he was not pursuing prayer 2 until prayer 1 was granted. Mr Oluoch pointed out that prayer 2 presupposed that prayer 1 had been granted, which was not the case. Mr Oluoch added that even if prayer 1 was granted, contempt proceedings would have to be instituted, which may contain a prayer for committal of the respondent to civil jail. After Mr Oluoch's above submissions, Mr Osoro said he was withdrawing prayer 2 and this court duly marked prayer 2 as withdrawn.

Thereafter, Mr Osoro said that the court order alluded to at ground (b) was served on the respondent together with a penal notice but that the respondent went ahead and buried his daughter on the disputed suit land despite the order restraining him from so doing. Mr Osoro urged the court to grant the leave sought to institute contempt proceedings against the respondent, adding that facts regarding the respondent's contemptuous conduct 'can be demonstrated when applicant is granted leave to institute contempt proceedings.'

For this part, Mr Oluoch went into a fair amount of length to challenge the validity of service of the court order and penal notice on the respondent. Mr Oluoch essentially maintained that there was no valid service and that in consequence thereof, the application for leave to institute contempt proceedings cannot stand. Mr Oluoch also said that the 'applicant' is not a party to the proceedings before court since if he was he would have been aware that similar burial objection proceedings had been filed by the parties to this case in Machakos and dismissed. Mr Oluoch referred in the latter regard to the respondent's replying affidavit sworn on 25.01.07. I interpose here to note that the replying affidavit alluded to by Mr Oluoch is not in this court file. Mr Oluoch asked this court to dismiss the present application with costs.

In reply, Mr Osoro submitted that it is not correct to say the 'Applicant' is not a party to the present case. In the latter regard, Mr Osoro referred to summons dated 19.08.04 for confirmation of grant; pointed out that within that summons there is a handwritten document dated 14.07.04 listing members of the family of Muthiani who is the deceased in this case; that the person named at No.4, i.e. ALEXANDER M. MAINGI in that handwritten list, is the 'Applicant' in the present notice of motion and that he is a beneficiary and a party. Mr Osoro then sought to explain how the court order the 'Applicant' seeks to rely on came to be served in photocopy form. Mr Osoro said that the respondent does not in his replying affidavit sworn on 25.01.07 dispute service of the court order but only disputes service of the penal notice. Mr Osoro's final point of reply was that in the anticipated application for contempt, the applicant will reveal more issues regarding the respondent's contemptuous conduct.

I have given due consideration to the notice of motion application dated 20.12.06 and the opposition thereto.

The application before me does not show on its face who the parties thereto are. The deponent of the affidavit sworn in support of the notice of motion is ALEXANDER MUOKI MUTHIAN. He, *inter alia*, deponed that he is one of the applicants/objectors herein and that he had authority to 'make this affidavit on behalf of the others.' His supporting affidavit does not indicate who 'the others' are. The end result is that there is a notice of motion application before this court which does not indicate who the parties are, the deponent of the affidavit supposed to support the application says he is one of the unnamed applicants and purports to have been authorized by anonymous colleagues to swear the affidavit. If the court wished to verify whether Alexander Mwoki Muthiani was indeed authorized by parties to the application before court, to whom would the court direct the inquiry?

During his submissions before this court on the present application, Mr Osoro referred to summons dated 19.08.04, pointed to a handwritten list of 14.07.04 annexed thereto and said of the person at entry No.4 in that list, Alexander M. Maingi that he is the 'Applicant' herein. Even if Alexander Muoki Muthiani who swore the supporting affidavit to the present application is deemed to be the applicant herein, the discrepancy between his name as it appears in his supporting affidavit and the name Alexander M. Maingi appearing at No.4 in the handwritten list of 14.07.04 annexed to the summons dated 19.08.04 requires to be explained by actual evidence not by a mere statement from the Bar.

The approach to the notice of motion under consideration has been very casual. This is not acceptable.

The notice of motion application dated 20.12.06 is hereby declared incompetent and struck out, with costs to the respondent.

Orders accordingly.

Delivered at Nairobi this 3rd day of September, 2008,

B.P. KUBO

JUDGE