



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MERU

Succession Cause 8 of 1991

IN THE MATTER OF THE ESTATE OF M'MBIJIWE MUGUONGO (DECEASED)

M'IKIARA M'MBIJIWEPETITIONER/RESPONDENT

VERSUS

FRANKLINE MUGAMBI & OTHERS.....OBJECTORS/RESPONDENTS

R U L I N G

1. The Application dated 17.7.2006 is brought by M'Ikiara M'Mbijiwe under Order XXXIX Rule 3 of the Civil Procedure Rules and s.3 of the Civil Procedure Act for orders that Alexander Muthamia M'Mbijiwe, Charity Nkuene M'Mbijiwe, Mwenda Muthamia and Kinyua Muthamia be arrested and committed to civil jail for **"contempt of varied court order dated 14.12.2004."** The Applicant also seeks orders that this court should issue such further orders as may meet the ends of justice and in any event, that the Respondents should bear the costs of the Application.

2. From the Supporting affidavit sworn by the Applicant on 17.7.2006 I gather as follows;-

The deceased in the Succession Cause, M'Mbijiwe Muguongo was the registered proprietor of parcel number Abogeta/Upper-Chure/145 and pursuant to orders made in this cause there was sub-division parcel number Abogeta/Upper-Chure/2210 was created and registered in the Applicant's name. The land had tea bushes which the Applicant claims that the Respondents started plucking without his permission and he obtained restraining orders of injunction against them on 14.12.2004 The orders were said to have been served on 16.12.2004 and on 18.12.2004 when the Applicant went to the land, the Respondents chased him away and so on 17.7.2006, a year and a half later he presented the instant Application for them to be committed to civil jail for disobeying the said court order.

3. The Replying Affidavit by the advocate for the Respondents, Mburugu Kioga Esq. was sworn on 25th May 2007. In it, the deponent states that the resultant sub-divisions from parcel number Abogeta/Upper-Chure/145 i.e. Nos. 2208, 2209, 2210 and 2211 were all in the names of the Applicant who held them **"in trust for all the other beneficiaries."** The deponent from paragraphs 6 to 20 of the Affidavit delves into issues both on record and not on record in making the argument that the original parcel of land i.e. No. 145 was to be sub-divided afresh after a consent order was recorded before Kasanga Mulwa J on 25.11.2002. That the consent order specifically stated what acreage of land the beneficiaries to the estate would inherit and the Respondents called a surveyor to the land to effect the consent order, a matter the Applicant was not happy with. That parcel number 2210 no longer existed after that visit by the surveyor and no order regarding it could be breached and no contempt of court could have been committed. The deponent further states that the order of 14.12.2004 was temporary and had long lapsed and the orders

sought cannot be granted.

4. The Replying Affidavit is attacked in a Further Affidavit sworn on 27.6.2007 as having been sworn by an advocate and that the issues deponed to in it were contested matters.

5. Nothing new came up in submissions and no law was quoted and I should go straight to my appreciation of the issues before me.

6. Firstly, it has been said time and time again that an advocate should not depone any affidavit on contested matters because he is not a party and cannot possibly know those matters of his own knowledge (see small **Enterprises Finance Co. Ltd vs George Gikubu Mbuthia, Nai. HCCC 3088/1994**).

Further, where a client is available to depone to those matters that are in dispute and an advocate instead swears an affidavit in that regard, then his affidavit amounts to hearsay (see **Ramzan Abdul Dhanji vs Union Insurance Co. Ltd [1944] LLR 5721 (HCK)**) I say these things because in the instant Application, the issue to determine is whether there was or there was no contempt of the order issued on 14.12.2004. Contempt proceedings are akin to criminal proceedings and surely an advocate cannot descend into the dock and take his clients place in answering criminal charges. I wholly agree with the Applicant that the Affidavit of Mr. Mburugu Kioga, Advocate cannot be admissible in such circumstances and the same must be struck out as I hereby do.

7. Turning back to the Application in contention, I have seen the orders of Sitati J. made on 14.12.2004. The substantive order made was to the effect that “**Franklin Mugambi M’Mbijiwe and four others**” should be restrained from entering, remaining in or in any way interfering with the Applicant’s or his agents’ or family’s quiet occupation of and enjoyment of land parcel No. Abogeta/Upper Chure/2210 “**pending the hearing and determination of the Application.**” The Application was to be mentioned on 20.12.2004 for directions and I note that the orders were issued ex-parte.

8. I have also seen an Affidavit of service sworn by one Joseph Kithinji M’Kiambati on 20.12.2004 and filed on the same day he depones as follows on paragraphs 3 and 4 as follows:

“3. That on 16th December 2004 I served the same Order to the Objectors herein Geoffrey Mutwiri M’Mbijiwe, Franklin Mugambi M’Mbijiwe, Alexander Muthamia M’Mbijiwe, Samuel Kinoti M’Mbijiwe, Erastus Gitonga M’Mbijiwe & Charity Nkuene M’Mbijiwe at their homes at Upper-Chure Sub/Location by tendering copies thereof to them and requiring their signatures.

4. That the said Objectors accepted service, they took their copies but refused to sign my original copy which I return herewith duly served on the Objectors and their Advocates M.M. Kioga & Co. Advocates which copy was received by one Kabii a clerk in the said firm but refused to sign at the back of our copy.”

9. I should pause here and return to the record of 14.12.2004. Although the extracted order which I have highlighted above would seem to indicate that the learned Judge gave orders pending hearing and determination of the Application, her actual orders were as follows:-

“(i) The Application dated 22/9/2004 be and is hereby allowed in terms of prayer 4 thereof on a temporary basis.

(ii) Mention on 20/12/2004 for further orders.”

10. On 20.12.2004, one Mr. Mwangi holding brief for Mr. Kioga for the Respondents appeared and the interim orders extended to 11.5.2004. The record would indicate therefore that the Respondents were represented although the record of 11.1.2005 would show that Mr. Kioga was on leave, a matter recorded by Lady Justice Sitati.

11. Later in the proceedings, a preliminary objection was taken to the hearing of the Application dated 22.9.2004 which objection was dismissed and the same was never heard on its merits and no final orders

were issued in respect thereof. That however may not be an issue if the initial order of 14.12.2004 had been disobeyed.

12. As I understand the law relating to contempt of court certain conditions must be met before an order for committal to civil jail can issue. These are

- a. That the order is properly served on the alleged contemnors and
- b. That the order has a penal notice on its face and
- c. That there is clear evidence of breach of the order.

13. In this case I have seen the order and it has a penal notice to it. I have elsewhere above stated that the said order was said to have been served on 16.12.2004 upon **“Geoffrey Mutwiri M’Mbijwe, Franklin Mugambi M’Mbijwe, Alexander Muthamia M’Mbijwe, Samauel Kinoti M’Mbijwe, Erastus Gitonga M’Mbijwe and Charity Nkuene M’Mbijwe.”** The order purportedly served did not on its face have all the names of the Respondents to be served as it only read **“Franklin Mugambi M’Mbijwe and 4 others”** The process server himself stated that he received the **“order from M/s Kiautha Ariithi and Co Advocates for the Petitioner for service to the objectors herein”**. Who was he going to serve and how did he know that the **“4 others”** apart from Franklin Mugambi M’Mbijwe are the persons now sought to be committed to civil jail? Even if he knew who they were by name how did he know them in person for him to tender copies of the order? He said that he went to their homes in Upper-Chure Sub-Location. How did he know those homes? In MB Automobiles Ltd vs Kampala Bus Service [1966] E.A. 480 it was held that failure to record the name and address of the person identifying the person to be served renders the affidavit of service incurably defective and that it was a statutory duty to disclose the identifying person. In this case, who led the process server to the homes of the persons said to be the contemnors? It is not to be presumed at all that the process server without so saying in his affidavit knew who to serve, where to serve them and that he in fact did so but that they refused to accept service. It may well be that the Applicant pointed out the Respondents but even then, without the order specifying in name the persons to be served, the service is still defective. My final word on service is that I am not satisfied that the service of the order was proper and without proper evidence of service contempt cannot be proved.

14. But just suppose in fact service was proper? I would still have a problem with the evidence of breach of the order because the only probable evidence of such breach is at paragraphs 10 and 12 of the Affidavit sworn on 17.7.2006 and in those paragraphs, the Applicant states as follows:

“10. That on 18/12/2004 after service of the said court order I went to work in my Land especially to pluck my Tea Bushes, the Objectors/Respondents chased me away from entering in my said land and they continued to pluck my 4,500 Tea Bushes.

“12 That the Objectors/Respondents especially ALEXANDER MUTHAMIA M’MBIJIWE, CHARITY NKUENE M’MBIJIWE, MWENDA MUTHAMIA and KINYUA MUTHAMIA are in violation of the said court order and they should be arrested and be committed to Civil jail for contempt of court order dated 14th December 2004”

15. What does **“Chase away”** mean in this context? How did the persons named flout the order in view of the fact that they were already on the land and there was no order to evict them. If the Applicant was not in occupation, a restraining order could not properly issue neither was it equivalent to an order for reinstatement. It is unclear to me even then what the breach was and none has been properly shown to me.

16. As I alluded to earlier and as was said by Denning MR in Re Bramblevale (1970) I ch. I at 128’

“Contempt of court is an offence of a criminal character. A man may be sent to prison for it.....To use the time honoured phrase, it must be proved beyond reasonable doubt.”

17. I also take to heart the words of Rawal J. in Catherine Muthoni Ileri vs George Mwaura Kibui [2007] e KLR that;

“The onus is on the applicant to prove that the Defendant has committed this serious offence and is culpable to receive the punishment for sacrilegizing the temple of Justice”

18. Finally and in coming to the end of this matter, I have been careful in reaching my decision because as Cross J observed in Re: B (E.A.) an infant (1965) ch 112 at 117.

“Committal is a serious matter. The court must proceed very carefully before they make an order to commit to prison.....”

19. I wholly agree and in this case, I do not see that the offence of contempt of court has been proved beyond reasonable doubt even though I have struck out the Affidavit in reply.

20. The Application dated 7.7.2006 is hereby dismissed with costs to the Respondent.

21. Orders accordingly.

DATED AND DELIVERED AT MERU THIS 23RD DAY OF OCTOBER 2007.

ISAAC LENAOLA

JUDGE

In presence

Applicant present in person.

Mr. Ondari holding brief for Mr. Kioga for Respondent.

ISAAC LENAOLA

JUDGE