



REPUBLIC OF KENYA



**In re Estate of Deborah Tarkok Chirchir (Succession Cause
26 of 2018) [2024] KEHC 4529 (KLR) (12 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4529 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
SUCCESSION CAUSE 26 OF 2018
JRA WANANDA, J
APRIL 12, 2024**

IN THE MATTER OF THE ESTATE OF DEBORAH TARKOK CHICHIR (DECEASED)

BETWEEN

JOYCE JEMATIA CHICHIR OBJECTOR

AND

HELLEN JEROTICH CHEPKWONY 1ST PETITIONER

ELIZABETH JEPCHUMBA CHERUIYOT 2ND PETITIONER

MARTIN KIBET CHIRCHIR 3RD PETITIONER

RULING

1. By the Notice of Motion dated 10/07/2023 and filed through Messrs Z.K. Yego Law Offices Advocates, the Objector seeks the following orders:
 - i. [.....] Spent
 - ii. The Petitioners/Respondents be cited committed to civil jail for a period not exceeding six months for disobeying the Court orders issued on 1st April 2019.
 - iii. Costs of this application be borne by the Petitioners/Respondents.
2. The Application is expressed to be brought under Section 94 of the Law of Succession Act and “all other enabling provisions of the law”. It is premised on the grounds stated on the face thereof and the Supporting Affidavit sworn by the Objector, Joyce Jematia Chirchir.
3. In the Affidavit, the Objector deponed that she is the Objector herein, that on 1/04/2019, this Court issued an order that Bamboo Bay Holdings Limited (hereinafter referred as “the company”) do receive monthly rent from Eldoret Municipality Block 7/57 and remit the rental income therefrom to the parties herein as the beneficiaries of the estate herein, that the company is supposed to remit the rental



income on or before the 5th of every month together with a detailed rental income statement of the said property, that the Petitioners are the directors of the company, have failed to obey the said order and have severally defaulted in remitting the Objector's rental share without any justifiable reason, that the total rental income is Kshs 458,000/- per month and based on the Court order, each party is to receive at least Kshs 100,000/- per month but the company has been remitting between Kshs 60,000/-70,000/- every month with unexplained delays, and that the company has not remitted the Objector's share for the last 9 months being November and December 2022 and January to July 2023.

Replying Affidavit

4. In opposing the Application, the 1st Petitioner, Hellen Jerotich Jepkwony swore the Replying Affidavit filed on 16/08/2023 through Messrs Nyairo & Co. Advocates. In the Affidavit, she deponed that ever since the deceased died, rental income has always been collected and shared amongst the beneficiaries and at no time has the Objector failed to receive her share save for the months of August and September 2021 whose non-remittance was explained as the rent collection was greatly affected by the COVID-19 pandemic, that rental business, just like any other business, is governed by market forces and as such income may not be constant, that it is because of this that whenever there was a delay in remittance, the delay was explained to the Objector, that due to the said challenges, none of the beneficiaries has received the share for the months in which payment was not made, that by the letter dated 30/07/2021, the Petitioners proposed to the Objector to consider proportionate payment of the rental income from the collections at hand so that every beneficiary gets some amount until such time as they would collect the full rent but the Objector never replied, that the 1st Petitioner has submitted accounts, receipt and payments through the Objector's Advocates but to date, no comment or challenge thereon has been received from the Objector, that the Objector has now exhibited an undated rent breakdown whose origin is unknown, that the Objector had filed a similar Application dated 25/03/2019 and the Court directed that the matter proceeds to the main hearing of the Objection and which directions the parties submitted to, that it is thus surprising for the Objector to now opt to present the current Application instead of pursuing the hearing of the Objection which Application is meant to delay the conclusion of the matter, and that the orders sought by the Objector are so serious and cannot be granted on mere allegation of fact.

Hearing of the Application

5. It was then agreed, and I so directed, that the Application be canvassed of by way of written Submissions. Pursuant thereto, the Objector filed her Submissions on 4/01/2024 while the Petitioners filed theirs on 15/01/2023.

Objector-Applicant's Submissions

6. Regarding the threshold to be met in order in contempt proceedings, Counsel for the Objector cited the case of *Kimanja Kamau (suing as the personal representative of the estate of Gideon Gitundu Kimere- (Deceased) v Francis Mwangi Mwaura & Another* [2018] eKLR and submitted that the orders were not only clear and ambiguous but were also succinct, that in defiance, the Petitioners have failed to obey the orders, that the Petitioners were duly served with the Application and they therefore had knowledge thereof, and that the blatant and deliberate conduct of the Petitioners is a great affront to the authority of the Court. He cited the case of *Teachers Service Commission v Kenya National Union of Teachers & 2 Others* [2013] eKLR and also the case of *Kenya Tea Growers Association v Francis Atwoli & 5 Others*.



Petitioners-Respondents' Submissions

7. On her part, Counsel for the Petitioners recited the background to the matter, including that the same had initially been commenced at the subordinate Court, that in the course of the proceedings, the existence of a Will prepared by Hon. Justice Chemitei when he was still in private practice was discovered, that the matter was subsequently transferred to this Court where the Objector filed an Objection and that the parties were then directed to proceed to the hearing of the Objection. She submitted that before the Objection could be heard, the Objector has now filed the instant Application. Counsel however appreciated that Section 5 of the Judicature Act gives this Court has the power to punish for contempt of Court in order to uphold the authority and dignity of the Court. She also cited Section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules.
8. Counsel contended further that the Application is fatally defective because it has not cited any law with regard to contempt of Court. She averred further that in order for the Court to issue orders for contempt, an Applicant has to prove certain elements as was held in the case of In the matter of an Application for contempt between *Julius Kimeli Langat and Another v Beatrice Chepkemboi Chumba and Another*, Succession Cause No. 39 of 2015 where the Court set out the specific elements, namely, that the Petitioners had knowledge of or notice of the terms of the order, that the order was clear, unambiguous and binding and that the Petitioners have deliberately disobeyed the terms thereof. Regarding knowledge, Counsel submitted that although the same is not denied, the order was not extracted and served thus no order with a penal notice exists. She however submitted that although no extracted order was served, the Petitioners have nevertheless adhered and obeyed it. Counsel reiterated that the Petitioners have religiously collected rental proceeds and shared it amongst the beneficiaries according to the collections made, that the main complaint of the Objector is that she does not receive what she believes that she ought to get, that this is a different position from stating that the order has been defied or disobeyed, that the Petitioners cannot give what they do not have or have not collected.
9. Counsel further contended that the order was issued against the company but the Application has been brought against the Petitioners in their personal capacity, that the order was to the effect that the rental income “collected” be shared equally, that therefore the monies to be shared is based on the rental income collected on a monthly basis and which depends on payments made by the tenants and the occupation of the rental premises, that there is no specific figure set out in the Court order, that the Objector has attached a list of tenants and the rent they each pay and it is on account of the said breakdown that the Objector has based the figure she claims ought to be remitted as her share, that the nature of the Application requires proof beyond reasonable doubt given that the Application is of criminal accusations and has far reaching consequences, that the Court cannot issue orders on speculation, that the Objector has to show that the Petitioners have been collecting the said amount but have failed to remit her share thereof, that what the Objector has attached is the alleged breakdown whose origin is unknown and cannot be admitted in evidence. She cited the case of In the matter of the estate of *Elias Nkonge Mwiandi, Florence Ntue Nkonge v Daniel Kobia Nkonge*, Succession Cause No. E006 of 2021.

Determination

10. Having carefully considered the Application, response thereto and the respective submissions presented, in my view, the issue that arises for determination is “whether the Petitioners are in contempt of the Court orders issued on 1/04/2019”.



11. Contempt of Court is that conduct or action that defies or disrespects authority of Court. [*Black's Law Dictionary*](#) 9th Edition defines contempt as follows:

“The act or state of despising; the conduct of being despised. Conduct that defies the authority or dignity of a court or legislature. Because such conduct interferes with the administration of justice.

12. Regarding the Contempt of Court law in Kenya, on 9/11/2018, Mwita J, in [*Kenya Human Rights Commission v. Attorney General & Another*](#) [2018] eKLR, declared the entire [*Contempt of Court Act*](#) No. 46 of 2016 to be invalid for lack of public participation as required by Articles 10 and 118(b) of the [*Constitution*](#) and found that the Act as enacted encroached upon the independence of the Judiciary. Before enactment of the now invalidated Contempt of Act, Section 5 of the [*Judicature Act*](#), Cap 8, Laws of Kenya was the only statutory basis with respect to the procedure for institution of contempt of Court proceedings. As it is therefore, there is no specific statute that governs contempt of Court in Kenya. A party seeking recourse for contempt of Court proceedings would therefore have to fall back to the provisions of Section 3 of the [*Judicature Act*](#) which however provides that in Kenya, the law that governs contempt of Court proceedings is the English law applicable in England at the time the alleged contempt is committed. Section 5 of the [*Judicature Act*](#) then imposes a duty on the High Court, the Court of Appeal and law practitioners to ascertain the applicable law of contempt in the High Court of Justice in England, at the time the Application is brought.

13. Be that as it may, Contempt of Court is in the nature of criminal proceedings and therefore, proof of a case against a contemnor is higher than that of balance of probability. Due to the gravity of consequences that ordinarily flow from contempt proceedings, it is trite that the order be extracted and served and it also be demonstrated that the person cited for contempt had personal knowledge of that order. In order to find a person guilty of contempt there must therefore be proof of wilful and intentional disobedience of a Court order. In [*Mahinderjit Singh Bitta – v Union of India & Others*](#) 1A No. 10 of 2010 the Supreme Court of India stated as follows: -

“In exercise of its contempt jurisdiction the courts are primarily concerned with enquiring whether the contemnor is guilty of intentional and wilful violation of the order of the court, even to constitute a civil contempt. Every party is lis before the court and even otherwise, is expected to obey the orders of the court in its spirit and substance. Every person is required to respect and obey the orders of the court with due dignity for the institution.

14. In this case, the Objector has submitted that the Petitioners were aware of the order because their Counsel was present in Court when the order was made. However, there is no evidence that the order was extracted and Petitioners served or specifically made aware of the terms thereof. Knowledge is a question of fact and for a person to be found guilty of contempt, he must have been aware of the terms of the order. That is, he must know what the order required him or her to do or not to do but wilfully and deliberately disobeyed it. In [*Katsuri Limited v Kapurchand Depor Shah*](#) [2016] eKLR, citing [*Kristen Carla Burchell v Barry Grant Burchell*](#) (Eastern Cape Division Case No 364 of 2005), it was stated as follows:

“in order for an applicant to succeed in civil contempt proceedings, the applicant has to prove (i) the terms of the order, knowledge of the terms by the respondent, failure by the respondent to comply with the terms of the order.”



15. Fortunately, in this case, the Petitioners have readily conceded that despite the omission to extract and serve the order, they have nevertheless complied with it. The issue of knowledge does not therefore arise herein since by alleging compliance, the Petitioners must mean that they were aware of the order.
16. On whether there has been disobedience of the order, since the order has not been extracted, the same is still in the Judge's handwriting and I have not been able to fully decipher it. However, on the face of the writing, it appears, as submitted by the Petitioner's Counsel, that the order simply provided that the company would collect the rent and distribute it equally among the 4 parties in this matter, (the 3 Petitioners and the Objector). There does not seem to be any specific figure mentioned in the order. This submission has not been challenged by the Objector and I therefore presume it to represent the correct position. In the circumstances, I am constrained to agree with the Petitioners' Counsel that what is to be shared out equally is the amount "collected" per month.
17. What the above therefore means is that the order appreciates that there are times when full targeted rent may not be collectable, perhaps because some units are not occupied or some tenants have not paid rent. The Petitioners have given as an example, the COVID-19 pandemic period that hit the economy hard and during which period, they allege, rental collections were at a minimum. In such circumstances, can the company be faulted for remitting less than what was targeted for collection? No, it cannot.
18. What I would have expected the Objector to do is to demonstrate to the Court that the company collected the entire targeted amount but withheld a portion thereof thus remitting less than what has been actually collected. Unfortunately, the Objector does not appear to even know how much was collected and appears to base her prayers on mere speculation. The Objector has also alleged that the company has not remitted the Objector's share of the rent for the 9 months being November and December 2022, January to July 2023. In response, the Petitioners have supplied documents indicating the amount collected over the period since the order was issued, the amounts disbursed and an explanation of the pro rata distribution of the rent collected. The Objector did not ask for leave to file a Further Affidavit to rebut these explanations and in her Counsel's Submissions, no effort whatsoever was made to disprove the explanations. My conclusion is therefore that the Objector has no evidence to controvert the explanations and documents supplied by the Petitioners.
19. I am also disturbed by the Objector's action of only exhibiting copies of her Advocates' letters addressed to the Petitioners, without also exhibiting the replies and other letters received from the Petitioners. Had the matter proceeded ex parte, this Court would never have known that the Petitioner did indeed give explanations, complete with supporting documents, to the Objector regarding the shortfall in rental collections and the pro rata disbursement of the amount collected. The Objector's act of withholding such communication is ill-advised and amounts to non-disclosure, suppression and concealing of material facts. Withholding of information from the Court amounts to a deliberate intention to mislead the Court and is tantamount to misrepresentation. This conduct is abhorrent and amounts to sharp practice.
20. For the foregoing reasons, this Court is not satisfied that sufficient evidence has been presented to support the prayers sought. In view of my above findings, the only irresistible conclusion is that the Objector's Application does not satisfy the prerequisites and does not also meet the expected threshold for this Court to make a finding of contempt of Court or grant the orders sought.
21. Before I pen-off, I wish to comment on the submission made by Counsel for the Petitioners to the effect that while the orders of 1/04/2019 were directed at the company, the Objector has instead sought for personal sanction against the Petitioners individually, as directors of the company. I agree that this observation by Counsel is a valid one and may well render the Application defective. However, it



should not be lost on Counsel that in appropriate cases, the Court is empowered to depart from the famous case of *Salmon v Salmon* company law principle and lift the veil of incorporation and thereby hold the directors personally liable. In this case, from the nature of the proceedings, it is clear that it is the Petitioners, as directors of company, and therefore the persons in control thereof, who were and still meant to ensure compliance with the order. In the circumstances of this case therefore, the Petitioners cannot use the veil of incorporation to escape liability or the obligation to ensure compliance.

22. There is also the lingering question over the strange choice of the provision of law under which the Application has been brought. As aforesaid, the Application is expressed to be brought under Section 94 of the *Law of Succession Act* which provides as follows:

“Neglect or misapplication of assets by personal representatives When a personal representative neglects to get in any asset forming part of the estate in respect of which representation has been granted to him, or misapplies any such asset, or subjects it to loss or damage, he shall, whether or not also guilty of an offence on that account, be liable to make good any loss or damage so occasioned”

23. It is therefore apparent that the said provision does deal with the issue contempt of Court. To this extent, since no provision relating to the issue of contempt of Court has been cited, and since the Objector has failed to give any explanation on such omission despite the issue having being raised, I find the Application to be fatally defective. A finding of contempt of Court is a serious matter and has the consequence of depriving a party of his personal liberty by detaining him/her in prison custody or leaving him/her with a scarred reputation including affecting the party’s suitability to hold a public office. Pleadings relating thereto therefore need to be drafted meticulously and with precision. Casual and shoddy pleadings filed in support of such an application should therefore be struck out.

24. In conclusion, and needless to state, I remind the parties that this Court shall not hesitate to take stern action against and impose appropriate penalties against any party that shall without reasonable cause, defy, ignore or disobey any orders made by the Court in this matter. Under no circumstances shall this Court allow or accept its authority to be undermined. Let no party therefore try to test this Court’s resolve to protect its authority. Such disobedience, if established, shall surely be swiftly and appropriately punished.

Final Orders

25. In the premises, I issue the following orders:
- i. The Objector’s Notice of Motion dated 10/07/2023 is hereby dismissed but with no orders as to costs.
 - ii. However, henceforth, while remitting the Objector’s share of the rental income collected from the property known as Eldoret Municipality Block 7/57, pursuant to the orders given hereon on 1/04/2019 by H. Omondi J (as she then was), the company, Bamboo Bay Holding Limited, shall through the Petitioners, clearly disclose to the Objector, the amount collected and the respective equal pro rata amounts or shares disbursed to each one of the 4 beneficiaries (the 3 Petitioners and the Objector) through a detailed rental income statement.
 - iii. For avoidance of doubt, all other aspects of the said order given herein on 1/04/2019 remain in place in full, as before.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 12TH DAY OF APRIL 2024

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WANANDA J. R. ANURO
JUDGE

