



**In re Estate of Zepherinus Mukhongo Makhaso alias Zepherinus
Mukhongo Liborio alias Zepherinus Mukhongo (Deceased) (Succession
Cause E005 of 2022) [2024] KEHC 5308 (KLR) (17 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5308 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
SUCCESSION CAUSE E005 OF 2022**

DK KEMEL, J

MAY 17, 2024

BETWEEN

RUTH NELIMA MUKONGO PETITIONER

AND

ZACHEAUS WALTER MUKHONGO OBJECTOR

RULING

1. By a notice of motion application dated 5th October 2023, pursuant to Order 40 Rule 3 (1) of the Civil Procedure Rules and section 1A, 1B, 3A, 3B of the *Civil Procedure Act* and all enabling provisions of the law, the Objector herein sought orders that the Petitioner, her agents and/or servants acting through her be committed to civil jail for a period of six months for disobeying a valid court order issued on 28th April 2023; that in the alternative, each one of them be ordered to pay a fine of Kshs. 500,000/= for disobeying a valid court order or attach her property valued at the same amount and that costs of the application be provided for.
2. The application is premised on the grounds on the face of it and supported by the affidavit of the Objector on the grounds that on 28th April 2023, this Honourable Court issued an order against the Petitioner and other persons acting through her restraining them from doing anything with regard to land parcel No. W. Bukusu/N.Myanga/1740 pending the hearing and determination of summons for confirmation of grant. That the Petitioner and the other persons were duly served with the order on 13th May 2023 but have since disobeyed the valid court order as they continue to plough the land and erect structures. That the Respondent has also sold and alienated the land which actions, unless arrested, will lead to the disintegration of the estate of the deceased and that there will be no estate to distribute in the end.
3. Vide directions issued on 13th December 2023, the application was dispensed with by way of written submissions. However, it is only the Petitioner who filed and exchanged her written submissions.



4. In a nutshell, counsel for the Petitioner submitted that on 3rd August 2022, the Objector herein sought orders restraining any encroachment, selling, transferring, alienating and/or doing anything on land parcel No. W. Bukusu/N.Myanga/1740 pending the hearing and determination of the objection proceedings. The Petitioner herein did not oppose the application and for emphasis by consent parties agreed that the status quo be maintained.
5. Counsel submitted that vide an affidavit dated 30th November 2023 and filed in Court on 1st December 2023 the petitioner denied all the Objector's allegations. It is imperative for this Court to note that on perusal of the court record no such affidavit exists.
6. Counsel submitted that as per the court order issued on 28th April 2023, it was clear that the restraining and status quo orders were issued with regard to land parcel No. W. Bukusu/N.Myanga/1740 and that it is clear that the estate of the deceased comprised of the following assets: land parcel No. W. Bukusu/N.Myanga/1740; land parcel No. W. Bukusu/N.Myanga/1737; land parcel No. W. Bukusu/N.Myanga/1020; land parcel No. W. Bukusu/N.Myanga/852; land parcel No. W. Bukusu/N.Myanga/312 and land parcel No. Bungoma Municipality/36.
7. Counsel submitted that land parcel No. W. Bukusu/N.Myanga/1740 is one of the six parcels of the estate of the deceased and that the evidence as availed by the Objector in support of his application fails to demonstrate that the activities, as alleged, occurred on other parcels of land other than land parcel No. W. Bukusu/N.Myanga/1740. Counsel argued that the availed photographic evidence, annexures 3a, b, c, d, e and failed to conform to the dictates as per section 78 of the [Evidence Act](#) on photographic evidence as no admissibility certificate was availed. Counsel submitted that the failure to attach a certificate as per section 78 of the [Evidence Act](#) was fatal to the case of the Objector and that it was not clear when the photographs were taken, who took the same and whether the same were a representation of what the current situation on ground with regard to land parcel No. W. Bukusu/N.Myanga/1740.
8. Counsel submitted that contempt of court proceedings are quasi criminal in nature. He relied on the case of Civil Appeal No. 3 of 2014-North Tetu Farmers vs Joseph Nderitu Wanjohi and Civil Appeal No. 3 of 2020-St. Mary Academy Limited & Another vs Grace Njeri Mukora & Another and Yvonne Jeruto and Another. Counsel argued that the standard of proof in contempt of court proceedings are slightly higher than on a balance of probabilities which simply indicates that the evidence as availed by the Objector fails to meet the dictates as per section 107 of the [Evidence Act](#). Counsel relied on the case of the Court of Appeal at Nairobi-Civil Application No. 24 of 1985-Mutika vs Baharini Farm Ltd.
9. Counsel argued that the Objector failed to prove that the Petitioner disobeyed the court orders issued on 28th April 2023 and prayed that the application dated 5th October 2023 be dismissed with costs.
10. I have considered the application filed by the Objector as well as the submissions filed. I find the only issue that arise for determination is whether the orders sought are merited.
11. Section 5 of the [Judicature Act](#) and which gives the High Court power to punish for contempt of court in order to uphold the authority and dignity of courts. Section 47 of the [Law of Succession Act](#) provides that the High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient while Rule 73 of the Probate and Administration Rules provides for the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.
12. Court orders must be obeyed at all times in order to maintain the rule of law and good order. While discussing the importance of the rule of law and compliance with Court orders, the Constitutional



Court of South Africa in the case of Kristen Carla Burchell vs Barry Grant Burchell, Eastern Cape Division Case No. 364 of 2005 stated as follows:-

“Compliance with court orders is an issue of fundamental concern for a society that seeks to base itself on the rule of law. *The Constitution* states that the rule of law and supremacy of *the Constitution* are foundational values of our society. It vests the judicial authority of the state in the courts and requires other organs of state to assist and protect the courts. It gives everyone the right to have legal disputes resolved in the courts or other independent and impartial tribunals. Failure to enforce court orders effectively has the potential to undermine confidence in recourse to law as an instrument to resolve civil disputes and may thus impact negatively on the rule of law.”

13. It is essential to note that contempt of Court is in the nature of quasi-criminal and, therefore, proof of a case against a contemnor is higher than that of balance of probability. This is because liberty of the subject is usually at stake and that the Applicant must prove willful and deliberate disobedience of the Court order, if they are to succeed.
14. For the instant application to succeed, the Objector must prove the terms of the order; knowledge of the terms of the order by the Petitioner; and failure by the Petitioner to comply with the terms of the order. (See the case of Republic v Attorney General & another Exparte Mike Maina Kamau [2020] eKLR).
15. Upon proof of these requirements, the presence of willfulness and bad faith on the part of the Respondent would normally be inferred, but the Respondent could rebut this inference by contrary proof on a balance of probabilities. (See Kristen Carla Burchell vs Barry Grant Burchell (supra)).
16. In this case, it is not in dispute that the deceased owned several properties. It is also not in dispute that the parties are at the confirmation stage. It is also not in dispute that pending before this Court is an Affidavit of Protest by the Objector herein against the confirmation of the grant.
17. The Objector contends that in blatant disregard to the said Court order, the Petitioner, her servants and/or agents have continued selling, alienating, transferring and/or encroaching on land parcel No. W. Bukusu/N. Myanga/1740. It is for this reason that the Objector prays that Petitioner be ordered to purge the contempt by being committed to civil jail and/or by being ordered to surrender the sum of Kshs. 500,000/= as a fine for disobeying a valid court order or attach property valued at the same amount.
18. This erudite Court does not condone the deliberate disobedience of its orders or reticent from its responsibility to deal firmly with proved contemnors. It is however trite that a Court order is binding on the party against whom it is addressed. It is also trite that he who alleges must prove.
19. In contempt proceedings, it is trite law that proof must be made beyond the standard in civil cases as contempt is quasi-criminal. The burden of proof lies on the Applicant. In the case of Gatharia K. Mutikika v Balian Farm Ltd (1985) KLR 27, it was held as follows: -

“The Courts take the view that where the liberty of the subject is, or might be involved in breach for which the alleged contemnor is cited must be precisely defined. A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be satisfactorily proved...it must be higher than proof on a balance of probabilities, almost but not exactly, beyond reasonable doubt.”



20. Therefore, the Objector must prove beyond peradventure that the Petitioner is guilty of contempt in that she willfully disobeyed the said orders. An order committing a person to prison for contempt is to be adopted only as a last resort and in the clearest of cases. (See the decision in *Sutton Holdings Limited v Abdullahi Omar Said* [2020] eKLR - CK Yano J).
21. In this case, the Objector alleges that the Respondent and/or her agents and/or servants have continued selling, alienating, transferring and/or encroaching on land parcel No. W. Bukusu/N. Myanga/1740 despite the existence of a valid Court order issued on 28th April 2023. The Objector proceeded to avail photographic evidence of the current situation on the ground and the annexures were marked as ZWM 3(a), (b), (c), (d), (e), (f).
22. Section 78 of the *Evidence Act* provides:
- (1) In criminal proceedings a certificate in the form in the Schedule to this Act, given under the hand of an officer appointed by order of the Attorney-General for the purpose, who shall have prepared a photographic print or a photographic enlargement from exposed film submitted to him, shall be admissible, together with any photographic prints, photographic enlargements and any other annex referred to therein, and shall be evidence of all facts stated therein.
 - (2) The Court may presume that the signature to any such certificate is genuine.
 - (3) When a certificate is received in evidence under this section the Court may, if it thinks fit, summon and examine the person who gave it.
23. In his Article titled ‘The Image of Truth: Photographic Evidence and the Power of Analogy,’ Mnookin postulates that:
- “Recall from the discussion of the Mumler trial that photographers claimed a particular expertise in the interpretation of photographs.’ It would seem, then, that if photographs were to be admitted into the courtroom as substantive evidence, they should first be certified by a photographer-a qualified expert-as worthy of belief. Without such a certification, judges might admit into evidence images that were as misleading as they were persuasive. This was precisely the fear of the author who labeled photographs "a most dangerous perjurer.”
24. The question of admissibility of photographs as evidence without certification has been extensively litigated and the authorities abound to shed light on this. A Certificate of photographic evidence is required to prove the authenticity of not only the photograph but also the process of its generation to satisfy the Court that both the process and outcome were free from any form of manipulation.
25. This entire claim by the Objector is denied
26. The evidence given by the Objector is what is contained in her affidavit. It is clear from the orders issued by this Court on 28th April 2023 that the parties were restrained from selling, alienating, transferring and/or encroaching on land parcel No. W. Bukusu/N. Myanga/1740 pending the hearing and determination of the Objector’s Affidavit in Protest. The photographic evidence as availed by the Objector was not clear enough to ascertain that the alleged actions were conducted on the supposed land parcel No. W. Bukusu/N. Myanga/1740 as no evidence in terms of a certificate was availed ascertaining the photographs are believable and not misleading.



27. It is worth mentioning that the requirement for a certificate is a legal position that a court must not help any party to get away with. In *National Bank of Kenya Ltd v Wilson Ndolo Ayah* [2009] eKLR the Court of Appeal stated:

“It is public policy that citizens obey the law of the land. Likewise, is good policy that courts enforce the law and avoid perpetuating acts of illegality. It can only effectively do so if acts done in pursuance of an illegality are deemed as being invalid.”

28. In the circumstances, i opine that the Objector has failed to prove to the requisite standard that the Petitioner is in contempt of the orders issued by this Court on 28th April 2023. It seems the objector just threw in some photographs of some illegal activities on some parcel of land without backing the claims with clear and concise evidence that the alleged activities took place on the subject parcel of land. It wa incumbent upon the Objector to surmount the standard of proof as the Petitioner stood to be thrown in jail for contempt of court. I find the Objector was rather casual in arguing his case. It is not enough to just make an allegation but the said allegation must be proved beyond the legal threshold of proof. I find this standard was not met by the Objector.

29. The upshot of the foregoing, is that the application dated 5th October 2023 lacks merit. The same is dismissed with no order as to costs.

Orders accordingly.

Dated and delivered at Bungoma this 17TH day

Of May 2024

D Kemei

Judge

In the Presence of:

Wekesa for Kituyi for Objector/Applicant

Sabwami for Petitioner/Respondent

Kizito Court Assistant

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