



**In re Estate of Lenah Wanjiku Gathuri alias Lenah Wanjiku Wamagata (Deceased)
(Succession Cause 3403 of 2014) [2024] KEHC 7494 (KLR) (Family) (20 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 7494 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY**

SUCCESSION CAUSE 3403 OF 2014

HK CHEMITEI, J

JUNE 20, 2024

**IN THE MATTER OF THE ESTATE OF LENAH WANJIKU
GATHURI ALIAS LENAH WANJIKU WAMAGATA (DECEASED)**

BETWEEN

EMILY LENAH WANJIKU KAGWE APPLICANT

AND

PAULINE WARINGA GATHURI 1ST RESPONDENT

GEORGET DAVID NJUGUNA GATHURI 2ND RESPONDENT

MARK WALLACE WAMAGATA GATHURI 3RD RESPONDENT

RULING

1. This ruling relates to the applications dated 7th February, 2022 filed by the Applicant, Emily Lenah Wanjiku, seeking for orders that:
 - (a) Spent.
 - (b) This Honourable Court be pleased to cite for contempt the Respondents herein, Mr. George David Njuguna Gathuri, Mr. Mark Wallace Wamagata Gathuri and Ms. Pauline Waringa Gathuri, for their disobedience of the order of the Honourable Court made on 22nd October, 2021, and duly served on all of them, and they be committed to civil jail for disobedience of the court order, until the contempt is purged.
 - (c) Pending the hearing and determination of this application, this Honourable Court do direct the Respondents herein, Mr. George David Njuguna Gathuri, Mr. Mark Wallace Wamagata



Gathuri and Ms. Pauline Waringa Gathuri shall not have any audience before this Honourable Court unless they purge the said contempt.

- (d) In default of the Respondents' purge of the contempt of the court orders of 22nd October, 2022:-
- i) This Honourable Court be pleased to allow the Applicant to collect income and/ or proceeds from assets forming part of the Estate of the Deceased, pending determination of the fresh summons for confirmation of grant.
 - ii. This Honourable Court do allow the Applicant to open and operate an interest earning account in the name of her counsel for collecting and preserving income from the estate, pending the determination of the fresh summons for confirmation of grant.
 - iii. This Honourable Court be pleased to enforce compliance with its own orders in any other way it deems suitable.
 - iv. The costs of this application be provided.
2. The application is supported by affidavit sworn by Emily Leah Wanjiku Kagwe on 7th February, 2022 who states *inter alia* that she is the beneficiary of a final judgment delivered by Hon. Lady Justice Maureen Odero on 22nd October, 2021 which ordered that:-
- i. A joint account be opened in the names of counsel for both parties within 30 days from date of judgment.
 - ii. The Respondents file a fresh application for confirmation of grant within 60 days from date of judgment.
 - iii. The Respondents do give an account of proceeds forming part of the deceased's estate within 60 days from date of judgment.
 - iv. The Respondents do give an account of proceeds forming part of the decease's estate within 60 days from date of judgment.
 - v. An order of temporary injunction do issue against the Respondents whether by themselves, their servants and/ or agents from trespassing, constructing on, wasting and/ or otherwise interfering, or dealing with the assets of the deceased pending the determination of the fresh summons for confirmation of grant.
3. The Applicant averred that when the judgment was read, the Respondents' advocate was present in court and no stay of the orders issued by the court was sought nor issued.
4. Her advocates wrote to the Respondents' advocate *vide* letters dated 2nd November, 2011 which had the extracted order attached, and 24th November, 2021, seeking to open the joint account and requesting him the advocate to advise his clients not to collect any income deriving from the estate until the joint account is opened. They also wrote to the tenants on Plot No. 2 Muchatha Market and LR No. Kiambaa/ Muchatha/ T. 357.
5. The court order was also served upon the respondents personally and there is an affidavit of service on record but they have declined to comply with the said orders.
6. That the Respondents have never rendered an account of proceeds forming part of the deceased's estate and they continue to derelict on their duties and responsibilities as personal representatives and they continue to collect and enjoy income from the estate.



7. The application is opposed *vide* replying affidavit sworn by Mark Wallace Wamagata Gathuri on 17th May, 2022. He avers *inter alia* that he was not present in court when the judgment was delivered and due to Covid – 19 restrictions, they were represented by an advocate who failed to update them on the judgment. He denies that the order was served upon them personally and he attributes failure to comply to Covid – 19.
8. He nevertheless seeks that this court gives him a chance and time to comply with the court orders and directions without further delay.
9. The Applicant has filed submissions dated 18th March, 2022 relying on the following among others *Estate of Christopher Kipchirchir (Deceased)* (2021) eKLR where the court stated as follows:

“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 that 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.”
10. The Respondents have filed submissions dated 12th February, 2024 placing reliance among others on the following *Bank of Africa Kenya Limited v Put Sarajevo General Engineering Co. Ltd & 2 others* [2018] eKLR which quoted the case of *Belinda Muras & 6 others vs Amos Wainaina* [1978] KLR where the court stated as follows:-

“A mistake is a mistake. It is no less a mistake because it is an unfortunate step. It is no less pardonable because it is committed by senior counsel. Though in the case of junior counsel court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a lawyer or experience who ought to know better. The court may not condone it but ought certainly do whatever is necessary to rectify if the interest of justice so dictate.”

Analysis and Determination

11. At paragraph 27 of *Henry Musemate Murwa v Francis Owino, Principal Secretary, Ministry of Public Service, Youth and Gender Affairs & another* [2021] eKLR, Judge Maureen Onyango cited with authority the case of *Samuel M. N. Mweru & Others v National Land Commission & 2 others* [2020] eKLR where Mativo J. restated the test for establishing contempt in his decision and stated –
 - “40. It is an established principle of law that in order to succeed in civil contempt proceedings, the Applicant has to prove
 - (i) the terms of the order
 - (ii) Knowledge of these terms by the Respondent,
 - (iii) Failure by the Respondent to comply with the terms of the order.

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. Perhaps the most comprehensive of the elements of civil contempt was stated by the learned authors of the book *Contempt in Modern New Zealand* who succinctly stated: -

“There are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases) that: -

- a) the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;
- b) the defendant had knowledge of or proper notice of the terms of the order;
- c) the defendant has acted in breach of the terms of the order; and the defendant's conduct was deliberate...”

12. The court has perused the entire application and the responses by the Respondents. There is no doubt in my mind that the Respondents simply disobeyed the court orders. The reason of Covid 19 pandemic is too flimsy for this court to consider.
13. The pandemic was insufficient reasons for the Respondents not to comply for the reasons that from the year 2014 they have been aware of this dispute. Their counsel on record I believe kept them informed. As a matter of fact, the correspondences attached to the Applicant's supporting affidavit by the firm of D K Thuo clearly showed that they were copied to the Respondents.
14. Nonetheless because of the remorse the Respondents have shown vide his replying affidavit this court shall grant them a second chance. If indeed they are remorseful and apologetic as they seem to suggest then they should comply. In any case, they seem to have more faith with their current counsel on record.
15. In the premises the court directs as follows:-
 - (a) The Respondents jointly and severally are hereby directed to comply within the next fourteen (14) days from the date herein with the decree of the court dated 22nd October 2021 and in default
 - (b) The Applicant shall collect income and or proceeds from assets forming part of the estate of the deceased pending determination of the fresh summons for confirmation of grant.
 - (c) The Applicant shall open and operate an interest earning account in the name of her counsel on record for collecting and preserving income from the estate pending the determination of the fresh summons for confirmation of grant.



- d. The Applicant is allowed to file fresh application for confirmation of grant within 60 days upon the above noncompliance.

DATED SIGNED AND DELIVERED AT NAIROBI VIA VIDEO LINK THIS 20TH DAY OF JUNE 2024.

H K CHEMITEI

JUDGE

