



REPUBLIC OF KENYA



**Ndegwa (Suing as the Legal Representative of the Estate of Jedidah Wanjiku Ndegwa - Deceased) v Karuri (Miscellaneous Application 13 of 2015) [2024] KEHC 6718 (KLR) (5 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 6718 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
MISCELLANEOUS APPLICATION 13 OF 2015**

**HM NYAGA, J**

**JUNE 5, 2024**

**BETWEEN**

**JOHN GITAHI NDEGWA (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF JEDIDAH WANJIKU NDEGWA - DECEASED) ..... APPLICANT**

**AND**

**JELIOTH WANJIRA KARURI ..... RESPONDENT**

**RULING**

1. The Applicant JOHN GITAHI NDEGWA filed this Notice of Motion dated 6<sup>th</sup> June, 2018 anchored under Section 5(1) of the *Judicature Act*, Sections 1A, 1B,3A and 63(1) of the *Civil Procedure Act* seeking for ORDERS:-
  1. That Jelioth Wanjira Karori be and is hereby cited for contempt ,convicted and committed to Civil Jail for a period not exceeding Six(6) months or such other sentence as may be found fair and just in the circumstances.
  2. That the costs for this Application be provided for.
2. The application is premised on the grounds on its face and supported by the Applicant's Affidavit sworn on the even date.
3. In a nutshell, it is the Applicant's case that the Respondent has belatedly and/or knowingly continued to dishonor and/or disobey the court order granted on 15<sup>th</sup> February, 2017 and violated the terms therein thus putting this court to public ridicule.
4. He avers that as a result of non-compliance with aforesaid court order he continues to suffer irreparable damage.



5. It is his deposition the respondent was served with the said court orders together with a Penal Notice but she disobeyed the same, and it is in the interest of justice and for the purposes of upholding the dignity and honour of this Honorable Court that the orders sought herein ought to be granted.
6. The Respondent's counsel Lawrence Ngugi Mwangi swore a replying affidavit in opposition to the Application. He avers that he has been thoroughly instructed to swear this Affidavit by the Respondent.
7. He depones that the applicant has not demonstrated or illustrated any harm he has suffered or continues to suffer emanating from the conduct omission or commission of the respondent from the year 2018.
8. It is his deposition that the Applicant was provided with a list of all the properties of deceased herein in Nairobi High Court Misc. Civil Application No. 23 of 2011 and that other than Nakuru Municipality Block 2/490 which Jonada Services Ltd purchased, the respondent did not interfere with any other property of the deceased and the Applicant had freedom to search or investigate the status quo of the properties as per the Application dated 5<sup>th</sup> May, 2011.
9. He asserts that one Nelson Ndegwa, the husband of the deceased, is the one who provided the list of the properties of the deceased and he lives at Koinange Estate in Nakuru and he is the right and proper person to be followed by the applicant for production of the documents or other issues and paraphernalia of the same.
10. He contends that the instant application ought to have been filed in High Court Misc. Civil Application No. 23 of 2011 where the court had granted the respondent powers to safeguard the deceased's interest and as such the application is misplaced, lacks merit and should be dismissed for being based on a wrong footing, ill will, bad faith and other ulterior motives.
11. He asserts that this application should be taken as harassment and embarrassment of the respondent by the applicant for no Apparent or substantial reason.
12. He posits that the Applicant should have sought the orders herein in NKU ELC NO.216 OF 2016 but not to keep filing multiple suits, applications and claims from the same person in view of the law of Res Judicata.
13. The respondent Jelioth Wanjira Karuri swore a further Replying Affidavit on 25<sup>th</sup> October, 2023. She avers that the application has been overtaken by events and it has become totally moot. That her powers of management of her sister's issues have been taken away by the Applicant who has the knowledge and possession of all the particulars of the deceased's properties in their totality.
14. She states that her main concern was to take care of his deceased's welfare and wellness during her lifetime and she did not venture into all her issues because she was so low to the extent of becoming bankrupt.
15. She further depones that the only property she was involved in was Nakuru Municipality Block 2/490 on which a school was running and doing badly financially and which had been charged to Kenya Finance Bank Ltd which has since become non-existent.
16. It is her further averment that all the details of the properties of the deceased are well known to the Applicant and the same are part of the record herein and the Applicant has the capacity as a guardian ad litem to find out their current condition and status. She also avers that she did not access any of the properties save for NAKURU MUNICIPALITY BLOCK 2/490 which was lawfully purchased by



Jonada Services Ltd while she was a director and the proceeds arising therefrom were partially used to settle the deceased's debts and hospital charges which were so monumental.

17. She urged the court to dismiss the Application with costs.

### **Applicant's Submissions**

18. In regards to whether the Respondent is in contempt of orders issued on 15<sup>th</sup> February, 2017, the Applicant relied on Section 4(1) of the Contempt of Court Act, Blacks Law Dictionary 10<sup>th</sup> edition on the definition of contempt of court and the case of *Katsuri Limited v Kapurchand Devar Shah* [2016] eKLR where four elements that must be proved to make a case of contempt were set as follows:-

- (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
- (d) The defendant's conduct was deliberate.

19. Regarding the first element, the applicant submitted that the orders directing the respondent to produce a full and accurate account of the assets and liabilities of the deceased herein and to furnish him with the ownership documents relating to the estate of the deceased was very clear and binding upon the respondent and as such this element has been satisfied.

20. With regard to the second element, the Applicant submitted that the respondent had full knowledge of the order dated 15<sup>th</sup> February 2017 and terms thereof as evidenced by her Counsel's Replying Affidavit and her submissions.

21. On the third and fourth element, the Applicant submitted that the respondent has knowingly and ignorantly failed to comply with court's orders that were issued almost 7 years ago.

22. In buttressing his submissions, the Applicant relied on the case of *Stewart Robertson vs Her Majesty's Advocate, 2007 HCAC63*, Lord Justice Clerk cited with approval in the case of *Simon Kibowen (Suing on behalf of 47 Residents of Kibingor Sub-Location) vs Nancy Jepkemoi Kolum & 2 others* [2020] eKLR.

23. With respect to whether the orders sought are merited, the Applicant submitted in the affirmative for reasons that the Respondent was in charge of all the property of the deceased during her lifetime and it is prudent that she renders accounts for the period she was in charge and that the same will enable him to proceed to petition for letters of administration of the deceased's estate expeditiously.

24. On whether this Court has jurisdiction to issue the orders sought, the Applicant invoking the provisions of Section 107 of the Evidence Act posited that the ground of res judicata raised by the respondent is not substantiated.

25. He prayed that the Application be allowed.

### **Respondents Submissions**

26. The respondent submitted that this application has been brought after her power and authority over the deceased's property has been revoked.



27. The respondent posited that the contents and substance of affidavits in support of her case have not been controverted and as such the same should be admitted wholly in support of his opposition to the application herein.
28. Regarding whether the court can grant the order sought, the respondent submitted in the negative for reasons that this matter was determined against the applicant on 19<sup>th</sup> January, 2023 and that the applicant has all the knowledge and possession of all particulars of the deceased's estate.
29. The Respondent also submitted that the Applicant has not demonstrated willful contempt on her part. In support of this position, she cited the cases of Peter K. Yego & others vs Pauline Wekesa Kode, Acc no. 194 of 2014 for the proposition that willful disobedience of the court order must be demonstrated before one is cited for contempt.
30. The respondent argued that court's concern is to do justice and litigants and advocates appearing before court must be genuine, sincere and trustworthy. To this effect reliance was placed in the case of Sheila Cassatt Issenberg & another vs Antony Machatha Kinyanjui (2021) eKLR.
31. The respondent further argued that court has inherent jurisdiction to protect itself from abuse or to see its process is not abused. In support of this position, she cited the cases of B vs Attorney General [2004] 1 KLR 431 & Philip Keipto Chemwolo & another vs Augustine Kubende [1986] eKLR.
32. The Respondent submitted that under Section 63(e) of the *Civil Procedure Act*, the court has powers to issue any supplemented orders as may appear to it to be just and convenient.
33. On whether the court has jurisdiction to grant the orders sought, the respondent submitted that if the Applicant had a claim he ought to have lodged it in the existing Succession Cause. She thus argued that matters raised in the application are res judicata and they have already been determined by a court of competent jurisdiction and hence the application is bad in law, vexatious and an abuse of the court process and as such it ought to be dismissed with costs.

### **Analysis & Determination**

34. Having considered the Application, supporting affidavit, responses thereto and submissions on record, I discern the issues arising for determination are:-
  - a. Whether the instant application is res judicata;
  - b. Whether the application ought not to have been filed in this matter;
  - c. Whether the Respondent is in contempt of court; &
  - d. Whether the Respondent should be committed to civil jail for a period of not less than 6 months?

### **Whether the Application is Res Judicata**

35. The substantive law on Res Judicata is found in Section 7 of the *Civil Procedure Act* Cap 21 which provides that:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court



competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court”

36. The Black’s law Dictionary 10<sup>th</sup> Edition defines “res judicata” as

“An issue that has been definitely settled by judicial decision...the three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties...”

37. An applicant or any person should not commence more than one action in respect of the same or a substantially similar cause of action. Kuloba J., in the case of Njangu vs Wambugu and another Nairobi HCCC No.2340 of 1991 (unreported), held that:

‘If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata.....’

38. Therefore, in deciding whether an issue in a subsequent Application is res judicata, a court of law should always look at the Decision claimed to have settled the issues in question and the entire Application and the instant Application in order to verify what issues were determined in the previous Application; whether they are the same in the subsequent Application and were covered by the Decision; and whether the parties are the same or are litigating under the same Title and that the previous Application was determined by a court of competent jurisdiction.

39. In the instant case the Respondent generally submitted that matters raised herein are res judicata as they have already been determined by a court of competent jurisdiction. The Respondent did not substantiate this position, as correctly submitted by the Applicant, as she did not specifically point out to this court the Application in issue that raised similar issues raised herein and was substantially determined by a court of competent jurisdiction. In the circumstances, the respondent’s averment and submissions on this issue lacks merit and I hereby find that the instant application is not res judicata.

#### **Whether the application ought not to have been filed in this matter**

40. The respondent’s view is that this application ought to have been filed in filed in High Court Misc. Civil Application No. 23 of 2011 where the court had granted her powers to safeguard the deceased’s interest or in NKU ELC NO.216 OF 2016 . I do not find merit on this position as the court that issued orders in issue is this court and it is the only court that can enforce those orders. This application is therefore properly before this court.

#### **Whether the Respondent is in contempt of court**

41. According to Black’s Law Dictionary; 9th Edition, page 360

“Contempt is a disregard of, disobedience to, the rules, or orders of a legislative or judicial body, or an interruption of its proceedings by disorderly behavior or insolent language, in its presence or so near thereto as to disturb the proceedings or to impair the respect due to such a body.”



42. In the case of Econet Wireless Kenya Limited vs Minister For Information and Communication of Kenya Authority [2005] eKLR Hon Justice Ibrahim (as he then was) stated as follows: -

“It is essential for the maintenance of the rule of law and order that the authority and the dignity of our courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against whom an order is made by court of competent jurisdiction, to obey it unless and until the order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by the order believes it to be irregular or void. (emphasis)”

43. Likewise in the case of T.N Gadavarman Thiru Mulpad vs Ashok Khot and Anor. [2005] 5 SCC, the Supreme Court of India in emphasizing the dangers of disobeying court orders held as follows: -

“Disobedience of this Court's order strikes at the very root of the rule of law on which the judicial system rests. The rule of law is the foundation of a democratic society. Judiciary is the guardian of the rule of law. Hence, it is not only the third pillar but also the central pillar of the democratic State. If the judiciary is to perform its duties and functions effectively and remain true to the spirit with which they are sacredly entrusted to it, the dignity and authority of the Courts have to be respected and protected at all costs. Otherwise, the very corner stone of our constitutional scheme will give way and with it will disappear the rule of law and the civilized life in the society. That is why it is imperative and invariable that Court's orders are to be followed and complied with.”

44. The High Court in the case of Samuel M. N. Mweru & Others v National Land Commission & 2 others [2020] eKLR discussed the applicable law on contempt of court as follows: -

“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.”

45. In these proceedings therefore, this court should determine whether the prerequisites set out above have been met.

46. With respect to the terms of the order, it is not in doubt that this court vide a ruling dated 15<sup>th</sup> February, 2017 issued the following orders:-

- a. The Respondent is hereby compelled to produce to court a full and accurate inventory of the assets and liabilities of the estate of Jedidah Wanjiku Ndegwa(deceased) and a full and accurate account of all dealings therewith up to the date of the account.
- b. The managerial powers over the estate of Jedidah Wanjiku Ndegwa given to the Respondent in H.C Misc. Application No. 23 of 2011 are hereby terminated.
- c. The Respondent is ordered to release all documents of ownership of properties belonging to the late Jedidah Wanjiku Ndegwa to the Applicant.



- d. This matter be mentioned within 30 days to confirm compliance.
47. The above orders were extracted by the Applicant and were served upon the Respondent as evidenced by an affidavit of service sworn by Herman G. Mwangi on 5<sup>th</sup> May, 2017. Further, the Respondent does not dispute knowledge of the terms of the order.
48. So did the Respondent comply with the orders of the court? The respondent was required to render a full and accurate inventory of the assets and liabilities of the deceased and to release all ownership documents of the deceased to the Applicant. To date these have not been done. The Respondent's reasons for noncompliance are she only dealt with the Nakuru Municipality Block 2/490 and the proceeds arising therefrom were partially used to settle the deceased's debts and hospital charges which were monumental. She also states that Nelson Ndegwa, who was the deceased's husband is the best person to be followed for production of documents and other issues, and that the details of the deceased's properties are well known to the applicant and he has the capacity to find out their current status.
49. The respondent did not review or appeal against the orders in issue and the reasons advanced do not absolve her from the responsibilities/obligations demanded in the order of 15<sup>th</sup> February, 2017. It is apparent therefore that the respondent has knowingly and willfully disobeyed the aforesaid orders of this court.

**Whether the Respondent should be committed to civil jail for a period of not less than 6 months?**

50. The Applicant has urged the court to allow its application as prayed.
51. The respondent on her part referred this court to section 63(e) of the *Civil Procedure Act* which mandates the court to issue any supplementary orders as may appear to be just and convenient. She alluded that the applicant wants to deny her invaluable constitutional rights.
52. The Constitutionality of the remedy of committal to civil jail has been jurisprudentially analysed in our courts. In Beatrice *Wanjiku & Another vs The Attorney General Petition 190 of 2011* it was held that:
- “Before the promulgation of *the Constitution*, Kenya took a dualist approach to the application of international law. A treaty or international convention which Kenya had ratified would only apply nationally if Parliament domesticated the particular treaty or convention by passing the relevant legislation. *The Constitution* and in particular Article 2(5) and 2(6) gave new colour to the relationship between international law and international instruments and national law. Article 2(5) provides? The general rules of international law shall form part of the law of Kenya and Article 2(6) provides that? Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.”
53. In Jayne Wangui Gachoka vs Kenya Commercial Bank Petition Number 51 of 2010 it was held:
- “The deprivation of liberty sanctioned by sections 38 and 40 of the *Civil Procedure Act* is permissible and is not in violation of either *the Constitution* or the ICCPR. The caveat, however, which has been emphasized in all the cases set out above, is that before a person can be committed to civil jail for non-payment of a debt, there must be strict adherence to the procedures laid down in the *Civil Procedure Act* and Rules, which provide the due process safeguards essential to making the limitation of the right to liberty permitted in this case acceptable in a free and democratic society.”



54. In *Republic vs Permanent Secretary Office of the President Ministry of Internal Security & Another exp Nassir Mwandih* [2014 eKLR] this Court held that:

“It is therefore clear that even in normal execution of decrees by committal to civil jail, as long as the safeguards under the relevant provisions of the *Civil Procedure Act* and the Rules made thereunder are complied with an objection on the constitutionality of the procedure would not be upheld.”

55. What is discernable from the foregoing is that committal to civil jail is not objectionable, subject to the due process being adhered to.

56. The procedure for instituting Contempt proceedings in Kenya was discussed in *Christine Wangari Chege vs Elizabeth Wanjiru Evans & Others* Civil Application No. 233 of 2007, [2014] eKLR where the Court observed as follows:-

“Though the Court of Appeal of England and Wales was established in 1875, some 92 years before the commencement of the *Judicature Act* the Act in the cited Section 5 simply directs that this court like the High Court must make reference to the powers exercised by the High Court of Justice in England and not those exercised by its counterpart, the Court of Appeal of England and Wales.

The High Court of Justice in England is that level of the court system in England, comprising three divisions, the Queen's Bench, the Chancery and Family Divisions. That court draws its jurisdiction to punish for contempt of court from both the statute, namely the *Contempt of Court Act*, 1981 and the Common Law. But the procedure to be followed in commencing, prosecuting and punishing contempt of court cases was, until 2012, as will shortly be explained, provided for by Order 52 Rules 1 to 4 of the Rules of the Supreme Court (RSC), made under the Supreme Court of *Judicature Act*, 1873 (or simply the *Judicature Act*, 1873). The *Judicature Act*, 1873 abolished a cluster of courts in England and Wales dating back to medieval periods, some with overlapping judicial powers, and in their place Supreme Court of Judicature, which must not be confused with the Supreme Court of the United Kingdom which was established only on 1st October, 2009 assuming the judicial features of the House of Lords.

Order 52 RSC, until 2012 as alluded to earlier provide the procedure of commencing contempt of court proceedings. The procedure may be summarized as follows, in so far as it relates to the High Court of Justice:-

- i. An application to the High Court of England for committal for contempt of court will not be granted unless leave to make such an application has been granted.
- ii. An application for leave must be made ex parte to a judge in chambers and supported by a statement setting out the particulars of the applicant as well as those of the person sought to be committed and the grounds on which his committal is sought, and by an affidavit verifying the facts relied on.
- iii. The applicant must give notice of the application for leave not later than the preceding day to the Crown Office.



- iv. Where an application for leave is refused by a Judge in chambers the applicant may apply afresh to a divisional court for leave within 8 days after the refusal by the Judge.
- v. When leave has been granted, the substantive application by a motion would be made to a divisional court.
- vi. The motion must be entered within 14 days after the granting of leave; if not, leave shall lapse.
- vii. The motion together with the statement and affidavit must be served personally on the person sought to be committed, unless the Court thinks otherwise.

It is imperative to note that in 2012, in England, the Civil Procedure Rules (2012) came into effect, replacing the Rules of the Supreme Court that existed previously. The current position was eloquently expressed by Justice Mativo (as he then was) in *Samuel M. N. Mweru & Others vs National Land Commission & 2 others* [2020] eKLR where he held as follows;

The learned Judges in the above case correctly pointed out that the rules applicable in the United Kingdom have been applied in Kenya with uneven degree of consistency and cited several examples.<sup>[26]</sup> The only consistency in the decided cases is that leave was a requirement.

However, following the implementation of the famous Lord Woolf's "Access to Justice Report, 1996," The Rules of the Supreme Court of England are gradually being replaced with the Civil Procedure Rules, 1999. On 1.10.2012, the Civil Procedure (Amendment No.2) Rules, 2012 came into force and Part 81 thereof effectively replaced Order 52 RSC in its entirety. Part 81 (Applications and Proceedings in Relation to Contempt of Court) provides different procedure for four different forms of violations.

Rules 81.4 relates to committal for "breach of a judgement, order or undertaking to do or abstain from doing an act."

Rule 81.11- Committal for "interference with the due administration of justice" (applicable only in criminal proceedings)

Rule 81.16- Committal for contempt "in the face of the court"), and

Rule 81.17- Committal for "making false statement of truth or disclosure statement."

An application under Rule 81.4 (breach of judgement, order or undertaking) now referred to as "application notice" (as opposed to a notice of motion) is the relevant one for making the application now under consideration. The application notice must set out fully the grounds on which the committal application is made and must identify separately and numerically, each alleged act of contempt and be supported by affidavit(s) containing all the evidence relied upon.

In *Christine Wangari Gacheche*<sup>[27]</sup> the Court of Appeal correctly pointed out that leave, now called "permission" is not required where committal proceedings relate to a breach of a judgement, order, or undertaking. However, leave is still a requirement for applications under Rules 81.12 & 81.17 cited above.

After evaluating the above Rules, the Court of Appeal concluded that "we find that on the basis of the new Civil Procedure Rules (of England) contained in the Second Supplement to the 2012 White Book, no leave is required before bringing an application, like the one before us, for committal for contempt



relating to breach of this court's order..." On that basis, I find that it was not necessary for the applicant to seek leave before filing this application, hence this application is properly before the court."

57. In the instant case, the order in question is the ruling delivered on 15<sup>th</sup> February, 2017. Going by the above decision then the applicant was not required to seek leave to commence this application.
58. The respondent is and has been fully aware of the same for years. She has not taken any tangible steps to comply. The fact that she is no longer the manager of the estate of her sister (now deceased) does not absolve her from the responsibility of accounting for her time as the manager.
59. I am thus in agreement that the respondent is in contempt of the orders of the court.
60. Should the court proceed to punish the applicant with a prison sentence as urged by the applicant?
61. The answer to this question is that while the court has the powers to act as such, it is also empowered to give alternative orders. This does not mean that failure to comply with a court order is to be taken lightly. It is just a recognition of the fact that the court has discretion to deal with the matter in a way it sees best.
62. Thus, in the interest of justice I will extend time for the the Respondent to comply with the court orders issued on 15<sup>th</sup> February, 2017. I direct that the Respondent should supply the Applicant with all the documents ordered by the court within 30 days from today, failing which she shall be liable to punishment.
63. Costs of this application shall be borne by the respondent.
64. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAKURU 5<sup>TH</sup> DAY OF JUNE, 2024.**

**H. M. NYAGA,**

**JUDGE.**

In the presence of;

Court Assistant Jeniffer

Ms Achieng for Chege – Applicant

No appearance for Respondent

