



**Gardale v Mire (Miscellaneous Application E006 of 2023)
[2024] KEHC 12178 (KLR) (11 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12178 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARSEN
MISCELLANEOUS APPLICATION E006 OF 2023
M THANDE, J
OCTOBER 11, 2024**

BETWEEN

RAMLA YUSSUF GARDALE APPELLANT

AND

ADHAN HASSAN MIRE RESPONDENT

RULING

1. Before this Court for determination is a Notice of Motion dated 12.10.23 seeking:
 1. Spent.
 2. That this Honourable Court vary and set aside its orders issued on 5th October 2023.
 3. That warrant of arrest do issue to the 1st Respondent and be brought before this Court to show cause why he should not be punished for disobeying Court order issued by Hon. Mohamed Mursal – Kadhi in Succession Case No. 5 of 2022 on 31st May 2023 at Garsen Law Courts.
 4. That the Honourable Court do order the OCSGarsen Police Station to execute orders of this Court.
 5. That any other orders this Honourable Court deem fit to grant to uphold the rule of law.
 6. That costs of this application be borne by the Respondent.
2. The grounds upon which the Application is premised are that in Garsen Succession Cause No. 5 of 2022 filed by the Applicant, the court by its orders of 31.5.23, distributed the estate of the deceased as per Islamic Shariah. The Applicant stated that the Respondent who is a beneficiary of the estate disregarded the orders issued by the court and obstructed the distribution of the estate. Further that the Respondent never appealed the orders and has been disposing of the estate to defeat the decree. The Applicant urged the Court to cite the Respondent for contempt.



3. The Respondent opposed the Application vide his replying affidavit sworn on 24.1.24. He averred that in the judgment at para 5b, the court directed that the estate remain undistributed since there are minors on the property and that the 2nd defendant remain the administrator of the estate. He asserted that any legal suit relating to the estate could only be rightfully sustained by the appointed administrator and not the Applicant. He further stated that the Applicant's averments are untruthful and accentuated by malice. He urged the Court to dismiss the Application.
4. I have given due consideration to the Application and rival affidavits. The law relating review of orders is set out in Order 45 of the Civil Procedure Rules as follows:
 - (1) Any person considering himself aggrieved—
 - (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
 - (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.
5. By dint of Rule 63 of the Probate and Administration Rules, Order 45 of the Civil Rules is applicable herein being a succession matter. Rule 63(1) provides:

Save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Order 5, rule 2 to 34 and Orders 11, 16, 19, 26, 40, 45 and 50 (Cap. 21, Sub. Leg.), together with the High Court (Practice and Procedure) Rules (Cap. 8, Sub. Leg.), shall apply so far as relevant to proceedings under these Rules.
6. The foregoing provision stipulates the grounds upon which an order may be reviewed or set aside. These include the discovery of new and important matters or evidence that were not within an applicant's knowledge or that the same could not be produced by at the time the decree was passed or the order made. The rider being that it must be demonstrated that due diligence had been exercised. An applicant may also seek review or setting aside of an order on account of some mistake or error apparent on the face of the record, or for any other sufficient reason.
7. The Applicant seeks the variation or setting aside of the order of 5.10.23 but has not exhibited a copy of the said order. A perusal of the record shows that on that date, there was no appearance by either of the parties. The Court thus stood over the matter to 7.12.23. Even if there had been an order made by the Court, the prayer would still have ran into headwinds. This is because the Applicant has not met the requirements of Order 45 of the Civil Procedure Rules. She has not pleaded discovery of any new and important matter or evidence before this Court for consideration. She has also not demonstrated that there is an error apparent on the face of the record and no other sufficient reason has been placed before the Court to warrant the review, variation or setting aside the order.
8. I now turn to the prayer for warrant of the Respondent. Her averments are that the Respondent disregarded the orders of the court and obstructed implementation of the orders. Indeed she appears to be satisfied with the orders for she has accused the Respondent of failing to comply with the same



and has refused to allow the distribution of the estate. The Respondent has denied the allegations and has stated that in the judgment, the court directed that the estate shall remain undistributed as there are minors who depend on the same.

9. I have perused the judgment and note that some page(s) are missing given that there are no paragraphs 3 and 4 therein. In what appears to be paragraph 5 (b), the judgment states as follows:

The estate to remain undistributed since there are minors who depend on the property

10. The Applicant did not controvert this position and the Court accepts the same.

11. Court orders are not issued in vain and are to be obeyed by the parties to whom they are directed. It has been stated in a long line of authorities that the reason why Courts will punish for contempt is to safeguard the rule of law and to protect the dignity of the Court. The purpose is also to assure a party in favour of whom an order is made that that order will be obeyed. Once a Court order is made, it must be obeyed. ROMER L.J in *Hadkinson v. Hadkinson* [1952] 2 ALL E.R. 567 stated:

It is the plain and unqualified obligation of every person, against, or in respect of, whom an order is made by a court of competent jurisdiction to obey it unless and until that 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 an order believes it to be irregular or even void.

12. A party who seeks orders for contempt of a court order, must bring the application within the threshold required, namely, such party must demonstrate the terms of the order in question, knowledge of the terms by the respondent and wilful disobedience by the respondent of the said order. In the case of *Samuel M. N. Mweru & Others v National Land Commission & 2 others* [2020] eKLR Mativo, J. (as he then was) restated what an applicant was required to prove in contempt proceedings, as follows:

It is an established principle of law that^[45] 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.^[46] Perhaps the most comprehensive of the elements of civil contempt was stated by the learned authors of the book *Contempt in Modern New Zealand*[47] 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
- (d) the defendant's conduct was deliberate.



13. It is not disputed that the Respondent is aware of the orders in question. However, while the Applicant has accused the Respondent of disregarded the court orders in question for the distribution of the estate and has obstructed the implementation thereof, she has not given particulars of the alleged obstruction. Further, while she has accused the Respondent of disposing of the estate by selling the same, she has not stated what has been sold and when, now to who the sale was done.
14. The standard of proof in contempt proceedings is well established and though it is higher than proof on a balance of probabilities it is not proof beyond reasonable doubt as that remains in the realm of criminal cases. This is as was held in the case of Mutitika v Baharini Farm Limited [1985] KLR 229, 234, where the Court of Appeal stated:

In our view, the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt...The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to an offence which can be said to be quasi-criminal in nature.
15. In order to be deserving of the orders sought, the Applicant was required to lay before this Court proof beyond a balance of probabilities that the Respondent disobeyed the order issued by the Kadhi's Court on 31.5.23. She however failed to do so.
16. In the result, this Court does not consider that the Applicant has made out a case to warrant the grant of the orders sought. Accordingly, the Application dated 12.10.23 is hereby dismissed. This being a family matter, there shall be no order as to costs.

DATED, SIGNED AND DELIVERED VIA MS TEAMS THIS 11TH DAY OF OCTOBER 2024

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M. THANDE
JUDGE

