



**In re Estate of Peter Kibicha Gathogo (Deceased) (Succession Cause E006 of 2021) [2023] KEHC 22782 (KLR) (22 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22782 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
SUCCESSION CAUSE E006 OF 2021**

**A MSHILA, J**

**SEPTEMBER 22, 2023**

**IN THE MATTER OF THE ESTATE OF PETER KIBICHA GATHOGO (DECEASED)**

**BETWEEN**

**ALICE NYOKABI KIBICHA ..... APPLICANT**

**AND**

**TERESIA NYAMBURA KIBICHA ..... RESPONDENT**

**RULING**

1. Before court is an application by way of Notice of Motion dated 21<sup>st</sup> October, 2022 and brought under Section 5 of the *Judicature Act*, Cap 8 Laws of Kenya, Part 81.4 of the Civil Procedure (Amendment 2) Rules of England 2012, Article 159(1) of *the Constitution* of Kenya 2010, Order 51 Rules 1 and 3 of the Civil Procedure Rules 2010 and all other enabling provisions of the law. The Applicant sought for orders that:-
  - a. Spent
  - b. Summons be issued against the Respondent to appear before court and show cause why he should not be committed to civil jail for such term as the court may deem just and fit.
  - c. The Honourable Court find, hold and declare that Teresia Nyambura Kibicha is in contempt of court by disobeying the orders issued on 25<sup>th</sup> March, 2022 and does cite her.
  - d. The Respondent be committed to civil jail for a term of six (6) months until she purges her contempt and complies with the orders of this Honourable Court issued on 25<sup>th</sup> March, 2022 or she be ordered to purge the contempt on terms that this Honourable Court deems fit.
  - e. In lieu of the fourth prayer, the Respondent be cited for contempt of court and fined a sum of Kshs. 1,000,000/=.



- f. The court makes any such order for purposes of enforcing the status quo orders issued by this court on 25<sup>th</sup> March, 2022.
2. The application is premised on the grounds that on 30/3/2022 the Respondent was served with the order of the court granted on 25/3/2022 maintaining status quo as set out in prayer 4 of the summons dated 23/3/2022 which order the Respondent is in contempt as she continues with quarrying activities destroying the suit land and wasting the estate's machine.
3. Alice Nyokabi Kibicha in her sworn supporting affidavit deposed that on 30/3/2022 the Respondent was served with the order of the court granted on 25/3/2022 maintaining status quo as set out in prayer 4 of the summons dated 23/3/2022 which order the Respondent defies as she continues with quarrying activities destroying the suit land and wasting the estate's machine. She averred that the Honourable Court has not varied or lifted its order for status quo as such the activities by the respondent imply bad faith and lack of respect for the court.
4. Subsequently, Teresia Nyambura Kibicha filed her Replying Affidavit on 31<sup>st</sup> January, 2023 in opposition to the Applicant's application. She deposed that the instant application is anchored on falsehoods and the same is aimed at painting her in bad light before the court whereas she is a law abiding citizen. She averred that the quarrying business is not operated in any of the parcels of land forming part of the estate as contained in the court order being Gatuanya/Muyu Block 2/838 registered in the name OF M/s. Gatuanya Developers Limited where the deceased was a director as such the same does not form part of the deceased's estate as such the allegations by the Applicant do not hold any water. In any case, the photographic evidence attached, does not demonstrate personal participation on her part. She averred that the Topnew stone cutting machine does not form part of the deceased's estate as the same is owned by M/s Gatuanya Developers Limited. She stated that the Applicant ought to have satisfied herself first that the deceased's estate had been interfered with prior to filing the instant application as the standard of proof in contempt proceedings is always higher than proof on a balance of probabilities which legal burden she has failed to discharge.
5. The Applicant filed a Further Affidavit on 5<sup>th</sup> May, 2023. She deposed that land parcel no. Gatuanya/Muyu Block 2/838 was illegally hived from Gatuanya/Muyu Block 2/2 as such the illegal subdivision cannot give rise to a clean and lawful title. The court order was said to conserve the whole of Gatuanya/Muyu Block 2/2 as such any activities on any illegally subdivided portion amounts to disobedience of the court order.
6. The application was canvassed by way of written submission.

### **Applicants' Submissions**

7. The Applicant through her counsel submitted that the order whose existence and personal service are not disputed by the Respondent. The Respondent was said to have wilfully and intentionally failed to obey the court order which is well within her knowledge. It was submitted that land parcel Gatuanya/Muyu Block 2/838 being a subdivision from parcel no. Gatuanya/Muyu Block 2/2 forms part of The Deceased's Estate As Well As The Topnew stone cutting machine. Reliance was placed on the case of *Sheila Cassatt Issenberg & another vs Antony Machatha Kinyanjui* (2021) eKLR.

### **Respondent's Submissions**

8. The Respondent submits that Gatuanya/Muyu Block 2/838 where the quarry activities are undertaken does not form part of the deceased's estate. In any case, the said property is not mentioned in the court order made on 24/3/2022. The Applicant was urged to desist from challenging the legality



of title no. Gatuanya/Muyu Block 2/838 as she lacked the necessary evidence. The Applicant was also said to have failed to place before court evidence to demonstrate that the Respondent was using the Topnew stone cutting machine. In any case, the said machines are owned by Gatuanyaga Developers Limited who are not party to this case. Reliance was placed in the case of *Peter K. Yego & others vs Pauline Wekesa Kode* (Acc No. 194 of 2014). Lastly, the Respondent submitted that the Applicant had failed to discharge the burden of proof to the required standard being higher than that of balance of probability. Reliance was placed on among other cases the case of *Katsuri Limited vs Kapurchand Depor Shah* (2016) eKLR.

### Issues For Determination

9. Having considered the Applicant's application the Replying affidavit by the Respondent in opposition, the further affidavit and the rival submissions, the only issue for determination is whether the Respondent is guilty of disobeying the court order.

### Analysis

10. Section 5 of the *Judicature Act* confers jurisdiction on the superior courts to punish for contempt. The section provides that:
  - (1) The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate courts.
  - (2) An order of the High Court made by way of punishment for contempt of court shall be appealable as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the High Court.
11. The *Halsbury's Laws of England* (4th Edition (9th Re-Issue), Pg. 33, para 52.) defines civil contempt as follows;

“...disobedience to process is a civil contempt of court to refuse or neglect to do an act required by a judge or order of the court within the time specified in the judgment order requiring a person to abstain from doing a specified act, or to act in breach of an undertaking given to the court by a person, on the faith of which the court sanctions a particular course of action or inaction...”
12. The applicable standard of proof for contempt proceedings is above a balance of probabilities, given the criminal nature of contempt proceedings. Reference is made to the case of *Mutitika vs Baharini Farm Ltd* [1985] KLR 229, 234, where the Court of Appeal had this to say:

“...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 offence which can be said to be quasi- criminal in nature.”
13. The main features of disobeying court orders are that the contemnor must be aware of the existence of the court order. There must be an existing court order capable of being disobeyed and lastly that breach thereof must be proved.



14. The Respondent herein is being accused by the Applicant is of disobeying the court order granted on 25/03/2022 of maintaining status quo in the succession matter herein as she continues to carry out quarrying activities at Komo/gatuanyaga while using the Topnew stone cutting machine to the detriment of the other beneficiaries.
15. The Respondent does not dispute the existence of the court order. She also does not dispute being personally served with the said order. Her main issue of contention is that the alleged quarrying activities are being carried out on land parcel no. Gatuanya/Muyu Block 2/838 which is registered in the name of M/s Gatuanyaga Developers Limited. She also states that the alleged stone cutting machines are also owned by M/s Gatuanyaga Developers Limited as such the said parcel of land and the machines do not form part of the deceased's estate. In the circumstances, the Respondent denies the allegation that she is in wilful disobedience of the orders of the court made on 25/3/2022.
16. Having perused the order of the court to maintain status quo, the parcel of land known as Gatuanya/Muyu Block 2/838 where the alleged quarry activities are said to be taking place it is noted that it is not listed as among the properties set out in prayer no. 4 of the summons dated 23/3/2022 which properties are the ones affected by the order of maintaining status quo.
17. The Applicant avers that land parcel no. Gatuanya/Muyu Block 2/838 was illegally hived from title no. Gatuanya/Muyu Block 2/2 belonging to the deceased by the Respondent. The Applicant attached a green card which shows that on 19/6/19 the title was closed on subdivision with new numbers being Gatuanya/Muyu Block 2/836-838. A letter dated 17/6/2018 is also attached which letter was written by the Respondent to the deceased where the deceased is being requested to acknowledge receipt of title deeds one being for title no. Gatuanya/Muyu Block 2/2. It is important to note that this letter was before the subdivision took place. Nothing on that letter shows any kind of animosity between the Respondent and the deceased. In any case, pursuant to article 165(5) of *the Constitution*, this court lacks jurisdiction in matters to do with the use, occupation of and title to land. This court only deals with distribution of properties ascertained as belonging to the deceased.
18. Moreover, what is before court is the application for contempt and not for illegal subdivision of land parcel number Gatuanya/Muyu Block 2/2. If the parties herein have issues with the ownership of land parcel number Gatuanya/Muyu Block 2/838, the same should be ventilated in the court clothed with the requisite jurisdiction. Nevertheless, the evidence before court demonstrates that the alleged quarrying activities are being carried out by the Respondent on land parcel number Gatuanya/Muyu Block 838. The same is registered under the names of Gatuanyaga Developers Limited as indicated on the title deed. There is also evidence that the machines being used to carry out the quarrying activities being Topnew stone cutting machines are owned by M/S Gatuanyaga Developers Limited with the other machinery in form of vehicles being leased from third parties.
19. Contempt of court is of criminal nature as such to prove a case against a contemnor, the standard of proof required is the one beyond reasonable doubt. That is to say, that the required standard of proof is higher than that of a balance of probabilities. The fact that someone's liberty is at stake requires that the offence must be strictly proved and the proceedings should be treated with a lot of seriousness. However, the power granted to the courts to punish for contempt should be used sparingly and should be effected as a last resort.



20. Similarly put, the threshold required is not just on a balance of probabilities but the threshold that is required for contempt proceedings is that required in criminal proceedings that is beyond reasonable doubt. In *Milka Wangoi Kamau & another v Habby Misoga Lugadiru* (2014) eKLR it was held that:

“As much as civil contempt is an aspect of civil litigations it has got criminal implications/ inclinations and hence its threshold is not merely founded on balance of probability but at times it must be proved beyond reasonable doubt. Therefore, the committal law is to the effect that the standard of proof required at committal proceedings is the criminal standard”

21. In the end, this court is satisfied that the Respondent is not guilty of contempt as the land parcel no. Gatuanya/Muyu Block 2/838 where the Respondent is allegedly undertaking quarrying activities is not amongst the properties which are listed in the order of the court of maintaining status quo. More particularly, land parcel no. Gatuanya/Muyu Block 2/838 and the stone cutting machines are registered and/or owned by M/S. Gatuanyaga Developers Limited.

### **Findings And Determinations**

22. In light of the forgoing reasons this court makes the following findings and determination;

- i. The application is found to be devoid of merit in its entirety and it is hereby dismissed with costs to the Respondent.

Orders Accordingly

**DATED SIGNED AND DELIVERED VIA TEAMS AT KIAMBU THIS 22<sup>ND</sup> SEPTEMBER, 2023.**

**A.MSHILA**

**JUDGE**

