



In re Estate of Mzee Ibrahim Memia (Deceased) (Succession Cause 34 of 2019) [2023] KEHC 23951 (KLR) (23 October 2023) (Ruling)

Neutral citation: [2023] KEHC 23951 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
SUCCESSION CAUSE 34 OF 2019**

G MUTAI, J

OCTOBER 23, 2023

IN THE MATTER OF THE ESTATE OF MZEE IBRAHIM MEMIA(DECEASED)

BETWEEN

AYUB MZEE MWANGI & OTHERS APPLICANT

AND

DAPHINE IBRAHIM MEMIA RESPONDENT

RULING

1. Before this court is a Notice of Motion application dated 7th July 2023. The application seeks the following orders;
 - a. Spent;
 - b. That this honourable court be and is hereby pleased to issue an order to appoint an independent agent to collect the rental income from Plot No. Sub-division 2105/1/MN and Plot No. Sub-division 2095/1/MN as from July, and the same be deposited within the court's account pending the hearing and determination of the instant application;
 - c. That this honourable court be pleased to cite the respondent for contempt of court;
 - d. That this honourable court be pleased to commit the respondent to civil jail for six (6) months, or for such a period as this honourable court may deem fit for contempt of court and/or that the respondent be ordered to pay a fine the quantum of which is appropriate for deliberately and/or wilfully disobeying the orders of this honourable court issued on the 17th of May 2023 having been issued in the presence of their advocates on record;
 - e. That this honourable court be and is hereby pleased to appoint an independent agent to collect the rental income from Plot No. Subdivision 2105/1/MN and Plot No. Sub division 2095/1/



MN, and the same be deposited within the court's account pending the distribution of the estate;

- f. That this honourable court may be pleased to issue any other order or directions it may deem fit to grant;
 - g. That the costs of this application be borne by the Respondent.
2. The application is premised on the grounds stated in the motion and also on the supporting affidavit of the 1st applicant sworn on 7th July 2023.
 3. The 1st applicant stated that according to this honourable court's ruling delivered on the 17th May 2023, the respondent was to comply with order number 3 by depositing half of the rental income collected from the two properties as from the month of June. In violation of the court order, the respondent unilaterally spent the entire rental income for her own personal use and gain. Further, the respondent cannot act as the personal representative of the deceased's estate and be in a fiduciary position on behalf of all the beneficiaries, whereas she is in contempt of court orders.
 4. He deponed that unless the orders sought are granted, the respondent will continue being in contempt, bringing disrepute and scorn to the court, the rule of law and the administration of justice.
 5. In response, the respondent filed a notice of preliminary objection dated 14th July 2023 and a replying affidavit sworn on the same date.
 6. The notice of preliminary objection is based on the following grounds; the application dated 7th July 2023, which seeks the appointment of an independent agent to collect rental income from Plot No. Subdivision 2105/1/MN and Plot No. Sub division 2095/1/MN pending distribution of the estate, offends the express provisions of Section 7 of the *Civil Procedure Act*, thus res judicata; the order sought in the applicants' application, in particular order 5 seeking appointment of an independent agent to collect rental income from Plot No. Subdivision 2105/1/MN and Plot No. Subdivision 2095/1/MN, pending distribution of the estate, was conclusively settled in the ruling delivered on 17th May 2023 by Hon. G.Mutai(J); and that the application dated 7th July 2023 is frivolous, vexatious and an abuse of court process and the same should be dismissed with costs.
 7. In the replying affidavit, the respondent stated that she was unable to remit any funds to the court for the reason that the expenses were more than the income. She further stated that the said income cannot meet her monthly needs.
 8. The respondent acknowledged her non-compliance with the orders of this court and apologised for the same. She stated that the letter dated 27th June 2023, to the applicant's counsel was done in good faith with no intent to cause offence to the applicant. Furthermore, she has been ailing, and her confinement would deteriorate her health. She urged the court to dismiss the application.
 9. The respondent further filed a supplementary affidavit sworn on 18th July 2023. She stated that she was the one who had been collecting rent from the suit properties even before the demise of her husband, the deceased herein. She relies on the rental income for her upkeep as she is a retiree. She stated the applicants have never objected to the same, and thus, no prejudice will be occasioned to them. She urged the court to apply the rules of natural justice in dealing with the application.
 10. The court directed that the application be canvassed by way of written submissions. Subsequently, the applicant, through his advocates Marende Necheza & Co. Advocates, filed the written submissions dated 1st August 2023.



11. Counsel relied on Section 4(1)(a) of the Contempt Act No.46 of 2016 and submitted that the order made was clear and unambiguous, and both counsel were on record on the day the ruling was delivered. The order required the Respondent to deposit half of the rental income collected from the two properties to the court and the other half be given to her for her own upkeep orders, which she has failed to comply with.
12. Counsel further submitted that the salient features for disobeying court orders are: the contemptnor must be aware of the existence of the court order; there must be an existing court order capable of being disobeyed; and breach thereof must be proved.
13. On the first feature, counsel submitted that the respondent's counsel was present in court when the ruling was delivered and orders made. The respondent has conceded to being aware of the ruling and orders of this court of 17th May 2023.
14. On the second feature, counsel submitted that the orders were delivered on 17th May 2023, and thus there were existing orders capable of being disobeyed.
15. On the third feature, counsel submitted that the respondent had acknowledged the breach and, therefore, the same has been proved to the required standard.
16. Counsel further submitted that the applicant has deliberately and wilfully disobeyed the orders of this honourable court in particular order 3. Counsel urged the court to find the respondent in contempt and apply the appropriate punishment under Section 28 of the [Contempt of Court Act](#), No.46 of 2016.
17. On the preliminary objection, counsel submitted that the ruling of 17th May 2023 did not appoint a neutral agent to collect the rental proceeds. It is the respondent's non-compliance with the said orders that resulted in the application herein. The preliminary objection is unmerited and ought to be dismissed with costs.
18. The respondent, on the other hand, through her advocates Messrs. Wandai Matheka & Co. Advocates, filed her written submissions dated 17th August, 2023. Counsel submitted on two issues, which in her view are up for determination, namely, whether the instant application is competent; and whether the application dated 7th July 2023 satisfies the prerequisites for the court to grant the orders sought, bearing in mind the circumstances of this case.
19. On the first issue, counsel relied on the case of Kenya Human Rights Commission versus Attorney General & Another [2018] eKLR in which the court nullified the [Contempt of Court Act](#), No.46 of 2016, and submitted that the application herein is incompetent as it is brought under Section 27(b) & 28 of the said Act. It was submitted that the applicable law for contempt of court is the English law under rule 81.4 of the English Civil Procedure Rules, which is applied by virtue of section 5(1) of the [Judicature Act](#).
20. Counsel further submitted that the application is not properly in court and that the law governing contempt of court in Kenya is the law that was applicable before the enactment of the [Contempt of Court Act](#).
21. On the 2nd issue, counsel submitted that the test for contempt of court orders is whether the breach was committed deliberately and mala fide. That the respondent rebutted the applicant's inference of wilfulness and bad faith through her replying affidavit and supplementary affidavit.
22. In respect to the preliminary objection, counsel relied on Section 7 of the [Civil Procedure Act](#) and submitted that in its ruling, the honourable court allowed prayer number 1 of the application dated



9th March 2023, which is similar to prayer number 5 of the application herein. The court declined to allow the said appointment.

23. In conclusion counsel urged the court to uphold the preliminary objection and dismiss the applicant's application with costs.
24. I have considered the application herein, the responses therein and the rival submissions of both counsel and the issues that emerge for determination are:
 - a. whether this application is incompetent?
 - b. whether the application is res judicata?
 - c. whether the respondent is in contempt of court orders?
25. The application herein has been brought under Article 48 and 159(2) of *the Constitution* of Kenya, Sections 1A,1B, 3 and 3A of the *Civil Procedure Act*, Sections 27(b) and 28 of the *Contempt of Court Act* No.46 of 2016, Section 47 of the *Law of Succession Act* and Order 51 rule 1 of the Civil Procedure Rules, 2010.
26. Counsel for the applicants, in his submissions, has relied on the *Contempt of Court Act*, No.46 of 2016. The respondent, on the other hand, raised concerns on the same in her submission and submitted that reliance on the said act, which has been nullified by a court of law, makes the application incompetent.
27. This court notes takes judicial notice of the fact that the *Contempt of Court Act*, No.46 of 2016, was declared unconstitutional by E. Mwita, J in the case of Kenya Human Rights Commission versus the Attorney General & Another (Supra) for, inter alia, encroaching on the independence of the judiciary.
28. On the other hand, Article 159 (2)(d) of *the Constitution* provides that justice should be administered without undue regard to procedural technicalities. The court in the case of Kenya Ports Authority versus Kenya Power & Lighting Limited [2012] eKLR, defined procedural technicalities by stating:-

“Under that provision, would a Preliminary Objection fall under the general description of what might be considered procedural technicalities? I think not. Some definitions may come to aid.

The definition of “procedure” is defined in Blacks Law Dictionary is:

“The mode of proceeding by which a legal right is enforced as distinguished from the substantive law which gives or defines the right and which, by means of the proceeding the court is to administer; that which regulates the formal steps in an action or judicial proceeding.”

And in the Collins Dictionary “procedure” is defined as “a way of acting or progressing in a course of action.....the established mode or form of conducting the business of legislature, or the enforcement of a legal right.

“Technicality” is defined in Collins Dictionary as:

Petty, formal point arising from a strict interpretation of rules.”

Blacks Law Dictionary defines “Technical” and “Technical errors” as follows:

“ Technical– immaterial, not affecting the substantial rights; without substance’; and



“Technical errors – errors committed in course of a trial which have not prejudiced the party and hence are not grounds for reversal.”

Combining the meanings of these words, “procedural technicalities” may be described as those that more concern the modes of proceedings and the rules involved that regulate formality and processes rather than substantive rights under law. This may not be an all-encompassing definition, but I think people generally associate procedural technicalities with annoying strictures and rules which hinder the achievement of substantial justice. An example would be citing a provision from a non-existent or wrong statute when the context is clear as to the statute intended.”

29. Accordingly, it is my finding that the application is not incompetent. I am guided by the case of Samuel M. N. Mweru & Others versus National Land Commission & 2 others [2020] eKLR, where the court quoted the case of Republic versus Kajiado County & 2 Others ex parte Kilimanjaro Safari Club Limited in which the court held as follows:-

“The applicable law as regards contempt of court existing before the enactment of the Contempt of Court Act was restated by the Court of Appeal in Christine Wangari Gachege versus Elizabeth Wanjiru Evans & 11 Others, [2014] eKLR. In that case, the Court found that the English law on committal for contempt of court under Rule 81.4 of the English Civil Procedure Rules, which deals with breach of judgment, order or undertakings, was applied by virtue of section 5(1) of the Judicature Act which provided that:

“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.”

This section was repealed by section 38 of the Contempt of Act of 2016, and as the said Act has since been declared invalid, the consequential effect in law is that it had no legal effect on, and therefore did not repeal section 5 of the Judicature Act, which therefore continues to apply. In addition, the substance of the common law is still applicable under section 3 of the Judicature Act.

This Court is in this regard guided by the applicable English Law which is Part 81 of the English Civil Procedure Rules of 1998 as variously amended, and the requirement for personal service of court orders in contempt of Court proceedings is found in Rule 81.8 of the English Civil Procedure Rules.”

The court agreed with the holding by stating,

“I agree with the above reasoning that since the act that repealed section 5 of the Judicature Act has been declared unconstitutional, the effect is that section 5 of the Judicature Act still stands.”

30. On whether the respondent is in contempt of court orders, the court in the case of Sheila Cassatt Issenberg & another versus Antony Machatha Kinyanjui [2021] eKLR stated:-

“The reason why courts punish for contempt is to uphold the dignity and authority of the court, ensure compliance with directions of the court, observance and respect of the due process of law, preserve an effective and impartial system of justice, and maintain public confidence in the administration of justice by courts. Without sanctions for contempt, there would be a serious threat to the rule of law and administration of justice. For a party to be cited for contempt, he must have violated and or disobeyed an order that was directed at



him... Due to the gravity of consequences that ordinarily flow from contempt proceedings, it is proper that the order be served and the person cited for contempt should have had personal knowledge of that order... The emphasis as shown in the above cases is that there must be “willful and deliberate disobedience of court orders.” There cannot be deliberate and willful disobedience, unless the contemnor had knowledge of the existence of that order. And because contempt is of a criminal nature, it is always important that breach of the order be proved to the required standard; first, that the contemnor was aware of the order having been served or having personal knowledge of it, and second; that he deliberately and willfully disobeyed it... But even as courts punish for contempt to safeguard the peaceful and development of society and the rule of law, it must be borne in mind that the power to punish for contempt is a discretionary one and should be used sparingly.”

31. In this case, the respondent has conceded to having not complied with the court orders of 17th May 2023. In view of her own admission, this finds and holds that she is in contempt of court.
32. Whereas ill health would ordinarily be an extenuating circumstance, she did not file an application seeking review of this court’s previous orders.
33. On whether the application is res judicata, Section 7 of the [Civil Procedure Act](#) provides,

“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.”

34. The court in the case of *Invesco Assurance Company Limited & 2 others versus Auctioneers Licensing Board & another; Kinyanjui Njuguna & Company Advocates & another (Interested Parties)* [2020] eKLR where the court stated:-

“The doctrine of res judicata is set out in Section 7 of the [Civil Procedure Act](#). The doctrine ousts the jurisdiction of a court to try any suit or issue which had been finally determined by a court of competent jurisdiction in a former suit involving the same parties or parties litigating under the same title.

A close reading of Section 7 of the Act reveals that for the bar of res judicata to be effectively raised and upheld, the party raising it must satisfy the doctrine’s five essential elements which are stipulated in conjunctive as opposed to disjunctive terms. The doctrine will apply only if it is proved that:

- i. The suit or issue raised was directly and substantially in issue in the former suit;
- ii. That the former suit was between the same party or parties under whom they or any of them claim;
- iii. That those parties were litigating under the same title;
- iv. That the issue in question was heard and finally determined in the former suit; and
- v. That the court which heard and determined the issue was competent to try both the suit in which the issue was raised and the subsequent suit.



35. The order to appoint an independent agent to collect the rental income from Plot Sub division 2105/1/MN and Plot No. Sub division 2095/1/MN and the same be deposited within the court's account pending the distribution of the estate, was dealt with by this honourable court in its ruling of 17th May 2023. Therefore, it amounts to res judicata.

36. The upshot of the foregoing is that this application succeeds in part.

Disposition

37. I therefore make the following orders:-

1. I find and hold that the Respondent wilfully and deliberately disobeyed the orders of this court. Consequently, I allow prayer 3 of the application;
2. I order that the Respondent does appear before me on 14th November 2023 for purposes of mitigation; and
3. I dismiss Prayer 5 for being res judicata.

38. Each party shall bear own costs, this being a family matter.

Orders accordingly.

DELIVERED, DATED AND SIGNED THIS 23RD DAY OF OCTOBER 2023 AT MOMBASA VIA MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of: -

Ms. Njuguna holding brief for Mr. Matheka for the Respondent;

No appearance for the Applicant;

Mr. Arthur Ranyondo – Court Assistant

