REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

SUCCESSION CAUSE NO. 299 OF 2014

IN THE MATTER OF THE ESTATE OF FREDRICK BINAYO SONGOLO (DECEASED)

RULING

1. The application for determination is the summons dated 11th June 2021. It is brought at the instance of Francis Binayo, who I shall refer to hereafter as the applicant, and principally seeks citation of Esnas Kamonya Mutie, who I share refer hereto as the respondent, for contempt of court orders that had been made on 17th November 2020.

2. The factual background is that the applicant orally moved the court on 17th November 2020 for orders to access the estate of the deceased, specifically Plot No. 45 Serem Market. The same was allegedly granted in the presence of the respondent and her Advocate. A formal order was extracted and was served upon the Advocates for the respondent on 24th November 2020. The respondent then wrote to the applicant a letter dated 8th March 2021, indicating that they knew about the order. On 16th December 2020, the applicant instructed agents to inspect the premises, asses the need for carrying out repairs on the premises. The agents had access to the estate, assessed it and prepared a report for the appellant. He acquired materials for the repairs, but his workers were denied access to the property. The applicant wants to maintain the estate using his own resources, and complains that the respondent had collected millions of shillings from the estate in terms of rent. He avers that he has never interfered with her agents, and wonders why she has denied his agents entry.

3. Attached to the application are copies of the grant made herein on 18th July 2014 appointing the applicant and the respondent administrators of the estate, the order extracted on 23rd November 2020 of the order made on 17th November 2020, the letter dated 8th March 2021 from the Advocates for the respondent to the Advocates for the applicant, and the report preparedupon the inspection carried out by agents of the applicant.

4. The respondent replied to the application, vide her affidavit sworn on 23rd July 2021. She avers that the order of 17th November 2020 allowed both administrators to access the subject plot, but the applicant used a false grant to mislead tenants, and obtained access in the guise of effecting repairs, which she stopped since tenants were on the verge of relocating. She avers that she wrote to him, through her Advocates, on 8th March 2021, but he never responded. She avers that she had not disobeyed court orders. She further avers that the applicant has never been keen to have the grant confirmed. She asserts that the application was in bad faith. She has attached several documents to her affidavit, most of which are not altogether relevant, save for the letters exchanged by their Advocates, dated 19th February 2021 and 8th March 2021.

5. It was directed on 13th July 2021 that the application be disposed of by way of written submissions. From the record from me it would appear that only the applicant has filed written submissions. I have perused through the same and noted the arguments made there.

6. What constitutes contempt of court is fairly notorious, for it has been addressed by the courts in many cases, and many decisions abound on it. It is, simply put, wilful and deliberate disobedience of a court. See *Mutitika vs. Baharini Farm Ltd* [1985] KLR 227 (Hancox, Myarangi JJA & Gachuhi Ag JA). The law on it, in terms of both process and substance, is the Judicature Act, Cap 8, Laws of Kenya, section 5 of which applies the law of England on the subject. Again, the courts have discussed widely what this means, and I need not go over that. The elements that need to be established are the terms of the order, knowledge of those terms, and failure by the person to whom, the order is directed to comply with it. See *Samuel MN Mweru & others vs. National Land Commission & 2 others* [2020] eKLR (Mativo J).

7. The terms of proof, proof of civil contempt is higher than that of ordinary civil cases. Contempt of court is a quasi-criminal wrong. The sanction for it is criminal in nature, a fine or imprisonment. As it borders on criminality, the proof required is higher than balance of probability, primarily because the liberty of a subject is at stake. Because of the gravity of contempt proceedings, it is mandatory that the order in question be served on the subject or the person to be cited, so that they have personal knowledge of the order. No one should be punished over an order whose contents they have no knowledge of. Knowledge of the order is to be gauged from the fact of service of the order on the subject. A party who has been served personally with the order is deemed to be aware of the terms of the order that they are said to have contravened or disobeyed. Proof of service is critical. Knowledge is a question of fact, and it has been said that the fact that the order was made in the presence of the Advocate for the subject or in the presence of the subject is not enough. The order or to be served as that is the surely way of establishing that the persons has knowledge of the terms of the order. See *Sheila Cassatt Issenberg & another vs. Anthony Machatha Kinyanjui* [2021] eKLR (Mwita J).

8. It is not in dispute that an order was made by the court on 17th November 2020. It directed the administrators to allow each other access to the property in question. Was the order served on the respondent, so as to make her aware of the terms of the order? The applicant says that the order was made in the presence of the respondent and her Advocate, and letters from her Advocates have been cited, to which show awareness by the Advocates of the order. What comes out very clearly is that although the order was formally extracted, it was not served on the respondent personally. It is not alleged that it was served on her personally, and no affidavit of service was filed or displayed as evidence of the service. It cannot, therefore, be said that she had knowledge of the terms of the order. I have looked at the record of 17th November 2020, and I have not seen anything there to the effect that she was present in court when the order was being made. Even then, her attendance did not change the fact that service was still mandatory.

9. The order itself was not specific on the purpose of the access, it merely allowed the administrator to access the property as part of their duties as administrators, to either collect rent, inspect the premises, meet tenants and supervisors, etc. It would appear that the applicant was allowed access, during which time his agents made an assessment of the property and filed a report, which suggested that repairs be done. The contention relates to the repairs. When the applicant sought to access to effect repairs, then access was denied. Was access to effect repairs without the concurrence of the other party?

10. Repair or renovation of estate assets is always a touchy matter. Touchy because some administrators and survivors of a deceased person effect repairs or renovate premises with a sinister motive, that of eventually claiming entitlement to that particular property on the basis that they improved it or added value to it through the repairs or renovation, and that they were then the persons entitled to the property. The repairs or renovation then become a ticket for them to acquire a stake in that particular property. So, where there are more than one administrator doing more to a property than just visiting it or inspecting it or visiting the persons in occupation, would require concurrence of co-administrators, otherwise acts that would have a fundamental effect on the character of the property, like repairs or renovation, should not be done solely by one side. The applicant does not appear to have had shared the report he generated on the property with the respondent, to get her concurrence on whether repairs were to be carried out, and he does not appear to have sat with her, to agree on the modalities of effecting the repairs or renovations. Improvement of estate assets ought to be done with estate funds. The administrators should have agreed on the source of those funds. If the applicant was to fund it from his pocket, then issues should have arisen as to how he was to recoup that expense, and from where, matters that would have required him to consult the respondent.

11. I have said this before, and I must say it again here, that even though there are two administrators of the estate h rein, I n law there is only one administration or presentation to the estate of the deceased. The two administrators hold one grant, which appoints all two of them as administrators. None of them holds a grant which makes them the sole administrators of the estate. None of them hold superior position, with respect to administration, over the other. None has more powers or more rights or heavier duties over the estate over the other administrator. Since there is only one administration, and not two, it behoves the two administrators to act as one, with regard to managing the estate of the deceased. Responsibilities and duties must be shared. The administrators must agree on the management of the assets, inclusive of decisions relating to how and when maintenance works on estate property is to be done. They must take a common stand on the expenses of the administration, and on the settlement of liabilities and debts and other outgoings. It should not be the business of one administrator to make decisions on behalf of the estate, it should be the corporate responsibility the two of them.

12. It is my finding that the access allowed by the order of 17th November 2020, did not extend to carrying out repairs or renovations or other alterations on the property without the concurrence of the other administrator, or without obtaining leave of court to do so, if concurrence was not forthcoming, to avoid difficulties in future. I am not persuaded that there was wilful disobedience of the said order, therefore, for the above reasons. I am not persuaded that a case has been made out for the respondent to be cited for contempt, and I hereby dismiss the application dated 11th June, 2021. There shall be no orders on costs.

13. Finally, to avoid unnecessary fights, over all manner of things that relate to estate assets, the most prudent thing is to always to move quickly to distribute the estate, so that the property is shared out, thereby giving freedom or liberty to the beneficiaries to have total control over what is allocated to them, obviating the sort of litigation that is being witnessed here. The parties herein should, therefore, concentrate on disposing of the pending business, which should ultimately lead to distribution of the estate.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 4TH DAY OF FEBRUARY, 2022

W. MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Mr. Shivega, instructed by Victor Shivega & Co., Advocates, for the applicants.

Mr. Fwaya, instructed by Gabriel Fwaya, Advocate, and Mr. Maruja, instructed by Maruja & Amunga, Advocates, for the respondent.