



**In re Estate of Mary Rose Wairimu Dames alias Mary Wairimu Dames (Deceased)
(Succession Cause 85 of 2019) [2024] KEHC 14338 (KLR) (15 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14338 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
SUCCESSION CAUSE 85 OF 2019
A MSHILA, J
NOVEMBER 15, 2024
SUCCESSION CAUSE NO. 85 OF 2019
IN THE MATTER OF THE ESTATE OF MARY ROSE WAIRIMU
DAMES ALIAS MARY WAIRIMU DAMES (DECEASED)
AND
IN THE MATTER OF AN APPLICATION FOR CONTEMPT OF COURT**

BETWEEN

**JOHN ANDREW DAMES 1ST APPLICANT
WILLIAM HENRY DAMES 2ND APPLICANT
CAROL KOTIL SEYSNER DAMES 3RD APPLICANT
CHRISTOPHER WOOD DAMES 4TH APPLICANT
PATRICK NJUBI DAMES 5TH APPLICANT**

AND

**MARGARET ESTHER DAMES 1ST RESPONDENT
JAMES HOSEAH GITAU MWARA T/A GITAU J.H. MWARA
COMPANY 2ND RESPONDENT
JAMES MWAURA NDUNGU T/A NDUNGU MWAURA AND
COMPANY 3RD RESPONDENT
GEOSURV SYSTEMS LTD 4TH RESPONDENT**



RULING

1. The 2nd, 3rd and 4th Respondents filed their Notice Of Purge Of Contempt Of Court Pursuant To The Applicants' Two (2) Applications Dated 12th November, 2021 & 10th Neovember, 2021 dated 30th January, 2024.
2. The said Notice reads as follows;-
 - a. Whereas the 1st Respondent passed away on 13th January, 2024 in Switzerland while the two Rulings of the Applications dated 2nd November, 2021 and 10th November, 2021 were pending for a Ruling date.
 - b. Whereas pursuant to a series of two court Rulings dated 22nd September, 2022 and 23rd February 2023 and the Deputy Registrar's Taxation Ruling dated 24th February, 2022, and the Consolidated Statement of Estate Accounts dated 5th October, 2022 filed by the 4 Respondents as ordered by the Honourable Court, most of the prayers 1,2,3,4,5,6,7,8,9,10,11 and 12 were settled by the two Courts Rulings cited above and the Taxation Ruling or were spent or overtaken by events. This left the five (5) Applicants to pursue the four (4) Contempt of Court prayers 13,14,15 and 16 which are pending for determination.
 - c. Whereas the 2nd, 3rd and 4th Respondents were acting at the behest of the instructions of the 1st Respondent in the subject matters in the two Applications dated 12th November, 2021 and 10th November, 2021, the 2nd, 3rd & 4th Respondents hereby offered unconditional and unreserved apology to the Honourable Court for all acts of omissions or commissions done in pursuit of the speedy implementation of the distribution in the Certificate of Confirmation of Grant which were contrary to specific clauses in the Consent Order dated 28th October, 2020.
 - d. The 2nd, 3rd and 4th Respondent request the Honourable Court to accept and record this unconditional purge of all acts of omissions and commissions which amounted to contempt of the Consent Order dated 28th October, 2020 as stated in the two applications dated 12th November, 2021 and 10th November, 2021 respectively. This being a family siblings dispute, they requested that the two (2) applications be marked as settled and each party to bear its own costs.
3. John Andrew Dames the Co-executor of the deceased's estate filed his affidavit in response to the notice of purge of contempt dated 16th May, 2024 on his own behalf and on behalf of his Co-applicants. He deposed that the Respondents submitted the Notice of Purge of Contempt without attempting to resolve or reach an agreement with them. The Respondents were required by the ruling of 22nd September, 2022 and that of 24th February, 2023 to prove compliance with the Consent Order and to give viva voce evidence as such the Respondent's claim that most prayers have been overtaken by events or spent is disputed. The Respondents were said to be using their client the 1st Respondent as a scapegoat as the 1st Respondent would not have acted contrary to the consent order. The Respondents were said to be held to a higher standard of conduct. Their apology was said not to purge their contempt as the same does not address the financial ramifications of the Respondents as such the Applicants cannot agree to mark the applications as settled and each party to bear its own costs. The Applicants gave out their settlement terms that the Respondents should cover the Applicant's costs, withdraw their Bill of Costs with costs and that the sum of Kshs. 11,200,000/= to represent all they will receive in the succession matter, that the Respondents should facilitate the return to the executors of the 7.5



acres joint title deed and the title deed pertaining to the 85.3 acres. The court was urged to render its ruling in the event the Respondents reject the Applicants' proposal.

4. James H. Gitau Mwara filed his Replying Affidavit in response dated 28th June, 2024 on his own behalf and on behalf of the 3rd and 4th Respondents. He contended that the notice of purge of contempt is not a mere apology. In any case, the notice was said not to be subject to the Objector's acceptance as such the Objector was said to be disrespectful of the court process as the purge of contempt of court is given to the court and once accepted, the matter ends there and the court cannot make a ruling on the 2 applications as this would be inviting further litigation. The Objector was said to be reopening matters already settled by a Taxation Ruling dated 24th February, 2022 as such the prayers by the Objector have been overtaken by events as they have been settled by the court. Further, that they filed a statement of the estate accounts dated 5/10/2022 as directed by the court and that there was no evidence of embezzlement of funds. The Objectors were said to be coercing the Applicants to drop the Taxation Ruling and the Certificate of Costs of Kshs. 46,131,260/= so as to accept the purge of contempt. The 1st Respondent was said to have been substituted by 3 new Co-Administrators. The Partial Certificate of Confirmation of Grant and the consent were revoked by consent of the 8 beneficiaries. The instructions carried out by the executors were said to have been given by the 1st Respondent as mandated by the revoked grant. The court was urged to accept and record the NOTICE of Purge of Contempt of Court dated 30th January 2024 without any terms and conditions and bring the two (2) applications to an end.

Issues For Determination

5. After reading the application and the respective submissions this court has framed the following issues for determination;
 - i. Whether the Respondents had due Notice of the Consent Order.
 - ii. Whether this is the appropriate time for this Hon. Court to adopt the notice to purge of Contempt of Court

Analysis

Whether the Respondents had due Notice of the Consent Order

6. The Practice Directions have always been that a copy of the judgment or order not to do an act must be personally served on the party or in accordance with an order for alternative service; indeed where a party is likely to be deprived of his liberty, the law then envisages a strict requirement of personal service and proof of service but there is rider that the court may dispense with service if it is satisfied that the person/party had notice or knowledge of the terms of the order or judgment;
7. A situation that depicts notice or knowledge is where a party or its legal representative or agent was present in court when the judgment or order was read; therefore, either personal service or knowledge of a court order are pre-conditions to liability in such proceedings and the former must be proved whereas the latter can be inferred;
8. It is not disputed that the 2nd and 3rd Respondents are both advocates; and upon perusal of the court proceedings when the consent was adopted as an order of the court the record reads 'and upon hearing Counsel for the Petitioners and Counsel for the Objectors'; from this reading of the court record it is apparent that the 2nd Respondent was present in court when the order was adopted; therefore it can safely be presumed that the 2nd Respondent had full notice; and from this presumption an inference can be drawn that the 2nd, 3rd and 4th Respondents had knowledge of the order;



9. For the forgoing reasons this court finds that the 2nd, 3rd and 4th Respondents acting at the behest of the 1st Respondent had notice and knowledge of the court order made on the 28/10/2019 and that strict proof of personal service is unnecessary;
10. This Court is satisfied that the Respondents all had notice and knowledge of the order;

Whether this is the appropriate time for this Hon. Court to adopt the notice to purge of Contempt of Court
11. The applicable law would have been the *Contempt of Court Act* No.46 of 2016 but the Act was declared unconstitutional in the case of *Kenya Human Rights Commission vs The Attorney General & Anor* [2018] eKLR; therefore the applicable law on contempt of court for the time being is found at Section 5 of the *Judicature Act* which reads as follows:-

5(1) The High Court and the Court of Appeal shall have the same power to punish for contempt of court as if for the time being possessed by the High Court of Justice in England, and such power shall extend to upholding the authority and dignity of subordinate courts.
12. The Applicants contend that having been aware of the order the 2nd, 3rd and 4th Respondents proceeded to act on the instructions of the 1st Respondent and are in disobedience of four (4) of the Contempt of Court prayers that is 13,14,15 and 16 as sought by the Applicants; the Respondents have proceeded to file a Notice purging their contempt which apology is not to the satisfaction of the Applicants as the same does not address the financial ramifications of the Respondents as such the Applicants cannot agree to mark the applications as settled and each party to bear its own costs.
13. This Court will not belabor itself in addressing this issue as it is this courts considered view that in this instance the 1st Respondent is deceased so by her demise all the acts of omissions or commissions done in pursuit of the speedy implementation of the distribution in the Certificate of Confirmation of Grant which may have been contrary to specific clauses in the Consent Order dated 28th October, 2020 can now be corrected by the remaining Co-administrator who is one of the Applicants; he is at liberty to engage the other beneficiaries to resolve or reach an agreement with them and thereafter seek a review or rectification of the Confirmed Certificate of Confirmation of Grant.
14. The other bone of contention is pegged on the Fees arising from the Taxation Ruling and the Certificate of Costs. The Respondents submit that the Applicants appear to be using this to coerce them into forgoing before accepting the apology and notice.
15. Again, this court reiterates that the Applicants are directed to engage the 2nd and 3rd Respondents with a view to resolving or reaching an agreement with them on the contentious aspect of the Taxation and Certificate of Costs.
16. This courts considered view is that at this stage this is not the appropriate time for this court to address the issue of adoption of the Notice to purge the Contempt of Court

Findings And Determination

17. For the foregoing reasons this court makes the following findings and determination;
 - i. This Court finds that the Respondents had notice and knowledge of the consent order.
 - ii. The parties are directed to engage in negotiations and prepare and file a progress report.
 - iii. Mention on 24/03/2025 for directions.



iv. Each party shall bear their own costs of the application;

It is so Ordered.

DATED, SIGNED AND DELIVERED VIA TEAMS AT KIAMBU 15TH DAY OF NOVEMBER, 2024.

A. MSHILA

JUDGE

In the presence of;

Sanja – Court Assistant

Ngugi Kariuki – for the Applicants

Mwara Gitau – for Respondents

