



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**Coram: D. K. Kemei - J**

**P&A CAUSE NO. 264 OF 2011**

**IN THE MATTER OF THE ESTATE OF KIILU NDOLO (DECEASED)**

**KILONZO KIILU *alias* JACKSON KILONZO KIILU.....ADMINISTRATOR/APPLICANT**

**VERSUS**

**DOMINIC MUNYAO NGUMI.....1<sup>ST</sup> RESPONDENT**

**EDWARD KILONZO DAVID .....2<sup>ND</sup> RESPONDENT**

**MBUVI NANA .....3<sup>RD</sup> RESPONDENT**

**MWANZA DAVID.....4<sup>TH</sup> RESPONDENT**

**RULING**

1. The Administrator/Applicant herein filed an application dated 17/09/2020 pursuant to section 47 of the Law of Succession Act and Rules 49 and 73 of the Probate and Administration Rules seeking the following reliefs:-

- a. The Respondents be committed to civil jail for a period not exceeding six (6) months for contempt of court orders granted by the court on 13/07/2020.**
- b. The properties of the Respondents be attached and sold to cover damages incurred by the Administrator/Applicant.**
- c. The costs of the application be provided for.**

2. The application is supported by the grounds set out on the face thereof as well as the affidavit of the Applicant sworn on even date. The Applicant's case is that interim orders were issued against the Respondents on 13/07/2020 in open court in the presence of the Respondents and which restrained them together with their servants or agents from accessing, withdrawing, using, utilizing and or in any other way dealing with all the amount of money already collected as rent and deposited in bank account No. [...] held at Co-operative Bank of Kenya – Machakos Branch in the sum of Kshs.550,000/- pending the hearing and determination of an application dated 2/07/2020. The Applicant averred that the Respondents went ahead on the 14/07/2020 to withdraw all the amounts from the said bank in total disregard of the said court order which action was contemptuous and has put the court's integrity into disrepute, disrespect and mockery. It was the Applicants case that the court explained the consequences of disobeying the orders in open court in a language the Respondents understood and were thus deemed to have been aware of the same and were again personally served with the extracted order on 22/07/2020. It was further the Applicant's case that the Respondents actions in deliberately withdrawing the money from the bank is a total breach and contravention of the court orders warranting this court to punish them severely for contempt in order to send a strong message to them and members of public that court orders once granted are very serious and must be obeyed. Finally, it was the Applicant's case that this court should rise to the occasion and protect its dignity by allowing the application and granting the orders sought and uphold the rule of law.

3. The Respondents through the 3<sup>rd</sup> Respondent filed a replying affidavit sworn on 28/09/2020 in which they vehemently denied breaching any of the terms of the court order dated 13/07/2020 as allegedly by the Administrator and that they contend that the Administrator is out to vex them for no other purpose.

4. The Administrator/Applicant filed a supplementary affidavit dated 13/11/2020 in which he raised several issues *inter alia*: that the

Respondents have merely made a general denial that they did not breach the terms of the court order issued on 13/07/2020; that the respondents are the account holders and signatories to the said account and have not denied accessing the said account and withdrawing the monies; that the only way the Respondents could demonstrate honesty to the court that they did not breach the court order is for them to attach a bank statement for the said account for the period July, 2020 to September, 2020 indicating that the amount is still in the account; that in the absence of a bank statement then the Respondents have not demonstrated that they are not in contempt of the court orders; that the Respondents should be prevented from stealing a march on the Applicant and the court by obtaining undeserved advantage to deliberately and flagrantly disobey court orders.

5. Mr. Kilonzo for the Administrator filed submissions dated 16/11/2020 where he raised two issues namely whether the Respondents were aware of the court orders on 13/07/2020 and whether they are in contempt of the said court orders. On the first issue, counsel submitted that the Respondents who were previously acting in person were present in court on the 13/07/2020 when the orders were made and that the purport of the orders were duly explained to them in a language they understood. He further submitted that they were later served personally with the orders on 22/07/2020. Learned counsel contended that the Respondents conduct in proceeding to withdraw the monies from the account despite knowledge of the existence of the court order was blatant disobedience. Reliance placed in the case of **Mutitika –vs- Baharini Farm Limited [1985] KLR 227** where it was held that a person who knowing of an injunction or an order of stay, willfully does something or causes others to do something to break the injunction or interfere with the stay, is liable to be committed for contempt of court as such a person has by his conduct obstructed justice. Reliance was also placed in the case of **Basil Criticos –vs- attorney General and 8 others [2012] eKLR** where Lenaola J (as he then was) held that knowledge of a court order supercedes personal service. Counsel also relied on the English case of **Hadkinson -vs- Hadkinson [1952] 2 ALL ER 567** where it was held that it is an 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. On the second issue, counsel submitted that the respondents having been made aware of the court order on 13/07/2020 proceeded the following day to withdraw monies from the account in disregard of the court order. It was the contention of counsel that obedience of court orders is not optional but mandatory and that a person does not choose whether to obey a court order or not. Reliance was placed in the case of **Shimmers Plaza Limited –vs- National Bank of Kenya limited [2015] eKLR** and also the case of **Hadkinson –vs- Hadkinson [1952] e ALL ER 567**. It was further the submission of counsel that the Respondent is obliged to avail a bank statement for the relevant account so as to confirm that they did not disobey the court order. Finally, counsel urged the court to rise to the occasion and prevent the Respondents from stealing a march and obtaining underserved advantage by deliberately, willfully and flagrantly disobeying court orders and to allow the application with costs.

6. Mr. Mutuku learned counsel for the Respondents submitted that the application must fail on the grounds that it does not divulge the details of the account holders in account number [...] and that it does not show the amount of money in the said account number [...] or the person who withdrew the money and the exact amount withdrawn.

7. I have considered the rival affidavits as well as the submissions of both learned counsels. It is not in dispute that this court on the 17/03/2020 in the presence of the petitioner and the Respondents granted interim conservatory orders pending the hearing and determination of the petitioners application dated 2/07/2020 in the following terms:-

**“That an order is hereby issued against the Respondents by themselves, their servants and or agents restraining them from accessing, withdrawing using, utilizing and/or in any other way dealing with all the amount of money already collected as rent and deposited in Bank Account No. [...] held at Co-operative Bank of Kenya, Machakos Branch of Kshs. 550,000/= pending hearing and determination of this application.”**

It is also not in dispute that the Respondents who were present in court on the 13/07/2020 vide their replying affidavit have not denied being aware of the said court order save only that they claim that they did not breach the same. That being the position, I find the issue for determination is whether the Respondents are in contempt of the court orders issued on the 13/07/2020.

8. The Petitioner has averred that the Respondents blatantly disobeyed the court order dated 13/07/2020 by proceeding to withdraw monies from the subject bank account on the 14/07/2020 and now seek that they be committed to civil jail for a period not exceeding six months for being in contempt and further that their properties be attached and sold to cover damages incurred by the petitioner/applicant. The basis for contempt proceedings is to safeguard the dignity and authority of the court system, and to ensure that the dignity of the court is protected by punishing those found to have disobeyed its orders. The seriousness with which the court punishes for contempt is found in section 63 (c) of the Civil Procedures Act which provides as follows:-

**“In order to prevent the ends of justice from being defeated, the court may, if it so prescribed, grant a temporary injunction and in case of disobedience commit the person guilty thereof to prison and order that his property be attached and sold.”**

The above provision stems from the cardinal principle that court orders must be obeyed. Obedience of court orders is the foundation of the rule of law in any democratic state and that the converse leads to break down of law and order and hence anarchy. The Court of Appeal in the case of **Shimmers Plaza Limited –Vs- National Bank of Kenya Limited (2015) eKLR** held as follows:

**“We reiterate here that court orders must be obeyed. Parties against whom such orders are made cannot be allowed to trash them with impunity. Obedience of court orders is not optional rather, it is mandatory and a person, does not choose whether to obey a court order or not..... The court should not fold their hands in helplessness and watch as their orders are disobeyed with impunity left, right and centre. This would amount to abdication of our sacrosanct duty bestowed on us by the constitution. The dignity and authority of the court must be protected and that is why those who flagrantly disobey them must be punished, lest they lead us to a state of anarchy”**

In the English case of **Hadkinson –vs- Hadkinson [1952] 2 ALL ER 567** Romer L J stated as follows regarding obedience of court orders.”

**“It is 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 the 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.”**

The Respondents did appear before this court on the 13/07/2020 and at the time they were acting in person. The court duly explained to them the order of the temporary injunction pending the hearing and determination of the application and also duly explained about the consequences of disobeying the said orders. Hence, as far as this court is concerned, the Respondents had proper knowledge of the court orders made on the 13/07/2020 so that they should not be heard to raise issues of non-service of the court order. I note that the Petitioner has averred that other than the presence of the Respondents on the 13/07/2020 in open court, they were again served with the order on 22/07/2020. Such a service was in my view superfluous since the Respondents clearly understood the express tenor of the court orders made in their presence on 13/07/2020. I wish to associate myself with the decision of Lenaola J (as he then was) in the case of **Basil Criticos –vs- Attorney General & 8 others [2012] eKLR** where he stated as thus:

**“..... The law has changed and as it stands today knowledge supercedes personal service ..... where a party clearly acts and shows that he had knowledge of a court order, the strict requirement that personal service must be proved is rendered unnecessary.”**

Having established that the Respondents had knowledge of the order made on 13/07/2020, the next issue to be determined is whether or not they did disobey the same. According to the Petitioner, the Respondents swiftly moved to Co-Operative Bank Machakos branch the following day (14/07/2020) and proceeded to withdraw the sum of Kshs. 550,000/- from the said account in flagrant breach of the existing court order. The Respondents have vehemently denied the allegations and maintained that the petitioner is out to vex them for no good reason as he has not availed an iota of proof. The Respondents having denied any wrong doing. The burden thus shifted to the Petitioner to prove the allegations pursuant to the dictum that *“He who alleges must prove.”* Indeed, that burden of proof is pursuant to the provisions of section 107 – 109 of the Evidence Act. Contempt proceedings are quasi criminal in nature in the sense that the contemnor might end up behind bars if proved against him. Hence, the standard of proof is higher than proof on a balance of probability. The Court of appeal in the case of **Mutitika –vs- Baharini Farm limited [1985] KLR 227** held that the standard of proof in contempt proceedings must be higher than proof on a balance of probabilities and almost but not exactly, beyond reasonable doubt. In the present case, the petitioner had to satisfy the court to a degree beyond proof on a balance of probability that the Respondents indeed disobeyed the order of the court made on 13/07/2020.

9. The Petitioner in response to the Respondents replying affidavit filed a supplementary affidavit wherein he challenged the Respondents to produce a bank statement so as to establish whether or not a withdrawal of monies had been made. It seems the petitioner has now shifted the burden of proof to the Respondents. This is contrary to the rules of engagement since the burden of proof lies upon the petitioner to discharge as he is the one who had made the allegations that the Respondents had disobeyed the court order. It was incumbent upon the Petitioner to provide the evidence of disobedience of the court order by the Respondents. The Petitioner should not just make allegations and fail to back them up with tangible evidence. The Petitioner did not avail any evidence such as that a withdrawal of money had been made after the court order was made and that the same was done by none other than the Respondents. Further, the Petitioner failed to present any document such as a bank statement corroborating the alleged withdrawal of money from the bank and by whom. The contempt proceedings having taken the nature of a quasi-criminal trial, the petitioner was expected to prove the allegations on a higher scale than that on balance of probabilities but not that of proof beyond reasonable doubt. In the absence of any proof, I find the petitioner’s allegations to be just that and nothing more. Even though the petitioner attempted to coax the Respondents to avail bank statements, the Respondents did not take the bait and left him to prove the allegations which he miserably failed to do. The Petitioner’s allegations should pass muster so as require the court to punish the Respondents for contempt of court orders. It would be a travesty of justice to punish the Respondents for alleged contempt of court orders when the petitioner has not proved the same beyond the requisite threshold.

10. In the result it is my finding that the petitioner’s application dated 17/09/2020 lacks merit. The same is dismissed with costs to the Respondents.

It is so ordered.

**Dated and delivered at Machakos this 9<sup>th</sup> day of February, 2021.**

**D. K. Kemei**

**Judge**