REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

SUCCESSION NO. 372 OF 2012

IN THE MATTER OF THE ESTATE OF EDWARD

MUTUKU MWANDO alias MUTUKU MWANDO (DECEASED)

BETWEEN

PATRICK MUASYA MUTUKU

BONIFACE MUTALU MUTUKU.....APPLICANTS

AND

PATRICK NDAVI MUTISYA.....RESPONDENT

RULING

1. By Summons dated 6th July, 2020, the Applicants herein seek an order that the Respondent, **Patrick Ndavi Mutisya**, do attend court to show cause why he should not be imprisoned for contempt for flagrantly disobeying the order given by the Court on 4th July, 2013.

2. According to the Applicant, on 4th July, 2013 the Court restrained the Respondent from intermeddling with the deceased's estate and particularly parcel number Mwala/Myanyani/523 and upon becoming aware of the said order, the Respondent ceased his unlawful acts on the said parcel of land.

3. It was averred that the court issued the applicant with letters of administration intestate and a certificate of confirmation of the grant on 4 th July, 2013 and 6th February, 2019 respectively. Consequently, they were statutorily mandated to take charge of the estate and perform all the duties expected from them.

4. It was averred that some time in March, 2020, the Respondent entered the aforesaid land parcel and started carrying out developments thereon by undertaking some fresh works on a structure he had abandoned when the restraining orders were made against him. It was averred that despite being served with the order of 4th July, 2013 on 17th June, 2020, the Respondent continued to violate the same hence the present application.

5. The Applicant averred that in order to safeguard the integrity of judicial process in particular and respect for the law generally, the Respondent should be ordered to attend court to show cause why he should not be imprisoned for contempt.

6. In response to the application, the Respondent averred that he has been using the said land which he purchased since 6 th October, 2010 to date and that he did not enter thereon in March, 2020 as alleged. According to him, the said structure is his home where he resides and that he has never been served with any eviction or restraining order as alleged. He denied that he was served with any court order on 17 th July, 2010 and contended that the affidavit of service attached to the application shows that service was effected upon **Catherine Ndavi Mutisya** and **Bernard Mutisya** after the matter complained of.

7. The Respondent explained that he entered into an agreement with one **Penninah Mwando**, one of the wives of the deceased for purchase of the said parcel in the sum of Kshs 110,000.00 which he paid in full by 1st May, 2011 and the land was identified to him in the presence of area Assistant Chief and village members. He then constructed a permanent house thereon where he resides to date and the applicants have never complained about the alleged trespass. To the contrary the applicants have been leasing out the said portion to third parties yet the family has refused to refund him his money. He disclosed that whereas the other purchasers have been allowed to develop the portions they purchased, he is being discriminated against for no reason.

Determination

8. I have considered the application, the affidavits both in support of and in opposition to the application as well as the submissions made.

9. The matter before me is summons seeking that the Respondent attends court to show cause why he should not be committed for contempt. It is not an application seeking committal. The parties have however proceeded as if what is being sought is an order for committal.

10. This Court is aware that in **Kenya Human Rights Commission vs. Attorney General & Another [2018] eKLR**, **Mwita, J** declared that the entire ***Contempt of Court Act*** No 46 of 2016 is invalid for lack of public participation as required by Articles 10 and 118(b) of the Constitution and encroaches upon the independence of the Judiciary. I respectfully agree with that decision. I gather support for this position from **the Supreme Court of India's holding in Bar Association vs. Union of India & Another [1998] 4 SCC 409** where the court dealt with constitutional powers vested in it under Article 129 read with Article 142(2) of the Constitution of India and those of the High Court under Article 215 of the Constitution to punish for contempt and remarked that no act of Parliament can take away the inherent jurisdiction of the Court of record to punish for contempt. The court expressed itself as follows:

> ***"Parliament's power of legislation on the subject cannot, therefore, be so exercised as to stultify the status and dignity of the Supreme Court and/or the High Courts, though such a legislation may serve as a guide for the determination of the nature of punishment which this court may impose in the case of established contempt."***

11. **The same court once again observed in Sudhakar Prasad vs. Government of Andhara Pradesh & Others [2001] SCC 516,** that the powers of contempt are inherent in nature and the provisions of the Constitution only recognize the said pre-existing situation and that the provisions of the ***Contempt of Courts Act, 1971***, are in addition to and not in derogation of Articles 129 and 215 of the Constitution and that the provisions ***of Contempt of Courts Act*** cannot be used for limiting or regulating the exercise of jurisdiction contemplated by the two Articles. In my view the objective of the ***Contempt of Court Act*** was to sanitise contemptuous actions of state officers by making it frustrating and difficult to find them guilty of contempt and even then giving them a slap in the wrist literally where they are found in contempt. I therefore agree with the lamentations of **Sellers, LJ** in **Attorney General vs. Harris** (1961) 1 QB 74 **Sellers LJ** that:

> **"it cannot, in my opinion, be anything other than public detriment for the law to be defied, week by week, and the offender to find it profitable to pay the fine and continue to flout the law. The matter becomes more favourable when it is shown that by so defying the law the offender is reaping an advantage over his competitors who are complying with it... courts have the power to ensure that their decisions or orders are complied with by all and sundry, including organs of state. And in doing so, courts are not only giving effect to the rights of the successful litigant but also more importantly, by acting as guardians of the constitution, asserting their authority in the public interest." (Nthabiseng Pheko vs. Ekurhuleni Metropolitan Municipality & Another** CCT 19/11(75/2015)**)** (supra)**."**

12. It was on that note that **Kriegler, J** that opined that:

> **"In our constitutional order the Judiciary is an independent pillar of State, constitutionally mandated to exercise the judicial authority of the State fearlessly and impartially. Under the doctrine of separation of powers it stands on an equal footing with the executive and the legislative pillars of State; but in terms of political, financial or military power it cannot hope to compete. It is in these terms by far the weakest of the three pillars; yet its manifest independence and authority are essential. Having no constituency, no purse and no sword, the Judiciary must rely on moral authority. Without such authority it cannot perform its vital function as the interpreter of the Constitution, the arbiter in disputes between organs of State and, ultimately, as the watchdog over the Constitution and its Bill of Rights – even against the State." (S v Mamobolo** [2001] ZACC 17; 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 (CC) (para 16).

13. **Mahomed CJ**, on his part explained that:

> **"..Unlike Parliament or the executive, the court does not have the power of the purse or the army or the police to execute its will. The superior courts and the Constitutional Court do not have a single soldier. They would be impotent to protect the Constitution if the agencies of the state which control the mighty physical and financial resources of the state refused to command those resources to enforce the orders of the courts. The courts could be reduced to paper tigers with a ferocious capacity to roar and to snarl but no teeth to bite and no sinews to execute what may then become a piece of sterile scholarship. Its ultimate power must therefore rest on the esteem with which the Judiciary is held within the psyche and soul of a nation. That esteem must substantially depend on its independence and integrity."** ("The Role of the Judiciary in a Constitutional State - Address at the First Orientation Course for New Judges" (1998) 115 SALJ 111 at 112).

14. Accordingly, this application will be determined without reference to the provisions of that Act.

15. In the absence of the said legislation, we must revert to the position that prevailed pre-its enactment. Before the enactment of the Contempt of Court Act which deleted section 5 of the ***Judicature Act*** Cap 8 Laws of Kenya, the first port of call with respect to the procedure for institution contempt of Court proceedings in this country was and therefore is section 5 of the ***Judicature Act*** Cap 8 Laws of Kenya. That section provides:

> ***(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.

16. Therefore, the law that governs contempt of court proceedings is the English law applicable in England at the time the contempt was committed. The procedure in the High Court of Justice in England was considered in detail by the Court of Appeal in **Christine Wangari Gachege vs. Elizabeth Wanjiru Evans & 11 Others [2014] eKLR**. In that case the Court recognised that the only statutory basis for contempt of court law in so far as the Court of Appeal and the High Court are concerned is section 5 of the ***Judicature Act***.

17. The High Court of Justice in England comprises three (3) divisions – the Chancery, the Queens Bench and the Family Divisions. It is true that following the implementation of **Lord Woolf's** "***Access to Justice Report, 1996***", the ***Rules of the Supreme Court*** of England are being replaced with the ***Civil Procedure Rules, 1999*** and pursuant thereto the Court of Appeal in the above decision recognised that on 1st October, 2012 the ***Civil Procedure (Amendment No. 2) Rules***, 2012, came into force and Part 81 thereof effectively replaced Order 52 of the ***Rules of the Supreme Court*** which was the Order dealing with the procedure for seeking contempt of Court orders in the High Court of Justice in England, in its entirety. Under Rule 81.4 which deals with breach of judgement, order or undertaking, referred to as "application notice", the application is made in the proceedings in which the judgement or order was made or undertaking given and the application is required to set out fully the grounds on which the committal application is made, identify separately and numerically, each alleged act of contempt and be supported by affidavit(s) containing all the evidence relied upon. The said application and affidavit(s) must be served personally on the respondent unless the Court dispenses with the same if it considers it just to do so or authorises an alternative mode of service. The Court of Appeal held that leave or permission is nolonger required in such proceedings (relating to a breach of a judgement, order or undertaking) as opposed to committal for interference with the due administration of justice or in committal for making a false statement of Truth or disclosure statement.

18. It is therefore my view that the procedure described by the Court of Appeal ought to be adopted with necessary modifications. The applicant ought to have sought order that the Respondent be found to be in contempt and upon such finding to be called upon to show cause why he cannot be punished accordingly.

19. However, what was sought was an order that the Respondent do show cause why he should not be imprisoned for contempt for flagrantly disobeying the order given by the Court on 4th July, 2013. That order can only be issued upon a finding that the Respondent is actually in contempt. To that extent, the application as drafted is premature.

20. In the premises, the application dated 6th July, 2020 is struck out but with no order as to costs.

READ, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 16TH DAY OF JUNE, 2021.

G. V. ODUNGA

JUDGE

In the presence of:

Mr Kalua for Miss Nzilani for the interested party

Mr Musyoka for Mr Mutinda Kimeu for the Respondent

CA Geoffrey