



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

SUCCESSION CAUSE NO.38 OF 2018

IN THE ESTATE OF CHRISTOPHER KIPCHIRCHIR SUM (DECEASED)

KENNETH KIPROP SUM.....PETITIONER/APPLICANT

VERSUS

VERONICA CHEPSAT SUM.....OBJECTOR/RESPONDENT

R U L I N G

1. The petitioner/applicant herein via chamber summons dated the 22nd of June 2021 seeks to have the court review and set aside its ruling and orders dated the 20th of May 2020 in its entirety and further, that the court does stay the order dated the 20th of May 2020 requiring the arrest of the petitioner and his imprisonment for 3 months for contempt of court.
2. The application is premised on the grounds that the application dated the 26th of March 2021 did not deal with contempt of court and that the application for contempt is dated the 3rd of February 2021. In this regard, the petitioner/applicant observed that his written submissions never touched on contempt and thus the ruling dated 20/5/2020 is therefore erroneous and prejudices the applicant who is apprehensive of being apprehended. Finally, the petitioner stated that the application is being filed now because the ruling took time to get to the registry and that counsel got indisposed shortly thereafter, otherwise the motion is brought on time and for the sake of justice.
3. The application is supported by the affidavit of Kenneth Kiprop Sum, the petitioner/applicant herein sworn on even date wherein he reiterated the grounds for the application and further deposed that his advocate did not have an opportunity to submit on application dated the 26th of February 2021. In particular, it is averred that prayer No.2 of the application dated the 26/3/2021 did not deal with contempt but rather dealt with a completely different issue pending the determination of the contempt application. Thus, it is averred that the words 'while awaiting the determination of the said contempt application' are clear that the contempt application was not due for and was not the one for hearing.
4. The petitioner further averred that the submissions filed by his advocate dated the 23/4/2021 and filed on the 26/4/2021 did not refer at all to the contempt application because the application dated the 26/03/2021 was dealing with prayer 2 and not the contempt application which he submitted was not due. In this regard, the applicant contended that the court dealt with the application for contempt of Court dated the 3/02/2021 while the application before court was the one dated 26/03/2021. This it was argued was erroneous and as such the ruling dated and delivered on the 20th of May 2020 ought to be reviewed and set aside as no prejudice will be suffered if the orders sought are granted.

5. The application is opposed by the objector/respondent through her replying affidavit sworn on the 25th of June 2021. In the said affidavit, the respondent avers that the application is bad in law, misconceived and has been made in bad faith. It is thus deponed that Sections 44 and 49 of the Law of Succession Act would not afford the legal basis for the application herein. Further, it is deponed that the provisions of the Civil procedure Act quoted as the further basis of the application are inapplicable. In any case, the respondent avers that the petitioner/applicant having been found guilty of contempt ought to be in jail now but he is not as he has been dodging the police who have been served with the warrant of arrest.

6. The respondent also deponed that the applicant duly filed a replying affidavit sworn on the 23/3/2021 in response to the contempt application dated the 3/2/2021 and filed on the 5/2/2021, upon which the court directed parties to file and serve written submissions within 14 days. On the same day, that is on the 26/4/2021, the court made an order that the status quo be maintained, which order, the respondent avers was defied by the applicant herein resulting in an application by the respondent herein seeking to change the order of status quo to a restraining order. In this regard, it is averred that the court in its ruling made reference to the contempt application and also the response by the applicant to the contempt application. Thus, the respondent avers that the ruling of court on the 20th of May 2021 was over the two applications dated the 3/2/2021 and 20/5/2021 and it is on these facts that the court found the applicant guilty of deliberate contempt and sentenced him to serve 3 months imprisonment.

7. On the 5th of July 2021, court directed that the application be canvassed by way of written submissions and parties filed their submissions.

Petitioner/Applicant's Submissions

8. The applicant submitted through his submissions dated the 7th of July 2021 that the court should review the ruling dated the 20/5/2020 since dates are important and as such, the ruling dated the 20/5/2020 instead of 20/5/2021 is a mistake that ought to be corrected. In this regard, it was submitted that the date of delivery of the contested or impugned ruling being different from the date when the ruling was actually made is a clear issue of an error apparent on the face of the record which, the applicant can appeal to the appellate court.

9. Secondly, it was submitted that the court in its ruling dated the 20/5/2020 makes refence to an application dated the 26th February 2021 which it was submitted is nonexistent as there is no such application filed in court by the objector/applicant through her counsel. The only application by the objector is one dated the 26/3/2021.

10. Thirdly, it was submitted that there were two different applications before court, one dated the 26/3/2021 and another one dated the 3/2/2020. In this regard, it was submitted that the application dated the 26/3/2021 was set for hearing on 12/4/2021 which date had been fixed for hearing of the cause vide viva voce evidence while the application dated the 3/2/2021 was meant to be heard on the 18/3/2021 but was never heard on the said date. As such, it was submitted that the two applications are entirely different and seek different orders and thus the court erred by dealing with the application on contempt when it should not have.

11. Finally, the applicant submitted that the court should stay the order dated the 20/5/2020 requiring the arrest of the petitioner and his imprisonment for 3 months for contempt of court since the court dealt with the wrong application resulting in erroneous orders. In this regard, it was submitted that the petitioner/applicant did not have an opportunity to respond to the contempt application since the application for contempt was not the subject of the application dated 26/3/2021 and as such, the court should review its ruling and stay its orders of warrant of arrest.

Objector/Respondent's Submissions

12. The respondent on her part submitted through her submissions dated the 15th of July 2021 that the applicant did in fact file his response to the contempt application via replying affidavit sworn on 23rd of

March 2021 and which formed the basis of court's direction on the 24/3/2021 that the parties do file their submissions and status quo be maintained. It is this order of court that the respondent submitted was defied by the applicant resulting in an application dated the 26/3/2021 seeking the variation of status quo orders to a restraining order. In this regard, it was submitted that the court with a view of saving precious judicial time, delivered ruling on the two applications and found the applicant guilty of contempt of court.

13. The respondent also submitted that the applicant has come to court with unclean hands since the applicant defied and disobeyed court orders and proceeded to plough land when in fact he had been ordered to refrain from the same. Reliance was placed on the case of *Siteyia vs Gitome & 3 others [2015] eKLR* and urged court to dismiss the application.

14. It was further submitted that Rule 63 of the Probate and Administration Rules 1980, limits the applicability of Civil Procedure Rules in succession matters except in relation to the specific provisions expressly excluded in the rules. It therefore follows, so it was submitted, that the sections of the Civil Procedure Act relied on and quoted by the applicant are inapplicable and the court ought to disregard them. Furthermore, it was submitted that Sections 44 and 49 of the Succession Act as relied on by the applicant, are irrelevant in relation to the orders sought and reliance was placed on the case of *Re Estate of William Kipkosgei Kiptum (Deceased) [2021] eKLR*.

15. As regards the errors on the dates of the application and ruling, the respondent submitted that the same can be corrected by court either of its own motion or on application by any of the parties in line with Section 99 of the Civil Procedure Act. In this regard, the respondent relied on the case of *Republic vs Attorney General & 15 others Ex-Parte Kenya Seed Company Limited & 5 others [2010] eKLR as cited in Steve Onyango vs Techspa General Supplies Ltd & 2 others [2020] eKLR*. And urged court to exercise its inherent jurisdiction vested under Section 99 of the Civil Procedure Act and correct the ruling delivered on the 20/5/2021 so as to give effect to the actual intention of the court.

16. Finally, the respondent submitted that the court having found the applicant guilty of contempt of court already pronounced itself on the issue of contempt and as such the court should dismiss the application dated 22/6/2021 with costs.

Analysis & Determination

17. A perusal of the pleadings by the parties and their submissions are clear that the only issue for determination is whether the applicant has met the threshold for grant of the orders sought. In particular, the applicant seeks two orders, that of review/set aside and an order of stay of the arrest warrant. However, a look at the issues clearly indicate that they are intertwined and if one falls, the other does as well. This court will therefore focus on the merit or otherwise of the applicant's application.

18. It is trite knowledge that where appropriate, a litigant may seek redress either by way of appeal or review. In our instant case, the applicant has chosen the former which is aptly anchored under Section 80 of the Civil Procedure Act and elaborated under Order 45 of the Civil Procedure Rules. In this regard, it is well settled that the review proceedings have to be strictly confined to the scope and ambit of Order 45 Rule 1 of the Civil Procedure Rules, 2010 and Section 80 of the Civil Procedure Act.

19. Section 80 of the Civil Procedure Act provides as follows: -

“80. Any person who considers himself aggrieved-

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgement to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

20. On the other hand, Order 45 Rule 1 of the Civil Procedure Rules, 2010 provides as follows: -

45 Rule 1 (1) Any person considering himself aggrieved-

a. By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

b. By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgement to the court which passed the decree or made the order without unreasonable delay.

21. The above provisions clearly restrict the grounds for review and limit the same to the following grounds;

a. discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or;

b. on account of some mistake or error apparent on the face of the record, or

c. For any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay.

22. In *National Bank of Kenya Ltd vs Ndungu Njau [1996] KLR 469* as cited in *Republic vs Public Procurement Administrative Review Board & 2 others [2018] eKLR*, the court stated: -

“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established.”

23. From the foregoing, it is clear that the power to review a judgment or an order can be exercised on an application by a party upon discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked for merely a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed to establish. It may be pointed out that the expression “any other sufficient reason” means a reason sufficiently analogous to those specified in the rule as held in *Republic vs Public Procurement Administrative Review Board & 2 others [supra]*.

24. In the instant case, the contention of the applicant is twofold; first, it is his argument that the court ruling dated the 20/5/2020 instead of 20/5/21 is erroneous and thus constitutes an error apparent on the face of the record and should thus be reviewed/set aside. Secondly, it is the applicant’s contention that the court in its ruling dated the 20/5/2020 refers to an application dated the 26/2/2021 that is non-existent and that the application that the court ought to make reference to was the one dated the 26/3/2021.

25. A look at the ruling shows that it is indeed dated the 20/5/2020 instead of 20/5/2021. Furthermore, it is clear that the court made reference to application dated the 26/2/2021 when in fact it was making reference to application dated the 26/3/2021. It is also clear from the said ruling that though the dates differ, the contents referred to by court relate to the application dated the 26/3/2021.

26. The above in my view constitute typographical errors which the court has power to correct. In this regard, it is noteworthy that the Court has power to act on its own motion to regularize typographical or arithmetical slips under Section 99 of the Civil Procedure Act which provides;

“Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Court either of its own motion or on the application of any of the parties.”

27. This position has been confirmed and applied in a litany of cases including *Peter Maina Munina v Anne Wanjiru Wachira (Suing as Attorney of Samuel Nduati Njuguna) [2021] eKLR* where the court corrected wrong figures payable to the respondent and also in *Republic vs Director of Public Prosecution ex parte Josphat Sirma & 2 others [2017] eKLR*, where the court affirmed that it would correct clerical and arithmetical errors where they exist in a ruling or judgement of court.

28. In *Republic vs Attorney General & 15 others, Ex-Parte Kenya Seed Company Limited & 5 others [2010] eKLR*, the court examined the above position stating: -

“27. It is a codification of the common law doctrine dubbed ‘the Slip Rule’, the history and application of which has a wealth of authorities both locally and from common law jurisdictions. It is a rule that applies as part of the inherent jurisdiction of the court, which would otherwise become functus officio upon issuing a judgment or order, to grant the power to reopen the case but only for the limited purposes stated in the section.

28. Some of the applications of the rule are fairly obvious and common place and are easily discernible like clerical errors, arithmetical mistakes, calculations of interest, wrong figures or dates. Each case will, of course, depend on its own facts, but the rule will also apply where the correction of the slip is to give effect to the actual intention of the Judge and/or ensure that the judgment/order does not have a consequence which the Judge intended to avoid adjudicating on.”

29. This position has also been reiterated by Mulla, in his book *The Code of Civil Procedure, 18th Edition, 2012 at 3652* wherein he states that the power of review can be exercised for the correction of a mistake and not to substitute a view.

30. In the foregoing, it is my finding that the above errors, though apparent on the face of record, falls within the precincts of Section 99 of the Civil Procedure Act and do not require the review of the entire ruling or view of the court, but just the correction of the clerical errors which the court hereby corrects on its own motion.

31. In this regard, the ruling dated the 20/5/2020 is hereby corrected to read ‘*E-Delivered and dated this 20th of May 2021.*’ Furthermore, the first line of paragraph 1 of the said ruling shall read ‘*By an application dated 26/03/2021 supported by the affidavit sworn by VERONICA CHEPSAT SUM....*’ instead of 26/02/2021.

32. As regard the finding of contempt by the applicant/petitioner herein, a look at the proceedings indicates that the court’s intention was to convey its dissatisfaction with the disobedience of court orders by the applicant herein. It is trite the court orders are not mere expressions that can be assumed or implemented at the whims of the parties. On the contrary, court orders MUST be obeyed accordingly. Where one is dissatisfied with orders of court, the remedy lies in review and or appeal but not disobedience of the orders. As such, disobedience of court orders must always be disapproved by the court. Moreover, the court is clothed with wide powers and discretion to deal with matters before it in order to promote justice and confidence in judicial process.

33. In the present case, there is every indication that the court was disposing off the application by the respondent dated the 26/3/2021 wherein the Objector/respondent prayed to court to punish the petitioner/respondent herein for contempt in relation to the orders of court made on 20/11/2020 and

24/7/2020 that prohibited the applicant/petitioner herein from ploughing, leasing, selling or in any other manner dealing with parcel No 2226 pending the hearing interpartes of the application dated the 9/6/2020. Furthermore, it is not in doubt that the court varied the said orders on the 20/11/2020 which authorized the petitioner/respondent to proceed to LR No. 2226 Moiben and harvest and save the crops on the land to prevent them from being damaged and to secure the harvest in the store within the farm until the matter was heard and determined.

34. In clear disobedience of the court orders, the applicant herein rather than storing the harvest as directed, carted the same away to an unknown destination. The applicant herein did confirm by himself that he indeed carted the harvest away in his replying affidavit and the ruling of court confirms the same.

35. In addition, despite court orders issued on 24/7/2020 prohibiting the petitioner/applicant herein from ploughing land, he disregarded the same and proceeded to plough about 150 acres of L.R No 2226 Moiben. It is the two actions of the applicant/petitioner herein that resulted in court finding him guilty of contempt and sentencing him accordingly.

36. I thus agree with the respondent herein that the applicant has not come with clean hands and the ruling of court delivered on 20/5/2021 is deserved given the circumstances.

37. In the foregoing, it is my finding that the applicant's application dated the 22/6/2021 lacks merit and is hereby dismissed with costs to the respondent. The upshot therefore is that the warrant of arrest stands and the petitioner is still committed to civil jail for a period of 3 months.

S.M GITHINJI

JUDGE

DATED, SIGNED AND DELIVERED AT ELDORET THIS 21TH DAY OF SEPTEMBER, 2021

In the presence of: -

Mr. Miyianda for the Petitioner

Mr. Ndarwa for objector

Ms Gladys - Court assistant