



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

FAMILY DIVISION

SUCCESSION CAUSE NO. 1081 OF 2015

IN THE MATTER OF THE ESTATE OF JOHNSON MWANGI MAGONDU (DECEASED)

ESTHER NJOKI MAGONDU.....APPLICANT

VERSUS

CHARLES MWANGI MAGONDU...1ST RESPONDENT

HEZRON NJOMO MAGONDU.....2ND RESPONDENT

RULING

1. Before this Court for determination is the Notice of Motion dated **2nd November 2020** by which **ESTHER NJOKI MAGONDU** (the **Applicant**) seeks the following orders:-

“1. Spent.

2. THAT Charles MWANGI MAGONDU, an administrator of this Estate, and HEZRON NJOMO be cited for contempt of this Honourable Court’s orders given on 19th December 2019 for his failure and/or refusal to comply with the said orders.

3. THAT the said CHARLES MWANGI MAGONDU and HEZRON NJOMO be committed to prison for six months for contempt of the court’s orders given on 19th December 2019.

4. THAT CHARLES MWANGI MAGONDU and HEZRON NJOMO be jointly condemned to pay fines as shall be determined by this Honourable court.

5. THAT CHARLES MWANGI MAGONDU and HEZRON NJOMO be ordered to pay to Lead Realtors Limited, the sum of Kenya Shillings 2,176,800 which sum he has wrongfully collected from tenants in breach of the orders of this Honourable Court.

6. THAT the costs of this application be in the cause.”

2. The application was premised upon **section 1A, 1B, and 3A of the Civil Procedure Act, Cap 21, Laws of Kenya**. The contempt of **Court Act No. 46 of 2016** and **Article 159 of the Constitution of Kenya 2010** and was supported by the Affidavit of even date sworn by the Applicant.

3. One **DAVID IRIMU GATHANGIRA** a **Director of Lead Realtors Ltd** also filed in court his Affidavit dated **2nd November 2020** in support of the application.

4. The **1st Respondent CHARLES MWANGI MAGONDU** opposed the application through his Replying Affidavit dated **14th June 2021**. The **2nd Respondent HEZRON NJOMO** also filed a Replying Affidavit dated **14th June 2021** in opposition to the application.

5. The application was canvassed by way of written submissions. The Applicant filed the written submissions dated **21st April 2021** whilst

the Respondent relied upon their written submissions dated 27th July 2021.

BACKGROUND

6. This succession cause relates to the estate of the late **JOHNSON MWANGI MAGONDU** (hereinafter the 'Deceased') who died intestate on 14th March 2015. The Deceased was survived by the following persons.

- (i) **Esther Njoki Magondu – Daughter**
- (ii) **Joyce Wanjiku Magondu – Daughter**
- (iii) **Florence Kafura Magondu – Daughter**
- (iv) **John Kamau Magondu – son**
- (v) **Hezron Njomo Magondu – son**
- (vi) **Charles Mwangi Magondu – son**

7. The Deceased also left a substantial estate. Grant of letters of Administration Intestate was made to **Charles Mwangi Magondu** (the 1st Respondent) and **Esther Njoki Magondu** (the Applicant) on 13th May 2019. The Grant is yet to be confirmed.

8. The Administrators became embroiled in a dispute regarding the administration of the estate specifically regarding the collection of rental income which dispute came before the High Court. **Hon Lady Justice Ali-Aroni** delivered a Ruling on 19th October 2019 in which the following orders were made-

1. THAT Lead Realtors Limited be and is hereby appointed to collect income, pay any outgoings, generally manage the following properties and deposit such rent in a joint account of the administrators;

- a. **Plot No. 454 at Kariobangi Light Industries with a building comprising of 19 units and a warehouse.**
- b. **Property No. 4A section I Umoja Innercore comprising of 7 rental units**
- c. **Plot No. 78/C-22 section 2 Umoja Innercore comprising 12 rental units.**
- d. **L.R. No. 36/11/295 Eastleigh comprising of two buildings with 28 rental units.**
- e. **Penbal extension of Title No. Nairobi/Block 28/876**
- f. **Plot No. C-2432 Dandora comprising of 36 units.**
- g. **Property Nairobi/Block 26/962 Metro Villa**
- h. **L.R. No 15400/48 Sossion Estate.**
- i. **Title Loc. No. 10/Gatheru/551**

2. That the administrators will forthwith open a joint account where all rent proceeds will be deposited. The rent will only be utilized with the consent of all beneficiaries and/or by the order of the court.

3. That further Charles Mwangi Magondu the 1st respondent shall within the next 60 days file an account of all rents collected from the date of the deceased's death to date.

4. That costs be to the applicant.

9. The Applicant alleges that the respondents have deliberately failed and/or refused to comply with the above court orders hence the present application that the Respondents be found to be in contempt of court orders and be punished for such contempt.

10. On their part the Respondents deny that they willfully disobeyed the courts orders. They urge the court to dismiss the present application with costs.

ANALYSIS AND DETERMINATION

11. I have carefully considered the application before this court, the Affidavit in Reply as well as the written submissions filed by both

parties.

12. It is not in dispute that the High Court made orders on **19th December 2019** regarding the collection of the rental income accruing to the estate of the Deceased. The court appointed **Lead Realtors Limited** to collect income, pay any outgoing and to manage the properties comprising the estate. The court further ordered that the two Administrators of the estate (being the Applicant and the 1st Respondent), open a joint account into which all the rental income collected would be deposited. That the said rental income was to be utilized only with the consent of all the beneficiaries or by an order of the court. Finally, the Administrators were directed to file an account of all rental income derived from the time of death of the Deceased.

13. The Applicant avers that despite having been properly served with the said court order the Respondents have refused to comply. That they have frustrated **Lead Realtors** from collecting the rent and managing the properties as per the court orders.

14. The Applicant alleges that the 1st Respondent has frustrated the opening of the joint account. It is further alleged that when **Lead Realtors** attempted to collect the rents in **January and February 2020**, they discovered that the Respondents had already collected the rents from the tenants.

15. The Applicant averred that at the commencement of the **Covid-19** Pandemic the 1st Respondent told the tenants that they could pay him the rent due with a rebate of 50%. Obviously, the tenants preferred to pay the reduced rent to the Respondents rather than paying the full amount to **Lead Realtors**. Annexed to the Applicants supporting Affidavit (Annexure **"ENM-2"**) are copies of receipts issued to the tenants by the 1st Respondent.

16. In this way the Respondents frustrated the collection of rent by **Lead Realtors** as ordered by the court. The Applicant states that as a result of these actions by the Respondent the estate of the deceased has been subjected to financial loss.

17. **David Irimu Gathagera**, a Director of **Lead Realtors** swore an Affidavit in support of the application. He confirmed that the tenants informed him that they were under strict instructions from the 1st Respondent not to provide the company with any information regarding how much rent had been paid to the Respondents. That he only obtained the relevant information when he levied distress and sought to evict some of the tenants.

18. **David Irimu** further averred that he wrote to the Respondents on **6th February 2020** reminding them of the courts orders and requesting that they forward to **Lead Realtors** any and all rental income collected from the tenants (Annexure **'DG -2'**). That the Respondents ignored his letter and continued to collect rent from the tenants.

19. The Applicant claims that to date the Respondents have collected a sum of **Kshs 2,176,800**. She urged the court to allow this application in order to prevent further disobedience to court orders and to prevent further loss to the Estate.

20. On their part both Respondents have opposed the application for contempt. The 1st Respondent claims that he had difficulties in filing the statement of Accounts written **60 days** as directed by the court. He pleads that he has now filed the statement.

21. The 2nd Respondent avers that the courts order was not directed at him. He states that he has never interfered with collection of rent by **Lead Realtors**. Both Respondents urge the court to dismiss the application.

22. However the Applicant counters that the 2nd Respondent has been collecting rent from the 2nd properties known as No. **A4 section 1 Umoja Innercore** and from **Nairobi/Block 78/876**.

23. It is trite law that court orders must be obeyed by those to whom said orders are directed.

24. **Section 5** of the **Judicature Act Cap 8, Laws of Kenya** which grants to the High Court power to punish for contempt of court provides as follows:

"5(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."

25. **Blacks Law Dictionary** defines contempt as follows:-

"contempt is a disregard of disobedience to, the rules or orders of a legislative or judicial body, or an interruption of its proceedings by disorderly behavior or insolvent language, in its presence or so near thereto to disturb the proceedings or to impair the respect due to such a body."

26. In the case of **Econet wireless Kenya Limited v Minister for Information & communication of Kenya & another [2005] eKLR**, the court stated as follows:

"It is essential for the maintenance of the rule of law and order that the authority and the dignity of our courts are upheld at all times the court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against or in respect of whom, an

order is made by the court of competent jurisdiction to obey it unless and until that 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 order believes it to be irregular or void.” (own emphasis)

27. The reason why courts punish those who willfully disobey court orders is to safeguard the rule of law and to uphold the dignity and authority of the courts. Failure to obey courts orders will lead to disorder and lawlessness. In the case of **Teachers Service Commission vs Kenya National Union of Teachers & 2 others [2013] eKLR** the court held as follows: -

“The reason why courts will punish for contempt of court then is to safeguard the rule of law which is fundamental in the administration of justice. It has nothing to do with the integrity of the judiciary or the court or even the personal ego of the presiding judge. Neither is it about placating the applicant who moves the court by taking out contempt proceedings. It is about preserving and safeguarding the rule of law. A party who walks through the justice door with a court order in his hands must be assured that the order will be obeyed by those to whom it is directed.

A court order is not a mere suggestion or an opinion or a point of view. It is a directive that is issued after much thought and with circumspection. It must therefore be complied with and it is in the interest of every person that this remains the case. To see it any other way is to open the door to chaos and anarchy and this Court will not be the one to open that door. If one is dissatisfied with an order of the court, the avenues for challenging it are also set out in the law. Defiance is not an option.”

28. For a party to succeed in an application for contempt of Court order or decree, at least four elements must be satisfied:

- a) **That the terms of the order (or injunction or undertaking) are clear and unambiguous and are binding on the Defendant.**
- b) **That the Defendant has knowledge of or proper notice of the terms of the order.**
- c) **The Defendant has acted in breach of the order.**
- d) **The Defendant’s conduct is deliberate.**

29. Contempt proceedings are quasi-criminal in nature as the liberty of a person is at stake. The standard is therefore higher than in Civil Proceedings being on a balance of probabilities but is not beyond reasonable doubt as is required under Criminal Proceedings.

30. **In Bell – Tuhoy & another [2002] 3 All ER Lord Denning** stated

“the courts take the view that where the liberty of the subject is, or might be involved, the breach for which the alleged contemnor is cited must be precisely defined. A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be satisfactorily proved ----- it must be higher than proof on a balance of probabilities, almost, but not exactly, beyond reasonable doubt.”

The said court proceeded to add, that,

“the guilt has to be proved with such strictness of proof as is consistent with the gravity of the charge.....”

31. The orders made by the court on **19th December 2020** were clear and unambiguous. The orders stated clearly what each party was required to do.

32. The Respondents both had personal knowledge of the orders of **19th December 2020**. There is evidence that the orders were personally served upon both the 1st and the 2nd Respondent. Annexed to the Applicants supporting Affidavit is an Affidavit of service dated **26th February 2020**. (Annexure **ENM ‘3’**) indicating that service of the order was effected upon each of the Respondents. Indeed, the Respondents in their replying Affidavits have both conceded to having knowledge of the court order.

33. The next question is whether there has been willful and deliberate disobedience of the court orders. There is evidence that the courts orders that the Administrators open a joint account was complied with. Annexed to the 1st Respondents Replying Affidavit is a Bank Statement from **ABSA BANK** (Annexure **CMM ‘2’**). However, the court made several other orders which were **not** complied with.

34. On the question of the Statement of Accounts the court directed that the same be filed within **60 days**. The order was specifically directed to **“Charles Mwangi Magondu”** the 1st Respondent. The 1st Respondent **did not** file the relevant accounts within **60 days** as directed.

35. In the Replying Affidavit dated **14th June 2021** the 1st Respondent avers that he was unable to file the Statement of Accounts within **sixty (60) days** because the documents in support of the expenditure were not readily available. The 1st Respondent then proceeded to annex to his Replying Affidavit a Statement of Accounts for Rents collected from **April 2015 to December 2017**.

36. The 1st Respondent is therefore purporting to comply with orders given by the court in **December 2019** in **June 2021** a whole **eighteen (18) months AFTER** said order was made.

37. If the 1st Respondent experienced problems in collecting the data required to prepare the Accounts he could have approached the court to

seek an extension of time within which to comply. The fact that the 1st Respondent ignored the said parties and only purported to comply after he was called out through the Application filed by the Applicant is clear evidence that the 1st Respondent had no real intention of obeying said order.

38. The court is not persuaded by the excuses given by the 1st Respondent for his failure to comply. I find that in failing to obey the courts orders within the period specified by the court the 1st Respondent is in contempt of those orders.

39. There is evidence that despite orders made by the court that **Lead Realtors** collect the rents, the rents were paid to other parties. Copies of receipts issued to the tenants in **April 2020** (Annexure ENM '2') are annexed to the Applicants Supporting Affidavit.

40. Additionally **David Irimu** from **Lead Realtors** did swear an Affidavit detailing the frustrations he had experienced in his attempts to collect the rents as per the courts orders. He averred that the tenants informed him that they were under strict instructions from the 1st Respondent **not** to co-operate with the company which had been ordered by the court to collect the rents.

41. From the evidence available I am persuaded that there was proof of interference by the 1st Respondent in the management of the estate property which interference **ran contra** to the courts orders and was aimed at frustrating **Lead Realtors** in the execution of their court ordered mandate to collect the rents from the estate properties. There can be no doubt that the 1st Respondent deliberately disobeyed the orders made on **19th December 2019** and I have no hesitation in finding the 1st Respondent in contempt of court orders.

42. Regarding the 2nd Respondent no tangible evidence was presented to prove that he was in contempt of the orders of the court.

43. The Applicant has prayed that the Respondents be ordered to refund **Lead Realtors** the sum of **Kshs 2,176,800** representing rents which were wrongfully collected from the tenants. In my view this order cannot be made until the court receive a clear account from **Lead Realtors** as well as from the Respondents of the rents collected as from them from **19th December 2019** to date. To this end, prayer (5) of the Motion cannot be granted at this stage.

44. Finally and in conclusion this court makes the following orders;

- (1) **The 1st Respondent Charles Mwangi Magondu is found to be in contempt of court orders issued on 19th December 2019.**
- (2) **The 1st Respondent will pay a fine of Kshs 100,000 for said contempt and in default will serve three (3) months imprisonment.**
- (3) **The 1st Respondent is granted thirty (30) days within which to pay the fine in (2) above.**
- (4) **The 1st respondent shall within 60 days file an account of all rents collected from the date of the deceased to date (14th March 2015 – 30th November 2021).**
- (5) **Lead Realtors Limited to file an account of all rents collected from the date they started collecting rent from the deceased's estate up to date.**
- (6) **This being a family matter, the court no orders to costs.**

DATED IN NAIROBI THIS 12TH DAY OF NOVEMBER, 2021

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MAUREEN A. ODERO

JUDGE