



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HIGH COURT P&A MISC. APPLICATION NO. 6 OF 2019

JOSEPHAT MWANIA MUIA

(Executor of the estate of Asby Masila Muia).....APPLICANT

-VERSUS-

STEVE MATHUKA.....RESPONDENT

(In the matter of an application by Josephat Mwanja Muia against Steve Mathuka, the principal of Kenya Power Pension Fund for an order of committal)

RULING

1. The application for determination is dated 25/11/2019 and was filed pursuant to leave granted by this court on 19/11/2019. It is brought under section 5(1) of the Judicature Act, the Civil Procedure Rules, 1999 of England [The Civil Procedure (Amendment No. 2) Rules 2012, applications and proceedings in relation to contempt of court Rule 81.4 of part 81, The Constitution of Kenya, the inherent jurisdiction of the court and all other enabling provisions of the law). It seeks;

a) An order of committal to be made against Steve Mathuka, the principal of Kenya Power Pension Fund, to prison for such period as this Honorable court may deem fit and just in that he, the said Steve Mathuka, has disobeyed the order made in Makueni PMCC Succession Cause No 42 of 2016 on the 9th day of June 2017 *inter alia*;

i. That, the Kenya Power Pensions Fund do and is hereby ordered to pay the Petitioner/Applicant Mr. Josphat Mwanja Muia all benefits and allowances of the deceased Asby Masila Muia to hold in trust and on behalf of Brian Muema Masila till he attains the age of 18 years old.

ii. That, the manager in charge of the Kenya Power Pension Fund do and is hereby ordered to comply with prayer (i) above.

b) An order that the cost of this contempt proceedings be borne by Steve Mathuka and/or Kenya Power Pension Fund.

2. The application is supported by the grounds on its face and the Applicant's supporting affidavit sworn on the same day. He deposes that the Respondent was served with the court orders of 09/06/2017 but despite numerous written demands and reminders from the Applicant's advocates, the Respondent has refused to pay. He also deposed that the terms of the order were clear, unambiguous and binding on the Respondent.

3. The application is opposed through a replying affidavit sworn by the Respondent on 09/12/2019. He acknowledges service of the orders on his employer but denies personal service on him. The gist of his opposition is that the orders were temporarily stayed by this court on 25/07/2019 after which he received correspondence from his advocate to the effect that the temporary orders had been extended severally. He deposed that to the best of his knowledge, the orders of 25/07/2019(*High court order*) are still subsisting.

4. The application was canvassed orally.

5. Mr. Gichaba for the Applicant submitted that the act of service is not denied and that under section 5 of the Judicature Act, this court has jurisdiction to deal with the application. He relied on **Mombasa Civil Appeal No. 69 of 2015; Ramadhan Salim –vs- Evans M. Maabi T/A Murphy Auctioneers & Anor (2016) eKLR** where the Court of Appeal stated;

“From the above, it does appear that the magistrate did not have jurisdiction to entertain the contempt proceedings as he correctly held. That jurisdiction belonged to the High court or Court of Appeal. It is instructive that when the High court and this court

exercise that jurisdiction, it extends to the contempt committed in the subordinate court.”

6. Relying on the proceedings of the trial court, he submitted that the order of 09/06/2017 (*lower court order*) has never been set aside and must be complied with to avoid jeopardy. It was his contention that there would be no sanctity in the rule of law if orders are not obeyed.

7. Mr. Muthoka for the Respondent submitted that there is no conduct by the Respondent which is in defiance of the lower court order. He agreed that the Respondent’s employer was served with the order but could not comply because they were served with the High court order which stayed the lower court order.

8. He submitted that subsequent to the High court order, the Respondent has never been party to any proceedings in the High court or subordinate court. It was his contention that they are in possession of two conflicting orders. He relied on **Nairobi HCCC**

No. 111 of 2016; Cecil Miller –vs- Jackson Njeru & Anor (2017) eKLR where the Court stated as follows;

“As to whether the respondent is guilty of contempt of court, the elements of a civil contempt as espoused in a book titled ‘Contempt in modern Newzealand’ were set as follows;

- a) The terms of the order or injunction or undertaking were clear and unambiguous and were binding on the defendant.*
- b) The defendant had knowledge of or proper notice of the terms of the order.*
- c) The defendant has acted in breach of the terms of the order and*
- d) The defendant’s conduct was deliberate.”*

9. It was also his submission that there is no deliberate conduct by the Respondent.

10. In rejoinder, Mr. Gichaba acknowledged the High court order but contended that the stay therein was temporary and was never extended.

11. It was further his submission that the emails referred to by the Respondent were never copied to them.

12. Having considered the application, the affidavits, all the annexures, case law and rival submissions, it is my considered view that the only issue for determination is whether the Respondent is in contempt of the lower court order.

Analysis

13. This court has jurisdiction to entertain the application but it is also noteworthy that even the subordinate court which issued the “order” has the requisite jurisdiction to punish for contempt. **Section 10** of the **Magistrate’s Court Act, 2015** provides as follows;

(1) Subject to the provisions of any other law, the court shall have power to punish for contempt.

(2) A person who in the face of the court-

- a) assaults, threatens, intimidates or insults a magistrate, court administrator, judicial officer or a witness during a sitting or attendance in court or in going to or returning from court;*
- b) interrupts or obstructs the proceedings of the court; or*
- c) without lawful excuse disobeys an order or direction of the court in the course of the hearing of a proceeding, commits an offence*

(3) In the case of civil proceedings, the willful disobedience of any judgment, decree, direction, order or other process of a court or willful breach of an undertaking given to a court constitutes contempt of court.”

14. In the **Ramadhan Salim case (supra)** the Court of Appeal affirmed this position by stating as follows;

“The only jurisdiction the magistrate’s court could exercise when dealing with contempt of court is, if it is committed in the face of the court. However, the Magistrates Court Act, 2015 which came into force on 2nd January 2016 now gives the magistrate’s courts unlimited jurisdiction to punish for contempt.”

15. The better approach would have been to file the application in the subordinate court and follow the hierarchy but since the application is already here, I am of the view that it will not be just and mete to toss it up and down.

16. In determining whether the Respondent is guilty of contempt, I am duly guided by the elements espoused in the **Cecil Miller case (supra)**.

17. I have looked at the lower court order and the same has clearly directed the Kenya Power Pension Fund to pay all the deceased's benefits to the Respondent. The Applicant being the manager of the pension fund was ordered to ensure compliance. There was nothing ambiguous about the terms of the order.

18. On the second element, the Respondent has disputed personal service but it is evident that he was aware of the order. His depositions in Makueni HC Misc. P&A Cause 451 of 2017 buttress this fact. At paragraph 3 of his supporting affidavit dated 25/02/2019, he deposed as follows;

“That on 4th December 2017, the intended interested party (Kenya Power Pension Fund) was served with a court order issued on 9th June 2017 by the Senior Resident Magistrate’s Court at Makueni in Probate and Administration Cause No 42 of 2016... (annexed herewith and marked SM1 is a copy of the said order.”

19. In my view, the requirement under this element is ‘*knowledge of*’ and not personal service.

20. On whether there was breach of the terms of the lower court order, the Respondent’s position is that he is not in breach because the High court order is still in force. The terms of the High court order are as follows;

1) That under section 18(1)(b) of the Civil Procedure Act, this file be and is hereby transferred to SPM Court Makueni for hearing and determination.

2) That the same should be housed in SPM Makueni Succession Cause No. 42 of 2016 (Estate of Asby Musila Muia).

3) That all parties should be notified of these orders by the D.R.

4) That mention before the SPM (Court 1) on 14th day of August 2019 for directions on summons for revocation of grant.

5) That there shall be a temporary stay of lower court order of 9th day of June 2017 until the mention date.

21. The High court order was issued at the instance of Loice Atieno Oduk (*objector*)-the lady seeking revocation of the confirmed grant on the ground that she was the legal wife of the deceased hence ranking in priority to the Applicant who is the deceased’s brother.

22. At this juncture, it’s important to mention that the Kenya Power Pension Fund has never been a party in either the lower court or High court proceedings. It’s application to be enjoined as an interested party was held in abeyance to await the outcome of the appeal filed by the petitioner (*Applicant herein*) in the Court of Appeal. In the appeal, the petitioner is contesting the transfer of the succession matter to the Kisumu high court as ordered by Justice. C. Kariuki on 12/04/2018.

23. From paragraph 5 of the High court order, it is evident that the temporary stay of the lower court order was to be in force until the mention date before the lower court. In other words, the matter having been transferred back to the lower court for hearing and determination, the said court was seized of the matter from the date of mention. I have called for the lower court file and perused it.

24. It shows that when the matter came up for the mention before the said court on 14th August 2019, Mr. Kisongoa who held brief for M/s Janet for the Objector therein prayed for the extension of the High court order. The said record however shows that it was the lower court orders that were extended. It appears that Mr. Kisongoa believed that his prayer had been granted and communicated the same to M/s Janet who in turn passed the information to the Respondent’s counsel as shown in the email marked SM3.

25. The record further shows that the matter was mentioned two more times before the lower court and the lower court orders were extended again. On the other hand, the emails sent by Ms. Janet

on both occasions informed the Respondent’s counsel that the High court order had been extended.

26. From the foregoing and in light of the fact that the Kenya Power Pension Fund is not a party to the proceedings, it is clear that the Respondent was under the honest belief that the High court order was still in force. Accordingly, it is my considered view that failure to release the benefits, as per the lower court orders, was not deliberate.

27. As it is now, there is a contest between Loice Atieno Oduk and the Applicant with regard to administration of the deceased’s estate. The applicant is aware that the grant issued to him is being contested. In my view, his conduct of trying to have the benefits released to him by hook or crook is very curious. The lower court should be given the opportunity to finalize the case.

28. Secondly, it should not be forgotten that there is a contestation on the transfer of the succession matter in respect to the deceased’s estate to Kisumu. The matter is pending in the Court of Appeal. All parties must bear this in mind.

29. This court having transferred Makueni High Court Miscellaneous P&A Cause No. 451 of 2017 to the SPM’S court Makueni for hearing alongside SPM Makueni Succession Cause No. 42 of 2016 (*Estate of Asby Musila Muia*) became *functus officio*. The SPM’s court Makueni which has jurisdiction to hear the succession cause is best placed to determine any issue of contempt in this case.

30. I find that this application was improperly filed before this court and I strike it out with costs.

Delivered, signed & dated this 7th day of May 2020, in open court at Makueni.

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H. I. Ong'udi

Judge