REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

SUCCESSION MISC. APPLICATION NO. 33B OF 2018

IN THE MATTER OF THE ESTATE OF SIMEON KIPKOECH NGETICH (DECEASED)

AND

IN THE MATTER OF AN APPLICATION FOR CONTEMPT OF COURT

BETWEEN

ABRAHAM KIPROTICH KOGO & 6 OTHERS.....APPLICANTS

AND

TOMTILLA KAPTICH NGETICH.....RESPONDENT

RULING

[1] Before the Court for determination is the Notice of Motion dated **18 July 2019**. It was filed by the 7 Objectors herein, namely: **Abraham Kiprotich Kogo, Jeboo Tanui, Rosaline Too, Benjamin Kipyegon Kogo, Edwin Kipkemboi Kogo, Felix Kimutai Kogo** and **Silvester Kipchirchir Kogo** pursuant to **Sections 1A, 1B, 3 and 3A** of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya**. The application is also expressed to have been brought under the **Contempt of Court, No. 46 of 2016,** which had been declared unconstitutional on **9 November 2018**. The applicants are seeking orders that the respondent be committed to civil jail for a period not exceeding six (6) months for contempt of court or that he be fined accordingly. They also prayed that the costs of the application be provided for

[2] The application was supported by the affidavit annexed thereto, sworn by the 1st applicant, **Abraham Kiprotich Kogo,** in which he averred that, on the **24 May 2019**, the Court issued an order for the maintenance of status quo pertaining to the existing boundaries, the occupation and use of the parcel of land known as **LAND PARCEL NO. NANDI/SARORA/97** being part of the estate of **Simeon Kipkoech Ngetich,** now deceased. It was the contention of the applicants that the effect of that order was that each party was to remain on the portions they were occupying pending further orders of the Court; but that, in disregard of the Court Order, the respondent, her children, servants and/or agents unlawfully denied them access to and use of their respective portions of the suit property, thereby subjecting them to loss and damage. They also complained that the respondent and her children had destroyed the fence, trees and sugar plantation on the suit property and that they are poised to inflict further damage and loss unless penalized for their contemptuous acts.

[3] In her response to the application, the respondent averred, in her Replying Affidavit sworn on **22 July 2019**, that the application has been made in bad faith, as she was never served with the order in question. She further averred that she could not have committed the acts complained of, granted that her mother in law had voluntarily moved out of the suit property along with some of the applicants. She further asserted that the one of the objectors is still living on the suit property and engaging in his normal activities on his portion of the land without any hindrance. She accordingly prayed for the dismissal of the application with costs.

[4] The 1st applicant filed a Further Affidavit in response to the respondent's averments, conceding that some of his siblings have never been to the suit property; but asserted that the property is ancestral land and therefore that they each have a right to it as they have no other place to call home. He reiterated his assertions that, since the respondent acted in breach of the *status quo* order issued herein by the Court, she ought to be cited for contempt.

[5] Pursuant to the directions issued herein on **8 October 2019**, the application was canvassed by way of written submissions. Thus, in the applicants' written submissions dated **22 October 2019, Mr. Kirui**, learned counsel for the applicants helped put the application in perspective by tracing its background to the order of **14 May 2019**. He pointed out that the said order was extracted and served on both the respondent and her advocates on **28 May 2019** and that an Affidavit of Service to that effect was duly filed. Counsel urged the Court to believe the averments by the applicants that, in disobedience of the said order, the respondent and her sons denied them access and the

freedom to use their respective portions of the suit property.

[6] With regard to the applicable law and principles, **Mr. Kirui** cited **Teachers Service Commission vs. Kenya National Union of Teachers & 2 Others** [2013] eKLR as well as the cases of **Christine Wangari Gachege vs. Elizabeth Wanjiru Evans & 11 Others** [2014] eKLR and **Martin Nyaga Wambora & Another vs. Justus Kariuki Mate & Another** [2014] eKLR to augment his submission that this Court has the same power to punish for contempt as is for the time being possessed by the High Court of Justice in England. Counsel pointed out that the issue of service of the order is inconsequential, granted that the contemnor was duly represented in court by an advocate when the order in question was pronounced. In this regard, counsel relied on **J.Z. Ochino & Anohter vs. George A. Okombo,** Nairobi Civil Appeal No. 30 of 1989; **Kenya Bus Services vs. Susan Muteti,** Nairobi Civil Appeal No. 15 of 1982 and **Tourist Development Corporation vs. Kenya National Capital Corporation & Another**, among others, to demonstrate that knowledge of an order supersedes personal service. He accordingly urged the Court to find the respondent and her sons guilty of contempt and to punish them accordingly.

[7] On his part, **Mr. Choge**, counsel for the respondent, took the view that the applicants have failed to prove to the requisite standard that the respondent disobeyed the court order to warrant her being cited for contempt of court. He urged the Court to consider the definition of contempt as set out in **Black's Law Dictionary, Ninth Edition,** and the case of **Johnson vs. Grant** [1923] SC 789 at page 790 to underscore the rationale for the offence of contempt of court; namely, that it is fundamental to the rule of law. It was therefore the submission of **Mr. Choge** that, since contempt proceedings are of a serious nature, entailing penal consequences, it was imperative that the order be served on the respondent along with the penal notice. He reiterated the point that there is a higher burden of proof on an applicant in contempt proceedings than just a balance of probabilities. He accordingly urged the Court to find that that burden has not been discharged in this instance.

[8] I have carefully considered the application within the backdrop of the proceedings held herein; and in particular the order of **14 May 2019**, and the written submissions filed herein by learned counsel. These proceedings are in respect of the estate of **Simeon Kipkoech Ngetich** (the deceased) and the protagonists are all siblings and brothers to the deceased, save for the 2nd applicant, **Jeboo Tanui** who is their mother. From the averments made herein, it is not in dispute that **LAND PARCEL NO. NANDI/SARORA/97** initially belonged to the grandfather of the applicants, the late **Kipngetich Arap Tanui**; and that the family members were in agreement that the suit property be shared amongst the children of one of the widows, **Jeboo Tanui**, who is the 2nd applicant.

[9] There is further no dispute that the said property was transmitted to **Simeon Kipkoech Ngetich**, one of the three children of **Jeboo Tanui**; the other two being **Rosaline Too** and **Lilian Jepkemei**. In his earlier affidavit filed on **23 November 2018** in support of the application for revocation of grant, the 1st applicant averred that the transmission to **Simeon Kipkoech Ngetich** was made in trust, so that he could hold the property pending subdivision for the benefit of all the beneficiaries including **Jeboo Tanui;** but that he died shortly thereafter before he could accomplish the distribution of the suit property. The applicants now contend that, following the demise of **Simeon Kipkoech Ngetich** on **4 October 1992**, his widow, the respondent proceeded secretly and obtained grant in respect of the suit property and had it registered in her name; and that she now contends that it is not available for distribution amongst the children of **Jeboo Tanui.**

[10] It was on account of the foregoing that the applicants filed the application for revocation of grant, dated **23 November 2018.** While that application was pending hearing and final determination, the applicants were constrained to file the Summons dated **6 May 2019** seeking restraining orders against the respondent pending the hearing and determination of the revocation application. On the basis of that application, which was filed under a Certificate of Urgency, a *status quo* order was made herein on **14 May 2019** on the following terms:

> **[a]** That pending the hearing and determination of this cause, the *status quo* pertaining to the existing boundaries, the occupation and use of **LAND PARCEL NO. NANDI/SARORA/97**, being the estate of **Simeon Kipkoech Ngetich,** be maintained and that each party do remain on the portions they are occupying presently pending further orders of the Court.
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> **[b]** That the Respondent, **Tomtilla Kaptich Ngetich**, be and is hereby restrained from destroying trees, vegetation, crops and/or houses belonging to the applicants herein erected on the **LAND PARCEL NO. NANDI/SARORA/97** being the estate of **Simeon Kipkoech Ngetich** pending the hearing and determination of the Succession Proceedings.
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> **[c]** That the costs of the application be costs in the cause.

[11] In the instant application, the applicants contend that the order in question was formally extracted and served on the respondent; and that in utter disregard thereof, the respondent proceeded to deny them access to their respective portions of the suit land and destroyed the sugarcane plantation belonging to the 6th applicant, **Felix Kimutai Kogo**. It was further the contention of the applicants that the respondent, together with her children prevented the 1st applicant from harvesting the trees he planted on his portion of the subject land and had threatened to destroy the said trees to the detriment of the 1st applicant. They have therefore sought that the respondent be cited for contempt of court and punished accordingly.

[12] As has been pointed out hereinabove, although the application was expressed to have been brought under the provisions of the **Contempt of Court Act, 2016,** that legislation was declared invalid on **9 November 2018** for lack of public participation pursuant to **Articles 10 and 118(b)** of the **Constitution** in **Kenya Human Rights Commission vs. Attorney General & Another [2018] eKLR.** In effect therefore, the applicable law in this regard is that which obtained prior to the passing of the **Contempt of Court Act;** as guided by **Section 5** of the **Judicature Act, Chapter 8** of the **Laws of Kenya.** That provision states thus:

> **"(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 such power shall extend to upholding the authority and dignity of the subordinate courts.**
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> **(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."**

[13] Thus, in **Econet Wireless Kenya Ltd vs. Minister for Information & Communication of Kenya & Another [2005] KLR 828,** the obligation to obey court orders was well explicated thus:

> **"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 whom an order is made by 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 the order believes it to be irregular or void."**

[14] In the premises, the elements that the Objectors herein needed to prove are:

[a] that the Order of **14 May 2019** was clear, unambiguous and binding on the respondent;

[b] that the respondent had proper notice or knowledge of the terms of that Order;

[c] that the Petitioners have deliberately failed to obey the terms of the Order;

(see **Katsuri Limited vs. Kapurchand Depar Shah [2016] eKLR)**

[15] The applicable standard of proof, as was correctly observed by **Mr. Choge**, is above a balance of probabilities, given the criminal connotations of contempt proceedings. In **Mutitika vs Baharini Farm Ltd** (supra), the Court of Appeal made this clear thus:

> **"…In our view the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt...The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to offence which can be said to be quasi- criminal in nature."**

[16] With the foregoing in mind, I have carefully considered the averments set out in the affidavits of the parties with a view of determining whether the three elements afore mentioned. First and foremost, there is no dispute that the order of **14 May 2019** was extracted and signed by the Deputy Registrar of this Court on **24 May 2019** for purposes of service on the respondent. The order has, appended to it, a penal notice indicating that:

> **"This is a valid Court Order. Anyone disobeying the same shall be cited for contempt of court and dealt with according to the law."**

[17] Moreover, the Affidavit of Service sworn on **15 July 2019** by **Jared Kipyegon Rutto, Advocate**, confirms that the order was served on the respondent on **28 May 2019** in the presence of the area assistant chief, one **Mr. Abraham Maritim**; and that on the same date, service of the order was effected on the respondent's Advocate, **Mr. Choge**. Thus, the applicants presented credible proof that the only person named as the contemnor in the contempt application, namely **Tomtilla Kaptich Ngetich**, was duly served with the *status quo* order. Clearly therefore, the order made on **14 May 2019**, which was issued on **24 May 2019** was not only clear and unambiguous but was also binding on the respondent.

[18] As to whether the order was disobeyed by the respondent, the 1st applicant deposed, in paragraphs 6 and 7 of his Supporting Affidavit that he was denied access to the suit property when he sent his workers on **13 June 2019** to fell some trees which he intended to sell to raise school fees for his children. As these allegations were denied by the respondent, it was imperative that the said workers be named specifically and that first hand evidence be obtained from them as to what transpired on **13 June 2019;** which was not done. It was further the contention of the 1st applicant that his younger brother, **Felix**, was denied access to his sugar cane plantation. **Felix** is the 6th applicant herein and therefore was in a better position to depose to those specific facts. Again the applicants opted to rely on hearsay the 1st applicant's hearsay evidence.

[19] Regarding the 2nd applicant who was also allegedly denied access and had to turn to well-wishers for support, the respondent's response was that she had been moved away from her house on the suit property for the purpose of treatment. Granted the higher standard of proof in such cases, it was for the respondents to demonstrate that indeed the 2nd applicant had made a move to return to her house and was denied access, with details as to when this happened. No specific evidence was given by the applicants in this connection. Even the applicants' allegations that the matter was reported to the area chief and the police remains doubtful as no such evidence, by way of a letter or an abstract of the police records or otherwise, was availed before the Court to buck up these assertions.

[20] In the result, having given due consideration to the evidence placed before this court, I am not satisfied that it constitutes proof to the requisite standard that the respondent has since interfered with the existing boundaries of the suit land or that she destroyed vegetation or crops or houses on the suit property belonging to the applicants herein. My finding then is that the application lacks merit and is hereby dismissed with an order that the costs thereof be in the cause. For the avoidance of doubt, the order of **14 May 2019** is hereby confirmed and the same shall remain in force pending the hearing and determination of the application dated **23 November 2018** and that, going forward, should there be credible proof of disobedience, the Court will not hesitate to punish the contemnors as by law required.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 17TH DAY OF JULY 2020

OLGA SEWE

JUDGE