



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**PROBATE & ADMINISTRATION CAUSE NO. 15 OF 1985**

**IN THE MATTER OF THE ESTATE OF KIPTOO CHEBOI (DECEASED)**

**AND**

**IN THE MATTER OF AN APPLICATION FOR COMMITTAL TO CIVIL JAIL FOR CONTEMPT OF COURT**

**BETWEEN**

**KEEME LOITAREM.....PETITIONER/RESPONDENT**

**AND**

**ANNE LOITAREM OSILINGI.....1<sup>ST</sup> OBJECTOR/APPLICANT**

**SIMON KIRUI CHEBOI.....2<sup>ND</sup> OBJECTOR/APPLICANT**

**RULING**

[1] The Notice of Motion dated **8 March 2018** was filed herein by the two Objectors (herein after the Applicants) pursuant to **Section 1A, 3A** of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya** and **Order 40 Rule 3(1)** and **Order 51 Rule 1** of the **Civil Procedure Rules, 2010**. The Applicants moved the Court for orders that:

[a] Spent

[b] The Petitioner/Respondent herein, namely, **Keeme Loitarem** and his agents and/or assigns, namely, **Loktari Makumbi, Samuel Losem, Francis Kiyapyap, Nicholas Kupar, Johnstone P. Chochoi, Joseph Lodengo** and **Yego Makumbi** be committed to civil jail for six (6) months for contempt of court;

[c] That the Petitioner/Respondent and his assigns and agents mentioned in (2) above herein be condemned to pay **Kshs. 500,000/=** each being damages;

[d] The Court do issue further orders compelling the Respondent/Petitioner and his agents and assigns named in (2) above to obey the said court orders;

[e] That the costs of the application be provided for.

[2] The grounds set out in support of the application are that, on the **5 June 2015**, the Applicants obtained preservation orders in respect of the **Estate of Kiptoo Cheboi** (the Deceased herein), and caused the Court Order in that regard to be extracted and served upon the Respondent, his agents and assigns; but that in disobedience of the Court Order, the Respondent and his agents and assigns have willfully disobeyed the said orders. The application is also premised on the averments set out in the Supporting Affidavit sworn on **8 March 2018** by the 1<sup>st</sup> Applicant, **Anne Loitarem Osilingi**, as well as the documents annexed thereto.

[3] It was the averment of the 1<sup>st</sup> Applicant that, on the **25 May 2015**, they moved the Court for orders for preservation of the **Estate of Kiptoo Cheboi**, namely, **Land Parcel No. Pokot/Siyoi/104**; and that the Court granted the prayers for preservation and an order for temporary injunction restraining the Respondent and his agents and/or assigns from any dealings with the Estate to the detriment of the Applicants. It was further averred that the formal Order of the Court was duly extracted and served on the Respondent and his agents and assigns; but that in disregard of the said Order, the Respondent proceeded to subdivide, sell and lease the aforesaid parcel of land with the

sole intention of defeating the interest of the Applicants.

[4] It was further averred that **Samuel Losem, Francis Kiyapyap, Johnstone P. Chochoi** and **Joseph Lodengo** have now moved into the parcel of land and started tilling it and planting blue gum trees as well as erecting structures on the land to the detriment of the Applicants and in disregard of the court orders; and that at the same time, **Nicholas Kupar, Yego Makumbi** and **Loktari Makumbi** have also, in total disobedience of the orders of the Court, moved into the land and have started building permanent structures, planting trees and tilling the land with the sole aim of defeating the interests of the Applicants. In the premises, the Applicants prayed that their application be allowed and that the orders sought therein be granted to ensure that the ends of justice are met.

[5] The application was opposed by the Respondent vide his Replying Affidavit sworn on **19 June 2018**. He averred that Grant of Letters of Administration Intestate to the Estate of the Deceased herein was issued on **17 January 1985** by the Court with the full knowledge and consent of each and every member of the Deceased's family; and that the said Grant was confirmed on **16 February 2015** whereupon the parcel of land known as **West Pokot/Siyoi/104**, which was the only asset comprising the Deceased's Estate, was distributed as proposed.

[6] While conceding that he was served with an *ex parte* order dated **5 June 2015**, it was the contention of the Respondent that that *ex parte* order was so poorly extracted that it was incapable of sustaining the application for contempt of court on account of its vagueness. He further averred that the *ex parte* order of **5 June 2015** lapsed on **27 June 2015** when the application was scheduled for *inter partes* hearing. He also questioned the propriety of introducing third parties to the Succession Cause and seeking that they be punished for contempt without a demonstration as to how they are connected to the orders that have been allegedly contravened. Accordingly, the Respondent urged for the dismissal of the instant application.

[7] **Samuel Losem, Francis Kiyapyap, Johnstone P. Chochoi** and **Ronald Yego Makumbi** who were similarly cited in the instant application as contemnors also filed their respective Replying Affidavits. Their averments were along the same lines, that they were never served with the initial application or the order that is said to have been contravened. They averred that they were made aware of the instant application for contempt through the Respondent who is a neighbour. They faulted the process adopted by the Applicants in ventilating their grievances, contending that the **Law of Succession Act** and the **Probate and Administration Rules** do not provide for injunctions; and therefore that the order of injunction issued herein was issued in error; and that, in any event, contempt which is akin to a criminal offence, has not been proved against them.

[8] Directions were given by the Court on **12 November 2018** that the application be canvassed by way of written submissions. Apparently, only the Applicants complied and filed written submissions on **27 November 2018**. Their argument was that the contemnors were duly served and therefore were well aware of the order of **5 June 2015** which they proceeded to disobey with impunity by planting blue gum trees thereon; and by subdividing the land and building permanent structures on it to the detriment of the Applicants. In support of their arguments, the Applicants relied on **B vs. Attorney General [2004] eKLR** as well as **Republic vs. Kenya School of Law & Another**; and **Sam Nyamweya & 3 Others vs. Kenya Premier League Limited & 2 Others**.

[9] I have carefully considered the application, the affidavits filed in response thereto, as well as the written submissions filed herein by the Applicants. I have similarly perused the record and it does confirm that the Respondent, **Keeme Loitarem**, was issued with a Grant of Letters of Administration Intestate in respect of the Estate of the Deceased, **Kiptoo Cheboi**, on **17 January 1985**. That Grant was thereafter confirmed on **16 February 2015** and a Certificate of Confirmation issued on **19 February 2015**. Subsequently, the Applicants, who are the siblings of the Petitioner/Respondent filed an application dated **25 May 2015** for revocation of the Grant, contending that it was fraudulently obtained. Along with that application, the applicants filed an application for preservation of the Estate pursuant to which interim conservatory orders were made on **3 June 2015** and issued on **5 June 2015** pending *inter partes* hearing on **27 July 2015**.

[10] That *ex parte* order is the subject of the instant contempt application. The order was couched in the following terms:

**"THIS MATTER coming up for hearing of our application dated 25<sup>th</sup> May 2015 on 3<sup>rd</sup> June 2015 before Honourable Justice J.R. Karanja AND UPON reading the said application together with the supporting Affidavits:-**

**IT IS HEREBY ORDERED THAT:-**

- 1. That the service of this application be certified as urgent and service dispensed with in the first instant.**
- 2. That pending the hearing and determination of this application interpartes, the honourable court be pleased to issue a preservation order and/or an order of Temporary injunction restraining the Respondent and/or his agents and/or assigns from subdividing, trespassing, distributing, constructing, wasting, destroying/transferring, selling, leasing, alienating and/or in any other way dealing with land parcels No. West Pokot/Siyoi/104 and other properties of the late Kiptoo Cheboi (deceased) in a way detrimental to the interests of the objectors.**
- 3. That the hearing on 27th July 2015..."**

[11] Clearly therefore, a valid court order was made and extracted in peremptory terms, restraining the Respondent and his agents and assigns from subdividing, trespassing, distributing, constructing, wasting, destroying/transferring, selling, leasing, alienating and/or in any other way dealing with land parcel No. **West Pokot/Siyoi/104** and other properties of the late **Kiptoo Cheboi** (deceased) in a way detrimental to the interests of the objectors. Hence, the Respondent and his assigns were under obligation to obey the order unless and until set aside. In **Hadkinson vs. Hadkinson [1952] ALLER 567** this obligation was expounded thus by **Romer LJ**:

**"It is the plain and unqualified obligation of every person, against, or in respect of whom an order is made by a 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 an order believes it to be irregular or even void.**

**For, a person who knows of an order, whether null or valid, regular or irregular cannot be permitted to disobey it. It would be most dangerous to hold that the suitors or their solicitors could themselves judge whether an order was null or valid. Whether it was regular or irregular, that they should come to the court and not take upon themselves to determine such question. That the course of a party knowing of an order which was null and irregular, and who might be affected by it, was plain, he should apply to court that it might be discharged. As long as it exists, it should not be disobeyed."**

[12] In similar vein, the rationale behind the obligation to obey was well explicated in Econet Wireless Kenya Ltd vs. Minister for Information & Communication of Kenya & Another [2005] KLR 828, 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."**

[13] In the premises, the issues for determination in this application, which the Applicants were required to not only demonstrate, but to do so beyond the usual standard applicable to civil matters, are:

[a] that the Respondent had knowledge of or proper notice of the terms of that Order;

[b] that the Respondent has deliberately failed to obey the terms of the Order;

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

**[a] On whether the Order was Served:**

[14] Although it was the contention of the Applicants that the Order dated **5 June 2015** was served there is absolutely no proof of service on the Respondent, to whom the order was directed. All there is in the Supporting Affidavit of **Anne Loitarem Osilingi** is that: **"...service of the application upon the petitioner his agents and/or assigns was effected the same day..."(emphasis supplied)** There is no averment to the effect that the Order itself was served, or served on the Respondent. Accordingly the time, date and place of such service cannot be ascertained.

[15] It is now trite that for a party to be cited for contempt of court, it must be proved, either that the order was extracted and served on him/her along with the usual penal notice, or that he/she was aware of the order and proceeded to nevertheless disobey it. Hence, in Shimmers Plaza Limited vs. National Bank of Kenya Limited [2015] eKLR it was held that:

**"It is important however, that the court satisfies itself beyond any shadow of a doubt that the person alleged to be in contempt committed the act complained of with full knowledge or notice of the existence of the order of the court forbidding it. The threshold is quite high as it involves possible deprivation of a person's liberty..."**

[16] In the foregoing circumstances, there being no proof that the *ex parte* order of **5 June 2015** was served or when it was served, it cannot be said that the Respondent was in breach of the order, as it was not demonstrated when, if at all the alleged tilling, planting and construction works were undertaken. It is noteworthy that that order was obtained several months after the Grant was confirmed; hence the need for the Applicants to demonstrate the alleged breaches with exactitude. This was not done. The same finding applies to the other alleged contemnors who were neither parties to the application dated **25 May 2015** nor were any orders issued against them or served on them for observance. It cannot be said therefore that the Applicants have demonstrated to the requisite standard that the Order of **5 June 2015** was served on either the Respondent or the other alleged contemnors as is required by the law.

[17] Having failed to demonstrate that the order was served, the question as to whether the Respondent or the other alleged contemnors deliberately failed to obey the terms of the Order would not arise. In the result, it is my considered finding that the application dated **8 March 2018** lacks merit and is therefore dismissed but with an order that the costs thereof be borne by the Estate.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 13<sup>TH</sup> DAY OF MARCH 2019**

**OLGA SEWE**

**JUDGE**