



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 26 OF 1985

IN THE MATTER OF THE ESTATE OF JOSIAH MWANGI KARIUKI (DECEASED)

DORIS NYAMBURA KARIUKI.....APPLICANT

VERSUS

TERRY WANJIKU KARIUKI.....1ST RESPONDENT

MARK KARIUKI MWANGI.....2ND RESPONDENT

VERSUS

MAINA WA IHUTHIA.....1ST CONTEMNOR

RIARA KANYUIRA.....2ND CONTEMNOR

RULING

1. Contempt of court means the wilful disobedience of a court judgment, decree, order, or any other process. The contempt contemplated is the one that is intended to interfere with, obstruct, or interrupt the due process of the administration of justice (**Board of Governors Moi High School Kabarak –v- Malcom Bell & Another, Supreme Court Petition Nos. 6 and 7 of 2013**). In **Hadkinson –v- Hadkinson [1952] P.D 285** it was observed that it is the unqualified obligation of every person against, or in respect of, whom an order has been made by a court of competent jurisdiction, to obey it unless and until that order “is discharged, varied or set aside.” The disobedience of such an order would, as a general rule, result in the person disobeying it being held to be in contempt and therefore punishable by committal and attachment (**Wildlife Lodges Limited v County Council of Narok and Another [2005]2EA 344**).

2. In a case of contempt, the breach in respect of which the alleged contemnor is cited must not only be precisely defined but also proved to the standard which is higher than proof on a balance of probabilities but not as high as proof beyond reasonable doubt (**Mutitika and Others –v- Baharini Farm Limited 1982 – 88] 1KAR 863**). The reason for this high standard, a standard not normally associated with civil cases, is because contempt of court is an offence of a criminal character which may lead to the contemnor being sent to jail (**Re Bramble Vale Ltd [1970]Ch.128**). In **William Sapuro Kimanaa –v- National Bank of Kenya Ltd & Another, Nairobi (Milimani) HCCC No. 1933 of 1999**, it was held that for the purposes of contempt what is required is the existence of the order, the contemnor being aware of it, and proof of disobedience or violation of the same. Where, for instance, committal is sought for a breach of an injunctive order, it must be clearly proved that the order was clear and unambiguous, and that what the contemnor did in breach of the order is clear (**Republic –v- Commissioner of Lands and Others ex parte James Kiniya Gachira, Nairobi High Court Misc. No. 149 of 2002**).

3. Lastly, where there is a civil remedy or there is any other method of doing justice to the circumstances of the case, recourse ought not to be a process of contempt of court. (**Moses P N Njoroge & Others –v- Rev. Musa Njuguna & Another, HCC No. 247”A” of 2004 at Nakuru**). This is because the jurisdiction of committing for contempt should be most jealously and carefully watched and exercised with greatest reluctance and greatest anxiety on the part of the court to see whether there is no other mode which is open to the objection of arbitrariness and which can be brought to bear on the subject.

4. The deceased Josiah Mwangi Kariuki died intestate on 2nd March 1975. He was survived by three widows:-Dorcas Nyambura Kariuki (the applicant), Terry Wanjiku Kariuki (1st respondent) and Esther Mwikali Kariuki. Each widow had children. He left a vast estate. A joint grant of letters of administration intestate was issued to the applicant, the 1st respondent and Mark Kariuki Mwangi (the 2nd respondent) on 12th

June 1995. The 2nd respondent is the son of Esther Mwikali Kariuki. Following hearing, a decision was rendered on 8th December 2009 confirming the grant. The matter was heard by Justice K. H. Rawal (as she then was) who distributed the estate to the beneficiaries.

5. The applicant brought an application dated 22nd December 2009 seeking to have varied and set aside the ruling dated 8th December 2009 and the consent order recorded on 11th November 2008 that formed part of the ruling. One of her grounds was that her counsel was not privy to the consent. This is the consent that, among other things, agreed on who were the widows and the children of the deceased. It was agreed on who the beneficiaries were. The application is pending resolution. What is of significance is that LR No. 4898/188 (Castle Inn) was found to be one of the properties in the estate. It was directed to be equally shared between the houses of the 1st respondent and Esther Mwikali Kariuki.

6. The applicant filed two applications, one dated 11th April 2017 and the other dated 28th April 2017. Both were in respect of LR No. 4898/188 (Castle Inn). The application dated 11th April 2017 sought the committal of the respondents to civil jail for disobeying the court orders issued on 22nd September 2014 and 10th May 2016. The applicant's case was that this property was part of the estate of the deceased; that her matrimonial home is situated on the property since 1975; that on 22nd September 2014 and on 10th May 2016 this court issued orders of *status quo* asking that the assets and property of the estate of the deceased be maintained pending the hearing and determination of her above application for review; that the respondents were aware of the orders; despite that, they had continued to interfere with the property including leasing this property to a third party and carrying out extensive destruction of the existing buildings.

7. It should be noted that one of the complaints by the applicant in the application for review was that the consent and ruling had materially prejudiced her because she had ended up losing this property to her co-widows when she was in fact the one residing on it.

8. The application dated 28th April 2017 was against Maina Wa Ihuthia (1st contemnor) and Riara Kanyuira (2nd contemnor) to whom the respondents had leased the property. It was her case that the contemnors were aware of the orders yet they had entered into the lease and had carried out extensive demolitions to the existing buildings and had put up new structures on the property. These acts, it was stated, were in contempt of the court orders.

9. The orders of 22nd September 2014 and 10th May 2016 are not disputed. What the respondents are disputing is what they meant. What *status quo* was being maintained by the orders? According to the respondents, what the orders meant was that they could not transfer, sell or charge the property or put it beyond the reach of the applicant. The 1st respondent stated this in her replying affidavit sworn on 8th May 2017, brought on her behalf and that of the 2nd respondent. According to them, the *status quo* order did not extend to leasing the premises. They stated, and this was admitted, that by lease dated 29th December 2003 the premises were leased by the applicant to Basil Limited for a period of 10 years. When it ended, the company refused to vacate. The applicant had to use litigation to force it out towards the end of 2015. It was following this that the respondents then leased the premises to the contemnors.

10. The respondents stated, and this was denied by the applicant, that the latter still uses part of the premises for business and has rented some of it.

11. The lease between the applicant and Basil Limited extended into the period after the property had been given to the respondents following the judgment that is sought to be reviewed. The applicant was getting rent from the lease. She was not evicted from the property by the respondents.

12. By the time of the *status quo* orders, and because of the decision that distributed the estate of the deceased, the property belonged to the respondents. If the applicant was leasing it and earning rent from it when it did not belong to her, why should she have a problem with the respondents, the owner, leasing it to the contemnors? It is my considered view that, given the history of this case, the *status quo* orders of 22nd September 2014 and 10th May 2016 were intended to protect Castle Inn property from being sold, or otherwise disposed of, now that there was an application that was challenging the order giving the property to the respondents. The orders were intended to make sure that, in the event that the court finds that the property ought to go to the applicant, the same would still be available. It would appear not disputed that the property had not been transferred to the respondents following the decision of 8th December 2009. The *status quo* orders were made to ensure that the transfer is not affected until the review application is heard and determined.

13. It is considered, and both sides agree on this, that Castle Inn is a commercial property. The value of such property can only be maintained, if not improved, by such lease and/or the continuance of commercial activity on the same. If the property is left without a commercial activity, it will go to waste. What the contemnors ought to appreciate is that the lease to them is subject to these ongoing proceedings.

14. It was the applicant's case that since she was a co-administrator of the estate, her consent was required before the property could be leased. It is not contested that she did not provide her consent to the lease. However, the applicant and the respondents have been co-administrators for the longest period. Yet, when the applicant leased the property to Basil Limited she did not seek the consent of the respondents. There is no evidence she shared the rent with the respondents, or the estate. She was doing this even when the property had been given to the respondents. Today, the property belongs to the respondents. The only role that the applicant can legitimately play is to enable the transmission of the property to the respondents. She is, however, no longer the owner of the property. The property no longer belongs to the estate. This is until the review application is resolved.

15. The result is that, on the evidence, it has not been proved to the required standard that by leasing the suit property the respondents were in any contempt of the orders of 22nd September 2014 and 10th May 2016. Neither were they in contempt when they made constructions on the property. The property was still within the reach of the estate of the deceased.

16. I have found that the actions by the respondents in leasing the Castle Inn to the contemnors did not constitute contempt of the orders of

22nd September 2014 and 10th May 2016. It follows that contemnors would have no contempt case to answer in respect of the orders.

17. The result is that, considering the facts of the case and the principles of law application, I find that the applications dated 11th April 2017 and 28th April 2017 have no merit and are consequently dismissed with costs. In reaching this conclusion, I considered the written submissions by counsel and the decisions they cited.

18. So that this dispute does not linger forever, I direct that the application dated 22nd December 2009 be heard on **6th May 2019**. Parties have leave of 30 days to file and exchange any further affidavits and submissions.

DATED and SIGNED at Nairobi this 8th day of MARCH 2019

A.O. MUCHELULE

JUDGE

DATED and DELIVERED at Nairobi this 12TH day of MARCH 2019

ALI-ARONI

JUDGE