



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

SUCCESSION CAUSE NO.53 OF 2017

IN THE MATTER OF THE ESTATE OF HENRY NZIOKA MULLI (DECEASED)

BENDETTA MUTINGE MULLI.....1ST APPLICANT

FAITH MUTHEU MULLI.....2ND APPLICANT

-VERSUS-

ANN ITUMBI MULLI.....1ST RESPONDENT

MONICA GOMES.....2ND RESPONDENT

JAMES MUTUKU MULLI.....3RD RESPONDENT

BENJAMIN MUNYAO MULLI.....4TH RESPONDENT

MARGARET NZISA MULLI.....5TH RESPONDENT

RULING

1. This ruling relates to three applications that shall be addressed chronologically.

a. Application for Injunction

2. The applicants and the 1st respondent herein petitioned for letters of administration and the same is yet to be granted.

3. The applicants herein then filed summons dated 17.8.2018 under Section 47 of the Succession Act and Rule 73 of the Probate and Administration Rules seeking injunctive orders against the respondents from dealing in the listed properties pending the issuance of the grant and confirmation.

4. The applicants sought the following orders:-

1. Spent

2. Spent.

3. THAT this honorable court be pleased to grant a temporary injunction against the respondents, their agents, servants or any person acting under their authority restraining them from intermeddling or dealing in any manner with the assets of the deceased person herein pending issuance of a grant of letters of administration and a certificate of confirmation herefrom or as this court may direct and in particular, the assets as listed in items a to r of the application.

4. THAT the Honorable court be pleased to order all proceeds forming part of the Deceased's estate being from **L.R No. 37/254/33 situate in City County of Nairobi, L.R. 3734/389 situate in City Council of Nairobi, Mulli Academy and Kenol- Kobil Petrol Station on No. Plot 273 Kangundo** town be deposited in court until a grant of letters of administration and a certificate of confirmation is issued therefrom as this court may direct.

5. THAT the costs of this application be in the cause

5. It is supported by Supporting Affidavit sworn by **Benedetta Mutunge Mulli** sworn on **17.8.2018** and filed on **20.8.2018**. In the said affidavit, the deponent avers that the 4th Respondent issued eviction notices to the tenants of **L.R No. 37/254/33 situate in City County of Nairobi** to pave way for illegal construction. She attached a copy of the said notices issued in August 2018 indicating the same. The applicant avers that revenues from the properties of the deceased are being wasted by the respondent, she attached a list of the properties of the deceased and documents indicating ownership of the said properties by the deceased. The applicant averred that she has been residing on **L.R No. 3734/389 situate in City County of Nairobi** for a period of 45 years and the 4th Respondent took over management and threatens to chase away the tenants hence is apprehensive that the estate may suffer irreparable loss thus seeks that court protect the assets of the deceased.

6. The 1st applicant filed a further affidavit dated 29th October, 2019 in support of her application. She deponed that she was married to the deceased in a Kamba Customary marriage and acquired the deceased's surname as per her national identity card annexed to the affidavit. She averred that she was also recognized in the eulogy of the deceased as a wife and attached a copy of the burial program. She averred that the 1st respondent was engaged in a dispute with the deceased that she was to relinquish her interest in **L.R No. 37/254/33** so that **LR 3734/389 situate in City County of Nairobi** be registered in her names and the dispute was taken to court vide High Court Civil case 243 of 2007 that is annexed to the affidavit.

7. There is also a supplementary affidavit deponed by **Jackson Nzyuko Matilu** on 30th October, 2018 averring that he knew the 1st applicant as the wife of the deceased. There is a supplementary affidavit deponed by **Pascal Ndeti Kathendu** on 30th October, 2018 averring that he knew the 1st applicant as the wife of the deceased and he delivered the ntheo and ndila and ngasya to officiate the customary marriage. There is a supplementary affidavit deponed by **Charles Kyalo Ngei, Josephine Ndungu Pius, Bishop Peter Mutuku Hunjah, Ruth Wikali Muli and Susan Mutio Masaku** on 30th October, 2018 averring that they knew the 1st applicant as the wife of the deceased, and that the deceased had 3 wives, that is the 1st respondent, the 1st applicant and Dorris Mataura Muli (deceased).

8. The 1st Respondent opposed the application via undated Replying Affidavit filed on **17.8.2018**. The said respondent averred that **L.R No. 37/254/33 and 3734/389 situate in City County of Nairobi** belong to her. She attached copies of certificates of title to that effect. She averred that the notices that were issued to the tenants on **L.R No. 37/254/33 situate in City County of Nairobi** by the 4th Respondent were within the powers of attorney donated to him by her and has attached a copy of the power of attorney. She avers that she had never received the proceeds from Mulavo Enterprise Limited, the petrol station, the farm in Ithanga and does not own shares in Mulli Academy limited or Neema Holdings and in any event it is the 1st applicant who is continuing to waste the estate of the deceased by not giving an account of the proceeds from the petrol station, east Africa breweries and monies he has been collecting as rent from the estate of the deceased. She further averred that the applicant shall not suffer any irreparable damage as she has been receiving all the proceeds from all the properties named in the application apart from **L.R No. 37/254/33 and 3734/389 situate in City County of Nairobi** and if the orders sought are granted, the respondents will be greatly prejudiced for the **L.R No. 37/254/33 and 3734/389 situate in City County of Nairobi** belong to her and are not the estate of the deceased thus she seeks that the application be dismissed as no grounds have been demonstrated to warrant the orders sought.

9. The application was allowed in the interim in terms of the order dated 10.9.2018 where the court ordered that the status quo be maintained in respect of all the listed properties. The court directed that the application be canvassed vide written submissions. The Respondents then filed an application dated 24.9.2018 that shall be analyzed in the next heading, however the same prompted the court to direct that it together with the application dated 17.8.2018 be heard by way of viva voce evidence.

b. Application to vary /set aside Court Orders issued on 10th September, 2018 in respect of L.R No. 37/254/33 and 3734/389 Situate in County of Nairobi

10. The Respondents/Applicants filed application under Section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules that sought that the properties **L.R No. 37/254/33 and 3734/389 situate in City County of Nairobi** be expunged from the list of assets/properties of the deceased and the injunctions issued in respect of the same be lifted and further that the Respondents be restrained from accessing or dealing or interfering with the same.

11. The application was grounded on the following facts as per the affidavit of Anna Itumbi Muli dated 24th September, 2019; That the Applicant is the legal owner as a joint tenant with the deceased of the said **L.R No. 37/254/33 and 3734/389 situate in City County of Nairobi**. Copies of certificates of title were attached to the application. The deponent averred that **L.R No. 3734/389 situate in City County of Nairobi** is her matrimonial home where she lives today and that the respondents have been harassing the tenants on occupation of the **L.R No. 37/254/33**, a copy of a letter addressed to the tenants was annexed. She averred that the respondents obtained a temporary injunction against her thus the same has restrained her from dealing in her property thus she seeks the same be lifted for her only source of income is the rent collected from the premises.

12. In reply to the application, the 1st Respondent vide affidavit dated 1st October, 2018 opposed the application. She deponed that at the time of registration of the titles in the joint names in 1974 and 1969, the 1st applicant was not a spouse of the deceased. A copy of the marriage certificate indicating celebration of marriage on 22nd February, 1975 was annexed. Further that the registration of the deceased's death as an entry was laced with fraud and that the developments on **L.R No. 37/254/33** were hers and she collected rent from the premises until April 2017 and the 1st applicant then threatened the tenants which prompted the dispute to be taken to the business premises rent tribunal. A copy of the order issued thereto was attached to the application.

13. When the matter came up for hearing, Pw1 was Benedetta Mutunge Muli. She sought to adopt her affidavits as her testimony and testified that she married the deceased in 1972 thus sought that she be allowed to remain in occupation of the premises that belonged to her husband. In cross-examination, she testified that the property is situated in Nairobi West and she learnt that the same was registered in the

names of her husband and her co-wife. She testified that she developed the property but has not presented receipts as evidence of the same. She testified that her co-wife was made a joint owner of the property as a trustee. She also testified that there are more than 15 properties bought by the deceased though the titles are not yet out. On re-examination, she testified that she had been residing in the Nairobi West property for over 40 years.

14. Pw2 was Bishop Peter Hunja who sought to adopt his affidavit in support of the 1st applicant's application. On cross examination he testified that the 1st applicant has been residing on the Nairobi West plot but the title deed is in the joint names of the deceased and the 1st Respondent.

15. Pw3 was Ruth Mwikali Muli who sought to adopt her affidavit in support of the 1st applicant's application. On cross examination she testified that she was residing in one of the rooms in the Nairobi West property for 2 months and that the 1st applicant had been married to the deceased in the early 1970's and the union was formalized customarily in 1981 but was later she was chased by him, however the deceased directed that the Nairobi West property was to belong to the 1st applicant. She testified that she never interacted with the 1st Respondent.

16. Pw4 was Pascal Ndeti who sought to adopt his affidavit in support of the 1st applicant's application. On cross examination he testified that a traditional ceremony was held in 1981 between the deceased and the 1st applicant and in 1985 the ceremony was fully finalized by the payment of dowry. He testified that he learnt that the deceased had 2 other wives before marrying the 1st applicant, that the deceased was an ambassador and wanted the 1st respondent to relinquish the Nairobi West property and take up the Lavington property. He further testified that the deceased was a freedom fighter and had to block repossession thus registered the property in the joint names of the 1st Respondent and himself. Further that there was no written will but the deceased made some wishes over the distribution of the assets. On re-examination, he testified that the 1st applicant made some construction on the Nairobi West property thus should be entitled to the same.

17. Pw5 was Jackson Nzyuko Matiku who sought to adopt his affidavit dated 30.10.2018 in support of the 1st applicant's application. On cross examination he testified that the deceased was his brother in law and he married his elder sister who is the 1st applicant. He testified that the marriage took place in 1972 and was later formalized customarily and the deceased had three wives. The applicants closed their case and the Respondents were allowed to testify.

18. Rw1 was Anna Itumbi Muli. She sought to rely on her affidavit in support of the application dated 24.9.2018 and the replying affidavit to the application dated 17.8.18. She testified that the 2 properties **L.R No. 37/254/33 and 3734/389 situate in City County of Nairobi** should not be included in the assets of the deceased for they were jointly registered in her names and the deceased thus when he died, she being the survivor is the legal owner. On cross-examination she testified that she was married customarily to the deceased after he left detention in 1957 and after he divorced his first wife. She testified that she was a wife of the deceased when the property was being acquired and she made contribution to the same. Further that the deceased had other beneficiaries who can benefit from the other properties. She testified that Lavington was her matrimonial home and Nairobi West was rented out, further that the 1st applicant was managing the Nairobi West property and used to collect rent from it, however in 2018 she appointed her son to collect the rent via power of attorney. She testified that she has a right to evict tenants from her plot. On reexamination she testified that she was legally married to the deceased in 1975 as per the marriage certificate after the deceased divorced his first wife Doris, and that the 1st applicant came into the picture in 1980.

19. The court directed the parties to file and exchange submissions.

20. Counsel for the 1st Applicant in his submissions raised three issues for consideration. Firstly whether in a polygamous marriage a property purchased by a man and registered in his joint names of one of future spouse, become absolutely that of the so spouse to the exclusion of all others in his demise, and secondly whether the contested properties are matrimonial properties and available for distribution as part of the deceased's estate. On the first issue, counsel submitted that according to the evidence of the 1st applicant, she was married to the deceased from 1972 under Kamba Customary law and the 1st Respondent has not brought evidence of marriage to the deceased in 1957 thus for all intents and purposes she was a spinster until 1975 when she was in a civil marriage with the deceased. Learned counsel submitted that at the time of registration of **L.R No. 37/254/33 and 3734/389 situate in City County of Nairobi on 26.11.69 and 23.8.74 respectively** the 1st respondent failed to ascertain her status thus he was registered as a trustee. Counsel cited the definition of a wife under Section 3(1) of the Law of Succession Act and Section 2 of the matrimonial property Act and submitted that both the 1st applicant and 1st Respondent are widows of the deceased and have equal rights to the assets of the deceased. On the 2nd issue, earned counsel submitted that the properties **L.R No. 37/254/33 and 3734/389 situate in City County of Nairobi** are registered in joint names but article 27(4) of the Constitution prohibits discrimination on the grounds of marital status and similarly, Section 6(1) of the Matrimonial Property Act defines matrimonial property and Section 8(1)(e) of the same Act provides that property acquired after dissolution of a polygamous marriage shall be regarded as being owned by the man and the wives and taking into account the contributions thereof. Counsel submitted that the 1st respondent is registered as a trustee of the subject properties. Counsel cited the provisions of Section 60, 61 and 91 of the Land Registration Act and the import of the sections is that only a confirmed grant can allow transfer of land that was jointly owned and registered therefore the contested assets form part of the deceased's estate and are available for distribution. Counsel concluded by submitting that the application filed on 17.8.2018 should be allowed and the application by the respondent filed on 24.9.2018 be dismissed.

21. Counsel for the Respondents vide written submissions filed on 7.2.2019 submitted that **L.R No. 37/254/33 and 3734/389 situate in City County of Nairobi** are not available for distribution because according to Section 60 of the Land Act and under the principle of survivorship she became the owner of the suit property. Counsel cited the case of **Re Estate of Johnson Njogu Gichohi (Deceased) (2018) eKLR and In Re Estate of Josephine Mumbua Mehaff (Deceased) (2015) eKLR** where the court held that land that was owned by virtue of survivorship do not form part of the estate of the deceased.

22. In this application, it appears that the contest is whether or not the 1st applicant and the 1st respondents were wives of the deceased and who was the first in time so as to defeat the interest of the other over the disputed property and, after going through the evidence on record, I

find the following issues:-

- i. Whether the Applications have merit**
- ii. Whether the court may grant the orders sought and**
- iii. What orders may the court grant?**

23. The petition herein was filed on 27.11.2017 and the grant has not been issued leave alone confirmed. However with regard to the disputed properties the 1st respondent is accused of what amounts to wasting of the estate of the deceased and otherwise referred to as intermeddling with assets that form part of the deceased estate. The respondent's justification is that she is a wife to the deceased, the registered owner and the survivor to the deceased and therefore is entitled to deal in the properties.

24. Section 82(a) of the Law of Succession Act provides that;

“Personal representatives shall, subject only to any limitation imposed by their grant, have powers to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arise out of his death for his estate”

In interpreting the above provision of law, the Honourable Court in the case of **Alexander Mutunga Wathome v Peter Lavu Tumbo & Another [2015] eKLR (Machakos Succession Cause No. 80 of 2011)** noted that;

“In law one can only represent the estate of a deceased person when a grant of representation has been made in respect of the estate of such deceased person under the Law of Succession Act. In addition section 82 of the Law of Succession Act provides that it is the personal representative who has the powers to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased. A personal representative is defined under section 3 of the Act as the executor or administrator, as the case may be, of a deceased person.”

25. Section 45 of the Law of Succession is to the effect that no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

26. The court takes the view that any of the actions in dealing with the disputed properties and yet no one has been appointed an administrator to the estate of the deceased amount to intermeddling.

27. I find that the application has raised weighty legal issues with regard to the customary marriage, the exception to doctrine of sanctity of a title deed, issues of alleged fraud and issues of identity of the legal nature of the interest in the disputed properties and where such issues are raised in a succession cause, rule 41(3) of the Probate and Administration Rules provides that claims which are *prima facie* valid should be determined before confirmation. It states that :-

“Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate or the property comprising it to abide the determination of the question in proceedings under Order XXXVI, rule 1 of the Civil Procedure Rules and may thereupon, subject to the proviso to section 71 (2) of the Act, proceed to confirm the grant.”

28. In light of the evidence presented in court and the above mentioned provisions of the law, I am of the view that the issues raised by the parties cannot be fully canvassed in this application, however the court is duty bound to prevent wastage of the estate of the deceased. The power to do so is set out under the inherent jurisdiction of the court and under Section 47 of the Law of Succession Act and Rule 73 of the probate rules and to that end the Court has power to grant injunctive orders to meet the ends of justice.

29. This was observed in the case of **The Estate of George M'Mboroki (Deceased) [2008] eKLR** where the court held that **“it holds such intrinsic authority so as to observe the due process of the law, to prevent the abuse of the process, to do justice between the parties and to secure a fair trial between them”**.

30. The celebrated case of **Giella v Cassman Brown & Co. Ltd (1973) E.A 358** sets out the grounds for granting an injunction. On the first principle as set out in the case, I am satisfied that the 1st applicant has established a prima facie case as described in **Mrao v First American Bank & 2 others [2003] KLR, 125**. It was evident from the facts tendered in court that part of the estate of the deceased has been subjected to what amounts to intermeddling in the estate by both the 1st applicant and the 1st Respondent and yet the application for letters of administration is pending before the court. In the case of the Estate of **Veronica Njoki Wakagoto (Deceased) 2013 eKLR** where the court stated **“that the property of a dead person cannot be lawfully dealt with by anybody unless such a person is authorized to do so by the law.....the law takes a very serious view of intermeddling and makes it a criminal offence”**.

31. I am satisfied that if the order so sought by the 1st applicant is not granted, there will be irreparable loss to the estate of the deceased that cannot be compensated by damages. In **Ann Wairimu Wachira v Jerioth Wangui Maina and 2 others (2016) eKLR**, court observed that the applicant must demonstrate that the loss alleged cannot be compensated by damages. The facts speak for themselves and intermeddling in the estate of the deceased cannot be compensated by way of damages.

32. With regard to the application dated 24.9.2018 the issue to be determined is whether or not the applicant has raised sufficient grounds to warrant setting aside of orders issued on 10th September, 2018 in respect of **L.R No.37/254/33 and 3734/389 situate in City County of Nairobi**. The 1st Applicant/Respondent has imputed fraud on the part of the 1st Respondent/ Applicant hence necessitating a determination as to whether or not the standard for fraud has been met. See **R.G. Patel v Lalji Makani (1957) EA 314**.

33. In **Rosemary Wanjiku Murithi v George Maina Ndinwa (2014) eKLR**, the Court held that proof of fraud involves questions of fact. Simply raising the issue of fraud in a statement of defence and counterclaim is not proof of fraud. From the application, I notice that the applicant has made allegations, and I would expect a report made to the CID, and investigation report implicating someone for fraud to be attached as annexures to the affidavit and in the absence of any, the court is not able to make a determination that the registration was obtained through falsehoods or fraud. The 1st respondent has raised the issue that she derives income from the suit property and she is free to approach the court for a limited grant or an *ad colligenda* to allow her deal in the property as per the direction of the court. Be that as it may, the fraud alleged in order to defeat the title would be better proved in an ELC court in the terms of Section 25, 26 of the Land Registration Act and Section 13 of the ELC Act, hence I advise the parties to file pleadings in the court with the requisite jurisdiction.

34. Having outlined the details of the arguments of the parties so as to address the issues framed at the onset of my analysis the facts before the court do not disclose sufficient reason to set aside the Court order granted on 5th September, 2018 and issued on 10th September, 2018 and hold the view that any other grievances with respect of the distribution of the estate of the deceased can be adequately addressed during the hearing for confirmation of grant.

c. Application for contempt of court filed on 7th February, 2019.

35. The Applicant **Bendetta Mutunge Mulli** filed a notice of motion on 7th February, 2019 under Section 5 of the Judicature Act, CAP 8, Section 2 of Part 81 of the Civil Procedure (Amendment No. 2) Rules, 2012, United Kingdom and sought orders that **the 1st and 4th Respondents, David Mwanzia Kyule, Mr Njuguna, Chief Inspector of Police, Officer Commanding Station, Langata Police Station** be committed to civil jail for contempt for disobedience of the orders issued on 5.9.2018.

36. The application is grounded on the following facts;

a. The Court on 5.9.2018 granted inter alia an order that the status quo prevailing with regard to the properties... **L.R No.37/254/33 situate in City County of Nairobi** and the same be served

b. The firm of M/S Mutisya and Co Advocates were served and the 1st and 4th Respondents have ignored the same and evicted the tenants on **L.R No.37/254/33**.

37. The 1st applicant herein through her affidavit sworn on **6.2.2019**, deponed that despite the court directing that rent be paid in respect of **L.R No.37/254/33 situate in City County of Nairobi** the tenants were evicted and denied access to the suit premises. Copies of the order, receipts of rent payment, copies of photographs of rent payment were annexed to the application.

38. The application is also supported by supplementary affidavits of Bonface Muindi Mulli, Jimmy Mwanzia Ndunda, Charles Muli Mutuluki, Consolata Mueni Mutungi and Esther Karwirwa on 8th March, 2019. The deponents averred that they had respectively been tenants on **L.R No.37/254/33** and have been paying rent to Bendetta Muli and from December, 2017 to Benjamin Munyao Muli for a period of 10 months and after the 10 months they deposited the same in court. They averred that on 5.2.2019 Benjamin Munyao in the company of police officers gave instructions for the premises to be locked and as such they have been denied access to the premises.

39. In reply to the application, Benjamin Munyao Mulli vide replying affidavit dated 29th March, 2019 averred that the tenants were evicted pursuant to a notice that was issued for purposes of renovation and also other tenants were evicted pursuant to an order issued by the Business Premises Rent Tribunal issued on 11.1.2019. A copy of the said order and the eviction notice were attached. He averred that maintaining the status quo does not mean that the estate be left to waste hence the instant application was an abuse of court process and ought to be dismissed with costs.

40. The court gave directions that the matter be canvassed by way of oral submissions

41. Counsel Nzaku submitted on behalf of his client the 1st applicant that the eviction of the tenants on **L.R No.37/254/33** was in total disregard of the orders issued on 5.9.2018 and 17.9.2018 thus the Respondents should be punished for contempt.

42. Miss Alusiola for the Respondents submitted that the supplementary affidavits filed on 8.3.2019 be struck out for the deponents are strangers to the application. She submitted that the purpose of the eviction was for purposes of renovation and a renovation notice was issued before the extension of the orders herein. Further that the applicant has not been evicted thus the application should be dismissed.

43. In the case of **Sam Nyamweya & Others –v- Kenya Premier League Ltd and Others [2015] eKlr**) Lord Justice Clerk stated that:-

“contempt of court is constituted by conduct that denotes wilful defiance of or disrespect towards the court or that wilfully challenges or affronts the authority of the court or the supremacy of the law, whether in civil or criminal proceedings.”

44. From the above definition of contempt of Court the issues for determination are;

a. What is the law applicable in respect of contempt of court?

b. Were the orders issued on 5.9.2018 and 17.9.2018 valid orders of the Court?

c. Were these orders served upon contemnors and were they aware of the said orders?

d. Are the 1st and 4th Respondents, David Mwanzia Kyule, Mr Njuguna, Chief Inspector of Police, Officer Commanding Station, Langata Police Station guilty of contempt of the above stated orders?

e. What orders may court grant?

45. From the Court record, the application is brought under Section 5 of the Judicature Act Cap 8, the said section provides that “**Repealed by Act No. 46 of 2016, s. 38** .

46. The case of **Kenya Human Rights Commission v Attorney General & another [2018] eKLR**, Justice E.C. Mwita held that :

“1. A declaration is hereby issued that Sections 30, and 35 of the impugned contempt of court Act No 46 of 2010 are inconsistent with the constitution and are therefore null void.

2. A declaration is hereby issued that the entire contempt of court Act No 46 of 2016 is invalid for lack of public participation as required by Articles 10 and 118(b) of the constitution and encroaches on the independence of the Judiciary.”

47. Section 23 (3) of the Interpretation and General Provisions Act Cap 2 Provides that “**where a written law repeals in whole or in part another written law, then, unless a contrary intention appears the repeal shall not—**

a. revive anything not in force or existing at the time at which the repeal takes effect; or

b. affect the previous operation of a written law so repealed or anything duly done or suffered under a written law so repealed; or

c. affect a right, privilege, obligation or liability acquired, accrued or incurred under a written law so repealed; or

d. affect a penalty, forfeiture or punishment incurred in respect of an offence committed against a written law so repealed; or

e. affect an investigation, legal proceeding or remedy in respect of a right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing written law had not been made.

48. The import of the above section is that Section 5 of the Judicature Act was done away with and replaced by the Contempt of Court Act, hence the application is brought under the incorrect provisions of the Law.

49. In respect of the declaration of unconstitutionality of the Contempt of Court Act, the South African case of *Sias Moise v Transitional Local Council of Greater Germiston, Case CCT 54/00, Justice Kriegler (for the majority) held:*

“If a statute enacted after the inception of the Constitution is found to be inconsistent, the inconsistency will date back to the date on which the statute came into operation in the face of the inconsistent constitutional norms. As a matter of law, therefore, an order declaring a provision in a statute such as that in question here invalid by reason of its inconsistency with the Constitution, automatically operates retrospectively to the date of inception of the Constitution.”

50. Therefore as it is there is no law that governs contempt of court and recourse would have to be had to the provisions of Section 3 of the Judicature Act that provides that;

“The jurisdiction of the Supreme Court, the Court of Appeal, the High Court, the Environment and Land Court, the Employment and Labour Relations Court and of all subordinate courts shall be exercised in conformity with—

a. The Constitution

b. subject thereto, all other written laws, including the Acts of Parliament of the United Kingdom cited in Part I of the Schedule to this Act, modified in accordance with Part II of that Schedule

c. subject thereto and so far as those written laws do not extend or apply, the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th August, 1897, and the procedure and practice observed in courts of justice in England at that date

Provided that the said common law, doctrines of equity and statutes of general application shall apply so far only as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary.”

51. In this regard the statutes of general application **in force in England on the 12th August, 1897, and the procedure and practice observed in courts of justice in England at that date** in respect of contempt of court indicate that *the only other law relating to contempt of court in England was contained in sections the Supreme Court of Judicature Act 1873 and 1875 and the procedure is provided for under Order 52 Rules 1 to 4 of the Rules of the Supreme Court.*

52. The procedure in that regard is Order 52 RSC, that may be summarized as follows, in so far as it relates to the High Court of Justice:-

- i. An application to the High Court of England for committal for contempt of court will not be granted unless leave to make such an application has been granted.
- ii. An application for leave must be made ex parte to a judge in chambers and supported by a statement setting out the particulars of the applicant as well as those of the person sought to be committed and the grounds on which his committal is sought, and by an affidavit verifying the facts relied on.
- iii. The applicant must give notice of the application for leave not later than the preceding day to the Crown Office.
- iv. Where an application for leave is refused by a Judge in chambers the applicant may apply afresh to a divisional court for leave within **8** days after the refusal by the Judge.
- v. When leave has been granted, the substantive application by a motion would be made to a divisional court.
- vi. The motion must be entered within 14 days after the granting of leave; if not, leave shall lapse.
- vii. The motion together with the statement and affidavit must be served personally on the person sought to be committed, unless the Court thinks otherwise.

53. In the case of **North Tetu Farmers Co. Ltd v Joseph Nderitu Wanjohi [2016] eKLR Justice Mativo observed that leave is not required where committal proceedings relate to a breach of a judgement, order, or undertaking.** Despite having brought the application under the incorrect provisions of the law, the root of the application is a disobedience of a court order therefore the court ought to satisfy itself of the elements of civil contempt as were laid out in *Contempt in Modern New Zealand that was cited in North Tetu Farmers Co. Ltd v Joseph Nderitu Wanjohi [2016] eKLR* as follows:-

"There are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases) that:-

- (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.

54. With regard to the 2nd issue, the pleadings and able submissions by Counsel for all parties it is not disputed that the impugned orders are valid Court orders as witnessed by the court record.

55. With regard to the 2nd issue, whether the said Court orders were served to the contemnors, the record bears witness that there was service as per the affidavit of service on record. In addition, the respondents were always party to these proceedings. They were privy to and had knowledge of these proceedings right from the start to date. Infact the applications that culminated to non- compliance directly concern and involve them as the citees for letters of administration and applicants for letters of administration.

56. The third element is disobedience of the court orders *a priori*, is the 1st and 4th respondent together with **David Mwanzia Kyule, Mr Njuguna, Chief Inspector of Police, Officer Commanding Station, Langata Police Station** guilty of contempt of the above stated orders?

57. In **Re Bramblevale (1970) 1 Ch. 128** Lord Denning stated as follows:

“Contempt of court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved. To use the time honoured phrase, it must be proved beyond all reasonable doubt.”

58. The burden of proof is that the Contempt of Court is proved beyond reasonable doubt that the 1st and 4th Respondents and **David Mwanzia Kyule, Mr Njuguna, Chief Inspector of Police, Officer Commanding Station, Langata Police Station** willfully disobeyed Court orders cited above and instead proceeded with the eviction of the tenants from the suit property.

59. What constitutes Contempt of Court in the instant case is as follows;

- The suit property **L.R No.37/254/33 situate in City County of Nairobi**, the subject of Succession Proceedings in the instant Court file.
- According to the 1st applicant, contrary to existing valid Court orders that stopped ordered maintenance of the status quo the 1st to 4th Respondents together with **L.R No.37/254/33 situate in City County of Nairobi** impeded her access to the same .

60. I find that, although the conduct complained of amounts to contempt of the Court's orders cited above, I find that the 1st applicant has not discharged her legal duty to prove beyond reasonable doubt the contempt by the 1st respondent. The other complained actions relate to persons who are not party to the suit therefore court cannot make any finding from allegations in that regard.

61. In **Re Estate Of David Kyuli Kaindi (Deceased), Succession Cause No. 3403 Of 2005**, it was pointed out that:

“[18] The most potent remedy in the hands of a beneficiary is that of calling personal representatives to account. Beneficiaries who are not personal representatives have no control over the estate. The property of the deceased does not vest in them. They have no power over it; neither do they have any obligations with respect to it. When aggrieved by the manner the estate is being run their remedy lies in seeking accounts from the personal representatives, and, in extreme cases of maladministration and misconduct by the personal representatives, in applying for revocation of the grant.”

[19] The obligation to account is tied up with the fact that personal representatives are also trustees. They are defined as such in the Trustee Act, Cap 167, Laws of Kenya, at Section 2. This is so as property belonging to another vests in them in their capacity as personal representatives, and they hold the same for the benefit of others – beneficiaries, heirs, dependents, survivors, creditors, among others. They stand in a fiduciary position in relation to the property and the beneficiaries. As they hold the property for the benefit of others or on behalf of others – they stand to account to the persons for whose benefit or on whose behalf they hold the property. It is an equitable duty and a statutory obligation.”

62. Despite the Respondents not yet being appointed as personal representatives and having been satisfied that there has been interference in what may or may not be the estate of the deceased, this being a court of equity, and the 1st respondent having explained his actions that they were in pursuance of an eviction order, though the same amount to contempt of court it is just that the said respondents and the 1st applicant give an account of what transactions they have engaged in with regard to the estate.

63. The from the foregoing, I am satisfied that the principles for granting injunctions have been set out in the celebrated case of **Giella v Cassman Brown & Co. Ltd 1973 EA 358**. In considering the pleadings, there does exist a serious issue to be tried, one that forms the subject matter of this suit and in preserving it, would only culminate in meeting the ends of justice as sought by the parties.

64. Section 54 of the Law of Succession Act that provides; **“A court may, according to the circumstances of each case, limit a grant of representative which it has jurisdiction to make, in any of the forms described in the fifth schedule”**. I would advise the parties to utilize the said provision of the law so as to legalize any action that they take in respect of the estate of the deceased. In addition, I advise the petitioners to accelerate the hearing of the instant petition.

65. I caution the parties against intermeddling, for having noted that the offence has been committed, the 1st applicant is free to apply for review of the instant orders.

66. I therefore make the following orders

i. A temporary injunction order be and is hereby issued against the respondents, their agents, servants or any person acting under their authority restraining them from intermeddling or dealing in any manner with the assets of the deceased person herein pending issuance of a grant of letters of administration and a certificate of confirmation herefrom or as this court may direct and in particular, the assets as listed in items a to r of the application.

ii. The Parties shall cease from intermeddling with the estate of the deceased.

iii. That in the alternative, the court hereby directs that the proceeds forming part of the Deceased's estate being from L.R No. 37/254/33 situate in City County of Nairobi, L.R. 3734/389 situate in City Council of Nairobi, Mulli Academy and Kenol-Kobil Petrol Station on No. Plot 273 Kangundo town be deposited in court pending the hearing and determination of the petition.

iv. The 1st applicant and the 1st respondent give an account of proceeds forming part of the Deceased's estate being from L.R No. 37/254/33 situate in City County of Nairobi, L.R. 3734/389 situate in City Council of Nairobi, Mulli Academy and Kenol-Kobil Petrol Station on No. Plot 273 Kangundo.

v. The Application of 10.8.2018 for contempt of Court is dismissed but subject to review.

vi. Any part of the estate in occupation and contested herein shall be preserved to await the cause to be lodged over same claim in the next 3 months in the Environment and land court. Failure to lodge same as ordered with the next 3 months from the dates herein, the same disputed acreage will be subject to distribution thereof.

vii. The application to set aside the orders of 10th September, 2018 is denied/not granted.

It is so ordered.

Delivered, signed and dated at Machakos this 4th day of June, 2019.

D.K. KEMEI

JUDGE