



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

SUCCESSION NO 3 OF 2018

IN THE MATTER OF THE ESTATE OF EDWARD ABONDO KISERO (DECEASED)

BETWEEN

JULIANA NDUNGE MUA.....APPLICANT

AND

JANE ANYANGO ADALA.....RESPONDENT

RULING

1. On 5th February, 2019, this court opined that the deceased's estate ought to be protected and proceeded to grant of letters *ad colligenda bona* to the applicant and the respondent to jointly administer the deceased's estate. The said parties were further directed to commence proceedings leading to the grant of representation in respect of the deceased's estate and in the event of non-cooperation by one of them the other was at liberty to take out a citation. The court further ordered that pending further orders of the Court the income accruing from the following shall be deposited in a joint account to be opened in the name of the deceased's estate;

- i) Abondo Interiors Studios (Furniture Workshop business at Gikomba Market).**
- ii) Abondo Restaurant (Restaurant business at Lutheran Plaza).**
- iii) Janaby Essentials (Wines and Spirits Business)**
- iv) Monies at Account No. [xxxx], Bank of Africa, Kenyatta Avenue.**
- vi) Monies at Account No. [xxxx], Paramount Bank of Africa, Chester House, Koinange Street.**

2. The parties were further restrained from disposing of the piece of land in West Karachuonyo Division, Rachuonyo North Sub-County and not to dissipate the account Nos. No. [xxxx], Paramount Bank of Africa, Chester House, Koinange Street and [xxxx], Bank of Africa, Kenyatta Avenue. An order was issued directing the said Banks to furnish the Court with the particulars of the said accounts upon service of the order upon them by the applicant. As regards the Karachuonyo parcel, the area Chief was directed to avail the particulars and its status.

3. In addition, the parties were directed not to intermeddle with any of the deceased's known properties unless otherwise directed by the Court.

4. By Summons dated 24th June, 2019, the Applicant herein, **Juliana Ndunge Muambi**, the first wife of the deceased herein, **Edward Abondo Kisero**, seeks the following orders:

- 1. That this Honourable Court be pleased to order the attachment of the Respondent's property, Jane Anyango Adala for disobedience of the court order given on 5th February, 2019 and issued on 6th February, 2019;**
- 2. That this Honourable Court be pleased to order that Jane Anyango Adala, the Respondent herein duly served with a court order herein be imprisoned for 6 months for disobeying the order given on 5th February, 2019 and issued on 6th February, 2019;**

3. That this Honourable Court be pleased to grant any other order that is fit and just to grant herein.

4. That in any event, the costs hereof be awarded to the Petitioner/Applicant.

5. According to the Applicant, on the 5th February, 2019, this Honourable Court made an order directing the Widows of the Deceased to open a Bank Account to preserve the Estate of the Deceased pending issuance of the full grant herein which order and the Penal Notice were on the 8th February, 2019 served upon the Respondent herein, **Jane Anyango Adala** as well as her advocates on record.

6. It was averred that after several exchange of correspondence between the parties' advocates herein, an account of the Estate of the late **Edward Abondo Kisero** was opened with Kenya Commercial Bank, Moi Avenue Branch. Despite being aware of the Order of this Court of 5th February, 2019, in extremely callous and diabolical conduct, the Respondent has completely denied the Applicant, her children and appointed agents access and any information of the assets of the Deceased; continued to solely and unilaterally take control of all the assets of the Deceased; failed to bank a single cent to the joint account opened pursuant to the court order of 5th February, 2019; and failed to render any account of the proceeds of the businesses of the Deceased's Estate to the Applicant, her children and appointed agents.

7. It was the applicant's case that the deliberate conduct of the Respondent presents a real and imminent threat to the administration and dignity of justice and to the authority of this Honourable Court and is such as to bring the administration of justice and integrity of the judicial process into disrepute hence this court needs to make such orders as will ensure that its order of 5th February, 2019 is complied with.

8. In the applicant's view, the conduct of the Respondent is contemptuous of this Court.

9. In response to the application, the Respondent, **Jane Anyango Adala**, averred that the said application has been brought in bad faith by the applicant with the sole intention of frustrating her as the same consists of mere lies and information meant to mislead the court. It was averred by the Respondent that the Joint account in the name of the deceased was opened in compliance with the Court order. She denied that she has denied the applicant, her children or the alleged appointed agents access and any information of the deceased assets. According to her, the applicant sent one **Mr. Otieno Osii** whom she claimed was her manager to run Abondo Restaurant Limited at railways, the deceased son **Kelvin Otieno** to manage Abondo Restaurant Limited at Lutheran Plaza and **Mr. David Alago** to manage Abondo Interiors Studio being the timber business at Gikomba despite the fact that the court order did not apply to Abondo Restaurant Limited. According to her, **Mr. Kelvin Otieno** and **Mr. Otieno Osii** started working at the restaurants on 9th April, 2019 and while **Mr. Otieno Osii** worked up to 20th April, 2019 and afterwards **Mr. Kelvin Otieno** reported to the Abondo Restaurant Limited at Railways. Up to date he comes but only over lunch hour or during the evening with his friends where he eats lunch and asks to be parked for take away food after which he leaves. **Mr. David Alago** whom the applicant appointed as his manager at Abondo Interiors Studio was still the manager when the deceased was running the business and he is still the manager.

10. The Respondent reiterated that the Court Order did not apply to Abondo Restaurant Limited but the applicant insisted on sending her agents to the said businesses. The Respondent however did not chase them away nor block them from managing the affairs of the businesses. The Respondent therefore denied that she has in any way taken control of any of the deceased assets as alleged. According to her, since the applicant and herself were appointed as the joint administrators of the deceased estate and therefore the applicant cannot allege that she has failed to bank the income from the deceased estate since nothing and no one has stopped the applicant from running the businesses belonging to the deceased and banking any income from the business. What the applicant does not wish to do is to dedicate her time and money to run the businesses. It was her case that there were no orders of the court that required her to render any account of the proceeds of the businesses of the deceased's estate to the Applicant, her children or the alleged appointed agent.

11. It was therefore her position that she has complied with the Orders issued by the Honourable Court on 6th February 2019 contrary to the allegations by the Applicant hence the Applicant has not demonstrated in which ways that she has failed to honour the Orders of the Court.

12. The Respondent explained that as ordered by the Court and in compliance of the said Court order, she and the applicant opened a Joint account under the name of the deceased estate. That Contrary to the allegations by the applicant that no money had ever been deposited in the said account, all the monies at Account No; [xxxx], Bank of Africa, Kenyatta Avenue were transferred to the said joint Account whereas the monies in Account No. [xxxx] at Paramount Bank of Africa, Chester House, Koinange Street, were frozen by the Bank after the applicant directed them to do so and she annexed a confirmation from the Bank and the letter from the Applicant to the Bank. It was therefore her case that the orders of the court were clear that they were not to apply to Abondo Restaurant Limited, the company that runs the businesses at Railways and Lutheran Plaza.

13. She stated that she informed the court that she was not aware of any business going by the name Abondo Restaurant (restaurant business at Lutheran plaza) which the applicant is claiming and sought that the court directs the applicant to bring more proof apart from a certificate of registration confirming her allegations. It was her case that the respondent (sic) has not even shown how she stopped her from managing the deceased estate. In fact, at one point the Applicant hired goons to invade the restaurants at Railways and Lutheran Plaza for more than week and even chased away the customers. That she also brought in some people who would come to the restaurant and demand to be given food for free which was done.

14. The Respondent disclosed that despite the fact that the Orders of the court did not apply to Abondo Restaurant Limited, she engaged the applicant and asked her how she wants to be involved in the running of the businesses but she never responded The Respondent however insisted that the court was very clear that its orders were not to apply to Abondo Restaurant limited which the applicant is complaining that the Respondent has locked her out of the management.

15. The Respondent averred that she is neither aware of the whereabouts of Janaby Essentials which the applicant alleges to be wines and spirits Business nor is she managing or running the said business. According to her, she is not the one managing Abondo Interiors Studio neither has she ever stopped the applicant from running the business. If anything, it's being managed by **Mr. David Malago** who the

applicant appointed as her manager. The Respondent accused the applicant of just seeking to sit down while she run the business for her and is not willing to dedicate her time or resources to run the businesses and yet she expects income from the same. The Applicant, according to the Respondent, even informed her that she is too busy to run the businesses and can only do so through proxy. The Respondent however averred that she is a full time employee at Hilton Hotel and it is misleading and dishonest for the applicant to claim that she has been running the businesses while excluding her. The Respondent therefore averred that the Applicant's prayer that her property be attached for disobedience of the court Order are misplaced and made with the sole ulterior motive to illegally take away her property. Further, the Applicant's prayer that she be jailed for 6 months for contempt of court is part of the Applicant's scheme to frustrate the Respondent as she has vowed even during the family meetings to make the Respondent pay for what she terms as having stolen her husband who is now the deceased.

16. It was disclosed that there was a family meeting to try and resolve the dispute herein where the applicant's daughter insulted and assaulted the Respondent in the presence of the applicant terming the Respondent as barren and therefore I should not inherit from the deceased's estate. The applicant together with other family members even went ahead and appointed an expert going by the name of **Peter Magoma** to value the businesses so that they can get to know their worthy but when the expert gave his report the applicant disowned it. This is because the businesses have liabilities which the applicant has clearly stated that she will not inherit.

17. It was the Respondent's case that the applicant has not even demonstrated how she has tried to run the businesses envisioned in the court order and how the Respondent has stopped her. According to the Respondent, she only brought it to the attention of the Applicant through her lawyers that the court orders do not apply to Abondo Restaurant Limited but advised her that she was free to run Abondo Interiors Studio.

18. It was the Respondent's contention that the nature of the businesses herein requires that supplies have to be bought on daily basis and payments to the suppliers done on daily basis and when she asked the applicant that they pool the resources together so that they can sustain the businesses she declined. With the court Order requiring the income to be deposited in the joint account including the money that was held in the accounts, it became impossible to run the businesses. That she even had to pay workers and suppliers from her own income as she could not access the money at the bank. Since the Business at Gikomba under Abondo Interiors is a furniture business, the applicant should demonstrate to the court her input into the business like whether she acquired any raw materials and was stopped her from bringing them to the workshop or if the Respondent stopped her from getting carpenters to do the work.

19. The Respondents averred that despite the fact that the Court order did not apply to Abondo Restaurant Limited and in view of the fact that the applicant brought in her agents to manage the restaurant businesses, she should prove to the court that indeed she went ahead and procured the hotel consumables and other food stuff to run the hotel and not just allege that the Respondent did not deposit any money to the joint account. According to the Respondent, the applicant is merely concerned with the money not being deposited in the joint account whereas she has taken no initiative to run the businesses and generate the income to be deposited in the account.

20. The Respondent stated that she has high regard for the courts and sincerely respect the orders of the Courts and would gain nothing by disobeying the same. It was therefore her case that this application is frivolous, vexatious and lacks merit and ought to be dismissed with costs.

21. On behalf of the Applicant it was submitted that the Applicant has met the thresholds for grant of the reliefs sought in the application dated 24th June, 2019. According to the Applicant, the Respondent in her Replying Affidavit has attempted to interpret the Court Order by stating that the businesses at Railways and Lutheran Plaza belong to Abondo Restaurant Limited which was not subject of the said order. It was however submitted that the Respondent herein cannot be heard to try and interpret the said order in order to deny the Applicant and her children access to the said proceeds of the Deceased's Estate.

22. It was the Applicant's case that she has demonstrated contempt of court orders by the Respondent herein.

23. In support of the submissions the Applicant relied on **Woburn Estate Limited –vs- Margaret Bashforth [2016] eKLR; Refrigeration and Kitchen Utensils Limited –vs- Gulabchand Popatlal Shah & Another, Civil Application No. 39 of 1990; Cecil Miller –vs- Jackson Njeru & Anor [2017] eKLR; Teachers Service Commission vs. Kenya National Union of Teachers & 2 Others [2013] eKLR.**

24. The Respondent, on the other hand submitted that in order to determine whether the applicant is in contempt of the Orders of the Honourable Court issued on 5th February, 2019, it is important that we look at the Orders issued by the honourable court vis-à-vis the claims by the applicant. After setting out the order which were issued by the court, it was submitted that there were no orders issued by the court that directed the respondent to give any information regarding the estate of the deceased to the applicant, the deceased children or the applicant's appointed agents. Both the applicant and the deceased were appointed as joint administrators of the deceased estate. Therefore, the submission by the applicant that the applicant be held for contempt for denying the Applicant, her Children and appointed agents access and any information of the assets of the deceased is based on a non-existence court Order. Further, the applicant has not even demonstrated what information she sought from the respondent and the same was denied. The respondent on the other hand has stated and demonstrated that she allowed the agents appointed by the applicant to have access to the businesses books of accounts and invited the applicant to give ideas as to how they can run the businesses together including Abondo Restaurant Limited which was not part of the court Order.

25. It was the respondent's further submission that the applicant has not demonstrated how she has taken over the deceased assets to the exclusion of the applicant and the children. The applicant herself has admitted that she appointed agents to run the deceased businesses on her behalf who are still managing the businesses with her authority. One of her appointed agents **Mr. David Alago** still runs and manages Abondo Interior Studio.

26. It was further submitted that since the court order stated that the income accruing from the deceased stated assets and businesses shall be deposited in a joint account to be opened in the name of the deceased's estate, the applicant owed the court the duty to point out the sources of income that she is alleging the respondent has failed to bank in the joint account and specify the dates and time when the said income was earned and in whose hands it is held. The applicant cannot bring contempt proceedings against the respondent which carries serious

repercussions based on generalities. According to the Respondent, income from a business is not just all the money that gets into the business. Income from businesses and more so a limited liability company is generally as the result of a calculation in which expenses are deducted from revenues. Income may also be described as profit whether net or gross. Income/profits has to be distinguished from revenues which includes daily sales collections. The applicant has not in any way demonstrated in her application that Abondo Restaurant Limited or Abondo Interior Studio made any income and how much the income was. There is no annual financial report from the Company for the court to be able to determine whether or not Abondo Restaurant Limited or Abondo Interior Studios had made any income/profit. Even if Abondo Restaurant Limited had made an income, such income is deemed to belong to the Company's investors/shareholders and is paid as dividends and the same is not the subject matter of the instant proceedings as the court order was not directed to the Company. The Company is not the subject matter of the succession cause. In this respect the court was referred to the case of **Romana Chepkemboi Yego & Anor vs. Jane Njuguna & Anor [2017] eKLR**, where it was held that:

“...it is now settled law that a duly incorporated company is a separate and distinct legal entity different from its shareholders and directors. This is why it has perpetual succession and has the power to acquire property in its own name... in this case, the certificates of lease annexed to the 1st petitioner's supporting affidavit conclusively proves that the suit properties were at the time of the deceased death registered in the name of Roschilds Properties LTD. They were therefore owned by the Company and not the deceased. The deceased was only a shareholder in the Company and he was only entitled to the share or shares he held and not the assets of the company. The shares of a Company are different or are not synonymous with the assets owned by Company as insinuated by the objectors in their submissions.”

27. The respondent submitted that she has not in any way tampered with the shares of the deceased which are subject to administration. It was submitted that the orders of the court were to the effect that a Limited grant letters *ad colligenda bona* be issued to both the Applicant and the Respondent to jointly administer the deceased estate. Whereas the Applicant is focused on what the respondent has failed to do, she has not demonstrated what she has been able to do as a co-administrator.

28. As regards account, it was submitted that there was no such order.

29. Regarding the question whether the applicant has met the threshold required in contempt proceedings, the respondent referred to the case of **Michael Sistu Mwaura Kamau vs. Director of Public Prosecutions & 4 Others [2018] eKLR**, and submitted that the applicant has not demonstrated that the respondent in any way wilfully and deliberately disobeyed the orders issued on 5th February, 2019. It was submitted that contrary to the allegations by the applicant that it is the respondent who is interpreting the court orders to her favour, it is the applicant who is manipulating and twisting the Orders of the court to fit in her narrative. In the Respondent's submissions, the ruling of the court was also very clear that it was not to apply to Abondo Restaurant Limited. It was therefore submitted that the applicant has not met the required standards of proof in contempt proceedings. The applicant has only made allegations against the respondent with no documentary evidence. Further, the applicant has admitted that she appointed agents who have been running the businesses on her behalf. She has not stated how much income she has derived from the deceased estate. The applicant has self entitlement where she assumes that the respondent is to run the deceased businesses and account to her and the children. She forgets that she is also a joint administrator just like the respondent. In this regard the Respondent relied on **Re Estate of Pius Kingoo Muthwa (Deceased) [2019] eKLR**, where the court referred to **Re Bramblevale (1970) 1 Ch. 128**.

30. It is the respondent's submissions that the applicant has not proved that the respondent was able to comply with the court order and she wilfully failed to do so. Both the applicant and the respondent are interpreting the court Order differently.

31. It was therefore submitted that the applicant has not demonstrated or proved as required in contempt proceedings that the respondent is in disobedience of the court Order issued by this honourable court on 5th September, 2019. As a result of the foregoing, the application dated 24th June, 2019 should be dismissed with costs.

Determination

32. I have considered the application, the affidavits both in support of and in opposition to the application as well as the submissions made.

33. The law on contempt in this country is now well settled. Court orders are not made in vain and are meant to be complied with and if for any reason a party has difficulty in complying with court orders the honourable thing to do is to come back to court and explain the difficulties faced by the need to comply with the order. Once a Court order is made in a suit the same is valid unless set aside on review or on appeal. In **Econet Wireless Kenya Ltd vs. Minister for Information & Communication of Kenya & Another [2005] 1 KLR 828 Ibrahim, J** (as he then was) stated:

“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, 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 void”.

34. This position was confirmed by the Court of Appeal in **Refrigerator & Kitchen Utensils Ltd. vs. Gulabchand Popatlal Shah & Others Civil Application No. Nai. 39 of 1990**.

35. In **Wildlife Lodges Ltd vs. County Council of Narok and Another [2005] 2 EA 344 (HCK)** the Court expressed itself thus:

“It was the plain and unqualified obligation of every person against or in respect of whom an order was made by a Court of

competent jurisdiction to obey it until that order was discharged, and disobedience of such an order would, as a general rule, result in the person disobeying it being in contempt and punishable by committal or attachment and in an application to the court by him not being entertained until he had purged his contempt. A party 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 a question. That the course of a party knowing of an order which was null or irregular, and who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it existed it must not be disobeyed...If there is a misapprehension in the minds of the defendants as to the reasonable meaning of the order, then the expectation of them is that they would have made an application to the court for the resolution of any misunderstanding and this would have been the lawful course...In cases of alleged contempt, the breach for 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...The inherent social limitations afflicting most people in a developing country such as Kenya have the tendency to restrict access to the modern institutions of governance, and more particularly to the judiciary which is professionally run, on the basis of complex procedures and rules of law. Yet, this same Judiciary is generally viewed as the impartial purveyor of justice, and the guarantor of an even playing ground for all, a perception which ought to be strengthened, through genuine respect for the courts of justice, and through compliance with their orders. Consistent obedience to court orders is required, and parties should not take it upon themselves to decide on their own which court orders are to be obeyed and which ones overlooked, in the supposition that this oversight will not impede the process of justice...Justice dictates even-handedness between the claims of parties; and if it the case that the plaintiff/applicant has not been accorded a level playing ground for the realisation of its economic activities, a matter that of course can only be established through evidence in the main suit, then the court ought to provide relief, by applying the established principles of law, one of these being the law of contempt...An *ex parte* order by the court is a valid order like any other and to obey orders of the court is to obey orders made both *ex parte* and *inter partes* since the Court by section 60 of the Constitution is the repository of unlimited first instance jurisdiction, and in this capacity it may make *ex parte* orders where, after a careful and impartial consideration, it is convinced that issuance of such an order is just and equitable. There is nothing potentially oppressive in an *ex parte* order, since such an order stands open to be set aside by simple application, before the very same court...Where a party considers an *ex parte* order to cause him undue hardship, simple application will create an opportunity for an appropriate variation to be effected thereto; and therefore there will be no excuse for a party to disobey a court order merely on the grounds that it had been made *ex parte* and this argument will not avail either the first or the second defendant.”

36. In Central Bank of Kenya & Another vs. Ratilal Automobiles Limited & Others Civil Application No. Nai. 247 of 2006, the Court of Appeal held that Judicial power in Kenya vests in the Courts and other tribunals established under the Constitution and that it is a fundamental tenet of the rule of law that court orders must be obeyed and it is not open to any person or persons to choose whether or not to comply with or to ignore such orders as directed to him or them by a Court of law. The consequences of failure to obey Court orders are that any action taken in breach of the court order is a nullity and of no effect.

37. Similarly, in Awadh vs. Marumbu (No 2) No. 53 of 2004 [2004] KLR 458, it was held that:

“It must be remembered that court orders must be obeyed at all times in order to maintain the rule of law and good order. This of course means that the authority and dignity of our courts must be upheld at all times and this differentiates civilised societies from those applying the law of the jungle at times referred to as banana republics. It is the duty of the Court not to condone deliberate disobedience of its orders nor waiver from its responsibility to deal decisively and firmly with the approved contemnors.”

38. Court orders are not meant for cosmetic purposes. They are serious decisions that are meant to be and ought to be complied with strictly. As was held in Teacher’s Service Commission vs. Kenya National Union of Teachers & 2 Others Petition No. 23 of 2013:

“The reason why courts will punish for contempt of court is to safeguard the rule of law which is fundamental in the administration of justice. It has nothing to do with the integrity of the judiciary or the court or even the personal ego of the presiding judge. Neither is it about placating the applicant who moves the court by taking out contempt of court proceedings. It is about preserving and safeguarding the rule of law. A party who walks through the justice door with a court order in his hands must be assured that the order will be obeyed by those to whom it is directed. A court order is not a mere suggestion or an opinion or a point of view. It is a directive that is issued after much thought and with circumspection. It must therefore be complied with and it is in the interest of every person that this remains the case. To see it any other way is to open the door to chaos and anarchy and this Court will not be the one to open that door. If one is dissatisfied with an order of the court, the avenues for challenging it are also set out in the law. Defiance is not an option.”

39. It was therefore appreciated by Ojwang, J (as he then was) in B vs. Attorney General [2004] 1 KLR 431 that:

“The Court does not, and ought not to be seen to, make Orders in vain; otherwise the Court would be exposed to ridicule, and no agency of the Constitutional order would then be left in place to serve as a guarantee for legality, and for the rights of all people.”

40. A Court order is binding on the party against whom it is addressed and until set aside remain valid and is to be complied with. I shudder to think of the place of our judicial system if parties are left to freely decide what court orders to obey and which ones to ignore. Parties must realise that once they are brought to court they are subject to the jurisdiction of the Court. Under Article 159(1) of the Constitution, Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under the Constitution. In exercising judicial authority the Courts and Tribunals are, *inter alia*, to be guided by the principle that the purpose and principles of the Constitution shall be protected and promoted. Under Article 10(1) of the Constitution the national values and principles of governance in the Article bind all State organs, State officers, public officers and all persons whenever any of them (a) applies or interprets the Constitution; (b)

enacts, applies or interprets any law; or (c) makes or implements public policy decisions. Under clause (2)(a) of the same Article the national values and principles of governance include the rule of law. Musinga, J (as he then was) in Moses P N Njoroge & Others vs. Reverend Musa Njuguna & Another Nakuru HCCC No. 247 "A" of 2004 was of the view, which view I respectfully associate with, that the rule of law requires that orders of the Court be respected and obeyed and that duty equally applies even where a party is dissatisfied with an order and has appealed to an appellate court against the order, ruling or judgement. Contemnors, the learned Judge held, undermine the authority and dignity of the Courts and must be dealt with firmly so that the Court's authority is not brought into disrepute. The Judge was however of the view that that recourse ought not to be to a process of contempt in aid of a civil remedy where there is any other method of doing justice, and 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 Judges to see whether there is no other mode which is open to the objection of arbitrariness, and which can be brought to bear upon the subject.

41. However, it must be noted that the contempt of court is an affront to judicial authority and therefore is not a remedy chosen by a party but is invoked to uphold the dignity of the court. The mere fact, therefore, that a party offended by disobedience of a Court order has floated his idea on what should be done to the contemnor, does not tie the court's hands as to that mode of punishment although the Court may well take into account the suggested mode of punishment in appropriate cases.

42. It is therefore my view and I so hold that the Courts are not only empowered to commit for contempt but are under a Constitutional obligation to uphold the rule of law and in doing so to commit for contempt if the conduct of parties invite such course.

43. It is trite law that where committal is sought for breach of an order, it must be made clear what the defendant is alleged to have done and that which is breached. The application must state exactly what the alleged contemnor has done or omitted to do which constitutes a contempt of court with sufficient particularity to enable him to meet the charge. The necessary information must be given in the notice itself. The slightest ambiguity in the order can invalidate an application for committal as ambiguity can in turn lead to the standard of proof, which is higher than the standard in civil cases but lower than criminal standard, not being attained especially on affidavit evidence. Therefore, generally the law is that no order requiring a person to do or abstain from doing any act may be enforced by contempt unless a copy of the order has been served personally and endorsed with a notice informing him that if he disobeys the order he is liable to the process of execution. See Republic vs. Commissioner of Lands & 12 Others Ex Parte James Kiniya Gachira Alias James Kiniya Gachiri Nairobi HCMA No 149 of 2002, Victoria Pumps Ltd & Another vs. Kenya Ports Authority & 4 Others [2002] 1 KLR 708 and Jacob Zedekiah Ochino & Another vs. George Aura Okombo & 4 Others Civil Appeal No. 36 of 1989 [1989] KLR 165.

44. However, where it has been brought to the Court's attention that its orders are being abrogated or abridged by brazen or subtle schemes and manoeuvres in the name of technical procedures, the Court cannot turn a blind eye to the same. As was held in Gatharia K. Mutitika & 2 Others vs. Baharini Farm Ltd. [1985] KLR 227:

"It is quite clear on the authorities that anyone who, knowing of an injunction, or an order of stay, wilfully does something, or causes others to do something, to break the injunction or interfere with the stay, is liable to be committed for contempt... The reason is that by doing so he (or she) has conducted himself (or herself) so as to obstruct the course of justice and so has attempted to set the order of the court at naught."

45. I therefore associate myself with Lenaola, J in Basil Criticos vs. Attorney General & 4 Others [2012] eKLR, Republic vs. Minister of Medical Services Misc. Civil Application No. 316 of 2010 that:

"...the law has changed and so as it stands today, knowledge supersedes personal service and for good reason...where a party clearly acts and shows that he has knowledge of a court order, the strict requirement that personal service must be proved is rendered unnecessary."

46. This position was adopted by Musinga, J in Republic vs. Minister of Medical Services (supra) and Kimaru, J in Gatimu Farmers Company vs. Geoffrey Kagiri Kimani & Others [2005] eKLR. In the former case the learned Judge expressed himself as follows:

"Article 159(2) (d) of the Constitution requires the court to administer justice without undue regard to procedural technicalities. Article 10 of the Constitution stipulates various national values and principles of governance which bind all state organs, state officers, public officers and all persons whenever any of them applies or interprets the constitution or any law or implements public policy decisions. The values include the rule of law, good governance, integrity, transparency and accountability. The rule of law is vital in the stability of any nation and its institutions. In this new constitutional dispensation, it would be a mockery of justice for a respondent in contempt proceedings to come to court and say that even though he was aware of the terms of a prohibitory order, the order was not properly served upon him or that he considered the same to have some procedural defect, for example, lack of indorsement thereon, and therefore he ought not to be punished for contempt of court."

47. This is akin to the position taken by Akiwumi, J (as he then was) in Kenya Tourist Development Corporation vs. Kenya National Capital Corporation Limited & Another Nairobi HCCC No. 6776 of 1992 when he expressed himself as follows:

"An injunction in prohibitory form operates from the time it is pronounced, not from the date when the order is drawn up and completed. Consequently the party against whom it is made will be guilty of contempt if he commits a breach of the injunction after he has received notice of it, even though the order has not been drawn up...Where an order requires a person to abstain from doing an act, it may be enforced, notwithstanding that service, of a duly endorsed copy of the order has not been served, if the Court is satisfied that pending such service, the person against whom enforcement is sought has had notice of the terms of the order either by being present when the order is made or being notified of the terms of the order whether by telephone, telegram or otherwise...It is of high importance that orders of the Court should be obeyed. Wilful disobedience to an order of the Court is punishable as a contempt of court and such disobedience may properly be described as being

illegal...Those who defy a prohibition ought not to be able to claim that the fruits of their defiance are good, and not tainted by the illegality that produced them.”

48. As stated in *Halsbury’s Laws of England*, 4th Edn. Vol. 5 para 65:

Where an order requires a person to abstain from doing an act, it may be enforced notwithstanding that service of a duly indorsed copy of the order has not been served, if the court is satisfied that, pending such service, the person against whom enforcement is sought has had notice of the terms of the order either by being present when the order was made or being notified of the terms of the order, whether by telephone, telegraph or otherwise.

49. Therefore, the law now is that once a party knows about the existence of a Court order, he cannot be heard to claim that he was not served therewith since knowledge supersedes service. It is however upon the applicant to adduce evidence showing that the alleged contemnor actually or constructively knew of the order. Constructive knowledge may be inferred where the person alleged to have been in contempt of the Court order was an alter ego or proxy of the person upon whom actual service was effected. Once the applicant shows that service was actually effected on a person who is reasonably expected to have brought the existence of the Court order to the notice of the contemnor, it is my view that the onus shifts onto the alleged contemnor to show that the existence of the order was not brought to his attention.

50. In this case, for avoidance of doubt the order allegedly disobeyed granted letters *ad colligenda bona* the applicant and the respondent to jointly administer the deceased’s estate. The said parties were further directed to commence proceedings leading to the grant of representation in respect of the deceased’s estate and in the event of non-cooperation by one of them the other was at liberty to take out a citation. The court further ordered that pending further orders of the Court the income accruing from the following shall be deposited in a joint account to be opened in the name of the deceased’s estate;

- i) Abondo Interiors Studios (Furniture Workshop business at Gikomba Market).**
- ii) Abondo Restaurant (Restaurant business at Lutheran Plaza).**
- iii) Janaby Essentials (Wines and Spirits Business)**
- iv) Monies at Account No. [xxxx], Bank of Africa, Kenyatta Avenue.**
- vi) Monies at Account No. [xxxx], Paramount Bank of Africa, Chester House, Koinange Street.**

51. The parties were further restrained from disposing of the piece of land in West Karachuonyo Division, Rachuonyo North Sub-County and not to dissipate the account Nos. No. [xxxx], Paramount Bank of Africa, Chester House, Koinange Street and [xxxx], Bank of Africa, Kenyatta Avenue. An order was issued directing the said Banks to furnish the Court with the particulars of the said accounts upon service of the order upon them by the applicant. As regards the Karachuonyo parcel, the area Chief was directed to avail the particulars and its status.

52. In addition, the parties were directed not to intermeddle with any of the deceased’s known properties unless otherwise directed by the Court.

53. In this case the facts constituting contempt are that despite the joint account having been opened, the Respondent has completely denied the Applicant, her children and appointed agents access and any information of the assets of the Deceased; continued to solely and unilaterally take control of all the assets of the Deceased; failed to bank even a single cent to the joint account opened pursuant to the court order of 5th February, 2019; and failed to render any account of the proceeds of the businesses of the Deceased’s Estate to the Applicant, her children and appointed agents.

54. As regards the allegation of denial of access and any information of the assets of the Deceased to the applicant, her children or agents, it is clear that this court appointed the applicant and the respondent to be joint administrators of the estate of the deceased. The Court expressly declined to give an order for accounts. What the applicant is alleging in this application is in effect failure of disclosure. That was not part of the order given by this court and that cannot constitute contempt. The Respondent has averred that the Applicant has in fact been given access to Abondo Interiors Studios (Furniture Workshop business at Gikomba Market). There was no challenge to this allegation. It was further averred that the monies at Account No. [xxxx], Bank of Africa, Kenyatta Avenue and Account No. [xxxx], Paramount Bank of Africa, Chester House, Koinange Street were withdrawn and deposited in the joint account. Again this was not expressly controverted. It would have been easier for the applicant to annex the statements showing that no monies were being deposited in the said joint account.

55. In light of the allegations and counter-allegations made regarding the control of the businesses in question, this court cannot, on the basis of cold-print affidavits find that the applicant’s allegations of contempt have been proved to the required standards. I associate myself with the position in **Re Bramblevale (1970) 1 Ch. 128** as cited in **Re Estate of Pius Kingoo Muthwa (Deceased) [2019] eKLLR**, that:

“Contempt of court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved.”

56. As regards Abondo Restaurant (Restaurant business at Lutheran Plaza), the Respondent contends that the said business is being run by Abondo Restaurant Limited against whom no order was made. The Respondent however disclosed that she allowed the agents appointed by the applicant to have access to the businesses’ books of accounts and invited the applicant to give ideas as to how they can run the businesses together including Abondo Restaurant Limited which was not part of the court Order. That the Respondent *allowed* the applicant to have access to the said books and even asked the applicant to give ideas on how the said business is to be run is an indication that the Respondent has some control over Abondo Restaurant Limited. As to whether the deceased was part of the said entity is something which the parties

herein have decided to keep close to their chests. None of the parties has exhibited documents from the Registrar showing who the directors and shareholders of the said entity are and what their shareholding is. As I said in my earlier ruling in this matter and it bears repetition:

“...both the applicant and the Respondent have not been very helpful to this Court. The applicant has not placed before this court concrete material on the basis of which this Court can conclusively find that the assets mentioned belong to the Estate of the deceased. On the other hand the Respondent without denying the existence of the said assets has simply in an evasive manner contented herself with saying that it has not been proved that the said assets belong to the deceased’s estate.”

57. That position remains largely the same.

58. Having considered this application, it is my view and I hold that the applicant’s application dated 24th June, 2019 does not meet the threshold of the standard expected in contempt proceedings. The said application fails and is hereby dismissed with no order as to costs.

59. That said, when this court issued the orders on 5th February, 2019, it was hoped that sobriety and good sense would prevail between the applicant and the respondent and that they would see the need to sit down together as the now heads of the family of the deceased and in the interest of the family resolve their differences amicably. That was the reason why they were appointed joint administrators. It would seem that that was just wishful thinking. Instead of commencing the process of administering the estate of the deceased, they have instead embarked on flexing their muscles. They ought to realise that now that the deceased is no more, the continued fight over his passion is no longer helpful to any of them. If they continue living in the past, they are likely to simply waste and dissipate the estate. It seems that the assets of the estate are mainly businesses. Such assets only thrive in an environment of peace and tranquillity and once the customers get wind of the fact that there are squabbles within the estate, their customers will simply look elsewhere and they will be left baby-sitting pieces of papers in the names of certificates of registrations and licenses without anything to trade on.

60. This court is however aware that there are third parties involved whose interests are being jeopardised by the endless, senseless and I daresay selfish fights over the control of the said assets. In the premises, since the parties have clearly shown lack of cooperation in preserving the estate and no attempt to trigger the process of administering the estate proper, this court is left with no alternative but to discharge them from their role as administrators.

61. Accordingly, I hereby direct the office of the Public Trustee, Nairobi to immediately step into the shoes of the administrators of the estate of the deceased and get into his estate and in particular the assets mentioned in the order dated 5th February, 2019 and administer the same pending further orders of this court.

62. In the meantime, this matter is hereby referred to the mediation Registrar to appoint a mediator to bring the parties together with a view to arriving at an amicable solution.

63. Those shall be the orders of this court.

Read, signed and delivered in open Court at Machakos this 8th day of October, 2019.

G. V. ODUNGA

JUDGE

In the presence of:

Miss Kavita for Miss Kinyua for the Respondent

CA Geoffrey