



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 265 OF 2009

IN THE MATTER OF THE ESTATE OF GITERE KAHURA (DECEASED)

SAMUEL MBURU GITERE.....1ST APPLICANT

ANNE WANJIKU GITERE.....2ND APPLICANT

VERSUS

KENNETH KIMARI GITERE.....1ST RESPONDENT

DAVID WAKANGU GITERE.....2ND RESPONDENT

CHANBRIN AGENCIES LTD.....3RD RESPONDENT

PREVIEW REALTORS.....4TH RESPONDENT

RULING

1. The application for determination is dated 21st March, 2019. It seeks the committal to civil jail of Kenneth Kimari Gitere and David Wakangu Gitere for contempt of court. It sought for the said individuals to be declared unfit to serve as administrators of the estate and for rent collected from various properties of the estate to be deposited in court. The application was brought at the instance of Samuel Mburu Gitere and Anne Wanjiku Gitere who are co-administrators of the estate of the deceased herein. It was contended that on 3rd December 2018 the court made an order directing the 1st and 2nd Respondents to render accounts with regard to L.R No. 209/64/29, L.R No. 209/64/30, L.R No. 209/2729/2 and L.R No. 209/2763/18 Gikomba within 30 days. It was averred that there has been no compliance with the court order. The factual background was detailed in the affidavit in support of the application, sworn on 21st March, 2019 by the 2nd Applicant and on behalf of the 1st Applicant.

2. In her supporting affidavit Anne Wanjiku Gitere deponed that when the order was issued, the Respondents were not present in court and the matter was mentioned with the court issuing directions that the 30 day period for compliance was to commence on 20th December, 2018. She further averred that on 21st January, 2019, being fully aware of the orders of the court, the 1st and 2nd respondents sought for and were granted 14 more days to file the accounts as directed by the court.

3. In addition, the 2nd applicant stated that on 4th February, 2019, the 1st and 2nd Respondents purported to file accounts of Gitere Kahura Investment Limited contrary to the orders of the court. It was her case that the said accounts do not consist of a full, accurate and audited accounts under section 83(h) of the Law of Succession Act but merely jumbled documents consisting of rent collection schedules of some of the assets of the estate mixed with those of a 3rd Party, Gitere Kahura Investment Limited.

4. With regard to L.R No. 209/64/29 and L.R No. 209/64/30, she stated that the accounts provided were for rent collected by the agents from August to October 2018 only. As for the property known as L.R No. 209/2729/2 only rent from August 2018 to January 2019 was provided and for the property L.R No. 209/2763/18 Gikomba no accounts were provided.

5. In response, the Respondents filed a notice of preliminary objection dated 14th June, 2019 seeking to strike out the application. When the matter came to court for hearing on 18th June, 2019 the 1st Respondent testified that he was a co-administrator of the estate together with the 2nd Respondent and the Applicants herein.

6. He stated that the properties of the deceased that yielded rental income were Mogotio flats yielding Kshs. 320,000 per month, part of Muthithi flats yielding Kshs. 480,000/= per month, and parklands flats which were partly owned by the deceased yielding Kshs. 2,000,000/= per month. He affirmed that there was no dispute as to what property belonged to the company and what belonged to the deceased. He stated

that the properties belonging to the estate of the deceased as L.R No. 209/64/29 which consisted of two blocks of flat units referred to as Muthithi Road A and B, L.R No. 209/64/30 also referred to as the Diplomatic Flats and L.R No. 209/2729/2 referred to as the Mogotio flats

7. The 1st respondent indicated that at the time of the confirmation of grant, the estate had no liabilities but one of the properties had not yet been discharged as the bank was holding it as a debenture. He also indicated that rental income had not been distributed to the beneficiaries. With regard to the order of the court in issue, he stated that he had neither filed any accounts concerning the Gikomba plot nor had he submitted accounts from the year 2009 when he took up the administration of the estate to the date given by the court. He dismissed claims that he had disobeyed court orders in failing to file accounts by stating that the court order did not give any format of how the accounts should look like. He added that he wished to rely on the accounts filed by Chabrin for the period between January 2013 and January 2018 adding that he had always been acting in the best interest of the estate.

8. The parties filed written submissions in support of their respective positions in this matter which I have considered. The order that is alleged to have been disobeyed was issued by Lady Justice A. Ongeru on 3rd December 2018 directing the 1st and 2nd Respondents to render accounts with regard to L.R No. 209/64/29, L.R No. 209/64/30, L.R No. 209/2729/2 and L.R No. 209/2763/18 Gikomba within 30 days. It was stated that the 1st and 2nd Respondents in total disregard of the said orders failed to file accounts touching on estate assets

9. The applicable law regarding contempt of court existing before the enactment of the Contempt of Court Act, 2016 was restated by the Court of Appeal in **Christine Wangari Gachege vs. Elizabeth Wanjiru Evans & 11 Others, [2014] eKLR**. In that case the Court found that the English law on committal for contempt of court under Rule 81.4 of the English Civil Procedure Rules, which deals with breach of judgment, order or undertakings, was applied by virtue of section 5(1) of the Judicature Act which provided that:

“The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate courts.”

10. This section was however repealed by Section 38 of the Contempt of Act, 2016 and as the said Act has since been declared invalid by the Ruling of Justice E.C Mwita in **Nairobi Constitutional Petition No. 87 of 2017**, the consequential effect in law is that it had no legal effect on, and therefore did not repeal **Section 5 of the Judicature Act**, which therefore continues to apply. In addition, the substance of the common law is still applicable under **Section 3 of the Judicature Act**. This Court is in this regard guided by the applicable English Law which is Part 81 of the English Civil Procedure Rules of 1998 as variously amended, and the requirement for personal service of court orders in contempt of Court proceedings is found in Rule 81.8 of the English Civil Procedure Rules.

11. In **Re Bramblevale (1970) 1 Ch. 128** Lord Denning stated as follows concerning contempt of Court:

“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.”

Back at home the Court of Appeal in **Civil Appeal No. 95 of 1998 Mwangi H.C. Wangondu vs Nairobi City Commission**, it was stated that the threshold of proof required in contempt of Court is higher than applicable in normal civil cases, and one can only be committed to civil jail, or otherwise penalized on the basis of evidence that leaves no doubt as to the contemnor's culpability.

12. As regards culpability, the act or omission constituting disobedience of an order may be intentional, reckless, careless or quite accidental and totally unavoidable. An intentional act may be done with or without an intention to disobey the order, and with or without an intention to defy the court. The element of contumacy, which requires flagrant defiance of, the authority of the court, is no longer necessary to establish breach of a court order. It is now established that the mental element for liability for contempt arising out of disobedience is simply that the disobeying party either intended to disobey, or made no reasonable attempt to comply with the order. This was established in respect to the English House of Lords decision in **Heatons Transport (St Helens) Ltd v Transport and General Workers Union (1973) AC 15**.

13. The burden of proof requires the Contempt of Court to be proved beyond reasonable doubt to demonstrate that the 1st and 2nd Respondents willfully disobeyed the Court orders cited above. That instead they blatantly failed to provide full, accurate and audited accounts.

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

- i. An order was issued directing the 1st and 2nd Respondents to render accounts.
- ii. According to the applicants, contrary to the existing valid Court order the 1st and 2nd Respondents failed to provide full, accurate and audited accounts for the estate property.

14. From the Court record, the pleadings and submissions by Counsel for all parties it is not disputed that the impugned orders are valid Court orders in Succession Proceedings pertaining to the estate of the deceased. On record are accounts filed on 4th February, 2019 prepared by Chabrin agencies limited which the 1st respondent sought to rely on. A perusal of the bundle of documents attached indicates that the properties listed thereto are a combination of assets belonging to the estate of the deceased and the Kahura Investments Limited.

15. As previously directed by Justice Musyoka in his decision of 18th May, 2018, Company assets registered in the name of Gitere Kahura Investments Limited are not available for distribution as assets of the estate of the deceased and are therefore not part of these proceedings.

16. I have considered the evidence on record and there is no doubt that the court issued an order directing the 1st and 2nd Respondents to render accounts in compliance with Section 83(h) of the Law of Succession Act. As rightly stated by the 2nd Applicant the bundle of documents placed before the court is jumbled consisting of rent collection schedules of some of the assets of the estate mixed with those of a 3rd Party, Gitere Kahura Investment Limited. The court does not consider these as a full and accurate account of all dealings of the estate of the deceased from the date of appointment as administrators to date. The accounts placed before court are therefore not adequate.

17. I find that, the applicants have not discharged their legal duty to prove beyond reasonable doubt that the conduct complained of constitutes contempt of Court by the 1st and 2nd respondents. However, I would have found the 1st and 2nd respondents guilty of contempt of court if they had failed totally to account as ordered. They did take steps to give an account of the estate. However, as indicated above that account is not adequate in certain respects. The 1st and 2nd respondents are therefore granted thirty (30) days to address the issues raised within the meaning of Section 83(h) of the Law of Succession Act.

SIGNED DATED AND DELIVERED IN OPEN COURT THIS 5TH DAY OF NOVEMBER, 2019.

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L. A. ACHODE

HIGH COURT JUDGE

In the presence of.....Advocate for the Applicants

In the presence of.....Advocate for the Respondents