



REPUBLIC OF KENYA

IN THE HIGH COURT

AT EMBU

SUCCESSION CAUSE NO. 38 OF 2015

IN THE MATTER OF THE ESTATE OF CHRISTOPHER MATU WANG'ANG'A (DECEASED)

ROSEMARY KITHIRA MURORIA.....APPLICANT/PETITIONER

VERSUS

CECILIA NGIMA MATU.....1ST RESPONDENT/PETITIONER

SAMUEL KIENDE MUTHINJA.....2ND RESPONDENT

JOSEPH THIMBA.....3RD RESPONDENT

RULING

A. Introduction

1. This ruling pertains to the application dated 27th June 2019 in which the applicant has cited the 1st respondent for being in contempt and her son Anthony Githinji Matu be committed to jail for at least six (6) months for disobeying orders of this court issued on the 30th May 2019. The applicant also seeks to stop the 1st respondent and her son from intermeddling with the deceased's estate.
2. It is the applicant's case that the orders of this court issued on the 30th May 2019 directed both administratixes being the applicant and the 1st respondent ordered them to file a list of the deceased's assets and income generated from businesses. It was further ordered that a joint account be opened in the names of the two administrators where all income from the deceased's estate would be deposited and that both administrators do account for any income received.
3. It is the applicant's case that on her part she complied with the aforementioned court order vide an affidavit/statement dated 7th April 2019 and filed in court on the 10th June 2018 but the 1st respondent failed to comply and stated that she could not do so. It is also the applicant's case that the 1st respondent filed a replying affidavit dated 31/10/2019 in response to this instant application without leave of court and that the same should be struck off the record.
4. Through a statement filed on 10/06/2019, the applicant filed documents in compliance with this court's orders issued on the 30th May 2019.
5. In her replying affidavit, the 1st respondent opposed the application for contempt on grounds that it was an abuse of the court process and further that the court orders which are subject of the applicant's application applied to both parties and not the 1st respondent only.
6. The 1st respondent further deposed that she could not comply with the aforementioned court orders on the grounds that none of the deceased's estate were under her control as the same fell under the control of a management committee.

Analysis & Determination

7. I have carefully considered the application dated 27th June 2019; the affidavits on record, the submissions of Counsel and the authorities relied on. The issues to be determined are as follows:

- a. Whether the replying affidavit dated 31/10/2019 should be struck off the record

b. Whether the 1st respondent is in contempt of court orders issued on the 30th May 2019.

8. On the first issue, it is the applicant's case that the replying affidavit dated 31/10/2019 filed by the 1st respondent was filed without leave of court and as such should be struck off.

9. From the record, when the application dated 27th June 2019 came up for hearing on the 22nd July 2019, Mr. Njage for the 1st respondent was granted 21 days to file the replying affidavit to this application for contempt. In total disregard of the directions, the 1st respondent proceeded to file an affidavit. It was until the 30th May 2019 whereas this was the substance of the application for contempt filed by the applicant. On the 31st October 2019, the 1st respondent finally filed her replying affidavit to the instant application without seeking leave of the court. The time for filing given by the court had expired on 13/08/2019.

10. Order 51 Rule 14(2) provides that a response to an application may be filed 3 days to the hearing, it states;

“14 (1) Any respondent who wishes to oppose any application may file any one or a combination of the following documents-

(a) a notice of preliminary objection; and/or

(b) replying affidavit; and/or

(c) a statement of grounds of opposition;

(2) the said documents in subrule (1) and a list of authorities, if any shall be filed and served on the applicant not less than three days before the date of hearing.”

11. Order 51 Rule 14 applies to applications in the first instance where the respondent is still within time to file his replying affidavit. The case of the 1st respondent is different because her time to respond to the application had lapsed. She had sought and obtained leave from the court to file her replying affidavit within 21 days. Order 51 Rule 14 (2) is therefore not applicable herein.

12. The 1st respondent having obtained leave was duty bound to comply with the timelines given by the court. The court is aware of the provisions of Article 50(2) of the Constitution that gives a constitutional right to every person to be given a right of hearing. Due to this provision, I wish to extend this court's discretion to the 1st respondent and admit her replying affidavit sworn on 31st October, 2019. However, this court will penalize the respondent with payment of costs.

13. The only issue for determination herein is whether the 1st respondent is in contempt of court in respect of orders issued on the 30th May 2019. The aforementioned orders directed inter alia as follows:

a. “That the applicant and 1st respondent provide a list of the business of the deceased's estate within 30 days as well as the monthly income emanating there from.

b. That the applicant and 1st respondent do open a joint bank account within 30 days where all income would be deposited.

c. That each administrator do account for any received income within 60 days.”

14. It is the applicant's case that she complied with the aforementioned court order vide an affidavit/statement filed in court on the 10th June 2018. On her part the 1st respondent stated that she could not comply with the aforementioned court orders on the grounds that none of the deceased's estate were under her control as the same fell under the control of a management committee.

15. The question is whether this defence is viable in the face of the fact that she was a co-administrator of the deceased's estate. It is noted that after the application for contempt was filed, the 1st respondent, in compliance with the first order of the court proceeded to file an affidavit/statement detailing the list of the business of the deceased's estate and the monthly income emanating there from.

16. Regarding the opening of a joint bank account, it was the 1st respondent's case that “a higher court order would be required addressed to the two administratrix as well as other shareholders.”

17. What is contempt of court? According to the Black's Law Dictionary;

“Contempt is a disregard of, disobedience to, the rules or orders of a legislative or judicial body, or an interruption of its proceedings by disorderly behaviour or insolvent language, in its presence or so near thereto as to disturb the proceedings or to impair the respect due to such a body”

18. In the case of **Econet wireless Kenya Limited v minister for information & Communication of Kenya & Another [2005] eKLR**, the court stated as follows;

“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 the 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.”

19. Again, in the case of Teachers Service Commission v Kenya National Union of Teachers & 2 others (2013) eKLR Ndolo J observed that;

“The reasons why courts will punish for contempt of court then 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 proceedings. It is about preserving and safeguard the rule of law”

20. The judge went further to state;

“I am of the same persuasion that the reason why power is vested in courts to punish for contempt of court is to safeguard the rule of law which is fundamental in the administration of justice. The law of contempt has evolved over time in order to maintain the supremacy of the law and the respect for law and the respect for law and order. As it was in the time of Chief Justice Mckean in 1786 so it is today that courts have a duty to ensure that Citizens bend to the law and not vice versa. Indeed, if respect for law and order never existed, life in society would be but short, brutish and nasty. It is the supremacy of the law and the ultimate administration of justice that is usually under challenge when contempt of court is committed. This is so because, a party who obtains an order from court must be certain that the order will be obeyed by those to whom it is directed. As such, the obedience of a court order is fundamental to the administration of justice and the rule of law. A court order once issued binds all and sundry, the mighty and the lowly equally, without exception. An order is meant to be obeyed and not otherwise.”

21. The Contempt of Court Act is no longer operative as from the date of the judgment declaring it unconstitutional in Kenya Human Rights Commission v Attorney General & Another [2018] eKLR. I am therefore obliged to revert to the provisions of the law that operated before the enactment of the Contempt of Court Act, to avoid a lacuna in the enforcement of Court’s orders. It was in this respect observed in Republic v Returning Officer of Kamkunji Constituency & The Electoral Commission of Kenya HCMCA No. 13 of 2008, that the High Court has the responsibility for the maintenance of the rule of law, hence there cannot be a gap in the application of the rule of law.

22. In addition, where there is a lacuna with respect to enforcement of remedies provided under the Constitution or an Act of Parliament, or if, through the procedure provided under an Act of Parliament, an aggrieved party is left with no alternative but to invoke the jurisdiction of the Court, the Court is perfectly within its rights to adopt such a procedure as would effectually give meaningful relief to the party aggrieved, in exercise of the inherent jurisdiction granted to the Court by section 3A of the Civil Procedure Act to grant such orders that meet the ends of justice and avoid abuse of the process of Court.

23. Lastly, it was also noted in Kenya Human Rights Commission v Attorney General & Another (supra) that the Court has inherent powers to enforce its orders under Article 159 of the Constitution as follows:

“57. Article 159 of the constitution recognizes the judicial authority of courts and tribunals established under the constitution. Courts and tribunals exercise this authority on behalf of the people. The decisions courts make are for and on behalf of the people and for that reason, they must not only be respected and obeyed but must also be complied with in order to enhance public confidence in the judiciary which is vital for the preservation of our constitutional democracy. The judiciary acts only in accordance with the constitution and the law (Article 160) and exercises its judicial authority through its judgments decrees orders and or directions to check government power, keep it within its constitutional stretch hold the legislature and executive to account thereby secure the rule of law, administration of justice and protection of human rights. For that reason, the authority of the courts and dignity of their processes are maintained when their court orders are obeyed and respected thus courts become effective in the discharge of their constitutional mandate.”

24. The procedure existing before the enactment of the *Contempt of Court Act* was restated by the Court of Appeal in Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 Others [2014] eKLR. In that case the Court found that under Rule 81.4 of the English *Civil Procedure Rules*, which deals with breach of judgment, order or undertaking. The English law on committal for contempt of court 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.”

25. This section was repealed by section 38 of the Contempt of Act, which Act is now no longer operative, however, 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.

26. The said rule provides that unless the court dispenses with service, a judgment or order may not be enforced by way of an order for

committal unless a copy of it has been served on the person required to do or not do the act in question. Rule 81.6 of the English Civil Procedure Rules specifically provides that the method of service shall be personal service, which is effected by leaving the order with the person to be served.

27. This Court notes that Kenyan courts have also held that personal service of orders and a penal notice is a requirement in contempt of court proceedings, and reference is made to the Court of Appeal decisions in **Nyamogo & Another v Kenya Posts and Telecommunications Corporation, (1994) KLR 1**, and **Ochino & Another v Okombo & 4 others (1989) KLR 165** in this respect.

28. It is also the position and it has been held in several judicial decisions that if personal awareness of the court orders by the alleged contemnors is demonstrated, they will be found culpable of contempt even though they had not been personally served with the orders and penal notice. See in this regard the decisions in **Kenya Tea Growers Association v Francis Atwoli & Others**, Nairobi High Court Constitutional Petition No 64 of 2010, **Husson v Husson, [1962] 3 All E.R. 1056**, **Ronson Products Ltd v Ronson Furniture Ltd (1966) RPC 497**, and **Davy International Ltd vs Tazzyman (1997) 1 WLR 1256**.

29. 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. See in this respect the English House of Lords decision in **Heatons Transport (St Helens) Ltd v Transport and General Workers Union (1973) AC 15**.

30. In addition, it was held in **Mwangi H.C. Wangonde v Nairobi City Commission, Nairobi Civil Appeal No. 95 of 1998** that the threshold of proof required in contempt of Court is higher than that 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.

31. I come to the conclusion that the applicant has satisfied the court that the respondents were served with orders on 10th June 2019 as shown by the affidavit of service. The 1st respondent was present in court when the ruling of the court was delivered, a fact which has not been denied.

32. I do not find the defence of the 1st respondent plausible to the effect that the fact that the business of Slopes Hotel is run by a management committee is an impediment in the compliance with the order. This management committee from the minutes of the meeting held on 11th March 2018 was appointed by the Directors or their representatives who include the two administratrixes, that is the applicant and the respondent. The management committee works under the direction and authority of the directors.

33. It has been claimed that the business is co-owned by the deceased and one Samuel Kiende who is also deceased. The widows of the deceased herein are the applicants while one Elizabeth Kiende is the widow of Samuel Kiende. It is clear from the minutes of the meeting called to agree on how the business should run that the widows have taken over the running of the business should run that the widows have taken over the running of the business and have even agreed on how to share profits. Being the administratrixes of the estate of the deceased, the applicants are in a position of running the business of the deceased whose share has been identified as 50% with Elizabeth Kiende Minding her late husband's share.

34. The deceased has other beneficiaries apart from the two administratrixes and who are entitled to shares in the estate during distribution. This is the reason why the administratrixes must do their legal duties of preserving the assets and the income thereof, including accounting for the benefit of themselves and of the other beneficiaries who include their children. These interests is what informed the court order issued on 30/05/2019.

35. The applicant claims she has been kept out of the business by the 1st respondent and her son Anthony Githinji Matu the 2nd respondent. It is noted that the 2nd respondent works under the direction and authority of the 1st respondent as a manager having been appointed by the parties vide minutes of their meeting held on 11/03/2018. The orders of the court were directed to the applicant and the 2nd respondent in this case in their capacity as the administratrixes of the deceased's estate. The 2nd respondent is not a party to this case and had no obligation imposed on him by the said orders.

36. I therefore find that although he was named in the court order and served accordingly, he should not be directly held responsible of implementing the orders. in contempt. The court orders do not affect the widow of the late Samuel Kiende in regard to her family's 50 per cent share.

37. It is my finding that the 1st respondent is found guilty of contempt of court in respect of the orders made on 30th May 2019.

38. The 1st respondent will pay the costs of this application.

39. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 11TH DAY OF DECEMBER, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Mr. Onyango for the 2nd Administrator/Applicant

Mr. Okwaro for the 1st Administrator/1st Respondent

Both parties present