



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**FAMILY DIVISION**

**SUCCESSION CAUSE NO. 780 OF 1988**

**IN THE MATTER OF THE ESTATE OF AMOS WAGACHA GITHUKU (DECEASED)**

**EDWARD MUROKI MBIYU.....1<sup>ST</sup> APPLICANT**

**STEPHEN KARANJA MBIYU.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**JOHN NJENGA WAGACHA ALIAS**

**JOHN WAGACHA GITHUKU.....RESPONDENT**

**RULING**

1. The deceased Amos Wagacha Githuku died on 18<sup>th</sup> March 1984. He was survived by two widows: Ruth Muthoni Mbiyu and Hannah Wambui Githuku. A grant of letters of administration intestate was on 28<sup>th</sup> October 1998 issued to one of his children John Njenga Wagacha alias John Wagacha Githuku (the respondent). The same was confirmed on 7<sup>th</sup> April 2003. The respondent is from the house of Hannah Wambui Githuku. The estate comprised the following properties:-

- (a) Dagoretti/Kangemi/270;
- (b) Dagoretti/Riruta/T.54
- (c) Kericho/Londiani/233; and
- (d) Dagoretti/Riruta/6

According to the certificate of confirmation, each house was to receive half share of each property. Each widow was to be registered in respect of that share to hold in trust for herself and the children in the house in equal shares.

2. Following the application filed on 11<sup>th</sup> August 2014 by the applicants Edward Muroki Mbiyu and Stephen Karanja Mbiyu (children from the house of Ruth Muthoni Mbiyu), the court directed that within 30 days from the date of the ruling the respondent should file and serve a full and accurate account of all his dealings in respect with the estate. He was to show what he had done to share the estate to the beneficiaries in accordance with the certificate of confirmation, and to fully account for Kshs.2,035,000/= which had been received following the sale of Dagoretti/Riruta/T.54.

3. It should be pointed out that after the grant was confirmed, it was agreed by the family that Dagoretti/Riruta/T.54 be sold and that the proceeds be used to subdivide Kericho/Londiani/233 and Dagoretti/Riruta/6 to enable the sharing, and the balance of the proceeds be shared equally between these two houses.

4. In the inventory that the respondent filed on 15<sup>th</sup> April 2016 the respondent deponed that, following agreement, a joint account was opened in the names of the two widows into which the proceeds of the sale of Dagoretti/Riruta/T.54 were deposited. He produced the bank payments ("JNW1") to show that Kshs.2,035,000/= was paid into the account. It was his averment, which was not disputed, that he was not a signatory to the joint account held by the widows, but was aware some of the money had been used to administer the estate. I find that, the

respondent cannot be asked to account for the Kshs.2,035,000/= which was held in the account of the two widows.

5. Strictly speaking, the responsibility of the respondent ended when the certificate of confirmation was registered at the lands registry. From thereon, it was for each widow to ensure that she shares what she had received in the certificate of confirmation in accordance with the direction therein. Each widow was to hold her share of the estate on her own behalf and on behalf of the children in her house and to make sure that each beneficiary therein gets an equal share.

6. In the application dated 10<sup>th</sup> May 2016, the applicants sought that the court do find the respondent guilty of contempt of court orders by wilfully providing to court an inaccurate account or inventory of the assets of the deceased, which account was not in compliance with the certificate of confirmation. They sought the committal of the respondent into civil jail for a term not exceeding one year for wilful disobedience of the terms of the certificate of confirmation. The application alleged that the respondent had failed to complete the administration of the estate, and had produced inaccurate account. The respondent opposed the application by stating that he had discharged his duties to the best of his abilities and in accordance with the certificate of confirmation, and that whatever part of the estate that had not been fully administered and/or distributed was beyond his powers as the administrator. He explained what had happened in regard to the Kshs.2,035,000/=.

7. It is trite law that where committal is sought for breach of an order of the court it must be made clear what the respondent is alleged to have done or not done, and what was breached. The application must state clearly what the alleged contemnor did or did not do which constitutes a contempt of court, and the act of failure has to be demonstrated with sufficient particularity to enable him meet the charge **(Republic –v- Chesang Resident Magistrate & Another *ex parte* Paul Karanja Kamunge t/a Divisco Agencies & 2 Others [2016]eKLR)**. Contempt includes civil contempt and means wilful disobedience of any judgment, decree, direction, order, or other process of the court or wilful breach of an undertaking given to a court **(Republic –v- County Chief Officer, Finance and Economic Planning Nairobi City County (Ex parte David Mugo Mwangi [2018]eKLR)**.

8. It is also trite 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 jealously and carefully watched, and exercised with greatest reluctance and greatest anxiety on the part of the court to see whether there is not other mode which is open to the objection of arbitrariness, and which can be brought to bear upon the subject **(Moses P.N. Njoroge & Others –v- Rev. Musa Njuguna & Another, HCCC NO. 247 ‘A’ of 2004 at Nakuru)**.

9. Lastly, where the disobedience does not relate to a court order but to a failure to appropriately discharge a duty or responsibility legally entrusted upon an individual, or in situations where the legal duty is not performed satisfactorily, the same cannot be said to amount to contempt of court.

10. The applicant ought to have shown that the respondent had, for instance, stood in the way of their mother wanting to share what was due to them. They should have shown that the respondent received the Kshs.2,035,000/= but had not accounted for the same. None of these was shown.

11. I find that the application dated 10<sup>th</sup> May 2016 has no merits and is dismissed with costs.

**DATED and DELIVERED at NAIROBI this 7<sup>TH</sup> day of MAY 2018.**

**A.O. MUCHELULE**

**JUDGE**