



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 3336 'B' OF 2007

IN THE MATER OF THE ESTATE OF TOM O'OMUOMBO alias

THOMAS OCHIENG OMUOMBO (DECEASED)

Alice ATIENO OCHIENG.....APPLICANT

VERSUS

GREGORY OTIENO AGOLA.....1ST RESPONDENT

MESHACK ARTHUR WADHIER OCHIENG....2ND RESPONDENT

RULING

1. The deceased Tom O'Omumbo alias Thomas Ochieng Omumbo died intestate on 15th August 2007. The grant of letters of administration intestate was made to Gregory Otieno Agola (1st respondent), Alpha Beatrice Achieng, Emily Apamo Adera and Christine Atieno Omwombo on 30th November 2010, and confirmed on 22nd January 2015. The certificate of confirmation of grant directed how the estate was to be distributed among the beneficiaries of the deceased.

2. On 13th February 2018 the applicant Alice Atieno Ochieng filed the present application under **section 5(1)** of the **Judicature Act (Cap. 8)** and **Order 51 rule 1** of the **Civil Procedure Rules 2010** seeking the committal of the 1st and 2nd respondents (the 2nd respondent being Meshack Arthur Wadher Ochieng) to civil jail for contempt for the disobedience of the court orders that were issued on 22nd January 2015. These were the orders confirming the grant. Her case was that the respondent had deliberately ignored to comply with the orders and that posed a serious threat to the authority and dignity of the court. The relevant orders issued on 22nd January 2-15 (which were included in the certificate of confirmation) were that the respondents do pay the applicant Kshs.5,000,000/= within 90 days and that they pay her 20% of the money at Kenya Commercial Bank, Siaya Branch, Account No. [Particulars withheld]. There is no dispute that the money has not been paid to the applicant. She asked that the non-payment should attract punishment as the respondents were in contempt of court order.

3. The 2nd respondent opposed the application through his replying affidavit dated 7th March 2018. It was sworn on his behalf and on behalf of the 1st respondent. Their case was that they had sought, through application dated 25th February 2015 and filed on the same day, to have the distribution in the certificate of confirmation reviewed; that the application for contempt was premature as their application for reviewing had not been heard and determined. The application for review was based on the ground that the directive for the applicant to be paid Kshs.5,000,000/= was not part of what the parties had agreed upon regarding distribution, but that had been included in the orders by the court on its own motion. Nonetheless, the 1st respondent had made some payments to the applicant towards the fulfilment of the order.

4. It is notable, however, that the summons for review, filed on 25th February 2015 had nothing to do with either the Kshs.5,000,000/= or the 20% payment from the proceeds held in the bank account. The application was seeking further provision for Alpha Beatrice Achieng and Belamaris Antonnette Anyango. The two and their sister Bella Anyango Omwombo had been allocated plot Nos. 416 and 417 Soweto area in Nairobi, but had discovered that the plot was on road reserve and was in danger of demolition. They wanted the distribution to be reviewed so that they could get another property instead. The application was not made by the respondents, and therefore could not be the basis for the failure to implement the orders in the confirmation of the grant in respect of the applicant.

5. It is possible that this was realised. That is why on 8th March 2018 the respondents filed summons to stay the contempt application and to review and set aside the payment of Kshs.5,000,000/= by them to the applicant on the basis that the order was made by the court *suo moto*. Once again, the order for them to pay her 20% of the proceeds in the bank account was not challenged. The application is pending, just like

the application dated 25th February 2015.

6. I have perused the record. It is clear that the orders leading to the certificate of confirmation of grant were issued by consent of the parties. When the application filed on 8th March 2018 ultimately comes for hearing, the respondents will have to show that consent orders, which are otherwise now a contract, were obtained by mistake, fraud, misrepresentation or were against public policy.

7. For the time being, the application dated 25th February 2015 has nothing to do with the orders that the applicant stated had not been implemented by the respondents and cannot be used to stay the orders. They cannot be used by the respondents as the excuse for not obeying them.

8. The certificate of confirmation having been as a result of the consent of the parties, it cannot be said that the respondents (who were themselves parties in the cause) were not aware of contents thereof. They were party to the distribution that was reduced into the certificate of confirmation. There was no need for them to be formally served with the certificate of confirmation, or any specific order therein

9. The application for the respondents to be found guilty of contempt was made under **section 5(1) of the Judicature Act (Cap. 8)** which provided as follows:-

“The High Court and the Court of Appeal shall hold 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 the power shall extend to upholding the authority and dignity of subordinate courts.”

10. Quite unfortunately, **section 5** of the **Judicature Act** was repealed by **section 38** of the **Contempt of Court Act No. 46 of 2016** which commenced on 13th January 2017. This new **Act** was enacted –

“to define and limit the powers of courts in punishing for contempt of court and for connected purposes.”

Under **section 3** of the **Act**, its objectives are to –

“(a) uphold the dignity and authority of the court;

(b) ensure compliance with the directions of the court;

(c) ensure the observance and respect of due process of law;

(d) preserve an effective and impartial system of justice; and

(e) maintain public confidence in the administration of

justice as administered by court.”

It defines both civil and criminal contempt of court. Civil contempt is defined under **section 4** to mean –

“wilful disobedience of any judgment, decree, direction, order, or other process of a court or wilful breach of undertaking given to a court.”

Under **section 5** of the **Act**, every superior court shall have the power to punish for contempt of court in the face of the court; punish for contempt; and uphold the dignity and authority of subordinate courts. Under **section 7(2)** the Chief Justice may make rules of procedure to regulate proceedings and the process to try an offence of contempt of court in the superior and subordinate courts. The rules have not been made. However, with the repeal of **section 5** of the **Judicature Act** the courts in Kenya do not have to look at England for the procedure of initiating proceedings in contempt of court applications.

11. In my considered view, it should be enough, where there is alleged contempt of court in civil proceedings, for aggrieved party to file a notice of motion with grounds on which committal is sought and supporting affidavit showing the order, decree, judgment or undertaking that has been disobeyed and/or breached; the evidence that the respondent was served with or had knowledge of the order, decree, judgement or undertaking; and the evidence that there was indeed deliberate disobedience or breach of the same.

12. Under **Article 159(2)** of the Constitution of Kenya, 2010 the court is under a duty to dispense justice without undue regard to procedural technicalities. The power to punish for contempt is one of the inherent powers of a court to regulate its own conduct, safeguard itself against contemptuous or disruptive intrusions from elsewhere, and to ensure that there is unqualified obligation of every person against, or in respect of, whom an order is made by a court of competent jurisdiction to obey that order unless and until it is discharged (**Hardkinson –v- Hardkinson [1952] ALL ER 567**). It is therefore important that procedure should not be used to limit the court’s power and authority those who wilfully and deliberately obey its orders.

13. Strictly, the court’s jurisdiction was not properly invoked when the application was brought under **section 5** of the **Judicature Act**, as the **section** was repealed. However, in view of the foregoing, I will deal with the merits of the application.

14. I have noted that the respondents have not paid the applicants Kshs.5,000,000/=. They have not given her 20% of the proceeds held in account number [Particulars withheld] at Kenya Commercial Bank, Siaya Branch. I find no reason for the failure to pay. I determine that the failure to pay was wilful and deliberate disobedience of a court order. I find the respondents jointly guilty of contempt of the court order contained in the certificate of confirmation issued on 22nd January 2015.

15. Consequently, I direct the respondents to appear in court on 16th October 2018 to show cause why they should not be punished in accordance with the law.

16. Costs shall be borne by the respondents.

DATED and DELIVERED at NAIROBI this 2ND day of OCTOBER 2018.

A.O. MUCHELULE

JUDGE