



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
SUCCESSION CAUSE NO.12 OF 2011

RICHARD LANET KOONYO.....APPLICANT

VERSUS

SELEONE KOONYO.....1ST RESPONDENT

LABAN KOONYO.....2ND RESPONDENT

JANE KOONYO.....3RD RESPONDENT

MOITALEL KOONYO.....4TH RESPONDENT

RULING

INTRODUCTION

1. Richard Lanet Koonyo (hereinafter the applicant) moved this court on 21st March, 2016 for orders:

1. Spent

2. THAT the Respondents do show cause why they should not be committed to civil jail for a period not exceeding six (6) months for having disobeyed and contemned the order herein granted on 27th May, 2015

3. THAT in default of prayer 2 being met, the Respondents be committed to civil jail for a period not exceeding six (6) months or having disobeyed and contemned the order herein granted on 27th May, 2015

4. THAT the Respondents be personally in court on all the dates appointed for hearing of this application notice.

5. THAT the Respondents do pay the costs of this application notice in any event.

The Application is premised on the affidavit of the applicant as well as on nine (9) grounds as listed on the face of the application namely:

a. THAT the Court of Appeal holding in the case of **Christine Wangari Gachege V. Elizabeth**

Wanjiru Evans & 11 others [2014] eKLR has held that the procedure to be adopted in contempt of court proceedings is by way of Application Notice, hence the Applicant's present application.

b. THAT the Respondents were served with the court order granted on 27th May, 2015 and thus had knowledge of its existence.

c. THAT the said order is express and defects the applicant and the Respondents in clear terms to maintain the *status quo* of the deceased estate pending hearing and determination of the main suit and despite the Respondents being repeatedly requested not to dispose off any of the deceased's property, they have failed to heed to the request and as a result blatantly breached the said orders.

d. THAT the said Respondents have refused to comply with the said court order as to them it is of no consequence.

e. THAT the dignity and honour of this Honourable Court has thus suffered greatly and will suffer immensely as the cited person are not keen at all in complying with the order of 27th May, 2015.

f. THAT by the Respondents' refusal to abide by the orders of 27th May, 2015 issued by this Honourable Court, the cited Respondents have totally impugned the integrity of this Honourable Court making vain its said orders. It is necessary that he purges his contempt or otherwise be committed to civil jail for this express disobedience.

g. THAT the actions of the Respondents in causing, transfer and/or disposing off portions of the deceased land/property is deliberate ploy to defeat the purpose of the objection proceedings and there is a real likelihood of mismanagement and/or wasting of all and/or part of the deceased estate.

h. THAT the jurisdiction referred upon this court is exclusive and property invoked and the Applicant seeks to have the ends of justice met.

i. THAT it is in the interest of the entire estate and beneficiaries of the deceased, that the court orders of 27th May, 2015 be strictly adhered to.

The application is opposed and Laban Koonyo (hereinafter the respondent) has with authority of the other respondents sworn a replying affidavit opposing the application and seeking its dismissal.

THE APPLICANT'S CASE:

2. In a nutshell, the applicant's case is that the court granted an order on the 27th May, 2015 which order was served on the respondents. The order required all parties to maintain the *status quo* of the deceased estate pending the hearing and determination of the main suit.

3. The respondents have disobeyed the orders by going ahead to dispose off portions of the deceased's land. They have thus impugned the integrity of this Honourable Court making vain its said orders.

4. The acts complained of are the respondents have continued to construct, demolish and excavate on the property of the deceased. (photographs are annexed). They have through their agents and third parties gone ahead to issue title deeds (searches are annexed).

An affidavit of service is exhibited showing that the respondents were served.

THE RESPONDENT'S CASE

5. It is the respondent's case that they have been in occupation and possession of the portion of land given to each one of them by the deceased with their respective family members long before the matter went to court where apart from construction of residential structures, that is the *status quo* that should be maintained.

6. The process of applying and obtaining title deeds, it is stated, was commenced during the lifetime of the deceased and none of the respondents have alienated, partitioned and or dealt in any manner with the title deed issued during the pendency of these proceedings. It is denied that there is any construction or excavation on the land.

7. Service is denied and the respondents aver they do not know the Process Server, one Erastus Kirui. It is further urged that the process of transfer of titles to the respondents' names as a gift was initiated by the deceased herein long before the matter was initiated in this court.

THE APPLICANT'S SUBMISSIONS

8. The applicant summarises the issues for determination as:

- i. Whether the Respondents were served with the Court's Orders issued on 25th February, 2015.
- ii. Whether this Honourable Court has power to punish the Counterdefendants?
- iii. Whether the Respondents should be cited for contempt of this Honourable's Court Orders.
- iv. Can the Applicants be said to have established a *prima facie* case to warrant the grant of the prayers sought?

9. It is submitted that the respondents were served with the relevant order and were thus aware of it. They have disobeyed it by carrying out construction, excavation and demolition on the estate particularly on plot 107 as evidenced by photographs. They have gone ahead to issue title deeds during the pendency of this cause.

The case of **Chuck V. Crumer** (1 Coop.temp.Cott.342 is cited where Lord Cottenham stated:

“A party who knows of an order, whether null or valid regular or irregular, cannot be permitted to disobey it.”

I am also referred to the decision in **Teacher Service Commission V. Kenya National Union of Teachers and 2 others** [2013] eKLR and **Hadkison V. Hadkison**, [1952] 2 All ER 567.

10. It is submitted that this court has the power to punish for contempt. I am referred to the decision in **Econet Wireless Ltd. V. Minister for Information & communication of Kenya & Another**, [2005] eKLR. (See also *Steward Robinson V. Her Majesty's Advocate* 2007 HCAC 63.

THE RESPONDENT'S SUBMISSIONS

11. The Respondents submit that there are essential elements that must be proved namely:

- i. Whether there was any valid court order issued by this court on 25th February, 2015.
- ii. Whether the order dated 25th February, 2015 was clear and unambiguous.
- iii. Whether the order of 25th February, 2015 was served upon the Respondents or whether the Respondents were aware of the orders of 25th February, 2015.
- iv. Whether the Respondents are guilty of contempt of court order issued on 25th February, 2015.
- v. Whether the contempt application is competently before the Court.
- vi. What orders should this court make in relation to issued No.5 above and in the circumstances?

12. It is submitted that for the application to succeed the order of court must be clear and unambiguous. It is urged that there were two (2) orders, one dated 25th February, 2015 and another dated 27th May, 2015. The question is which of the 2 orders was served. The court is urged to find that there was no proper service of the court order of 25th February, 2015 or knowledge of the same by the citees who have jointly and severally been cited for contempt.

13. Were the respondents guilty of contempt of the orders of court of 25th February, 2015? it is submitted that it has not been sufficiently demonstrated which piece of land is alleged to have been subjected to sub-division.

14. The photographs exhibited do not show where and when the alleged contemptuous acts were carried out. The court has not been told what the *status quo* was at the time the orders were issued.

It is not clear also which activities if any have been carried out by which respondent after issuance of the order.

15. The propriety of the application itself is challenged. It is urged that the application must:

- i) Set out in full the grounds on which the committal application is made and must identify, separately and numerically, each alleged act of contempt including, if known, the date of each alleged act,
- ii) Be supported by one or more affidavits containing all the evidence relied upon.
- iii) Subject to paragraph v, the application notice and evidence in support must be served personally on the Respondents.
- iv) The court may:
 - a) Dispense with service under paragraph (v) if it considers it just to do so; or
 - b) make an order in respect of the service by an alternative method or at an alternative place.

And on the issue of penal notice, Rule 81:9(1) provides that a judgment, or order to do or not to do an act may not be enforced under rule 81:4 unless there is prominently displayed, on the front of the copy of the judgment or order served in accordance with this section, a warning to the person required to do or not to do the act in question that disobedience to the order would be a contempt of court punishable by imprisonment, a fine or sequestration of assets.

16. From the above provisions, it is submitted, it is quite clear that there must be a penal notice prominently displayed on the order, warning of the consequences of disobedience. In the instant case, the order as extracted and signed by the Deputy Registrar and as annexed to the supporting affidavit of the Applicant has no penal notice. The rules mandate such penal notice being conspicuously displayed unless there is an undertaking by the Respondents not to do the act which they are restrained from doing.

It is not in dispute that the court has powers to punish for contempt so that the power and authority of the court is not brought in dispute herein. The issue here is whether the action and/or omission constituting contempt of court have been established to the required standard.

17. The requirement that contempt of court must be proved beyond reasonable doubt has been clearly spelt in the case of **Duncan Manuel Murigi V. Kenya Railway Cooperation (2008) eKLR** where the court, in emphasizing the need for personal service of such order, cited with approval the case of **Bramblevale Limited (1970) CH 128 at P.137 where the Lord Denning Master of Rolls** stated:

“A contempt of court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved showing that when the man was asked about it, he holds

lies. There must be some further evidence to incriminate him.”

The above position was replicated in the case of **Kasembeli Sanane V. Manhui Muli alias Fredrick Saname & 4 others** (2013) eKLR where Omollo J. held that:

“proof of contempt of court must be beyond reasonable doubt.” (referring to Odinga's digest at page 275 paragraph 67(1))

18. Counsel refers me to various authorities all which I have had occasion to consider.

ANALYSIS & DETERMINATION

19. I have considered the respective positions taken by the parties herein. The issues for determination from my reading of facts herein are:

1. Were there valid orders of court of 27th May, 2015 and if so what was their import.
2. Were the orders duly served and/or did the respondents have knowledge of the order?
3. Have the Respondents disobeyed the said orders?
4. If 2 is in the affirmative, does this court have the powers to punish for the contempt?
5. What sanctions (if any) should the respondents face?

20. As held in the case of **Teachers Service Commission V. Kenya National Union** of Teachers and 2 others [2013] eKLR the reason why courts 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 presiding judge. Neither is it about placating the applicant who moves the court by taking out contempt proceedings. It is about preserving and safeguarding the rule of law.

21. Certainly orders of court must first be in existence and duly served on the alleged contemptnor. Knowledge of the existence of the orders is paramount.

There must then be disobedience of the orders for sanctions to apply. The court has the residue power to punish for contempt. We now have in place a new legal regime dealing with contempt court being the Contempt of Court Act 2016. This Act defines and Limits the powers of courts in punishing for contempt of court and for connected purposes. This Act commenced on 13th January, 2017.

22. Hitherto the power to punish for contempt was found within Section 5 of the Judicature Act Cap 8 Laws of Kenya. The section provides:

“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 such power shall extend to uphold the authority and dignity of subordinate courts.”

23. As regards service of the order and knowledge of the order, the courts have developed the Law progressively departing from the long held view that personal service was a must for contempt of court to be. In the case of **Basil Criticos V. Attorney General** this court (Lenaola Judge) had this to say:

“.....the law has changed. And as it stands today knowledge supersedes personal service.where a party clearly acts and shows that he had knowledge of a court order, the strict requirement that personal service must be proved is rendered unnecessary.”

24. Coming back to the facts surrounding the instant suit I notice from the record that on 27th May, 2015,

the court (Hon. Justice Mshila, presiding) gave a raft of orders, chief among which was an order that “*status quo*” be maintained. Before hand, a similar order had been issued on 16/2/2015. A similar order is on record on the 28th October, 2014.

The extracted order given under the Hand and Seal of this court on 16th day of February, 2015 and issued on the 25th day of February, 2015 reads as follows:

“ORDER:

AN APPLICATION FOR ORDERS:

1. THAT this application be certified as urgent and the same be heard on priority basis.
2. THAT pending the hearing and determination of this Application, this Honourable Court be pleased to issue an order of injunction against the respondents by themselves, employees, agents, servants from disposing, selling or on any other way dealing with the estate of the late John Kirrinkai Konyo.
3. THAT pending the hearing and determination of this succession cause, this Honourable Court be pleased to issue an order of injunction against the respondents by themselves, employees, agents, servants from disposing, selling or in any other way dealing with the estate of the late John Kirrinkai Konyo.
4. THAT this Honourable Court be pleased to issue preservation orders over all of the estate until the determination of this succession cause.
5. THAT costs be provided for.
6. THIS APPLICATION dated 6th October, 2014 coming up for hear on 16th February, 2015 before Hon.A. Mshila, Judge in the presence of Mr. Morintat Counsel for the Applicant and Mr. Karanja Holding brief for Mr. Lel Counsel for the Respondent

IT IS HEREBY ORDERED:

1. THAT status quo be maintained
2. THAT dated at the registry

GIVEN under my HAND and the SEAL of this Court this 16th day of February, 2015.

HON. A. MSHILA

JUDGE, NAKURU

ISSUED at NAKURU this 25th day of February, 2015

SGD.

DEPUTY REGISTRAR

HIGH COURT, NAKURU

PENAL NOTICE

TAKE NOTICE that disobedience of this court order after the same has been served upon yourself shall render you liable to contempt of court proceedings and the punishment

thereof.”

25. Looking at the order, it is quite clear in my mind that no attempt was made to establish the status of the estate as at 25th February, 2015 and even as at 27th February, 2015. The evidence availed is that despite the court order, the Respondents went ahead to construct, demolish and excavate on the estate. Some titles are also said to have been issued subsequent to the order. The Respondents indicate that the issuance of the titles had been an ongoing process, the pieces of land having been given as gifts to the Respondents by the deceased long before he died. The applicant made no attempt to establish with certainty that the process was not an ongoing one and to specifically point out the respective acts of each of the respondents in the processing of the titles. It is a possibility that such a process was one taking a life of its own at the lands office, the deceased having had initiated it before his death. This raises doubts on the alleged contemptuous act of processing titles.

26. The photographs on the alleged activities on the land are not conclusive on whether the acts complained of were in disobedience of the court order. I say this because the state of the land was not ascertained before the orders were issued.

It must be remembered that prove in a contempt application is beyond reasonable doubt. A lot of doubts arise in the circumstances of this case.

27. I need to address the issue of service and knowledge of orders. I notice that every time the matter came up for mention, the Respondents were duly represented by counsel.

As stated above, the Law as then was in contempt of court has since changed. The Law as it stands today (even before the enactment of the recent contempt of court Act) is that knowledge of an order is sufficient for purposes of contempt proceedings. What then does knowledge constitute?

The Court of Appeal has in the recent past had the opportunity to deliver itself on this issue in the case of ***Shimmers Plaza Ltd -VRS- National Bank Of KENYA LTD (2015) eKLR*** where the court stated that notice of an order is satisfied if the person or his agent can be said to either have been present when the Judgment or order was given or made, or was notified of its terms by telephone, email or otherwise. In the courts view ‘otherwise’ would mean any other action that can be proved to have facilitated the person having come into knowledge of the terms of the Judgment or order. This would definitely include a situation where a person is represented in court by Counsel.

28. Looking at the material before me in totality, I must hold and find that this application will fail for reasons that:

- a) The order “*Status quo be maintained*” was somewhat too general and ambiguous when the exact status of the estate had not been established.
- b) The respondents are four (4). No attempt is made to distinguish what specific acts if any, the respective Respondents are guilty of.
- c) The degree of prove in an application of this nature is “*beyond reasonable doubt.*” The applicant has not achieved this threshold.

29. With the result, the application dated 21st March, 2016 is hereby dismissed. Costs shall abide the outcome of the main succession cause.

Dated, Signed and Delivered at Nakuru this 18th day of January, 2017

A. K. NDUNG'U

JUDGE