



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA

SUCCESSION NO. 292 OF 2003

IN THE MATTER OF THE ESTATE OF MOHAMED RASHID (DECEASED)

MOZA MOHAMED RASHID.....APPLICANT

VERSUS

RASHID MOHAMED TIMAMY.....RESPONDENT

¼ RULING

1. The deceased to whose Estate the proceedings herein relate is Mohamed Rashid (“the Deceased”), who died intestate on 13.5.02 at Mewa Hospital. The record shows that a Grant of Letters of Administration was issued to Rashid Mohamed Timamy, Afrathim Mohamed Rashid and Moza Mohamed the sons and daughter respectively of the Deceased on 6.2.04. In addition to the Administrators, the Deceased was survived by 3 other daughters namely Shamsa Mohamed, Zainab Mohamed and Salma Mohamed. The estate of the Deceased comprised ½ share in Plot No. 860/I/MN and ½ share in Plot No. 112/XLIV. The said Grant was confirmed on 17.12.04. The Certificate of Confirmation of Grant issued on 17.12.04 indicates that the 2 sons of the Deceased were to get ¼ share each of the estate while the 4 daughters were to get 1/8 share each thereof.

2. By an Application dated 23.3.15, Moza Mohamed Rashid, the Applicant herein, seeks the revocation and setting aside of a transfer of Plot Number Mombasa/Block XLIV/112 to Ali Said Hamad and Mohamed Gataby by Rashid Mohamed Timamy, the Respondent herein. She also seeks the rectification of the register in respect of the said property and issuance of a title in the name of the beneficiaries as indicated in the Certificate of Confirmation of Grant. According to the Applicant, the Respondent illegally sold the Deceased’s interest in the said property. On 24.3.15, the Court did order that interim status quo be maintained till then.

3. By a Notice of Motion dated 14.9.15, the Applicant seeks the committal to 6 months civil jail of Rashid Mohamed Timamy, Ali Said Hamad and Mohamed Gataby for breach of the order of the Court of 24.3.15. The application is predicated upon the grounds as set out in the Application and further by the Applicant’s affidavit sworn on even date. The Applicant avers that the Court on 24.3.15 granted an order that status quo be maintained pending the hearing and determination of the Application dated 23.3.15. The Applicant further depones that the said order was served upon the advocates for the Respondent who communicated the orders to the Respondent who explained so when the matter came up for hearing on 30.4.15. That the Respondent disregarded the said orders and proceeded to construct the house which is subject to the proceedings herein.

4. When the matter came before me for hearing, Counsel for the Applicant informed the Court that the Applicant had abandoned the Application against Ali Said Hamad and Mohamed Gataby. He submitted that he relies entirely on the grounds in body of the application and the affidavit sworn by the Applicant.

He further submitted that the application was not opposed.

5. The jurisdiction of this Court to punish for contempt is found in The Contempt of Court Act No. 46 of 2016, which was assented to on 23.12.16 and commenced on 13.1.17. However, at time the Application herein was filed, the power to punish for contempt was provided for in Section 5 of the Judicature Act which provides:

5(1)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 upholding the authority and dignity of subordinate courts.

6. Other than stating that the “Respondent disregarded the said orders and proceeded to construct the house which is subject to the proceedings herein”, there is nothing else by way of evidence to show that the Respondent breached the orders of 24.3.15. The standard of proof in contempt proceedings is well established. Though the standard of proof is higher than proof on a balance of probabilities it is not proof beyond reasonable doubt as that remains in the realm of criminal cases. This is as was held in the case of **Mutitika v Baharini Farm Limited [1985] KLR 229, 234**, where the Court of Appeal stated

“In our view, the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt..The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to an offence which can be said to be quasi-criminal in nature.”

7. There is not an iota of evidence adduced by the Applicant to demonstrate even faintly that the said orders were breached. The burden of proof lies squarely on the Applicant but she has failed to discharge that burden. This is not a question of the evidence failing to attain the requisite standard of proof. It is an issue of there being no evidence at all. Before this court exercises its very special jurisdiction to punish for breach of an order, it is essential that proper proof of breach be produced.

8. In the result, I do not consider that the Applicant has made out a case to warrant the grant of the orders sought. Accordingly the Application dated 14.9.15 is hereby dismissed with costs to the Respondent.

DATED, SIGNED and DELIVERED in MOMBASA this 3rd day of February, 2017

M. THANDE

JUDGE

In the presence of: -

..... **for the Applicant**

..... **for the Respondent**

..... **Court Assistant**