



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 1559 OF 1995

IN THE MATTER OF THE ESTATE OF KIPKOECH KIRUI (DECEASED)

RULING

1. The application for determination is the Motion dated 5th November 2014. It is an application seeking that the respondent, Margaret Itsutsa, be punished for contempt of court for failing to comply with orders made on 22nd October 2006.
2. The background is given in the affidavit sworn on 5th November 2014 by the applicant. An order had been made on 22nd October 2006 directing the respondent to render accounts. The same was formally extracted and issued on 7th November 2006. It was allegedly served through post on the respondent's advocates, and personally on the respondent on 1st July 2008. There had been an attempt to comply with the orders but on 11th March 2009 it was ruled that the affidavits filed did not amount to proper accounts. The respondent was given 15 days to comply, failing which the applicant had liberty to file contempt proceedings. The applicant argues that the said orders have not been complied with to date.
3. There is a further affidavit sworn on 4th December 2014 by Geoffrey Cheruiyot Koech. He accuses the respondent of wasting the estate and delaying the completion of the administration of the estate.
4. The respondent replied to the application by an affidavit sworn on 2nd December 2014. She denies being in contempt of court. She avers that in compliance with the orders of 22nd October 2006, she did file an account which the court ruled to be unsatisfactory on 11th March 2007, and granted her 15 days to properly comply. The said order was then compromised on 2nd October 2009 when she was removed as administrator and replaced with the applicant. She has been fighting her removal as administrator since. It is her case that the orders made on 22nd October 2006 have been overtaken by events.
5. The application was argued orally on 20th April 2015. Mr. Sigira stated the case for the applicant, while Mrs. Thongori argued for the respondent. Mr. Sigira submitted that the respondent had not complied with the court orders in question, did not even deny that fact. Mrs. Thongori opposed the application on several grounds. Firstly, she submitted that there was inordinate delay in the prosecution of the respondent for contempt of court for the order in question was made in 2006. It was argued that the matter has been in court several times thereafter and the original order has since been varied. It was further argued that leave to initiate the contempt proceedings had not been obtained. It was submitted further that the contemplated application is intended to intimidate the respondent with regard to the appeal she has preferred at the Court of Appeal against one of the orders of the High Court.

6. The law on contempt proceedings in civil cases is fairly well settled. The proceedings are quasi-criminal in nature for they have a penal element. A person found liable for civil contempt may be jailed or their property sequestered. It is for that reason that the rules of procedure have to be strictly complied with. The standard of establishing disobedience of court orders is above that required for ordinary civil cases and is slightly below proof beyond reasonable doubt.
7. The prerequisites are that the orders alleged to have been disobeyed ought to have been brought to the attention of the person who is alleged to have disobeyed it. The said orders ought to have been formally extracted and served personally on the person bound to obey or comply with them. The order served ought to carry endorsement in the form of a penal notice to the effect that in the event of non-compliance there would be penal consequences. The other requirement is that the manner of the non-compliance with the order must be clearly set out in the application.
8. I have, in these proceedings, to determine whether the prerequisites set out above have been met. Was there personal service of the order made on 22nd October 2006 and extracted on 7th November 2006? There is on record an affidavit of service attesting to the fact that the said order was served on the respondent on 1st July 2008. The alleged fact of service has not been refuted by the respondent in her replying affidavit to the instant application, sworn on 2nd December 2014. She infact states in her replying affidavit that she was aware of the order and that she had even attempted to comply with it but the court was not satisfied with her efforts hence the further orders of the court made on 11th March 2007. The service of the order in question therefore is not an issue for determination. The order was served personally on the respondent, hence her attempt to comply with it.
9. Was there compliance with the order of 22nd October 2006 required the filing of accounts? The record is clear that no proper accounts have been filed todate. There was an attempt to comply, but the affidavits filed did not satisfy the court, hence the order made on 11th March 2009 extending the compliance period by 15 days. The respondent did not file the accounts within the extended period of 15 days and todate no such accounts have ever been filed.
10. The respondent explains that she did not comply with the orders after the extension granted on 11th March 2007 as the said orders were compromised on 2nd October 2009 when she was removed as administrator. She also appears to suggest that she should not comply given that she has an appeal pending at the Court of Appeal.
11. I have scrutinized the record carefully and I have not seen any order made after 11th March 2007 that compromised the orders of 22nd October 2006. On 11th March 2007 the court granted extension of the period within which the orders were to be complied with by 15 days. That meant that the respondent should have acted by 26th March 2009. Whatever happened on 2nd October 2009 was way out of the 15 days allowed by the court, and by then the respondent was already in default.
12. The order of 22nd October 2006, the subject of these proceedings, required the filing of accounts. The removal of the respondent as administrator by the order of 2nd March 2009 did not absolve her from the obligation to render the accounts demanded in the order of 22nd October 2006. The fact that there is an appeal filed arising from the judgment of 2nd October 2009 does not affect compliance with the orders made on 22nd October 2006 for the said appeal has nothing to do with the order of 22nd October 2006. It has not been demonstrated that there was stay of the said order by the Court of Appeal.
13. I am prepared to find and hold that the respondent knowingly and willfully disobeyed the orders of this court made on 22nd October 2006 and extended on 11th March 2009. However, there is the question as to whether due process was followed in the bringing of these proceedings.

14. The law on civil contempt of court as it relates to the High Court is Section 5 of the Judicature Act, Cap 8, Laws of Kenya, which provides that the High Court has the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England. The procedure to be followed in such cases is not set out, but is presumed to be the same as that provided for for the English Court.
15. Under the England Law, the procedure for civil contempt is the same as that prescribed for judicial review. The applicant must first seek leave of court by an application in chambers. The said application should be supported by a statutory statement and an affidavit verifying the statement. Once leave is granted, the substantive motion, based on the statement and verifying affidavit filed at leave stage, should be lodged in the case within 21 days.
16. In this case, the applicant did not follow the process stated above. She did not file a summons in chambers supported by a statutory statement, verified by affidavit. No leave was obtained in the process to file a motion for contempt. Instead, she relies on an order made in the case on 11th March 2009 in the following terms:-

“The affidavits filed by the respondent are not in the nature of the accounts which were undertaken to be filed. Leave to do so within 15 days from today. In default the applicant is at liberty to file contempt proceedings or to take any further steps appropriate.”

17. The applicant construes the order of 11th March 2009 to mean leave to file a substantive motion for contempt of court. The question is did the said order constitute leave as contemplated under the English law? I do not think it does. The English law has set out an elaborate procedure for civil contempt cases. The applicant must first apply summons in chambers for leave to institute contempt proceedings. The application for leave must be accompanied by a statement and an affidavit verifying the statement. Once leave is granted the substantive motion must be filed within twenty – one (21) days.
18. It is not contested that that process was not followed by the applicant. There was no application for leave filed and no leave to initiate contempt proceedings was granted by the court. The order recorded on 11th March 2009 was not on an application for leave, and it did not even grant leave. It merely granted liberty to the applicant to initiate the process towards the respondent being cited for contempt of court should she fail to render accounts within fifteen (15) days. That meant that after expiry of the 15 days the applicant was at liberty to move the court appropriately for leave to initiate contempt proceedings.
19. It has been stated that these proceedings are quasi-criminal in nature, for there are criminal sanctions attached. That being the case, a person accused of having acted in contempt of court should be taken through due process. The principles that govern criminal proceedings apply. There should be a fair trial. Fair trial includes having the person accused taken through a process. The rules of procedure must be strictly adhered to. That has not been the case here. Consequently, I am unable to find against the respondent.

20. In the end I do hereby dismiss the motion dated 5th November 2014. Costs shall be in the cause.

DATED, SIGNED and DELIVERED at NAIROBI this 5TH DAY OF FEBRUARY, 2016.

W. MUSYOKA

JUDGE