



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

PROBATE & ADMINISTRATION CAUSE NO. 29 OF 2014

RE: ESTATE OF KIPTALAM ARAP CHERUNYA (DECEASED)

MICHAEL KIPYASANG CHERUNYA
APPLICANT

VERSUS

MARY JEPTOO CHERUNYA1ST RESPONDENT

MAGDALENA JEPTABUT CHERUNYA 2ND RESPONDENT

RULING

1. The applicant prays that the respondents or their sons, Francis Cherunya, Julius Cherunya, Sammy Cherunya and John Cherunya (hereafter *the alleged contemnors*) be punished for disobeying the order made on 27th January 2015. On that date, the court extended orders of *status quo* first made on 13th February 2014. The orders related to the estate of the deceased; and, more specifically to the property known as Trans Nzoia/Mito Mbili/1.
2. The applicant has filed a chamber summons dated 18th March 2015. It is pleaded that the above orders were extended on 16th February 2015 to the 18th May 2015 in the presence of the alleged contemnors. The applicant states that on 14th March 2015, the alleged contemnors together “*with other hooligans invaded the suit land, destroyed a tractor, chased away the workers and seriously assaulted the applicant*”. A P3 form is annexed. Those matters are buttressed by the deposition of the applicant sworn on 18th March 2015.
3. The application is contested. There is a replying affidavit sworn by the two respondents on 15th May 2015. There is also a replying affidavit sworn by Julius Cherunya and Francis Cherunya on 29th June 2015; and, a supplementary affidavit by the same deponents sworn on 3rd November 2015. The respondents deny breaching the order. They also depose that they have never been served with the order of court; and, that the orders of *status quo* were vague. As a result, the respondents lodged an application dated 10th March 2014 seeking interpretation of the orders. They thus contend that the present chamber summons is a scheme to scuttle their applications dated 10th March 2014 and 13th March 2014.
4. In the supplementary affidavit, the two alleged contemnors also aver that they were charged in Kitale Chief Magistrates Court Criminal Case 1080 of 2014 for causing a breach of the peace. The charges related to the events of 16th March 2014; the subject matter of the contempt proceedings. On 30th October 2015, they were acquitted. In a nutshell, the respondents contend that the applicant has not proved the contempt.

5. On 8th February 2016, I heard learned counsel for the parties. I have considered the list of authorities filed by the respondents on 18th May 2015; the chamber summons; depositions; and, the rival submissions.
6. Section 5 of the Judicature Act grants this Court jurisdiction to punish for contempt. The procedure is set out in Order 52 Rule 5 of the Civil Procedure Rules of the Supreme Court of England as amended from time to time. The latest amendments dispense with application for leave to bring proceedings for contempt of court orders or abuse of court process.
7. The jurisdiction is exercised to protect the dignity of the court. It is meant to ensure that the streams of justice are kept pure. A party aggrieved by an order of the court should move to review, set aside or appeal the decision; not to disregard or disobey it. In *Hadkinson v Hadkinson* [1952] 2 All ER 567 at 569 it was stated as follows-

“A party who knows of an order, whether null and void, regular or irregular, cannot be permitted to disobey it...it would be most dangerous to hold that the suitors or their solicitors could themselves judge whether an order was null and void, whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question, that the course of a party knowing of an order which was null and irregular and who might be affected by it was plain. He should apply to the court that it might be discharged. As long as it existed, it must not be disobeyed”.

8. There is a long line of local decisions upholding that position. See for example *Mutitika v Baharini Farm Ltd* [1985] KLR 227, *Shah & Another t/a Lento Agencies v National Industrial Credit Bank Ltd* [2005] 1 KLR 300, *Benard Kongo Njau v City Council of Nairobi & Another*, Nairobi High Court ELC Case No. 495 of 2009 (unreported). I thus find that the chamber summons is properly before the court.
9. Contempt of court is a *criminal offence*. The *standard of proof* is quite high. The punishment can lead to loss of liberty. As a result, it must be proved that the contemnors were *served* with the court order; and, that they disobeyed it. It must be clear from their *overt acts* that they *intended* to breach the order of court.
10. Applying those principles here, I find as follows. The applicant did *not* file an affidavit of service showing that the two respondents or their four sons were personally served with the court order of 27th January 2015. Learned counsel for the applicants, Mr. Omboto, freely conceded the point. He however sought to rely on the fact that the alleged contemnors were in court on 16th February 2015. I note that the orders of 27th January 2015 were made in chambers *ex parte*. In the absence of proof of service with that order, the chamber summons is on a legal quicksand.
11. That finding is sufficient to dispose of the matter. But I may comment on the degree of proof. Like I have stated, the applicant needed to *prove* that the contemnors were served with the court order; and, that they *disobeyed* it. The two alleged contemnors were charged in Kitale Chief Magistrates Court Criminal Case 1080 of 2014. The charges related to the events of 16th March 2015; the subject matter of the contempt proceedings. On 30th October 2015, they were acquitted of the charges. In view of that acquittal, I would be hard pressed to say that the applicant has *proved* in these proceedings the *overt acts* that the respondents breached the order of court of 27th January 2015. I cannot also shut my eyes completely to the motion pending before this court for *interpretation* of the true boundaries of the impugned *status quo* order.
12. Lastly, the jurisdiction to punish for contempt should be exercised with restraint. See *Re Maria Anne Davies* (1988) 21 QBD 236.
13. The upshot is that the applicant’s chamber summons dated 18th March 2015 is hereby dismissed. Costs shall be in the cause.

It is so ordered.

DATED, SIGNED and DELIVERED at ELDORET this 1st day of March 2016.

GEORGE KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of:-

Ms. Lagat for Mr. Omboto for the applicant instructed by Rioba Omboto & Company Advocates.

Mr. Kibii for the respondents instructed by Limo R.K. & Company Advocates.

Mr. J. Kemboi, Court clerk.