



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

SUCCESSION CAUSE NO. 56 OF 2016

(FORMERLY MERU SUCCESSION CAUSE NO. 60 OF 2008)

IN THE MATTER OF THE ESTATE OF THE LATE MUNENE MUGO NCACU (DECEASED)

FAITH KANJA MUTHAURA.....1ST PETITIONER

STELLA NYAI MUTHAURA.....2ND PETITIONER

- VERSUS -

ELIAS MICHENI MUGO.....1ST OBJECTOR

ALPHAXARD M'MITHAE NKARI.....2ND OBJECTOR

R U L I N G

1. This is a Ruling on the 1st Petitioner/Applicant's Notice of Motion dated 16th February, 2016. The Motion is brought under section 5 (1) of the Judicature Act, Cap 8 of the Laws of Kenya, Order 52 Rule 2(2) of the Rules of the Supreme Court of England 1965 and section 3 a (sic) of the Civil Procedure Act Cap 21 Laws of Kenya. The application seeks an order of committal against the Defendant/Respondent to prison for a period to be determined by the court.

2. The grounds upon which the application is sought were set out in the body of the motion and the supporting Affidavit of Otieno Willy Calvin, Advocate sworn on 16th February, 2016. These were that the 1st Objector Elias Micheni Mugo and one Bernard Murithi were restrained by an order made by **Makau J** on 19th May, 2015 from entering into, demolishing the deceased's houses and structures, farming and/or interfering with the developments in LR Nos. Karingani/Mugirirwa/1916 and 1921; that in contempt thereof, the two had refused to obey the said order. That the said order was served upon the objectors on 30th May 2015 but they had refused to obey the same by persisting in the acts of intermeddling with the estate of the deceased

3. The Motion was opposed vide grounds of opposition dated 22nd July, 2016. It was contended that the application was incurably defective as; the same was in breach of section 63 of the Law of Succession Act; it was a motion instead of a summons; the deponent of the Supporting Affidavit is not a party to the proceedings and that there was no evidence of contempt of the subject court order.

4. The record shows that on 25th July, 2016, an order made by **Gikonyo J** sitting in Meru High transferring this matter to this court in the presence of the Counsels for the parties. The learned Judge fixed the matter for mention before this court on 17th August, 2016. On that date, Mr. Murithi appeared for the Objectors while Mr. Kijaru held brief for Mr. Otieno for the 1st Petitioner/Applicant. The court

then made directions as follows:-

- "1. let the applicant file and serve written submissions within seven (7) days.***
- 2. let the Respondent's file and serve written submissions within 7 days of service.***
- 3. mention on 01/09/16 to give a date for Ruling."***

5. On 1st September, 2016 the matter came up for mention as scheduled but neither the parties nor their Advocates appeared. Further, none of the parties had filed any submissions as had been ordered on 17th August, 2016. I am aware that these are succession proceedings whereby the practices and procedure is majorly obtained in the Law of Succession Act, Cap 160 of the Laws of Kenya and the Rules made thereunder. However, I think that certain provisions of the Civil Procedure Act Cap 21 Laws of Kenya which provides for procedure in civil courts are applicable to some extent. In particular, Section 1A of the Act is applicable as it resonates with Article 159 (2) (c) of the Constitution of Kenya. Section 1A of the Civil Procedure Act provides:-

"1A. (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

(2) The court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

(3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the court and to comply with the directions and orders of the court."

On the other hand, Article 159 (2) (c) binds this court in the exercise of its judicial authority to ensure that justice is not unnecessarily delayed.

6. From the foregoing, it is clear that both the parties and their Advocates were in breach of Section 1A (3) of the Civil Procedure Act, in that, they failed and refused not only to attend court on 1st September, 2016, but also failed to file their submissions as directed by the court. That being the case, the court decided to reserve its ruling on the application and this is the ruling.

7. Since the application was ordered to be determined by way of written submissions and the Applicant having opted not to file any, it follows that the applicant failed to argue her application and the same is for dismissal. This is in line with section 107 of the Evidence Act, Cap 80 Laws of Kenya which requires that he who alleges must prove. The Applicant made allegations in her application, but when called upon to prove them by way of submissions, she failed to do so.

8. What if the application was considered on merit, would it stand? The application is expressed to be brought, inter alia, under section 5 (1) of the Judicature Act,

Cap 8 of the Laws of Kenya. That Section 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 that power shall extend to upholding the authority and dignity of subordinate courts."

That is the substantive legal provision that gives this court jurisdiction to punish for contempt. It is clear from a reading of the said section that the practice and procedure to be applied is the one obtaining in England at the time of making the application. The application purports to invoke Order 52 Rule 2 (2) of the Rules of the Supreme Court of England of 1965. To my mind, that is not the law as to practice and procedure that was obtaining in England as at February, 2016 when the application was being made. In

2012, England undertook amendments to its Civil Procedure Act whereby the Rules of the Supreme Court concerning contempt were replaced with Part 81. That part makes extensive provisions of the procedure for committal. Some of the requirements, as far as the present application is concerned, are that the application for committal has to be by way of Application Notice under Part 23; the Application Notice must set out in full the grounds on which committal application is made and must identify, separately and numerically, each alleged act of contempt and if known, the date of each of the alleged acts and that the application must be supported by an affidavit or affidavits that contain all the evidence to be relied on. Further, such application and evidence must be served upon the Respondent personally.

9. In the present application, the Applicant not only invoked a non-existent provision of the law, Order 52 (2) of the Rules of the Supreme Court of England of 1965, but the affidavit in support of the application is sketchy as to the evidence of contempt or disobedience of the subject order. That affidavit contains six (6) paragraphs. Paragraphs 1, 5 and 6 are formal in nature as they introduce the deponent, aver that the application be allowed and that the affidavit had been sworn on the basis of knowledge and belief. That leaves paragraphs 2, 3 and 4. Paragraph 2 states when the order was made and its terms. Paragraph 3 discloses that the order was served and produces the Affidavit of Service. Then paragraph 4 which is the most important is in the following terms:-

"4. That up to now the objectors have refused to comply with the court orders made by the Honourable Mr. Justice J.A Makau and persist in their refusal and have continued to intermeddle with the estate of the deceased."

10. In my view, that paragraph does not satisfy the provisions of Part 81.10 which provides:-

"(3). The application notice must-

a) 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 of the alleged acts, and

b) be supported by one or more affidavits containing all the evidence relied upon."

(Emphasis supplied)

11. From the foregoing, it is clear that paragraph 4 of the Supporting Affidavit does not disclose the alleged acts of contempt and the dates, if any, that they were committed. The law requires that the applicant should state clearly the nature of the contempt, the acts of disobedience and the date when they were committed. This is meant to put the alleged contemnor on notice in very clear terms so that he/she knows the case he/she is facing. In the present case, the particulars disclosed are ambivalent and incapable of being effectively responded to. It did not specify how and when the order of 19th May, 2015 was allegedly disobeyed. In this regard, there was no proof of any contempt on the part of the Respondent in terms of Part 81.10 of the Civil Procedure Act of England, 2012.

12. For the avoidance of doubt, the Court of Appeal in **Christine Wangari Gacheke .v. Elizabeth Wanjiru Evans and 11 Others [2014] eKLR** has held that the procedure and practice currently obtaining in England for contempt of court is that set out in Part 81 of the Civil Procedure Act of England, 2012. In this regard, the current application falling short of the requirements of Part 81 aforesaid, is but a non-starter.

13. In this regard, this court finds the application dated 16th February, 2016 to be without merit and the same is hereby dismissed. Since the Respondent only filed grounds of opposition but failed to file any submissions as ordered, I will order no costs on the application.

It is so ordered.

DATED and delivered at Chuka this 6th day of October, 2016.

A.MABEYA

JUDGE

Ruling read and delivered in open court in the presence of Counsel for the Objector in the absence of the Counsel for the Petitioner.

A .MABEYA

JUDGE

6/10/2016