



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL DIVISION
CIVIL CAUSE NO. 125 OF 2015 (O.S)

IN THE MATTER OF THE NJENGA KARUME TRUST REGISTERED TRUSTEES

AND

IN THE MATTER OF THE NJENGA KARUME TRUST

AND

**IN THE MATTER OF THE TRUST IN THE WILL OF JAMES NJENGA KARUME
(DECEASED)**

BETWEEN

ALBERT KIGERA KARUME 1ST PLAINTIFF

SAMUEL WANJEMA KARUME2ND PLAINTIFF

LUCY WANJIRU KARUME3RD PLAINTIFF

VERSUS

**KUNG’U GATABAKI & MARGARET NDUTA
KAMITHI**

**(SUED AS TRUSTEES OF THE NJENGA KARUME TRUST1ST
DEFENDANT**

**THE NJENGA KARUME TRUST REGISTERED TRUSTEED 2ND
DEFENDANT**

AND

**GRACE NJOKI NJENGA KARUME..... 1ST INTERESTED
PARTY**

JANE MUKUHI MATU2ND INTERESTED PARTY

TERESIA NJERI KARUME2ND INTERESTED
PARTY

DR. FRANSICSA WANJIKU KAHIU.....4TH INTERESTED
PARTY

RULING

1. On 26th March, 2015 the Plaintiffs lodged an application under a certificate of urgency seeking various orders. Upon considering the same, the court gave exparte orders of a preservatory nature in the following terms:-

“2. That the Defendants/Respondents by themselves and/or through their employees, servants and/or agents be and are hereby restrained by way of a temporary injunction from selling, transferring, charging , mortgaging, disposing off or wasting in anyway whatsoever any of the immovable properties managed and held under the Njenga Karume Trust for 14 days.

3. That the Defendants/Respondents by themselves and/or through their employees, servants and/or agents be and are hereby restrained by way of a temporary injunction from further demolishing, destroying, wasting or in any way whatsoever interfering with the operations and dealings of the restaurant and business known as Pizza Gardens on the property known as Land Reference Number 209/8370 in Westlands for 14 days.”

2. Those orders were extended on 9th April, 2015 and on 17th April, 2015, respectively and are still in force. While extending the said orders on 17/04/2015, Mbogholi J directed that the Preliminary Objection dated 01/04/2015 by the 1st Defendant and the 2nd Defendant’s Motion on notice dated 02/04/2015 be heard on 05/05/2015. The motion by the 2nd Defendant sought to set aside the said orders and to generally stay these proceedings on the grounds, inter alia, that the issues in this suit are similar to issues pending in H.C Succession Cause NO. 3102 of 2013. In making those directions, the court extended those orders to the 05/05/2015.
3. When the matter came up yesterday, 05/05/2015 for the hearing of the 1st Defendant’s said Preliminary Objection and the 2nd Defendant’s Motion dated 02/04/2015, Mr. Munge, Learned Counsel for the Plaintiffs informed the court that his clients had filed a fresh Notice of Motion dated 30/04/2015 seeking to cite the Defendants for contempt of court. He pointed out that after the orders were extended on 17/04/2015, the alleged contemnors disobeyed the said orders on 21st April, 2015 and that it was imperative that the said application for contempt of court be heard before any other or further proceedings are undertaken in this matter.
4. Mr. Munge submitted that, whilst the 1st Defendant’s Preliminary Objection dealt with procedural issues, the 2nd Defendant’s motion sought to discharge the said orders. That the integrity and authority of this court was at stake; that since contempt had been alleged, the contemnors must first purge the contempt before they can be heard in these proceedings. Counsel referred to the case of **Econet Wireless Kenya Ltd Vs Minister for Information & Communication of Kenya & Anor (2005) eKLR** for the proposition that because of the seriousness and urgency of a contempt of court application, once it is filed the court should suspend any other proceedings and deal with the same. Counsel further cited the case of **Trust Bank Ltd (in liquidation) Vs Shanzu Villas Ltd & 3 others (2004) eKLR** for the proposition that since the contemnor has no right of audience, an allegation of contempt should be disposed off first before dealing with any other business. Counsel therefore, urged that the Plaintiff’s motion dated 30th April, 2015 be heard first.
5. On his part Mr. Miller, learned counsel for the 2nd, 5th, 6th and 7th Interested parties supported the submissions of Mr. Munge and further submitted that, the Law of Contempt is akin to an issue jurisdiction which must be dealt with immediately it is raised; that the orders disobeyed seek to

- preserve the assets the subject of the suit; that the circumstances had changed from when the directions of 17th April, 2015 were made and that no prejudice will be occasioned to the Defendants if the application for contempt was dealt with first. Mr. Adera for the 3rd Interested Party associated himself with the submissions of Mr. Munge and Mr. Miller.
6. On the other hand, Mr. Oraro, Learned Senior Counsel for the 1st Defendant opposed Mr. Munge's application. He submitted that none of his clients were in contempt and that no allegations had been made against his clients in the contempt application; that his clients had responded to the allegations of contempt on 29th April, 2015 but that response had been excluded from the contempt application. That whilst contempt is a very grave issue, the fact that the Plaintiffs waited for close to 14 days to lodge the application meant that they were unserious with the issue and that in any event the same was intended to secure an adjournment for the Plaintiff's. Mr. Oraro concluded that in the **Econet Case (Supra)**, it was held that once an issue of jurisdiction has been raised, the same should be dealt with before a contempt of court application can be dealt with. That in view thereof, since the 1st Defendant's Preliminary Objection and the 2nd Defendant's Motion touched on the issue of jurisdiction, they should be dealt with first.
 7. Mr. Gatonye, Learned Counsel for the 2nd Defendant supported Mr. Oraro. He submitted that his clients had raised the issue of jurisdiction which should be dealt first; that the delay in the filing of the application for contempt was meant to help the Plaintiffs secure an adjournment and that there were no good reasons that had been advanced to vary the timetable that had already been fixed by the court as to the conduct of these proceedings.
 8. On his part, Mr. Kamau, Learned Counsel for the 4th Interested Party supported the positions taken by Mr. Oraro and Mr. Gatonye. He argued that the application for contempt was meant to perpetuate the continued postponement of his clients' right to enjoy the benefits under the Trust and Will of her late father. He argued that there would be no prejudice to be suffered by the Plaintiffs if they argued their application for contempt after the court has settled the issue of jurisdiction.
 9. In a rejoinder, Mr. Munge submitted that there was no issue of jurisdiction in the 1st and 2nd Defendants' objection and motion; that the Defendant's Counsel had admitted an activity taking place on 17th April, 2015 which should be investigated first; he observed that the delay in filing the application for contempt was occasioned by the attempts the Plaintiffs were making to effect service upon the contemnors who were evading service. Counsel therefore urged that the contempt application be heard first before any other proceedings in this matter.
 10. The Law of Contempt does not exist for the benefit of Courts or Judges who preside thereat. It exists to protect the Society. It is not the dignity of the court that is offended once a contempt of court has been committed but the challenge of the supremacy of the law itself. Contempt of Court goes to the very heart of the existence of society as a body polity. It is the rule of law and administration of justice that is on trial once a contempt of court is committed.
 11. In the case of **Teachers Service Commission Vs Kenya National Union of Teachers & 2 Others (2013) eKLR** the court held that:-

“The reason why courts will punish for contempt of court then 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 the presiding judge. Neither is it about placating the applicant..... it is about preserving and safeguarding the rule of law”.

12. In **Africa Management Communication International Ltd Vs Joseph Mathenge Mugo & anor (2013) eKLR** it was held: -

“The law of contempt has evolved over time in order to maintain the supremacy of the law and the respect for law and order. As it was in the time of Chief Justice Mckean in 1778, so it is today that courts have a duty to ensure that citizens bend to the law and not vice versa. Indeed, if respect for law and order never existed, life in society would be short, brutish and nasty. It is the supremacy of the law and the ultimate administration of justice that is usually under challenge when contempt of court is committed. This is

because, a party who obtains an order from court must be certain that the order will be obeyed by those to whom it is directed. As such, the obedience of court orders is fundamental to the administration of justice and rule of law.”

13. The foregoing shows how important obedience of court orders is central to the rule of law and administration of justice in any society. Similarly, since contempt of court applications are geared towards ensuring compliance with court orders, such applications are likewise important. In this regard, since a contemnor seeks to interfere with the administration of justice, the general rule is that a contemnor would not have any right of audience in any court of law until he is either punished for it or he purges the contempt. This is why once an allegation of contempt is raised in whatever manner, courts hasten to deal with them before undertaking any other business before them. This is a sound principle in that, since the courts are the institutions that are charged with the administration of justice in society, interference with that business not only puts their very existence in jeopardy but there is a risk in the society degenerating into chaos and anarchy. This is the position taken by the court in **the Econet Wireless Kenya Ltd Case** (supra) relied on by the Plaintiffs.

14. In that case the court delivered itself as follows: -

“Where an application for committal for contempt of court orders are made the court will treat the same with a lot of seriousness and urgency and more often will suspend any other proceedings until the matter is dealt with and if the contempt is proven to punish the contemnor or demand that it is purged or both. For instance, a contemnor will not be allowed to prosecute any application to set aside orders or take any other step until the application for contempt is heard. The reasons for this approach is obvious – a contemnor would have no right of audience in any Court of law unless he is punished or he purges his contempt. So the court is obliged to hear the application for committal first before any other matter. This is a general rule, which must be applied strictly.”
(Emphasis added).

15. That then is the general rule, that once an issue regarding an attack on the rule of law and administration of justice is raised, a court of law must move with expedition to deal with it to the exclusion of all other matters before it. This so because, Courts of law exist fundamentally and exclusively for the purpose, that is, to enforce the rule of law and maintain the administration of justice to avoid the disintegration of society.

16. Mr. Miller submitted that the issue of contempt is a kin to the issue of jurisdiction, that once an issue of jurisdiction is raised, a court is enjoined to forthwith deal with it and make a determination before taking any step in a proceeding. That is the law and it requires no authority. However, if one is required, the case of **“Lillian’s” Vs Caltex Kenya Ltd (1989) KLR 1** is good enough. In that case, the late Nyarangi J. A. observed as follows: -

“I think that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything without it a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings opening other evidence. A court of law down tools in respect of the matter before if the moment it holds the opinion that it is without jurisdiction....

It is for that reason that raised by a party or by a court on its own motion must be decided forthwith on the evidence before court. It is immaterial that the evidence is scanty or limited... as soon as that is done, the court should hear and dispose of that issue without much ado.”

17. The question therefore, that arises is, what happens if issues of contempt and jurisdiction are raised in the same proceedings. What takes precedence among the two? Mr. Oraro, Mr. Gatonye and Mr. Kamau were of the view that the issue of jurisdiction takes precedence. Mr. Munge, Mr. Miller and Adera did not address the issue. Mr. Munge only told the court that the objection and motion by the 1st and 2nd Defendant did not raise any issue of jurisdiction.

18. From precedence, it would seem that when these two issues are raised at the same time, the issue of jurisdiction MUST take precedence. The basis of that position is that a court of law first acquires jurisdiction before it can deal with any matter before it. If a court exercises a jurisdiction it does not possess its action and decision amounts to nothing, it is a nullity, it is *void ab initio*. Therefore, a court has to determine that issue first before it can embark in adjudicating any matter.
19. As early as 1904, Vaughan Williams L. J held in **Gordon Vs Gordon (1904 – 1907) ALL ER 702 at 705** at that: -

“... But when you come to an order which it is suggested may have been made without jurisdiction, if, upon looking at the order one can see that that is the ground of the appeal, it seems to me that such a case has always been treated as one in which the court will entertain the objection to the order, though the persons making the objection is in contempt.”

20. My view therefore is that the issue of jurisdiction would seem to be the only caveat or exception to the general rule that a contemnor has no right of audience until he is either punished or purges the contempt. Indeed in the **Econet Wireless case** (Supra), the court proceeded to hear, the application challenging jurisdiction before that of contempt. How then do these principles apply to the present case?
21. It is not in dispute that the Plaintiffs have on 4th May, 2015 filed and served an application seeking to cite several persons in these proceedings for contempt of the court order made on 26th March, 2015 and severally extended. That per se raises a red flag as to the administration of justice. Contempt of court as admitted by the Defendants and the 4th Interested Party is a grave matter that must be dealt with forthwith once raised. However, the Defendants allege that the Preliminary Objection by the 1st Defendant and the motion by the 2nd Defendant raise an issue as to the jurisdiction of this court and should therefore be heard first. Of course Mr. Munge denied that any substantive issue of jurisdiction has been raised in those two matters. The Defendants and the 4th Interested Party also submitted that due to the delay in bringing the contempt application, between 21st April, 2015 and 4th May, 2015, there was no bona fides in that application.
22. I have looked at the 1st Defendant's Preliminary Objection. The grounds therefor are four; that the court lacks jurisdiction to award damages under the originating summons; that the matter is complex and thus not fit for determination by way of originating summons; that the originating summons is a collateral attack on the proceedings in Succession Cause No. 3102 of 2013 and finally that the originating summons is an abuse of the court process. Mr. Munge's answer to this was that the issues raised here are procedural in nature and are curable under the rules. Since I am not considering the said objection, I am unable to make any finding one way or the other on the basis of those submissions by counsel.
23. As regards the 2nd Defendant's motion of 2nd April, 2015, the same seeks the setting aside of the orders that are presently in force and said to have been disobeyed. The second prayer however, seeks the stay of these proceedings in their entirety on the alleged ground that the issues raised herein are similar to those presently pending in High Court Succession Cause No. 3102 of 2015. This latter prayer, in my view, is clearly a jurisdiction Issue. If it be true that the issues raised in these proceedings are one and the same as those raised elsewhere, is that not an issue of sub-judice? Is the principle of sub-judice under Section 6 of the Civil Procedure Act, though not cited in the application not a jurisdictional issue? I think it is. If that allegation is finally established, my view is that it may go to the root of the jurisdiction of this court to entertain this matter.
24. Apart from the issue of jurisdiction, I think that the issue of delay in bringing the contempt application is also significant. The parties were agreed that an issue of contempt is so grave that a court of law should down its tools the moment it is raised. Its gravity stems from the fact that it goes to the very basis of the existence of Court of Law as forums where subjects in a civilized Society sort out their differences. If the rule of law has to be safeguarded, court orders MUST as of necessity be obeyed. In this regard, a party who has sought the court's assistance and has benefited from the court's exercise of discretion or jurisdiction must be diligent and at the forefront in safeguarding that power and authority of the court once it has been exercised. It is for

this reason that once contempt has been discovered, it should be brought to the attention of the court at the earliest in order to reverse the alleged state of affairs.

25. In this case, the alleged contempt was committed on the 21st April, 2015. Immediately thereafter, on 22nd April, 2015, the Advocates for the Plaintiff's notified the concerned parties of the alleged contempt and put them on notice of the intention to pursue contempt proceedings in respect thereof. However, no action was taken until 30th April, 2015 when the application was drawn and filed on 4th May, 2015. Mr. Munge's explanation to the delay was that the Plaintiffs were trying to effect service upon the Defendants or contemnors who were evading service. I have seen the Affidavit of service of Patrick M. Mutuma, a process server, sworn on 30th April, 2015 which details the meticulous attempts made to effect service of the order. Without making any conclusions, the question that arises is whether the order was to be served ante or post contempt to have led to the delay in filing the application. On my part, I am not satisfied with reasons advanced as to why the motion dated 30th April, 2015 was not brought immediately after the alleged contempt was committed. A delay of 14 days in the circumstances of this case is not reasonable. In any event, it is clear that the application was not filed under a certificate of urgency probably implying the Plaintiff's take on its importance.
26. In view of the foregoing, I am satisfied that the issue of jurisdiction raised in the objection and motion dated 2nd April, 2015 should be heard first. There is no good reason advanced to interfere with the timetable set by the court on 17th April, 2015.
27. Accordingly, the application by the Plaintiffs is declined. The Preliminary Objection by the 1st Defendant dated 1st April, 2015 and the 2nd Defendant Motion dated 2nd April, 2015 should proceed for hearing as scheduled. The Plaintiff's motion dated 30th of April, 2015 should be served and be heard in the normal manner.

It is so ordered.

DATED and DELIVERED at Nairobi this 06th day of May, 2015

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A. MABEYA

JUDGE