



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 108 OF 2007

IN THE MATTER OF THE ESTATE OF HENRY KIREMA MBOROTHI(DECEASED)

FESTUS MURITHI HENRY..... APPLICANT

VERSUS

TABITHA MUGURE HENRY.....RESPONDENT

R U L I N G

1. The applicant FESTUS MURITHI HENRY through a Chamber Summon dated 26th June, 2014 brought under certificate of urgency sought that the respondent **Tabitha Mugure Henry** who is the petitioner be committed to civil jail for a period not exceeding six(6) months or for such other period as the Honourable Court may be pleased for disobeying and contravening the orders made by the Honourable Court on 29th January, 2014 in the alternative the Honourable Court be pleased to compel the petitioner/respondent obey the court's orders of 29th January, 2014. That the honourable court be pleased to give appropriate directions as to the hearing of the summons dated 3rd February, 2014 and that the court do grant any other order that may serve the interest of justice.
2. The application is premised on the grounds on the face of the application intera alia; that the respondent/petitioner sold portions of the cause land L.R. 998 Uringu comprised in the estate of the deceased in total violation of the status quo orders made by the Honourable Court on 29/1/204; that the petitioner/respondent has proceeded to illegally evict the applicant from the cause land L.R.998-Uringu in total contravention of the orders made by the Honourable court on 29/1/2014 and that the petitioner/respondent is out to unlawfully disinherit the applicant who is son to the deceased.
3. The applicant in his affidavit of support has deponed that on 29/1/2014 the Honourable court made orders requiring the parties herein and in particular the petitioner to maintain status quo pending determination of the cause; however the petitioner has refused to heed to those orders.
4. The applicant has deponed that the respondent has instead of obeying court's orders proceeded to sell and transfer portions of the family/cause land against the orders of the Honourable court to unsuspecting purchasers and annexed a copy of confirmation from the lands office marked "FMI".
5. The applicant has deponed that the petitioner has totally barred him from stepping on the cause land and is in the process of evicting him altogether from the family land. The applicant prayed

for the respondent to be committed to civil jail for disobeying the orders of the Honourable court and as a way of preserving the deceased's estate.

6. The court record show that on 29/1/2014 the respondent though served was absent when court issued the orders in issue ordering that status quo be maintained as had been pertaining as of the time of filing the application dated 10th December, 2013 and that no party should be evicted from occupation which the party has been occupying. The orders were to be served upon Nchiru Police station to ensure compliance.
7. The issue for consideration is whether the petitioner/respondent was served with the court's order dated 29/1/2014 and whether if the order was served Penal Notice had and whether the prayers sought in the applicant's application can be granted.
8. The applicant in his application has generally averred that the court's order was disobeyed by the petitioner/respondent and has not indicated whether the respondent was served with the court's order or not and if so when? The applicant has not filed affidavit of service of the court's order. The applicant has further not disclosed when the petitioner sold and transferred portions of family/cause land to the alleged unsuspecting purchasers. The annexure "FMI" is of no help as it is undated and shows plot No.917,763,414,609 having been curved from 998, and 998 subdivided into six portions yet it is not shown when and on what basis. This court will not allow speculative matters to be used in a serious matter as this one. The applicant is being speculative and evasive in this application as he has failed to state when the land was sold and to who; and when he was barred from stepping on the cause land.
9. I have carefully perused the court document and it has revealed that the applicant by his own affidavit dated 19th October 2012, that he had all the time been living at a rented house at Mwiteria market within Meru Town since the demolition of his house. It is therefore most unlikely that he was evicted from cause land since the issuance of the courts order dated 29th January, 2014.
10. In an application for contempt of court for the contemnor to be punished for contempt the applicant has to show that the extracted court's order had penal notice and the same was duly served upon the contemnor.
11. In the case of **OCHINO & ANOTHER V OKOMBO & 4 OTHERS CIVIL APPEAL NO. 36 of 1989** the learned judges of Court of Appeal observed as follows:-

"The power to deal with contempt of court is provided for under Section 5 of the Judicature Act(Cap.8) and Order 39 (2)(b) (now Order 40) of the Civil Procedure Rules. We have to follow the procedure and practice in England. As we read the law, the effect of the English provision is that as a general rule, no order of court requiring a person to do or to abstain from doing any act may be enforced (by committing him for contempt) unless a copy of the order has been served personally on the person required to do so or abstraub from doing the act in question. The copy of the order served must be endorsed with notice informing the person or whom the copy is served that if he disobeys the order, he is liable to the process of execution to compel him to obey it(emphasis is mine).

12. The applicant in the instant application has failed to demonstrate that the respondent was served with the courts order personally and disobeyed the same. The court cannot rely on unsubstantiated allegation of service to punish the alleged contemnor. There was no personal service of the court's order on the respondent.

13. Having come to the conclusion that there was no extracted order with penal notice that was served upon the respondent, I have no alternative but to dismiss the applicant's application dated 26th June, 2014 with no order as to costs.

DATED, SIGNED AND DELIVERED AT MERU THIS 8TH DAY OF OCTOBER, 2014.

J. A. MAKAU

JUDGE

DELIVERED IN OPEN COURT IN PRESENCE OF:

Mr. Ndubi for the applicant

N/A for the respondent

J. A. MAKAU

JUDGE