



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: GICHERU, KWACH & SHAH, J.J.A.)
CIVIL APPEAL NO. 198 OF 1998
BETWEEN**

**LOISE MARGARET WAWERUAPPELLANT
AND
STEPHEN NJUGUNA GITHURIRESPONDENT**

**(Appeal from the Ruling and Order of the High Court
of Kenya at Nairobi (Mr. Justice Aganyanya) dated 29th July, 1998
in
SUCCESSION CAUSE NO. 1458 OF 1995)**

(IN THE MATTER OF ESTATE OF HUMPHREY EDWARD KAMUYU)

JUDGMENT OF THE COURT

*Loise Margaret Waweru (the appellant) and Stephen Njuguna Githuri (the respondent) are the daughter and son respectively of the late Humphrey Edward Githuri Kamuyu (the deceased) who died on 15th September, 1994. After the death of the deceased intestate, the appellant applied for a limited grant ad **colligenda bona** to collect and get in and preserve the deceased=s estate pending the hearing of the petition for a full grant. Among the assets the deceased left is a property on Plot LR No. Nairobi/Block 82/1111 , Greenfield Estate, Nairobi (hereinafter called **Athe premises @**).*

The limited grant sought by the appellant was issued to her by O=Kubasu, J. on 7th July, 1995 in **Succession Cause No. 1458 of 1995**. In August 1995, the respondent applied to the superior court pursuant to rule 49 of the Succession Rules to have the limited grant made to the appellant set aside, and for an order that the appellant be ordered to account for all the rent she had collected for the premises since the death of the deceased in September, 1994. In his affidavit in support of the application dated 28th August, 1995, the respondent deponed, inter alia, that he was the second born son of the deceased and he had been authorised by his lawful heirs to apply for letters of administration of the deceased=s estate and he had filed **Succession Cause No. 1733 of 1995**; that the appellant is his youngest sister married to a man called Waweru and therefore not an heir to the deceased under the Kikuyu customary law; that the application by the appellant for a limited grant to collect the rent from the premises was made secretly and without consulting the deceased=s heirs; and that the appellant did not intend to collect the rent for the benefit of the estate but for her own personal benefit.

The appellant filed a replying affidavit in opposition to the respondent=s application. She deponed that prior to his death, the deceased was living with her due to ill health and it was she who took him to Nairobi Hospital. She expressed her willingness to furnish accounts but objected to the grant being set aside until the deceased=s medical bill at Nairobi Hospital had been settled. She maintained that she too was the deceased=s heir. This application was heard by Githinji, J. who revoked the limited grant issued to the appellant on 7th July, 1995 and ordered her to return to court for cancellation the original grant within 7 days. The Judge gave leave to anybody interested in a limited grant to apply in **Cause No. 17**

33/95. He also ordered the appellant to render a true and just account of rent she had collected within 45 days. This order was made on 20th December, 1995.

The appellant partially complied with the order of Githinji, J. in that she returned the limited grant to the court for cancellation, but she did not render an account of the rent as ordered by the learned Judge. On 10th February, 1998 the respondent applied for leave to apply for an order for the committal of the appellant for contempt of court on the ground that she had disobeyed the order of the court given on 20th December, 1995 in that she had failed to account for the rent she had collected from the premises. Having obtained leave, the respondent filed an application for the committal of the appellant for contempt on 15th May, 1998 by being sent to jail or by attachment and sale of her property to recover the money owed to the estate of the deceased by the appellant.

In her replying affidavit sworn on 20th July, 1998, the appellant denied being in contempt and deposed that she used the money she collected as rent for the premises to pay the deceased's medical bill at Nairobi Hospital. She also said that immediately after the limited grant in her favour was revoked, she returned the original grant for cancellation. The application was eventually heard and in his ruling given on 29th July, 1998, Aganyanya, J. found the appellant guilty of contempt and fined her Shs 80,000/- and in default to be sent to prison for 3 months.

Peter Wainaina Mwaura, a court process server, in his affidavit of service sworn on 18th May, 1998 stated that on 24th July, 1998 he served a copy of the order and a penal notice on the appellant by living it with a young man who came to the gate when he went to the appellant's house at Sunrise Estate, Nairobi. According to Mwaura, the young man introduced himself to him as the appellant's houseboy and told him that he was authorised by the appellant to receive any message on her behalf. The application for committal was not served on the appellant herself but on Gichuki Kingara & Company Advocates, the Advocates on record for the appellant. Although the issue of service of the order and penal notice was not taken before the Judge, it has been raised before us in this appeal and we have to deal with it because the validity of the proceedings for contempt before the learned Judge depends on it.

There is no evidence on record to prove that the person who received the documents from Wainaina claiming to be her servant was duly authorised by the appellant to accept service on her behalf. But whatever may be the position, service on the houseboy did not constitute personal service on the appellant. It was held in the case of *Mander v Falcke*, [1891]3 Ch.488 that the notice of motion must be served personally on the respondent (even if he has an address for service) unless the court dispenses with such service on an ex parte application or at the hearing of the motion. The attendance of the contemnor at the hearing does not of itself waive the necessity for service. If the order is to refrain from doing an act or requires a positive act to be done, evidence must be led to prove service on the respondent of the order alleged to have been disobeyed along with a penal notice.

In this case it is clear from the evidence that there was no personal service on the appellant, and in the absence of this she could not be committed for contempt of court. Secondly, the appellant did not disobey the order in its entirety. She returned the limited grant to court for cancellation immediately after Githinji, J. made the order of revocation. She also seems to have misapprehended that part of the order which required her to account for the rent she had collected. She understood this to be an order requiring her to pay back the money.

For all these reasons, this appeal succeeds and is allowed.

The Judge's order of committal for contempt and sentence are set aside and substituted by an order dismissing the respondent's application dated 14th May, 1998 with costs. The appellant will also have the costs of this appeal.

Dated and delivered at Nairobi this 21st day of May, 1999.

J. E. GICHERU

JUDGE OF APPEAL

R. O. KWACH

JUDGE OF APPEAL

A. B. SHAH

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR