

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARSEN
MISCELLANEOUS CIVIL CASE NO.E003 OF 2023

BATULI OMARAPPLICANT

VERSUS

MAKADARA

OMARI

.....RESPONDENT

RULING

1. The Applicant herein has filed an application dated 15th January 2024 seeking for orders that the Respondent herein be committed to jail for contempt of court for failure to comply with the orders issued by the Kadhi`s court at Hola in Succession Cause No.1 of 2016 issued on 26th December 2016.
2. The application is based on grounds stated on the face of the application and supported by the affidavit of the applicant.
3. The case for the Applicant is that the Respondent is her brother. That their father died in 2009 and was survived by Applicant, the Respondent and 3 other sisters. He left behind several shambas. That they filed a succession cause at Kadhi`s court at Hola. That the Honourable Kadhi on the 16th July 2016 delivered a judgment distributing the estate of the deceased among the five siblings of the deceased in accordance with Islamic law. The court ruled that the Applicant and the Respondent divide the land of

the estate in the ratio of 1:2 respectively. That the Respondent was served with the order and failed to comply with it.

4. The Applicant contends that arising from the court's judgment she selected and begun cultivating a parcel of land that reflected her rightful portion of the estate but the Respondent kicked her out of the land and has barred her from accessing any part of the estate. That the action has denied her any benefit of the judgment and disregarded her inheritance rights.
5. The application was opposed by the Respondent vide his replying affidavit sworn on 13th November 2024 in which he avers that even though the judgment of the court outlined inheritance ratios, it did not specifically allocate or physically distribute any portion of land to any party. That the responsibility to allocate and distribute the land lies with the clan elders as per their community customs. That the Applicant's remedy lies with presenting the Kadhi's court judgment to clan elders to allocate her the land in line with the ratios stated in the judgment.
6. The Respondent averred that the contempt proceedings are premature as no formal decree of the judgment has been obtained and no execution proceedings have commenced. That the contempt proceedings are an abuse of the court process.
7. The Application was canvassed by way of written submissions of the counsel for the Applicant and those of the Respondent.

Applicant`s submissions

8. The Applicant submitted that the Respondent has failed to take any steps to implement the court`s judgment but has instead sought to maintain full control over the estate to the exclusion of the Applicant and in total disregard of the court order. That this shows that the Respondent has acted in clear disobedience of the court order.

9. It was submitted that section 5 of the Judicature Act empowers the High Court to punish for contempt. That Kenyan courts have consistently held that failure to comply with unambiguous court orders amount to contempt. The Applicant cited the case of **Republic v County Chief Officer, Finance & Economic Planning, Nairobi County Government & 2 others Ex parte Council of Governors (2019) eKLR** where the court held that:

Court orders are not made in vain...Once a court order is made in a suit, the same is valid unless set aside on review or on appeal.

10. The Applicant also relied on the case of **Wildlife Lodges Ltd v County Government of Narok & another (2005) 2 EA** where it was stressed that:

It is the plain and unqualified obligation of every person against whom an order is made to obey it until it is discharged.... Disobedience results in contempt.

11. It was submitted that the Respondent has willfully disobeyed a valid and binding court judgment and has

prevented the implementation of the judgment. The Applicant urged the court to:

- 1) Find the Respondent in contempt of court for disobedience of Kadhi`s judgment.
- 2) Impose appropriate sanction, including committal or fine, to compel compliance.
- 3) Order immediate restoration of the Applicant`s parcel of land as per the rightful share.
- 4) Award costs to the Applicant.

Respondent`s submissions

12. The Respondent on his part submitted that the application is devoid of merit, misconceived in law and based on misrepresentation of facts. That the Kadhi`s court did not appoint an administrator nor was a formal grant of letters of administration confirmed under the Law of Succession Act. That no party in the matter has obtained grant of letters of administration in respect of the estate of the deceased and as such the Respondent has no legal authority to distribute the estate of the deceased. That to do so would amount to intermeddling with the estate of the deceased contrary to section 45 of the Law of Succession Act. The Respondent in this respect cited the case of **Veronica Njoki wakagoto (Deceased) (2013) eKLR.**

13. It was submitted that the Respondent cannot be said to be in contempt of an order of which he has no legal obligation or capacity to implement as he is not administrator of the deceased`s estate. It was submitted

that the judgment of the Kadhi`s court gave the obligation to implement the judgment to the family and clan members.

14. It was submitted that the Applicant as a beneficiary is also entitled to apply for letters of administration so as to administer and distribute the estate of the deceased. That in view of the fact that no formal distribution has taken place the occupation of the land by the Applicant was unlawful.

15. The Respondent submitted that a party cannot resort to contempt to enforce a judgment that a party has not tried to execute in the normal channels. The Respondent in this respect relied on the case of **Republic v Principal Secretary, Ministry of Defence, (2021) eKLR** where it was held that contempt should not be used where a party has failed to execute or pursue enforcement of valid a judgment.

16. It was submitted that the ingredients of willful contempt are as was stated in **In the matter of Wanjigi v Inspector General of Police & 2 others (Petition E396 of 2024 (2025) KEHC 2755 (KLR) (Constitution and Human Rights (20 February 2025) (Ruling)** where the court held that:

Under these common law principles, to establish a case for contempt of court, the following elements must be proven:

a. Existence of a Clear and Unambiguous Court Order - the order alleged to have been disobeyed must be precise and unequivocal.

b. Service of the Order: The alleged contemnor must have been served with the order or have actual knowledge of it.

c. Willful Disobedience: There must be intentional and deliberate non-compliance with the court order

17. It was submitted that the legal threshold for contempt of court was stated in **Mberia & 3 others v County Secretary, County Secretary of Meru & 2 others 2023 KEELRC 2310 (KLR)** where it was held that:

The power to punish for contempt of court ought to be exercised carefully because of its potential to cost a person his/her liberty. Consequently, certain thresholds have been established by courts to give guidance while dealing with contempt of court proceeding. They include: -

a. Proof of personal service or knowledge of the decision, decree or order of the court on the part of the contemnor;

b. Proof of violation of the decision, decree or order of the court by the contemnor; and,

c. Proof that the violation of the decision, decree or order was deliberate.

Analysis and determination

18. I have considered the grounds in support of the application, the grounds in opposition thereto and the submissions by the respective counsels for the parties. The issue for determination is whether the application meets the threshold for contempt of court.

19. The purpose of the law of contempt is to maintain the rule of law and dignity of the court . In the case of **Econet Wireless Kenya Limited vs Minister for Information and Communication of Kenya Authority [2005] eLR**, Ibrahim J. (as he then was) stated as follows: -

“It is essential for the maintenance of the rule of law and order that the authority and the dignity of our courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against whom an order is made by court of competent jurisdiction, to obey it unless and until the order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by the order believes it to be irregular or void.

20. The Applicant in this matter is seeking to have the Respondent cited for contempt of court for failing to comply with the order issued by the Kadhi`s court at Hola in a judgment delivered on 17th July 2016. According to the Applicant the Respondent was required to distribute the estate among the beneficiaries and he has failed to comply with the order.
21. The Respondent on the other hand contends that there was no order for him to distribute the estate nor has he been appointed an administrator of the estate of the deceased for that purpose.
22. The threshold for contempt has been set out in the cases cited above. In **Tetu Farmers Co. Ltd v Joseph Nderitu Wanjohi (2016) eKLR** the Court set out the elements of civil contempt of court as follows: -
- i. order to be clear,**
 - ii. defendant to have knowledge of the order,**
 - iii. defendant acted in breach of the order and**
 - iv. the conduct was deliberate.**
22. The Respondent admits that he is aware of the court order but denies that he is in breach of the same.
23. Under Kenyan law only a personal representative appointed by the court has power to distribute the estate of a deceased who died intestate. A grant of letters of administration intestate has to be issued to enable the

person to administer and distribute the state. To interfere with the property without such letters amounts to intermeddling with the property of the deceased which is a criminal offence punishable under section 45 of the Law of Succession Act.

24. For a person to be held in contempt of a court order, it must be shown that the order the person is accused of dishonoring is clear and the terms are clearly stipulated. I have perused the judgment of the Honorable Kadhi. There is nowhere in the judgment where the Kadhi made orders for the Respondent to distribute the estate among the beneficiaries of the deceased. The Applicant has not led any evidence that the Kadhi's court has issued a grant of letters of administration to the Respondent requiring him to distribute the estate of the deceased and has failed to comply with the order.

25. It is trite that the standard of proof in contempt proceedings is higher than proof on a balance of probabilities. In **Gatharia K. Mutikika - vs Baharini Farm Ltd [1985] KLR 227** it was held that-

“A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be proved satisfactorily..... it must be higher than proof on a balance of probabilities, almost but not exactly, beyond reasonable doubt....

However, the guilt has to be proved with such strictness of proof as is consistent with the

gravity of the charge... Recourse ought not to be heard to process contempt of court in aid of a civil remedy where there is any other method of doing justice. The jurisdiction of committing for contempt being practically arbitrary and unlimited, should be most jealously and carefully watched and exercised with the greatest reluctance and the greatest anxiety on the part of the judge to see whether there is no other mode which is not open to the objection of arbitrariness and which can be brought to bear upon the subject..... applying the test that the standard of proof should be consistent with the gravity of the alleged contempt... it is competent for the court where contempt is alleged to or has been committed, and or an application to commit, to take the lenient course of granting an injunction instead of making an order for committal or sequestration, whether the offender is a party to the proceedings or not.”

26. In this application the Applicant has only made an averment that the Respondent has not complied with the court order and has not provided the evidence to prove the averment. There was no evidence that the Respondent has breached any court order. The application has not met the standard of proof required in contempt of court

proceeding which is on a standard higher than the usual standard of balance of probabilities.

27. In view of the foregoing, I do not find any merit in the application and the same is dismissed. Since the matter involves siblings, I order each of the parties to meet his/her own costs.

Delivered, dated and signed at GARSEN this 5th day of March, 2026.

J. N. NJAGI

JUDGE

In the presence of:

Miss Hajila for Applicant

Parties: - Applicant present virtually at her advocates offices

Respondent absent

Court Assistant - Rahma