

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
IN THE MATTER OF THE ESTATE OF KIMUTAI ARAP KOGO
SUCCESSION CAUSE NO. 13 OF 1999

SUSAN JEROTICH MUTAI.....1ST APPLICANT
KENNETH KIPYEGO BORE.....2ND APPLICANT
AND
JOSPHINA KOGO.....1ST RESPONDENT
EDITH CHEPCHIRCHIR.....2ND RESPONDENT

RULING

1. Before me is an Application seeking a finding of contempt of Court arising from alleged disobedience of a consent order adopted in this matter. To appreciate the context of the Application, I will recount the background of this Cause.

2. I have not come across the full Petition filed in this matter but from what I gather, the deceased, **Kimutai Arap Kogo**, died on 12/10/1993 at the age of 86 years old. By the Petition filed on 22/01/1999 through **Messrs Birech & Co. Advocates**, the Petitioners, **Josephine Kogo** and **Januarius Kipleting Mutai**, describing themselves as widow and son, respectively, of the deceased, jointly applied for a Grant of Letters of Administration to manage the estate of the deceased. I gather that the deceased left behind two widows, the said **Josephine Kogo** (1st Petitioner) as the 2nd wife, and the late **Paulina Kogo** who died in 1982, the mother to the said **Januarius Kipleting Mutai** (2nd Petitioner), as the 1st wife. The Petitioners listed a total of 10 family members (including themselves) as survivors of the estate, and 5 parcels of land and 4 bank accounts, as the assets comprising the estate. The Grant of Letters of Administration was then issued in favour of the Petitioners. There is however in the Court file, one Grant indicated to have been issued on 1/02/1999 and another indicated to have been issued on 24/09/1999. It is not clear why there seems to be two separate Grants.

3. It is however evident that the Grant was then confirmed on 2/03/2001 although the confirmation was to the effect that all the properties/assets were to be held by the two Petitioners/Administrators as trustees for the rest of the beneficiaries. There is also indication that the 2nd Petitioner/Administrator, **Januarius Mutai**, died subsequently on 30/05/2020. Further, the matter proceeded to Court Annexed Mediation before **CS Dennis Kizito Ng'wono Magare** (now Honourable Judge of the High Court), which resulted into a Mediation Settlement Agreement which the Court adopted on 28/01/2021, on which date the Court also issued an Amended Grant of Letters of Administration appointing, in addition to

the said **Josephina Kogo** (2nd wife), 3 more co-Administrators, namely, **Susan Jerotich Mutai** and **Kenneth Kipyego Bore** (from the 1st house), and **Edith Chepchirchir** (from the 2nd house). I however note that unlike in the Petition, the aggregate number of survivors was now indicated to be 15, and the parcels of land to be 9. The bank accounts however remained 4, as before. The Certificate of Confirmation of Grant was then rectified on 7/02/2022 in accordance with the terms of the Settlement Agreement.

4. About 1 ½ years later, the two new Administrators appointed from the 1st house, namely, **Susan Jerotich Mutai** and **Kenneth Kipyego Bore**, the Applicants herein, by the Application dated 19/06/2023 filed through **Messrs B.J. Sawe & Co. Advocates**, sought orders that the 1st Administrator, **Josephina Kogo** (2nd wife), who they claimed to have possession of the estate property documents, be compelled to release and/or execute such documents for purposes of transmission of the estate. The Applicants claimed that more than a year since the Mediation Settlement Agreement was adopted by the Court and a Rectified Grant issued, **Josephina Kogo** had refused to initiate the process of transmission of the estate. In response, **Josephina Kogo**, now represented by **Messrs Rotich Nyongio & Co. Advocates**, explained that it had not been able to complete transmission owing to, *inter alia*, existence of a Court case at the **Environmental and Land Court (ELC)**, involving some estate property, and also absence of ownership documents for some of the properties.
5. Fortunately, the parties recorded the consent dated 4/11/2024 compromising the Application, which consent the Court then adopted on 10/08/2025. By the consent, **Josephina Kogo** (1st Respondent) was to; **(i)** within 10 days, release to the 1st Applicant, original title documents to the properties, **Nandi/Songolei/159** and **Nandi/Songolei/161**, together with transmission forms, **(ii)** within 30 days, release share certificates to the Applicants to facilitate transmission of 50% of the shares to the 1st Applicant as trustee of the estate of a deceased beneficiary, and **(iii)**, the parties to, within 10 days, seek confirmation from the **Kenya Commercial Bank**, whether the account held therein is in existence and holds funds, and if so, 50% of the funds to, within 10 days, be released to the 1st Applicant. Upon compliance with the above 3 terms of the consent, the 1st Applicant was to withdraw from the administration of the estate of the deceased.
6. Other terms of the consent were that the 1st Applicant was to, within 30 days of receipt of the title document, commence sub-division of the parcel of land **Nandi/Songoliet/161** and to facilitate procurement of a separate parcel of land in favour of one beneficiary, namely, **Josephine Kalondu Kinyingi**. Other terms were that the Respondents were to procure and

facilitate sub-division of the parcel of land, **L.R. No. 11218/1(Asururiet)** to the beneficiaries, and that all the parties, when required or called upon to do so, were to execute such documents of forms required for sub-division and transmission of the properties.

7. The Applicants, not satisfied that their co-Administrators, **Josephina Kogo** and **Kenneth Kipyego Bore** (1st and 2nd Respondents, respectively), were taking steps to comply with the consent, have now through their Advocates, **Messrs B.J. Sawe & Co.**, moved the Court by way of the Application dated 3/06/2025, seeking orders that the 1st and 2nd Respondents be cited for contempt of Court for wilfully disobeying the consent, and be committed to civil jail. In the alternative, the Applicants have prayed that the Respondents be ordered to pay a fine. Another prayer is that the Respondents be ordered to comply with the consent order within 7 days.
8. In the Affidavit in support of the Application, the 1st Applicant deponed that the Respondents have not complied with any of the terms of the consent order and, despite multiple attempts to engage with the Respondents, they have consistently ignored all communication and have shown no intention of complying. She deponed that the Respondents were duly served with the final demand and notice of intention to institute contempt proceedings on 28/04/2025, and that the Respondents' actions constitute deliberate and wilful disobedience of a lawful Court order, amounting to contempt of Court. She urged that as a result of the Respondents' non-compliance, the Applicants have been unable to receive their rightful share of the estate confirmed in the Rectified Certificate of Confirmation of Grant, resulting in financial hardship and emotional distress. She contended that from the onset, the 1st Respondent, as the custodian of the title deeds, has not been willing to release the same to the beneficiaries, and has engaged them in a futile and frustrating back and forth exercise, and that the continued defiance of the Court order has also affected other beneficiaries of the estate, denying them access to their inheritance and causing unnecessary delays in finalization of the succession process. She also deponed that the signatures of the Respondents on the sub-division documents have been duly requested in line with the orders herein, in vain, and that this Court has inherent powers to enforce its orders by punishing for contempt.
9. The 1st Respondent, in response, filed the Replying Affidavit she swore on 26/06/2025 filed through **Messrs Rotich Nyongio & Co.**, in which she denied disobeying the consent order, and deponed that at the time of entering into the consent, there was vital information that was not within the reach of beneficiaries. She deponed that, for instance, in respect to the parcel of land **L.R. 9336/2 (Kipkabus)**, there is a sum of Kshs 1,527,274/- which must be

paid as land rent, that this being a liability to the estate, before they proceed, it is only fair that all beneficiaries, including the Applicants, first contribute to payment of existing liabilities before she gets the title. She deponed that as the only widow to the deceased, and an Administrator, she has a duty to ensure all beneficiaries are satisfied, and that in this case, the said **Josephine Kalondu Kinyingi** referred to in the Application, is not satisfied with the 5 acres given to her, and that the beneficiaries were trying to resolve her grievances out of Court, only to receive the instant Application intended to coerce them to release the documents at the expense of the said **Josephine Kalondu Kinyingi's** interest. She contended further that the Court Order arising from the consent was never extracted, and as such, it has never been served upon her or her co-Respondent. According to her therefore, the Application is premature.

10. The 1st Applicant then filed the Supplementary Affidavit sworn 1/07/2025 in which she urged that contrary to the 1st Respondent's assertion that the consent order "was never extracted", she stated that the same was formally extracted and served upon both Respondents, together with a letter requiring compliance. She exhibited a print-out of the email dated 25/05/2025 to that effect, and also referred to the Affidavit of Service filed on 4/6/2025, and also an email said to have been sent on 10/01/2025 as a follow-up, demonstrating steps the Applicants had taken towards sub-division of the parcel of land **Nandi/Songoliet/161**, to facilitate hiving-off of the portion due to **Josephine Kalondu Kinyingi**. She urged further that a consent, besides being a Court order upon adoption, is like a contract with obligations which the parties have agreed to meet. According to her, it is clear that the Respondents had no intention of honouring their obligations under the consent, and asserted that it is important for this Court to note that the consent was in settlement of an Application filed requiring the Administrators from the 1st house to release withholding titles and documents which were supposed to be handed or transferred to the 2nd house after the Mediation for distribution of the estate. She urged that the property **L.R 9336/2 (Kipkabus)** and its alleged land rent arrears of Kshs 1,527,274/- are nowhere mentioned or addressed within the consent and as per the distribution of the estate, the 1st house has no claim or right over the property, and that introducing issues relating to **L.R 9336/2 (Kipkabus)** is a diversionary tactic aimed at creating irrelevant excuses for non-compliance with the specific and unrelated terms of the consent. She contended further that the Respondents have continuously resided and farmed on the property for several decades and the 1st Respondent has been an Administrator of the deceased's estate for over 20 years, hence the rates and other outgoings were always within her knowledge. She restated that the consent specifically provides for **Josephine Kalondu Kinyingi's** interest by obligating the 1st Applicant to

facilitate procurement of a separate 5-acre portion of the parcel of land, **Nandi/Songoliet/161** in **Josephine Kalondu Kinyingi's** favour.

11. The parties then filed Written Submissions. The Applicant's Submissions is dated 4/07/2025, while the Respondents' is dated 18/07/2025. The parties, apart from perhaps citing authorities, basically repeated and reiterated the same matters already raised and addressed in their respective Affidavits. I therefore do not deem it necessary to again recount the same.

Determination

12. The one broad issue that this Court is called upon to determine in this matter is ***“whether the Respondents should be found to be in contempt of Court for allegedly disobeying the parties' consent adopted by the Court on 19/12/2024”***

13. ***“Contempt of Court”*** is described as that conduct or action that defies or disrespects authority of the Court. **Black's Law Dictionary 9th Edition** defines ***“contempt”*** as follows:

“The act or state of despising; the conduct of being despised. Conduct that defies the authority or dignity of a court or legislature. Because such conduct interferes with the administration of justice.

14. That an order of the Court must be obeyed as a matter of course cannot be in doubt, and this has been restated in a long line of case law. An example is the case of **Refrigeration and Kitchen Utensils Ltd -vs- Gulabchand Popatlal Shah & Another, Civil Application No. 39 of 1990**, in which the Court of Appeal stated that:

“... It is essential for the maintenance of the rule of law and good order that the authority and dignity of our courts is upheld at all times.”

15. The Court of Appeal, also in the case of **Shimmers Plaza Limited v National Bank of Kenya Limited (Civil Appeal 33 of 2012) [2015] KECA 945 (KLR) (Civ) (18 February 2015) (Ruling)**, guided as follows:

“We reiterate here that court orders must be obeyed. Parties against whom such orders are made cannot be allowed to trash them with impunity. Obedience of Court orders is not optional, rather, it is mandatory and a person does not choose whether to obey a court order or not. For as Theodore Roosevelt, the 26th President of the United States of America once said:-

“No man is above the law and no man is below it; nor do we ask any man’s permission to obey it. Obedience to the law is demanded as a right; not as a favour”.

The courts should not fold their hands in helplessness and watch as their orders are disobeyed with impunity left, right and centre. This would amount to abdication of our sacrosanct duty bestowed on us by the Constitution. The dignity, and authority of the Court must be protected, and that is why those who flagrantly disobey them must be punished, lest they lead us all to a state of anarchy. We think we have said enough to send this important message across.”

16. Contempt proceedings are quasi-criminal in nature as the liberty of a person is at stake. The standard is therefore higher than the one in civil proceedings where proof is on a balance of probabilities, but not beyond reasonable doubt as is required in criminal proceedings. This principle was reiterated by the Court of Appeal in the case **Gatharia K. Mutikika –v- Baharini Farm Ltd (1985) KLR 227** in which the Court stated as follows:

“We agree with Mr. Khaminwa’s submissions in this respect. In our view the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt. Winn LJ on page 1064 was in our view right in saying that the guilt has to be proved:

“with such strictness of proof ... as is consistent with the gravity of the charge ...”

The principle propounded in *Re Maria Annie Davies* [1889] 21 QBD 236, and 239, that:

“Recourse ought not to be had to process of contempt in aid of a civil remedy where there is any other method of doing justice. The observations of the later Master of the Rolls in the case of Re Clement seem much in point: ‘It seems to me that this jurisdiction of committing for contempt being practically arbitrary and unlimited, should be most jealously and carefully watched, and exercised, if I may say so, with the greatest reluctance and the greatest anxiety on the part of judges to see whether there is not other mode which is not open to the objection of arbitrariness, and which can be brought to bear upon the subject. I say that a judge should be most careful to see that the cause cannot be mode of dealing with persons brought before him on accusations of contempt should be adopted. I have myself had on many occasions to consider this jurisdiction, and I have always thought that, necessary though it be, it is necessary only in the sense in which extreme measures

are sometimes necessary to preserve men's rights, that is, if no other pertinent remedy can be found. Probably that will be discovered after consideration to be the true measure of the exercise of the jurisdiction”

17. Regarding knowledge of the existence of a Court order, for purposes of an invitation to make a finding of contempt, such knowledge is a question of fact and for a person to be found guilty of contempt, he must be aware of the terms of the order in issue. He must therefore know what the order required him to do, or not to do, but still wilfully and deliberately disobeyed it. This position was reiterated in the case of **Katsuri Limited v Kapurchand Depor Shah [2016] eKLR**, citing **Kristen Carla Burchell v Barry Grant Burchell (Eastern Cape Division Case No 364 of 2005)**, in the following terms:

“in order for an applicant to succeed in civil contempt proceedings, the applicant has to prove (i) the terms of the order, knowledge of the terms by the respondent, failure by the respondent to comply with the terms of the order.”

18. The context of the consent in issue herein is that it was entered as a compromise for the Applicants' earlier Application dated 19/06/2023, by which they had sought orders that the Respondents be compelled to release titles and documents which were supposed to be released to the 2nd house after the Mediation to enable transmission of the estate to be undertaken. The reason advanced by the 1st Respondent for failing to comply with the consent is that she subsequently discovered “vital information” that was not within the beneficiaries' knowledge at the time of recording the consent, to the effect that there was unpaid land rent in respect to the parcel of land known as **L.R. 9336/2 Kipkabus** amounting to Kshs 1,527,274/-. According to her, this amount is a liability to the estate and, as such, each beneficiary should contribute towards its settlement before the consent is complied with. I find this explanation to be unconvincing since the consent order nowhere mentions the above parcel of land as one of those to be acted upon in the consent. As such, the said parcel of land does not form any substratum of the consent. I am therefore at a loss as to how the alleged arrears in land rent has any bearing on compliance with the consent order.

19. The 1st Respondent also claims that the consent order was never extracted or served upon the Respondents. It is now settled law that knowledge of a Court order supersedes the need for personal service whether accompanied by a penal notice or otherwise. This position was also authoritatively affirmed by the Court of Appeal in the case of **Shimmers Plaza Limited vs National Bank of Kenya Limited (Civil Appeal No. 33 of 2012) [2015] KECA 945 (KLR) (Civ) (18 February 2015) (Ruling)**, as follows:

“This Court has slowly and gradually moved from the position that service of the order along with the penal notice must be personally served on a person before contempt can be proved. . . .

Kenya's growing jurisprudence right from the High court has reiterated that knowledge of a court order suffices to prove service and dispense with personal service for the purposes of contempt proceedings. For instance, Lenaola J in the case of Basil Criticos Vs Attorney General and 8 Others [2012] eKLR pronounced himself as follows:- “...the law has changed and as it stands today knowledge supersedes personal service where a party clearly acts and shows that he had knowledge of a Court Order; the strict requirement that personal service must be proved is rendered unnecessary”

20. In this case, the Applicants have convincingly proved that service upon the Respondents was effected, and there is an Affidavit of Service to that effect sworn by one **Kipyegon David Kibinei**.

21. However, even assuming that the orders was never served, the Respondents cannot seriously rely on the defence of absence of service since the consent was signed by their own Advocates who were properly on record for them, and who even attended Court and participated in confirming and presenting the consent to the Court for adoption. In fact, the same law firm that signed the consent on behalf of the Respondents is the same one that has now drawn and filed the Replying Affidavit sworn herein by the 1st Respondent. It is therefore a blatant mockery of this Court’s intelligence for the Respondents to now feign ignorance of the consent.

22. Having found as above, it is clear that the Respondents have no justification for failing to comply with the consent order. The terms of the order were clear and unequivocal and the Respondents have expressly admitted that they have not complied with the same. Since the consent is dated 4/11/2024, it is now almost 1 ½ years later yet it remains ignored by the Respondents. The Respondents must be reminded that a consent, once adopted by the Court, becomes a binding judicial order and must be honoured. This was well put in the case of **Frank Phipps & Pearl Phipps vs Harold Morrison SCCA 86 of 2008 Harris JA** stated: **“As a general rule, an order obtained by the consent of the parties is binding.”**

23. It is sad that despite this matter being in Court for the last 27 years, and despite distribution of the estate having been long agreed upon, and the Certificate of Confirmation of Grant

long issued by the Court, transmission of the estate is yet to be undertaken to date, simply because the Respondents are refusing to set in motion the steps agreed upon in the consent the subject of this Application.

24. I therefore find that the Respondents have wilfully disobeyed the order of this Court given on 10/08/2025, arising from the consent order dated 4/11/2024, which they voluntarily entered into. However, noting that this is family matter, and considering the advance age of the 1st Respondent and her hallowed position as the remaining family matriarch, by which position she is obviously entitled to some level of respect from the rest of the family members, punishing the Respondents for contempt of Court at this first resort by fining or jailing them, would not be appropriate in the circumstances as it may just exacerbate the already tense situation within the family. I will therefore give the Respondents a last chance to comply.

Final Orders

25. In light of the findings made above, I order as follows:

- i) The Notice of Motion dated 3/06/2025 is allowed, but at this stage, only in terms of prayer 5 thereof, for now.
- ii) Accordingly, the 1st and 2nd Respondents are hereby ordered to, within a period of **fourteen (14) days from the date hereof**, comply with the consent dated 4/11/2024 recorded by the parties in this Cause, and adopted by the Court by way of the order given on 10/08/2025, within the timelines agreed upon in the consent.
- iii) In default, the Court shall be at liberty to formally find the 1st and 2nd Respondents to be in contempt of Court and consequently, to mete out appropriate penalties and/or punishment against the 1st and 2nd Respondents, as sought in prayers 2, 3 and 4 of the Application.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 24TH DAY OF APRIL 2026

.....
WANANDA JOHN R. ANURO
JUDGE

Delivered in the presence of:

Mocha h/b for Sawe for the Applicant

Eldoret High Succession Cause No. 13 of 1999

Rotich Nyongio for the Respondent

Ms. Wambani h/b Kigen for the 4th Objector

Court Assistant: Brian Kimathi