



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

(CORAM: A.K. NDUNG’U)

SUCCESSION CAUSE NO. 211 OF 1999

IN THE MATTER OF THE ESTATE OF OMWENGA MOGAKA (DECEASED)

AND

IN THE MATTER OF REVOCATION OF GRANT OF LETTERS OF ADMINISTRATION

AND

IN THE MATTER OF SECTION 76 OF THE LAW OF SUCCESSION ACT BETWEEN

FRANCIS ONGERI ONDIEKI alias

FRANCIS ONGERI OMWENGA PETITIONER/APPLICANT

VERSUS

SABINA MORAA SWANYA

MILKA KWAMBOKA SITEKI

ANNAH KEMUNTO KIBAYEOBJECTORS/ RESPONDENTS

RULING

1. This ruling disposes the petitioner/applicant’s Summons dated 2nd October 2019 by which he sought the following orders: -

a. Spent

b. That this honourable court be pleased to set aside the consent order recorded in court on 31/08/2016 with resultant revocation of the grant obtained thereof and the objector’s application dated 20/06/2012 be set down for hearing in accordance with the law; and

c. That the Honorable court to issue directions that will help in administration of the estate of the late Omwenga Mogaka in accordance with the law.

2. The application is premised on **Section 47** and **76** of the **Law of Succession Act** and is supported by the grounds set out in the body of the application and the applicant’s affidavit sworn on 2nd October 2019.

3. The applicant claimed that based on the letters of administration he obtained in his late father’s estate, his father’s land parcel number Central Kitutu/Mwabundusi/ 1273 was registered in his name to hold in trust for himself and his two brothers. His step sisters later filed Summons for Revocation of Grant dated 20th June 2012 which he opposed. He claimed that despite his opposition to the application, his advocate who was then on record, entered a consent disposing the Summons without his approval. He complained that he was not informed that he had been appointed a co-administrator with his step sister Sabina Moraa, nor was he given a chance to participate in the confirmation of the grant and distribution of the estate in contravention of the law.

4. The applicant claimed that he was warned not to oppose the consent and had to go into hiding when his life was threatened. He averred that after his late wife filed a suit in May 2017 to stop one of the purchasers from interfering with the land she was violently killed in June

2017. Investigations into the killing of his wife led to the arrest and charging of suspects in Kisii Criminal Case No. 27 of 2018. He informed the court that he had been living under witness protection and he only got to learn about the consent order when his current advocate on record perused the court file and advised him on the matter.

5. The application was opposed vide the respondents' Statement of grounds of opposition dated 24th January 2020 which contended that this court is devoid of jurisdiction to adjudicate upon the summons and had become *functus officio* as the Summons had been adjudicated upon by a court of competent jurisdiction; second, that the Summons offended the provisions of **Order 9 Rule 9** of the **Civil Procedure Rules**; third, that the summons did not disclose any reasonable cause of action against the respondent; fourth, that the summons amounted to an abuse of due process of court; fifth, that the summons had been filed after an inordinate delay and lastly that the applicant is non-suited.

6. Alongside the grounds of opposition, M/s Sabina Morara Swanya also swore a replying affidavit on 22nd January 2020 on behalf of the respondents in response to the application. She started off by deposing that the deceased had married two wives who had passed away. The first wife, Nyangate Manyara was blessed with three daughters who were the respondents in the matter and the second wife had three sons namely Simon Moi Omwenga, Justus Obiri Omwenga and the applicant herein.

7. She stated that when the applicant sought letters of administration, he failed to disclose the full particulars and identities of the daughters of the first house. He was also issued with the grant as a sole administrator yet some of the beneficiaries were minors, contrary to the law. The applicant was also accused of alienating, selling and disposing of the Estate of the Deceased before the grant was confirmed and without obtaining the consent of the rest of the beneficiaries of the estate.

8. M/s Sabina averred that upon obtaining the grant, the applicant proceeded to transfer to himself LR No. Central Kitutu/ Mwabundusi/875 which belonged, to the deceased. He then caused Parcel No. 875 to be subdivided into three portions namely LR No. Central Kitutu/ Mwabundusi/1182, 1183 and 1184. He transferred Parcels No. 1183 and 1184 in favour of third parties and retained Parcel No. 1182 which he further subdivided into LR No. Central Kitutu/ Mwabundusi/ 1273 and 1274. The applicant then swapped Parcel No. 1274 with LR No. Central Kitutu/ Mwabundusi/1264. LR No. Central Kitutu/ Mwabundusi/1273 was the only parcel of land that formed the remnant of the estate of the deceased.

9. The respondent maintained that the Consent Order in respect of the summons for revocation of the grant issued to the applicant was entered into in the presence of the applicant who agreed to its contents. She deposed that the applicant had not demonstrated how the consent was illegal and the application had been made with inordinate delay which had not been explained.

10. In brief rejoinder, the applicant in a further affidavit sworn on 23rd September 2020 reiterated that he did not participate in the recording of the consent. He wondered how the estate had been subdivided yet he had not surrendered the title to Parcel No. 1273. This court was urged to do justice by setting aside the Consent Order and directing that the respondents' Summons be heard and disposed on merits.

11. The application was disposed of by way of written submission. Both parties filed their submissions which I have duly considered.

ANALYSIS AND DETERMINATION

12. The gravamen of the applicant's summons is the validity of the Consent Order dated 31st August 2016. As can be deduced from the foregoing summary of the parties' depositions, the consent was entered into, in compromise of Summons for revocation of grant which had been filed by the respondents, chiefly on the ground that the applicant had obtained the grant fraudulently by failing to disclose the identities of the respondents as beneficiaries of the estate of the deceased.

13. The impugned consent revoked the Grant of letters of administration issued to the applicant and issued a fresh grant in favour of the applicant and the 1st respondent jointly. The registration of the suit properties in the name of the applicant was cancelled and the Estate of the deceased which comprised of LR No.s Central Kitutu/ Mwabundusi/1273 and 1264 was distributed. The court ordered that Parcel No. 1273 be divided into two equal portions with one portion being registered in the name of the petitioner in trust for himself and the members of the second house while the other portion was registered in the name of the 1st respondent in trust for herself and the 2nd and 3rd objectors. The second house was also awarded the entire Parcel No. 1264.

14. This court has jurisdiction to set aside a consent order if certain conditions are met. In the seminal case of **Flora N. Wasike v Destimo Wamboko Civil Appeal No. 81 of 1984[1988] eKLR** Hancox JA. set out the factors to be considered in setting aside a consent order thus;

It is now settled law that a consent judgment or order has contractual effect and can only be set [a]side on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out: see the decision of this court in J M Mwakio v Kenya Commercial Bank Ltd Civil Appeals 28 of 1982 and 69 of 1983...

15. The learned Judge cited with approval the finding of the East African Court of Appeal in **Hirani v Kassam (1952) 19 EACA 131, at 134**, where it had been held:

"Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them ... and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court ...; or if the consent was given without sufficient material facts, or in general for a reason which would enable the court to set aside an agreement."

16. The applicant assailed the consent order on the ground that his advocate at the time, entered into the consent without his approval. He strongly denied being present when the consent was recorded and explained that he only got to learn about the consent order when his current advocates on record perused the court file and informed him of the consent order. He claimed that prior to that, he had gone into hiding when

his life was threatened for opposing the consent order. He also tied the brutal killing of his wife to the administration of the estate following the adoption of the consent by the court.

17. The applicant's learned counsel submitted that when the court recorded the consent, it did so without due regard to the whereabouts or identity of all the beneficiaries. The cases of *In re estate of Cosma Damiano Franco Ceino (deceased)*[2019]eKLR, *Re Estate of John Gitau Njau (Deceased)* [2011]eKLR and *Margaret Wagathuiru Gichanga v Jimnah Mwangi Gichanga* [2015]eKLR, where cited in support of the argument that it would be in the best interest of justice to set aside a consent order where all parties had not agreed to its terms.

18. The 1st respondent was just as emphatic in her assertion that the applicant was present when the consent was recorded by the court. She stated that the Summons for Revocation of Grant came up for hearing on 31st August 2016 and in the presence of the applicant and the respondents, their respective advocates agreed and entered into the consent.

19. Learned counsel for the respondents urged that owing to the fact that the consent was entered into by the duly retained advocate on behalf of the applicant who was also physically present; the consent became legal and binding on all parties as held in the cases of *Flora Wasike vs Destimo Wamboko* and *KCB vs Benjoh Amalgamated*. He argued that the applicant had not met the conditions necessary for vitiating a consent order as set out in the cases of *Brooke Bond Liebig (T) Limited vs Mallya* [1975]E.A. 266 and *Flora Wasike (supra)*.

20. While the court record is silent on the attendance of the applicant and the respondents in court on 31st August 2016, there is no doubt that their respective advocates appeared before the court on the said date. The fact that the applicant appointed the firm of M/s Bigogo Onderi & Company Advocates to represent him in the matter, vide a Notice of Appointment dated on 27th August 2012 is not contested.

21. The court record shows that after directions were given in May 2013 to dispose of the summons for revocation of grant by way of oral evidence, the matter was adjourned severally to enable the parties settle the matter amicably. In particular, the applicant's advocate intimated to the court, on 6th October 2014 that he had discussed with his clients including Francis, Justus Obiri and Simon Omwange the possibility of reconciliation and they had indicated that they be given time to reach a compromise.

22. I have analyzed the authorities cited by the applicant and I am of the view that the facts in this case are clearly distinguishable from the facts prevailing in those matters. The applicant in *Margaret Wagathuiru Gichinga (supra)* was completely oblivious of the succession cause and was unrepresented in the matter unlike the applicant in this case. All the parties in this case were properly represented by counsel unlike the applicants in the cases of *In re estate of Cosma Damiano Franco Ceino (supra)* and *Re Estate of John Gitau Njau (supra)*.

23. In the present case, there was an indication by the applicant's counsel, more than a year prior to the recording of the consent that the parties were in talks to dispose the summons for revocation of grant amicably. At this point, it is beyond peradventure that the applicant obtained letters of administration by concealing from the court the identities of the respondents whom he has admitted are his step sisters. It is now settled law that the Law of Succession Act does not discriminate between the female and male children or married or unmarried daughters of a deceased person when it comes to the distribution of his estate. (See *Stephen Gitonga M'murithi v Faith Ngiramurithi* [2015] eKLR and *Mary Rono v Jane Rono & Another* [2005] eKLR)

24. The letters of administration obtained by the applicant were also defective for flouting **Section 58** of the **Succession Act** as he was appointed the sole administrator of the estate yet his brothers Simon Moi and Justus Obiri were minors at the time. It is also evident that the applicant dealt with the estate of the deceased without the involvement of all legitimate beneficiaries of the estate.

25. The applicant represents the second house, which was awarded a larger share of the estate of the deceased pursuant to the impugned Consent Order. Bearing this in mind, the applicant's assertion that the issuance of the consent orders endangered his life and caused the brutal murder of his wife seems far fetched and has also not been proved.

26. The applicant has not demonstrated that the Consent Order was obtained fraudulently, by misrepresentation, collusion or mistake. Taken as a whole the facts in this case do not justify the setting aside of the consent order. Accordingly, the application dated 2nd October 2019 is hereby dismissed.

27. As this is a family dispute, the parties shall bear their own costs.

Dated, signed and delivered at Kisii this 27th day of January, 2021.

A. K. NDUNG'U

JUDGE