



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

SUCCESSION NO. 280 OF 2012

IN THE MATTER OF THE ESTATE OF JONATHAN KAROBIA KINUTHIA

RULING

1. The proceedings herein relate to the estate of Jonathan Karobia Kinuthia, (the deceased) who died intestate on 17.12.09 at the Kenyatta National Hospital. The record shows that the deceased was survived by his widow Irene Kabura Karobia (Irene). He was also survived by 2 sons and 6 daughters, namely Godfrey Kinuthia Karobia (Godfrey), Naomi Njoki Kangethe (Naomi), Jane Gacigi Mbugua (Jane), Rose Wairimu Karobia (Rose), Francis Muhia Karobia (Francis), Serah Wanjiru Waweru (Serah), Nellie Gachiku Karobia (Nellie) and Ruth Wangui Irungu (Ruth), all adults. Jane died and was survived by her children Edward Mbugua Mbugua, (Edward) and Isabella Njeri Gacheru (Isabella). The estate of the deceased consists of the following assets:

Title No. Kabete/Kibichiku/xxxx

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Title No. Kabete/Kibichiku/xxxx

L. R. No. xxx/xxxxx/xxx

2. A grant of letters of administration was on 18.6.12 issued to Irene and Nellie. The Administrators filed a summons for confirmation of grant dated 20.12.18. The summons was opposed by Rose, Naomi, Edward and interestingly, Nellie, by their affidavit of protest sworn on 24.4.19. Francis, Godfrey, Ruth and Serah filed their own affidavit of protest sworn on 16.5.19. At issue was Title No. Kabete/Kibichiku/xxxx (Plotxxxx) which is said to have 30 double rooms with a monthly rental income in excess of Kshs. 200,000/= and L. R. No. xxx/xxxxx/122 (Plot xxx) with 10 single rooms and with a monthly rental income of about Kshs. 20,000/=. In the summons for confirmation, it had been proposed that Plot 1384 be allocated to Francis and Godfrey in equal shares while Plot 122 was to go to Naomi, Sarah, Ruth and Rose in equal shares. The allocation of the other properties was not disputed.

3. In the first protest, it was proposed that all beneficiaries benefit from the 2 properties. In the second protest, it was proposed that Plot 122 be allocated to Francis and Godfrey in equal shares while half the income be applied to the maintenance of their elderly mother Irene. It was further proposed that the income from the Plot 1384 be collected by Francis and Godfrey to be utilised towards the upkeep and maintenance of their elderly mother Irene for life and thereafter the rooms to be apportioned as follows:

Naomi 3 rooms

Ruth 3 rooms

Rose 3 rooms

Serah 3 rooms

Edward & Isabella 3 rooms

Francis 7 rooms

Godfrey 8 rooms

4. Due to Irene's advanced age, a fresh grant was on 20.5.19 issued to Nellie and Geoffrey. The grant was confirmed on 3.6.19 and a certificate of confirmation of grant issued on even date.

5. By an application dated 26.2.20, the Applicants Francis, Godfrey, Ruth and Serah seek:

1. **Spent.**

2. **That the Certificate of Confirmation of Grant of Letters of Administration issued herein on the 3rd day of June, 2019 be amended to address minor errors or mistakes in the body of the Certificate.**

3. **That the amendment be made to amend the omission of distribution of Land Parcel Number Kabete/Kibichiku/1384 which has been left out of the Schedule as currently appears on the Certificate of Confirmation.**

4. **That amendment and/or correction be made to distribution of Land Parcel IR 55009 LR 209/11388/122 to reflect that the said parcel is distributed to Francis Muhia Karobia and Godfrey Kinuthia Karobia equally.**

5. **That the costs of this application be provided for.**

6. The Application is premised on the grounds that the consent recorded on 3.6.19 was to the effect that whereas the rental income from Plot 1384 and Plot 122 is to be applied for the maintenance and upkeep of Irene, the properties were to be distributed as per the schedule annexed to the affidavit of protest by Francis Godfrey, Ruth and Serah sworn and filed on 16.5.19.

7. The Application is opposed by the Respondents Rose, Naomi, Edward and Nellie, whose position is that the certificate of confirmation of grant reflected the correct position. It is their case that on 3.6.19, the Hon. Onger, J. after noting that nothing had been allocated to Irene, directed the parties to step outside and agree on what their elderly and sick mother Irene would be entitled to. To them the consent recorded and signed by parties' counsel was to the effect that the rental income of the 2 properties would be deposited in a joint account in the name of the Administrators and applied for the upkeep of Irene. The rest of the properties would be distributed in the manner proposed in their affidavit of protest

8. Parties filed their written submissions in support of their respective positions which I have duly considered.

9. The record does not contain the consent signed by the parties' counsel referred to by the Respondents. It does however contain the order of the learned Judge of 3.6.19, which is reproduced below:

1. By consent, the rental incomes from Kabete/Kibichiku/xxxx and LR xxx/xxxxx/xxx be applied for the maintenance and upkeep of IRENE KABURA KAROBIA for as long as she lives.

2. A joint account to be opened in the joint names of the administrators GEOFFREY (sic) KINUTHIA KAROBI and NELLIE GACHIKU KAROBIA into which the proceeds shall be deposited.

3. The rest of the properties to be distributed in accordance with the schedule attached to the affidavit of FRANCIS MUHIA KAROBIA, GODFREY KINUTHIA, RUTH WANGUI KAROBIA and SERAH WANJIRU WAWERU.

10. It is to be noted that while the learned Judge's order refers to a schedule. It is noted that the affidavit sworn by the Respondents does not contain a schedule. Further, while the order referred to the rest of the properties, the said affidavit of protest does not contain a proposal regarding the rest of the properties. The said affidavit is limited to Plot 1384 and Plot 122 and the proposal is that the same be distributed to all beneficiaries in equal shares. The affidavit sworn by the Applicants on the other hand does contain a schedule which shows how all the properties of the deceased are to be distributed.

11. The order of 3.6.19 is expressed to be by consent of the parties. It is trite law that a consent order made in the presence of parties' counsel is binding on all parties and may only be varied or discharged if obtained by fraud or collusion. This was the holding in the case of Samuel Mbugua Ikumbu v Barclays Bank of Kenya Limited [2015] eKLR where the Court of Appeal stated:

This Court in the case of Brooke Bond Liebig v. Mallya

“A consent judgment may only be set aside for fraud collusion, or for any reason which would enable the court to set aside an agreement.”

In Hirani v. Kassam (1952), 19EACA 131, this Court with approval quoted the following passage from Seton on Judgments and Orders, 7th edition, Vol.1 p.124 as follows:

“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 consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement.”

12. In the present case, it noted that the order of 3.6.19 was made by the learned Judge in the presence of Mrs. Ameka, learned counsel for the Applicants and Ms Githii, learned counsel for the Respondents. Accordingly, and duly guided by the Court of Appeal in the cited case, the order is binding on all the parties herein.

13. From the wording of the order, it is clear that the parties only agreed on the application of the income of the 2 properties during their mother’s lifetime. The first 2 orders stipulated that the said income would be deposited in a joint account of the 2 Administrators and utilised for the maintenance and upkeep of the parties’ mother during her lifetime. The third order stated that the rest of the properties would be distributed in accordance with the schedule attached to the affidavit of the Applicants. So which are **the rest of the properties**? To my mind, the plain and unambiguous meaning of **the rest of the properties** could only be properties, other than Plot 1384 and Plot 122.

14. A careful look at the consent order reveals that the distribution of the 2 properties, other than the income thereof, was not addressed therein. It follows therefore that such distribution could not have found its way in the certificate of confirmation of grant of 3.6.19. The certificate of confirmation of grant reflects that which is contained in the consent order. Accordingly, my finding is that there is no mistake or error, minor or otherwise, that requires to be amended or rectified in the said certificate of confirmation.

15. From the affidavits of protest on record, it is evident that the distribution of the 2 properties is a highly contented issue over which the parties herein hold diametrically opposed positions. This issue can only be determined by the Court once properly moved.

16. In the end, I find I find that the Application dated 26.2.2020 lacks merit and the same is hereby dismissed. This being a family matter, there shall be no order as to costs.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 16TH DAY OF APRIL, 2021

M. THANDE

JUDGE

In the presene of: -

.....for the Applicants

..... for the Respondents

.....Court Assistant