



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 1940 OF 2014

IN THE MATTER OF THE ESTATE OF AMOS KABIRU KIMEMIA (DECEASED)

DUNCAN KIMEMIA KABIRU.....1ST APPLICANT

JANE WAMBUI MWANGI.....2ND APPLICANT

MARGARET WANJIRU KABIRU.....3RD APPLICANT

CAROLINE WANGUI KABIRU.....4TH APPLICANT

MORRIS MWANGI KABIRU.....5TH APPLICANT

-VERSUS-

HANNAH WANJERI KABIRO.....1ST RESPONDENT

ELIZABETH GACHAMIU KABIRU.....2ND RESPONDENT

SAMUEL MAINA KABIRU.....3RD RESPONDENT

DANIEL NDUNGU KAGUNDA KABIRU.....4TH RESPONDENT

RULING

1. The deceased Amos Kabiru Kimemia died intestate on 10th October 2013. His first family comprised his widow Hannah Wanjeri Kabiro (who died in 2016) and the following children: -

- (a) Susan Wakonyo Kabiru;
- (b) Faith Wanjiru Kabiru;
- (c) Charles Macharia Kabiru;
- (d) Margaret Muthoni Kabiru;
- (e) Samuel Maina Kabiru (3rd respondent);
- (f) Elizabeth Gachamiu Kabiru (2nd respondent);
- (g) Rahab Waitherero Kabiru;
- (h) David Ndungu Kagunda Kabiru (4th respondent); and

(i) Hannah Wanjeri Kabiru (1st respondent).

The second family was that of Jane Wambui Mwangi (2nd applicant) whose children were:-

- (a) Caroline Wangui Kabiru (4th applicant);
- (b) Duncan Kimemia Kabiru (1st applicant); and
- (c) Morris Muchai Kabiru (5th applicant).

Margaret Wanjiru Kabiru (3rd applicant) belonged to this house, but DNA results showed that the deceased was not her paternal father.

2. A grant of letters of administration intestate was on 27th April 2015 issued to the respondents. The petition failed to include the second family. The grant was confirmed on 22nd February 2016, and the deceased's entire estate was shared among the members of the first house.

3. On 12th May 2016 the 1st applicant filed an application to revoke the grant as confirmed. His substantial complaint was that the petition and all the proceedings leading to the grant and distribution of the estate had deliberately and fraudulently excluded the second house. After quite some time, it was agreed that the children of the second house be subjected to DNA to confirm they were fathered by the deceased. Except for Margaret Wanjiru Kabiru, the results were positive. On 9th July 2019 both sides, who were represented, agreed to have their dispute referred to Court Annexed Mediation. What was to be determined was basically how the estate of the deceased was to be shared. The estate was quite substantial.

4. On 30th January 2020 the parties recorded a Mediation Settlement Agreement. The main agreement was that the certificate of confirmation would be revoked, and that the following property would go to the second house (the house of Jane Wambui Mwangi) to be shared among the beneficiaries: -

- (a) Nakuru/Mun. Block 2/134;
- (b) Nakuru/Mun. Block 2/417;
- (c) Kiminini/Kapkoi Sisal Block/Wamuini "A"/47;
- (d) Nakuru/Thigiu/94;
- (e) Bahati/Kabatini Block 1/3174;
- (f) Shawa/Rongai Block 1/44; and
- (g) Bahati/Kabatini Block 1/4810.

The rest of the property of the deceased was given to the first house (house of Hannah Wanjeri Kabiru) to be shared among the members.

5. On 5th February 2020 the Mediation Settlement Agreement was received by the court and adopted as the order of the court.

6. What is before the court is an application dated 8th October 2020 by the applicants seeking to set aside the Mediation Settlement Agreement and the order adopting it as judgment of the court. The other request was that the court reinstates the application for revocation and lists it for hearing and determination. The complaint by the applicants was that, although the parties had signed the Mediation Settlement Agreement on 20th January 2020, they expected that the parties would be present in court during its adoption as the order of the court. They claimed that the Agreement had not settled the issue regarding -

“how properties allocated to them would be distributed.”

They stated that there was an error on the part of the court to adopt the Agreement in the absence of the parties and this should be corrected. They further stated that subsequent to the Agreement, they had through search discovered that Nakuru/Mun. Block 2/134 belonged to Amosamu Builders and Developers and that it was charged to Barclays (Now ABSA) Bank; that Nakuru Mun. Block 2/417 was charged to Standard Chartered Bank; and that Nakuru/Thigiu/94 was occupied by relatives of the deceased who were claiming that he had given to them. They stated that this was new and material evidence that should lead to the review of the Agreement and the order of the court. In respect of Nakuru/Thigiu/94, the 1st applicant stated that:-

“I aver that during our visit of the property before the mediation consent, the inhabitants were not in the premises and only met them after the mediation where they laid claim over the property.”

The applicants sought the review and setting aside of the Agreement and order to enable the parties prosecute the issue of distribution of assets and conclude the matter with finality.

7. The replying affidavit was sworn by the 4th respondent on behalf of the others. Their case was that after the application for revocation was filed and the results of the DNA came out, their advocate wrote to the applicants' advocate ('DNKK 1') on 10th April 2019 enclosing copies of titles of the properties to the estate. This was to facilitate negotiations that were on-going. Among the titles given were the three now in question. The applicants advocate called ('DNKK 2') for more titles. The advocate wrote ('DNKK 4') to say that the applicants were going to visit and inspect the properties of the deceased before proposing how the estate would be distributed. On 23rd May 2017 ('DNKK 5') the applicants' advocate wrote to propose the distribution. Nakuru/Mun. Block 2/417 was one of the properties the applicants wanted. On 5th July 2019 the respondents' advocate made a counterproposal ('DNKK 6'). When the parties were not able to agree they came to court and agreed on going to mediation. This was followed by the Mediation Settlement Agreement. Subsequently, the applicants wrote to raise issue with the three properties. The respondents stated that the applicants had full information about the estate of the deceased, and fully participated in the mediation before the Agreement was arrived at. They stated that it was an oversight on their part to offer Nakuru/Mun. Block 2/134 to the applicants because it was in the name of Amosamu Builders and Developers Limited which had two shares, one share belonging to the deceased and one share belonging to a third party. They, in good faith, are offering Nakuru/Mun. 2/418 in its place. They acknowledged that Nakuru/Thigiu/94 had occupants and they have been involved in the process of getting them out. On their part, the respondents stated that they have also been involved in several disputes with tenants, KRA and other third parties in bid to wrestle and make available the rest of the estate of the deceased before distribution. Lastly, the respondents contended that the application was lacking in merits, and that, in any case, the applicant had not led sufficient grounds to enable the setting aside of the agreement and orders of the court.

8. Mr. Mwaura for the applicants and Ms. Wambui Kyama for the respondents filed written submissions which I have considered.

9. I have outlined the history of the dispute to show that when the parties agreed to go to mediation the understanding was clear that what was on the table was how the two families were going to share the estate of the deceased. Before they agreed to go to mediation, they had been negotiating a settlement. They had exchanged title documents of the properties constituting the estate of the deceased. The applicants had an opportunity to search the titles and to inspect the properties to find out if they were vacant, or occupied. Evidence that any of the properties belonged to a third party or was occupied was material for the purpose of discussing a settlement before the mediator.

10. The new and important evidence that is contemplated under **Order 45 rule 1** of the **Civil Procedure Rules** is evidence which after the exercise of due diligence was not within the applicant's knowledge or could not be produced by him at the time of the decree or order (**Jackson Gatere –v- Mount Kenya Bottlers Limited, Civil Appeal No. 107 of 1995**). It is evident that the applicants had all the available evidence at the time of the Agreement. If they did not have the evidence, it was within their means to obtain it, if they exercised due diligence.

11. It is also material that the applicants admit that they signed the Mediation Settlement Agreement on 20th January 2020 before the mediator. The Agreement indicated which property would go to the first house and which property would go to the second house. The particulars of each property were given. As to how each house was going to share to the respective beneficiaries that was not the dispute before the mediator. The beneficiaries will have to agree among themselves or seek to go back to the mediator to share it or come to court to distribute it under the **Law of Succession Act (Cap. 160)**. This is not a matter that can be dealt with by the facility of review under **Order 45 rule 1**.

12. Once the parties had signed a Mediation Settlement Agreement which was then lodged into the court, it became incumbent upon the court to adopt it to enable enforcement to set into motion. Paragraph 12 of **The Judiciary of Kenya Directions of Court Annexed Mediation** (as amended in 2018) provides as follows:-

“12. (a) Where there is an agreement resolving some of all the issues in dispute, such agreement shall be in the prescribed Form 8, duly signed by the parties and shall be filed by any of the parties, with the Deputy Registrar or Magistrate of Kadhi as the case may be within ten (10) days of conclusion of the mediation.

(b) Any agreement filed with the Deputy Registrar or Magistrate or Kadhi as the case may be shall be adopted by the Court and shall be enforceable as a Judgment or order of Court.”

The complaint by the applicants that they needed to be present to participate in the adoption is therefore baseless. What was important was that they had signed the Mediation Settlement Agreement. They admit that they signed the Agreement.

13. Because the parties agreed to settle their dispute, and they signed the Mediation Settlement Agreement, the resultant order adopting the Agreement became a consent order of the court. It was held in **Flora N. Wasike –v- Destimo Wamboko [1988]eKLR** and in **Board of Trustees National Social Security Fund –v- Michael Mwalo [2015]eKLR**, and in several other decisions, that a consent order entered into by the parties has a contractual effect, and cannot be set aside or varied unless it is proved that it was obtained by fraud or collusion or by an agreement contrary to the policy of the court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general or for reason which would enable the court to set aside an agreement. I do not find that the applicants have given any reasons that would enable the court to review the Mediation Settlement Agreement signed on 20th January 2020 or the order that was entered on 5th February 2020. For the avoidance of doubt, the application dated 11th May 2016 to revoke the grant issued to the respondents was compromised through the consent order for DNA, the consent order referring the matter to Court Annexed Mediation and the Mediation Settlement Agreement signed on 20th January 2020.

14. The result is that the application dated 8th October 2020 by the applicants has no merits, and is dismissed with costs.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF JUNE 2021.

A.O. MUCHELULE

JUDGE