



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCC NO. 21 OF 2018

IN THE MATTER OF THE ESTATE OF JANE TAPLELEI

NGERECHI – DECEASED

ANTHONY KIPKEMOI TANUI.....1ST APPLICANT

DAVID TANUI KIBET.....2ND APPLICANT

VERSUS

REBECCA CHERONO CHUMO.....1ST RESPONDENT

CAROLINE CHEPNGENO TANUI.....2ND RESPONDENT

RULING

1. Jane Taplelei Ngerechi (Deceased) died on 01/02/2006. She was survived by six children. Four of the five petitioned for Letters of Administration intestate to the Deceased's estate. Three of the four are the named Applicants and Respondents in the present Applications.

2. On 21/10/2018, Letters of Administration intestate were granted to the four namely: David Kibet Tanui (hereinafter, "David"); Anthony Kipkemoi Tanui (hereinafter, "Anthony"); Regina Cherotich Ngetichi (hereinafter, "Regina"); and Rebecca Cheronon Chumo (hereinafter, "Rebecca"). The other two heirs to the estate are, Caroline Chepngeno Tanui (hereinafter, "Caroline") and Rachel Chepkoech Cheruiyot (hereinafter, "Rachel".)

3. It would appear that initially the five heirs could not agree on the mode of distribution of the Deceased's estate. This prompted Rebecca to file a Summons for Confirmation of the Grant dated 16/01/2010 on her own. In it, she proposed that all the three principal assets of the estate be divided equally amongst the five beneficiaries.

4. David responded to Rebecca's Summons for Confirmation of the Grant with an Affidavit of Protest of Confirmation dated 05/03/2020. It was filed on behalf of himself and Regina and Anthony. The gravamen of the Protest seemed to be that one of the principal assets included by Rebecca for distribution was not part of the estate of the Deceased but belonged to him (David). The gist is contained in paragraphs 11 – 13 of his Affidavit of Protest thus:

11. That I verily believe that the inclusion of my said property in the instate estate is in bad faith and meant for the purpose of, inter alia, achieving selfish personal gain and creating disharmony within the family of the late Jane Taplelei Ngerechi.

12. That I have been advised by my counsel on record, which advice I verily believe to be legally sound, that the other two properties i.e. Nakuru/Municipality Block 29/150 (Rhonda) and Miti Mingi/Mbaruk Block 3/611 (Barut) should not only be equally distributed but equitably too.

13. That I verily believe that my protest herein is to the effect that my property i.e. Rongai Settlement Scheme Plot No. 21, Number 538 is excluded and/or expunged from the list of the properties to be succeeded (sic) herein.

5. The matter came up in Court on 10/03/2020. Counsel for both parties were present. Counsel for Rebecca conceded to the removal of the parcel Rongai Settlement Scheme Plot No. 21, Number 538 as one of the assets available for distribution admitting that it, in fact, belonged to David. The parties also agreed to meet and decide on the distribution of the two remaining assets available for distribution among the beneficiaries.

6. On 29/10/2020, Counsel for both parties – Mr. Kairu holding brief for Ms. Nancy Njoroge for Rebecca and Caroline and Mr. Magata for David, Rachel, Regina and Anthony – appeared and entered into a consent on behalf of their clients. The consent reads as follows:

BY CONSENT of the parties, parcel No. Nakuru/Municipality Block 29/150 (Rhonda) and Miti Mingi/Mbaruk Block 3/611 (Barut) be divided in equal shares between all the beneficiaries namely:

(i) Regina Cherotich

(ii) Anthony Kipkemoi

(iii) David Kibet Tanui

(iv) Rebecca Cheron

(v) Rachel Chepkoech Cheruiyot

(vi) Caroline Chepkemoi Tanui

7. The Court adopted the consent and ordered that a Certificate of Confirmation be issued in those terms. The Certificate of Confirmation was issued on 01/12/2020.

8. This should have ended the dispute since both the extent of the estate of the Deceased and the mode of distribution had been agreed by consent of all the beneficiaries. It did not. On 12/01/2021, Rebecca, through her counsel, filed a Notice of Motion seeking, in essence, to execute the Consent Order dated 29/10/2020 and seeking certain orders to restrain her siblings from interfering with its said execution. The exact orders sought in the Application are as follows:

(a) That the Application be certified as urgent and be heard under the vacation rules on a priority basis.

(b) That pending the hearing and determination of this Application interpartes, there be orders of injunction restraining the Respondents from interfering with the survey work, uprooting beacons on Parcel No. Miti Mingo/Mbaruk Block 3/611 (Barut)

(c) That pending the hearing and determination of this Application interparties, there be orders of injunction restraining the Respondents from preventing the surveyor from entering and subdividing Parcel No. Nakuru/Municipality Block 29/150 (Ronda) into six equal shares as per the certificate of confirmed grant issued on 1/12/2020.

(d) That there be orders restraining the Respondents from threatening the Applicants with a Criminal trespass if they enter parcels No. Miti Mingi/Mbaruk Block 3/611 (Barut) and Nakuru/Municipality Block 29/150 (Ronda)

(e) That the surveyor be provided with security by the Officer Commanding Kapkures Sub-County during his survey work on both parcels.

(f) That Costs be provided for.

9. The Application dated 12/01/2021 was placed before Mumbua T. Matheka sitting as the Duty Judge during the December recess. The Learned Judge, noting that there was prima facie evidence of interference with the enforcement of the Certificate of Confirmation of Grant issued temporary orders restraining David and Anthony and a certain Kennedy Cheruiyot who is named as a third Respondent in that Application.

10. David and Anthony, through their advocates, responded in two ways. First, they filed their responses opposing the Application dated 12/01/2021. Second, they have brought their own Application dated 18/01/2021. In essence, that Application seeks for the review and/or setting aside of the Consent Orders of 29/10/2020. The exact prayers in the Application dated 18/01/2021 are as follows:

1. That service of the Application be dispensed with and for reasons to be recorded the matter be certified as urgent and heard ex parte at the first instance.

2. That pending the hearing of this Application, this Honourable Court be pleased to stay the execution of the orders issued by this Court on 12th January, 2021.

3. That this Honourable Court be pleased to set aside and/or vary its orders issued on 12th January, 2021.

4. That this Honourable Court be pleased to set aside and/or vary the consent recorded herein on 19th October, 2020, cancel the Certificates or Confirmation of Grant dated 1st December 2020 and order that distribution of the deceased's estate to commence de novo.

5. That in the alternative this Honourable Court be pleased to Order that the Certificate of Confirmation of Grant dated 1st December, 2020 be executed by way of sale of the properties therein and the proceeds be shared equally among all the beneficiaries.

6. That the costs of this Application be provided for

11. After all parties had filed their responses to the two Applications on record and it was ripe for hearing, I gave directions that the two Applications be argued simultaneously and that they be argued by way of Written Submissions. Both parties have filed their submissions which I have read keenly. This short ruling covers both Applications.

12. The two Applications are, in a sense, mirror-images of each other: Either the Consent Order of 29/10/2020 is preserved and enforced in which case the prayers in the Application dated 12/01/2021 are merited or the Consent Order is reviewed and/or set aside in which case the prayers in the Application dated 18/01/2021 are merited.

13. It therefore follows that the prime question presented by the two Applications is whether a case has been made out for the review or setting aside of the Consent Order of 29/10/2021. For this reason, I will refer to David and Anthony, who are the applicants in the Application dated 18/01/2021, as “the Applicants” since I will consider their Application first. I will, in turn, refer to Rebecca as the “Respondent.”

14. It is a straightforward matter. I was gratified that Counsel for the Applicants cited my recent decision in ***In re. Estate of John Ezekiel Kiboit [2020] eKLR*** which dealt with the question when a Court will set aside a consent judgment. In that case, while reviewing our decisional law on the issue, the Court summarized the applicable principles:

*17. Our jurisprudence on setting aside of consent judgments is well established. A consent judgment can only be set aside or varied on grounds that would allow for a contract to be vitiated. These grounds include but are not limited to fraud, collusion, illegality, mistake, an agreement being contrary to the policy of the court, absence of sufficient material facts and ignorance of material facts. Hence in the celebrated ***Flora N. Wasike vs Destimo Wamboko [1988] eKLR***, Hancox, JA remarked:*

It is now settled law that a consent judgement or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out.

18. Earlier on, the Court of Appeal had similarly stated, in ***Brooke Bond Liebig v. Mallya 1975 E.A. 266*** that:-

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.

19. In ***Hirani v. Kassam (1952), 19EACA 131***, the Court quoted with approval 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.

20. Along the same vein, the Court of Appeal adopted the judgment of Harris J. R in ***Kenya Commercial Bank***

Ltd v. Specialised Engineering Co. Ltd (1982) KLR P. 485 and held that:

A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud 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 for a reason which would enable the court to set aside an agreement.

21. In the same case the Court further held the following regarding compromise of cases by advocates:

An advocate has general authority to compromise on behalf of his client as long as he is acting bona fide and not contrary to express negative direction. In the absence of proof of any express negative direction, the order shall be binding.

15. In the present case, David and Anthony wish to locate themselves within the part of our case law that says that a consent order can be varied for sufficient reason analogous to the other ones suggested by our case law including fraud, collusion, illegality, mistake, violation of public policy, absence of sufficient material facts and ignorance of material facts.

16. The Applicant’s argument is that there are portions of the two parcels of land to be equally divided among the beneficiaries which front the main road while other portions do not. They argue that those which front the main road will be more valuable and that, therefore, the subdivision will not be fair or equitable and will lead to prejudice on the part of some beneficiaries. Further, they say that parts of the two parcels have depressions and boulders which equally reduce reduces their value.

17. The Applicants say that when the beneficiaries realized that equal subdivision would lead to these alleged inequities, they met on 07/12/2020 and 15/12/2020 and agreed that the two parcels should be sold as is and then the proceeds to be shared equally. They say that they even opened a joint account for these purposes; and further that they had even identified a prospective buyer whose deal, however, fell through. The Applicants have attached minutes of the meeting that was apparently held that agreed to vary the terms of the Consent Order.

18. Additionally, the Applicants argue that both David and Anthony have developed some portions of the two parcels available for distribution and if subdivision is done equally then it would lead to an unfair loss of their investments.

19. The Respondent fault this line of reasoning. First, she denies that there was any agreement to vary the Consent Order at a family meeting as alleged by the Applicants and calls the minutes attached forgeries. Second, the Respondent argues that it does not matter anyway: there is simply no sufficient reason to vary or set aside the Consent Order. She explains that David has attempted to “bully” her and Caroline to acquiesce to the sale of the estate properties instead of subdivision so that money can be raised to repay a purchaser who had paid for the third portion which David had earlier gifted his siblings then changed his mind.

20. In essence, Rebecca says that there is absolutely no reason to set aside the Consent Order which was entered into voluntarily and knowingly. To the argument that the subdivision would yield to an unfair outcome because some portions would end up fronting the main road and others have boulders and depressions, Rebecca says that she would be willing to have the beneficiaries ballot for the portions.

21. Rebecca, therefore, argues that it is only fair that the Consent Order and Certificate of Confirmation be enforced.

22. Looking at the reasons proffered by the Applicants against the principles laid down in our case law, it is readily obvious to me that there is no sufficient reason to set aside or vary the Consent Order here. There has been no discovery of new facts and neither was the Consent Order entered into in ignorance of material facts. When the parties entered into the Consent on 29/10/2020, all the six beneficiaries knew that there was a main road and that some of the portions will front it. They also fully understood that some of the portions had depressions and boulders. Indeed, the Applicants so well understood because they claim that they have invested in the parcels. To claim ignorance at this point is, to be charitable, plainly disingenuous. What the Applicants have is not discovery of new facts previously unknown; it is buyers’ remorse. It is a change of heart.

26. Unfortunately for the Applicants, that change of heart is not permitted by our law. To easily undo Consent Orders because a party has subsequently changed their mind about the deal they entered into is to attack the integrity of our justice system in a fundamental way. It cannot be countenanced. That is why the threshold for setting aside Consent Orders is so high in our jurisprudence. It has not been met here.

27. The upshot is that the Application dated 18/01/2021 has no merits. It is hereby dismissed in its entirety. It follows that the Consent Order of 29/10/2020 and the Certificate of Confirmation of Grant dated 01/12/2020 are for enforcement. To the extent that the Application dated 12/01/2021 is aimed at enforcing the Certificate of Confirmation, it must be allowed.

23. However, there is a valid concern raised by David and Anthony:

while it is true that the Certificate for Confirmation allows for equal subdivision, it behooves all the administrators to make arrangements for the effectuation of the Certificate. It cannot fall on any one of them, as Rebecca seems to have done here, to unilaterally arrange for a surveyor to carry out the works without involving the other administrators. The administration of the estate is jointly vested in the four administrators. None of them has a veto power to do so.

24. In the end, therefore, the orders that recommend themselves to dispose of the Applications dated 12/01/2021 and 18/01/2021 are the following:

a. The Application dated 18/01/2021 is dismissed in its entirety.

b. The Application dated 12/01/2021 is also dismissed in its entirety except to the following extent:

i. All the Administrators to agree on a surveyor to carry out the subdivision as per the Certificate of Confirmation.

ii. If there is no agreement on the surveyor within fourteen (14) days from the date hereof, the County Surveyor to carry out the subdivision.

iii. All the beneficiaries to the estate to equally contribute towards the fees of the surveyor.

iv. After subdivision of the parcels in to equal portions, allocation of the parcels to be done by balloting which is to be facilitated by the Deputy Registrar.

c. The Surveyor, once identified, or the County Surveyor if there is no such agreement, to be provided with security by the Police Officer Commanding the Police Station which covers the area.

d. Meanwhile, *status quo* to be maintained until the subdivision and allocation has been completed.

e. Each party will bear its own costs.

25. Orders accordingly.

DATED AND DELIVERED AT NAKURU THIS 26TH DAY OF AUGUST, 2021

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JOEL NGUGI

JUDGE

NOTE: This judgment was delivered by video-conference pursuant to various Practice Directives by the Honourable Chief Justice authorizing the appropriate use of technology to conduct proceedings and deliver judgments in response to the COVID-19 Pandemic.