



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

SUCCESSION CAUSE NO 318 OF 2011

IN THE MATTER OF THE ESTATE OF JOTHAM BOAZ ODUNDO(DECEASED)

AND

IN THE MATTER OF AN APPLICATION FOR LETTERS OF ADMINISTRATION BY

FLORA OJWANG ODUNDO.....PETITIONER

AND

IN THE MATTER OF AN APPLICATION FOR REVOCATION / ANNULMENT OF GRANT BY

PERIS ODAWA.....OBJECTOR

AND

IN THE MATTER OF AN APPLICATION BY MANSHUKLAL RAISI MARU.....1ST INTERESTED PARTY

SHASHIKALA MANSHUKLAL RAISHI MARU.....2ND INTERESTED PARTY

VANITA MILAN PRABHULAL HARIA.....3RD INTERESTED PARTY

TRISHLA MILAN PRABHULAL TEJPAR.....4TH INTERESTED PARTY

UDAYE MILAN HIRIA.....5TH INTERESTED PARTY

RULING

1. In their Notice of Motion dated 18th January 2021 and filed on even date, the Interested Parties sought an order varying, reviewing or set aside finding 4 (1) and 6 of the Mediation Order/settlement dated 28th January 2020.
2. The 5th Interested Party, swore an Affidavit on 18th January 2021 in support of the said application and on his own behalf and on behalf of the other Interested Parties.
3. The Interested Parties averred that they were the registered legal owners of property known as Kisumu Municipality Block 7/130 (hereinafter referred to as the 'suit property') which they bought from the Petitioner and was registered in their names on 15th November 2018.
4. In October 2020, they learnt that a mediation session was conducted and a settlement reached as if the said suit property formed part of the deceased's estate. They complained that they were not invited to the said mediation yet they were the registered owners of the suit property and to their dismay the Petitioner and the Objector proceeded to make conclusive determination regarding the suit property.
5. They were apprehensive that their proprietary rights had been infringed and they were condemned unheard as it was a finding of the mediation that the suit property should be revalued and sold. They urged the court to expunge article 4 (1) and 6 of the mediation settlement report and argued that if the orders sought are not granted they stood to lose the suit property.

6. They invoked Section 93 of the Succession Act (sic) which they stated provided that once a property was sold by the legal administrator, such sale remained valid notwithstanding any subsequent revocation or variation of grant.
7. In opposition to the Interested Parties' application on 23rd February 2021, the Objector swore a Replying affidavit. The same was filed on 3rd March 2021. She averred that she was the deceased's daughter-in-law.
8. She was categorical that this being a succession matter it should be a beneficiary's only affair (**sic**). She added that the third-party purchaser was not an innocent purchaser for value without notice of defect.
9. She averred that the 1st Interested Party approached her and her co-objector Coletta Agutu Odundo in the year 2017 before the alleged succession requesting them to sell to him the suit property but they declined stating that that was family property and they could not sell the same without the family's consent.
10. She stated further that the purchasers subsequently went behind their backs and approached the Petitioner herein who illegally conducted the succession and disposed of the suit property without their knowledge or that of beneficiaries.
11. She contended that it was not her duty to call the Interested Parties to the mediation meeting. She asserted that in fact the beneficiaries were called upon by the court appointed Mediator. She pointed out that had the Interested Parties been vigilant, they would have followed up on the process in court.
12. She was emphatic that the beneficiaries of the deceased estate had mediated upon the suit property and a settlement was reached. She asserted that in any event the Interested Parties had a remedy of filing a different suit outside the jurisdiction of this court which case would be heard and finally determined.
13. She was categorical that the application was incompetent, misconceived and was meant to circumvent the cause of justice through protracted delays and thus urged this court to dismiss the same with costs.
14. In response to the Objector's Replying Affidavit, on 15th March 2021, the 5th Interested Party swore a Further Affidavit reiterating the averments he had made in his Supporting affidavit. The same was filed on 17th March 2021. He pointed out that the Objector had admitted in Paragraph 7 of her Replying Affidavit that the Petitioner sold to the Interested Parties the suit property in her capacity as administratrix of the estate of her late husband Jotham Boaz Odundo and caused the same to be transferred to them.
15. They emphasised that the said property was transferred to them on 25th November 2018 and that there was no delay in filing of their present application.
16. The Interested Parties' Written Submissions were dated 15th March 2021 and filed on 17th March 2021 while those of the Objectors were dated 28th June 2021 and filed on 16th July 2021. Notably, this court did not see the Petitioner's response to the present application and her Written Submissions in the court file. Indeed, while reserving the Ruling herein, this court noted the Interested Parties' Advocates averments that they had not been served with the Petitioner's Written Submissions.
17. This Ruling is based on the said Written Submissions which all parties relied upon in their entirety.

LEGAL ANALYSIS

18. The Interested Parties submitted that the averment of non-service of the Notice to attend the Mediation Session was not disputed and that it was clear from the Mediation Settlement that they were invited and declined to attend the Mediation Session. They relied on Article 50(1) of the Constitution of Kenya 2010 that provides that every person has a right to a fair and public hearing before a court.
19. To buttress their argument, they placed reliance on the case of **Judicial Service Commission vs Hon Justice Mbalu Mutava & The Attorney General Civil Appeal No 52 of 2014** (eKLR citation not given) amongst other cases where the common thread of the decisions was that in all cases where a body is exercising administration action, it must observe the rule of natural justice, which are, the right to be heard by an unbiased, the right to be notified of the charges and the right to answer to those charges and in particular right to fair hearing.
20. They were categorical that once the Petitioner obtained a Grant which was confirmed in her name on 18th December 2014 and thereafter sold the suit property to the Interested Parties, the suit property did not therefore belong to the deceased's estate. To buttress this point, they invoked Section 93 and 94 of the Law of Succession Act which provides that should there be an error or mistake in the manner the way a deceased's estate was sold, then the petitioner would be liable to make good any loss or damage so occasioned.
21. On her part, the Objector submitted that the Petitioner had no title to pass of to the Interested Parties and thus no legal right to dispose of the suit property. She argued that the said Interested Parties could not therefore get a better title than that of the Petitioner herein. She further relied on Section 76 (a) (b) and (c) of the Law of Succession Act in arguing that in this case, the Petitioner from whom the Interested Parties purportedly obtained title to the suit land had no title to the land
22. She further relied on the cases of **Lawrence Mukiri vs Attorney General & 4 Others [2013] eKLR**, **Katana Kalume & Another vs Municipal Council of Mombasa & Another [2019] eKLR**, amongst several other cases where the courts held that where a person is not the owner of goods and does not sell them under the authority or consent of the owner, the buyer acquired no better title to the goods than the seller.

23. She was categorical that the Interested Parties did not carry out any due diligence before entering into the transaction. She argued further that if the Interested Parties would have perused the Succession file that gave rise to the Grant, they would have avoided the transaction.

24. She submitted that the Interested Parties were neither beneficiaries nor creditors to the deceased's estate and consequently, they could not interfere with the decisions of lawful beneficiaries as per the Mediation Agreement. She argued that the Interested Parties had no *locus standi* in the suit herein and asserted that their remedy was in other avenues.

25. A reading of the record shows the Petitioner obtained the Grant of the Letters of Administration on 19th October 2011. The same was confirmed on 5th December 2014 and the Certificate of Confirmation of Grant issued 18th December 2014. Her share in respect of the suit property Kisumu/Municipality/Block 7/130 was shown to have been whole.

26. The Objector then filed Summons for Revocation or annulment of the said Grant dated 19th November 2018 where she averred that she had been denied her rightful inheritance as the Petitioner had fraudulently transferred the suit property to her name and who was in the process of disposing the same. The record showed that parties attempted to negotiate the matter out of court but the same was not successful.

27. On its own motion on 9th December 2019, the court referred the matter to a court-annexed mediator to assist parties reach a settlement. The mediation was carried out and a Mediation Settlement Agreement dated 28th January 2020. The same was filed on even date.

28. The Interested Parties' Notice of Motion application dated 28th February 2019 and filed on 28th February 2018 (**sic**) seeking to be enjoined as interested parties in the proceedings herein was allowed on 16th September 2010. They were represented during all court proceedings until when the matter was referred to mediation on 9th December 2019.

29. Notably, court annexed mediation is governed by the **Judiciary of Kenya Practice Directions on Court Annexed Mediation** issued by the Chief Justice under **Article 159 of the Constitution** and **section 59B (1) (a), (b) and (c) of the Civil Procedure Act**. It is an informal and non-adversarial process where an impartial mediator encourages and facilitates resolution of a dispute between two or more parties. The mediator does not determine the dispute and/or come up with a decision.

30. Pursuant to the said procedure, the parties herein arrived at an amicable settlement that was reduced in writing. There were several consents that were recorded by the beneficiaries to the deceased's estate under the hand of Mediator Timothy Deya. They were all executed on 30th June 2020.

31. Subsequently, a Mediation Settlement Agreement was executed by Mediator Evans Onzere Ondudo on 28th January 2020. In Paragraph 4 (I) of the said Mediation Settlement Agreement, it was provided as follows:-

“Kisumu Municipality/Block7/130 (Location: Odera Street) be valued professionally and sold. Proceeds from the sale be shared equally between the two parties. The previous purchaser be given priority in the purchase of the property.”

32. It is important to note that once the agreement was arrived upon, it took the form of a consent. In the cases of **Flora N. Wasike vs Destimo Wamboko [1988] e KLR** and in **Board of Trustees National Social Security Fund vs Michael Mwalo [2015] e KLR**, the courts therein held that a consent order that was entered into by parties had a contractual effect and could not be set aside or varied unless it was 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.

33. Notably, the court noted that the suit property had already exchanged hands and was currently in the hands of the Interested Parties who purchased the said property for value. It was sold in 2018 which was four (4) years after the Certificate of Confirmation of Grant was issued on 18th December 2014.

34. Where a deceased's assets have been misapplied by personal representatives and are traceable into the hands of a particular person, the law allows the beneficiaries entitled to such assets to follow them into the hands of the person holding such property. The limitation of how such assets can be followed is to be found in Section 93 (1) of the Law of Succession Act Cap 160(Laws of Kenya) which stipulates that:-

“All transfers of any interest in immovable or movable property made to a purchaser either before or after the commencement of this Act by a person to whom representation has been granted shall be valid, notwithstanding any subsequent revocation or variation of the grant either before or after the commencement of this Act.”

35. Further Section 94 of the Law of Succession Act states that:-

“When a personal representative neglects to get in any asset forming part of the estate in respect of which representation has been granted to him, or misapplies any such asset, or subjects it to loss or damage, he shall, whether or not also guilty of an offence on that account, be liable to make good any loss or damage so occasioned.”

36. This court perused the aforesaid Mediation Settlement Agreement by Evans Onzere Endusa and noted that the Interested Parties did not execute the same. It was not clear whether they were invited and/or participated in the mediation proceedings. If they were invited and did not appear, it was expected that the same ought to have been recorded in the Mediation Agreement. The only issue the Mediator noted was that apart from Aoko Ondiek & Co Advocates, no other lawyers turned up.

37. In the absence of such an observation by the Mediator and/or proof that the Interested Parties were notified of the dates of mediation proceedings, this court could not with certainty conclude that the Interested Parties were aware of the same and they declined to attend. The advocates may have been negligent in not having followed up but it is trite law that no party should be penalised for the blunders of his advocates.

38. Indeed, in the case of **Republic vs Speaker Nairobi City County Assembly & Another Ex Parte [2017] eKLR**, it has been held that blunders will continue being made and that just because a party has made a mistake does not mean that he should not have his case heard on merit.

39. As can be seen herein, the court can set aside an agreement if there is sufficient reason for it to be set aside. One of those reasons could be non-service of a notice to a party to attend a mediation session as was correctly pointed out by the Interested Parties.

40. The argument of whether or not the Interested Parties were *bona fide* purchasers was a pertinent one. The question of whether or not the Petitioner had power to sell the property to the Interested Parties was equally relevant. These were legal issues that could only be effectively adjudicated upon by the court and a determination made. Be that as it may, nothing stops parties from resolving difficulties raised by those two (2) issues in a mediation process.

41. It was therefore in the interests of justice that parties be given an opportunity to explore possibilities of an amicable settlement in a mediation session whereupon the court could make a determination in the event the mediation process failed. This court was thus persuaded that there was merit in setting aside the Mediation Settlement Agreement dated 28th January 2020.

DISPOSITION

42. For the foregoing reasons, the upshot of this court's decision was that the Interested Parties' Notice of Motion application dated 18th January 2021 and filed on even date was merited and the same be and is hereby allowed. The effect of this decision is that the Mediation Settlement Agreement dated 28th January 2020 be and is hereby set aside and/or vacated.

43. It is hereby directed that this matter be referred to mediation. The file to be placed before the Deputy Registrar on 8th December 2021 for further orders and/or directions in this regard.

44. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 22ND DAY OF NOVEMBER 2021

J. KAMAU

JUDGE