



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NO 118 OF 2015

ZIPPORAH WANJIRU KARANJA.....1ST PETITIONER

JEREMIAH KARANJA KIBUTHU.....2ND PETITIONER

VERSUS

MILKAH MUTHONI.....1ST APPLICANT

WANGUI KAHORO.....2ND APPLICANT

AND

ELIZABETH WANGUI.....BENEFICIARY

RULING

1. The applicants filed a summons under **Section 47 of the Law of Succession Act, Rule 63 (1) and 73 of the probate and Administration Rules, order 45** Rule 1 of the Civil Procedure Rules and sought for orders interlia;

a. THAT this Honourable court be pleased to issue an order setting aside and/or reviewing the consent order entered in court on the 8th May,2019 by Mrs. Sally Mbeche, Advocates for the Petitioners and Mrs. Gathecha, Advocates for Applicants and issued by this Honourable court on the 14th May, 2019.

b. THAT in alternative to prayer 3 above, this Honourable court be pleased to review and/or rectify the mode of distribution contained in the Certificate of Confirmation of grant dated 8th May,2019 in respect to land parcel number Maela /Ndabibi Block 2/773 measuring approximately 1.51 Hectares to reflect equal shares between the petitioners and the beneficiary herein.

c. That pursuant to prayer 4 above, this Honourable Court do order that the Land parcel number Maela /Ndabibi Block 2/773 be subdivided into two equal portions and be registered in the name of the petitioner and Beneficiary against each portion.

d. That cost of this application be provided for.

2. The application is premised on the supporting affidavit of the beneficiary and the following grounds;

a. THAT the 1st Applicant herein, who was at all material times, the deceased wife and a mother to Elizabeth Wangui, the beneficiary herein, and the 2nd Applicant, the mother of the deceased, was not a party to the consent and had not authorized Mrs. Gathecha to enter into any consent with the Petitioners' Advocates.

b. THAT the purported consent did not have the blessings of the Applicants and the beneficiary as the same was secretly filed in court without their knowledge in collusion with the Petitioners' Advocates.

c. THAT as at the time when the purported consent was entered into in court by Mrs. Gathecha, there was no discussion on the mode of distribution by the Beneficiary herein.

d. THAT unaware of the consent dated 8th May,2019 the Applicants together with the Beneficiary filed a protest letter dated 29th

October,2019 before this Honourable court on the 30th October,2019.

e. THAT the Beneficiary herein has been gravely prejudiced by the said orders as she does not intend to sell her portion in **Maela/Ndabibi Block 2/773**.

f. THAT Mrs. Gathecha, previous advocates of the Applicants, never sought nor obtained consent of the Applicants and the Beneficiary to have the grant confirmed nor did they consent to the mode of distribution of the deceased estate.

g. THAT the consent order in the circumstances was fraudulently entered into by Mrs. Gathecha without the Applicants and Beneficiary's instructions as the instructing clients.

h.. THAT the order dated 8th May 2019 affects the beneficiary's interest on the suit property as she does not intend to sell her portion of land.

i. THAT in any event, the consent order was conditional to the extent that the suit property was to be sold to the highest bidder and proceeds shared equally between the Petitioner and Elizabeth Wangui Kibuthu which is yet to be complied with by the Petitioners three (3) years down the line.

j. THAT the non-compliance of the consent order has far reaching consequences and is prejudicial to the interests of the Beneficiary.

k.THAT the Petitioner herein is mischievous as she has never showed any intent to comply with the consent order.

l. THAT there is a mistake apparent on the face of the purported consent and which warrants the setting aside of the same.

m. THAT there is sufficient reason to set aside and vacate the consent order dated 8th May, 2019.

3. The advocate Muthoni Muchiri Gathecha filed an affidavit and averred that the application is made in bad faith and out of malice as she was in constant communication with the clients. She stated that she held several meetings with the clients in her office and that the clients agreed to the terms of the consent.

4. She stated that after attending court on 8th May 2019, she wrote to the clients on 10th May 2019 who later appeared in her office where a mutual agreement was drafted confirming the terms of the consent. The advocate asserted that there was no fraud on her part as she had no personal interest in the matter. She stated that it was very unfair for the applicant to lie before the court that she had no instructions and that the applicant should clearly state the reasons for wanting to set aside the consent but not dragging her name into mad.

5. She averred that she received a protest letter and responded to the same. She further averred that she paid for their valuation on their instructions and that is why they confirm that she should be paid in their affidavit yet they deny instructing her. She asserted that she has not been paid her fees which was to be paid once they had received their share and this may be one of the reasons why they are making the false allegations.

6. The 1st petitioner also filed a replying affidavit and averred that the 1st and 2nd applicants were never considered as beneficiaries to this matter as the 1st applicant was never legally married to the deceased and did not participate in the burial arrangements nor the succession matter. The 2nd applicant is a mother to the deceased who has her own land where the deceased was buried, therefore has no claim over the deceased estate.

7. The 1st petitioner averred that the beneficiary has not annexed any authority from the applicants to swear the supporting affidavit. She also averred that her advocate has never been served with the protest letter annexed and finds this as an afterthought as no action has taken place since October 2019.

8. The 1st petitioner averred that the parcel of land that was to be sold has not gotten a buyer due to financial constraints being experienced in our economy and the applicant is thus contradicting herself by stating that the 1st petitioner is mischievous in not complying with the consent of selling the land and yet on the other hand wants the consent set aside.

9. The 1st petitioner averred that the applicant has come to court with unclean hands and has brought this application after an inordinate delay since the consent and grant was issued 3 years ago. The application lacks merit as it is aimed at delaying the matter further, which will affect the applicant's beneficial interest.

10. Parties were directed to dispose of the issue by way of written submissions.

Applicants' and beneficiaries written submissions

11.The applicants placed reliance in **Order 45 of the Civil Procedure Rules, Rule 63 of the P & A Rules** and the case of **Brooke Bond Liebig v Mallya (1975) EA 266** and submitted that a consent can only be set aside on grounds of fraud, or collusion or as per **Order 45 of the Civil Procedure Rules** on discovery of new and important matter, on account of a mistake or error apparent on the face of the record or any sufficient reason.

12. The applicants and the beneficiary have demonstrated that their former advocate entered into the said consent order without their instructions. Mrs. Gathecha in her affidavit rebutted that she had instructions but failed to attach any instruction note and/or agreement. Mrs.

Gathecha also acknowledged that she had received a protest letter dated 29th October 2019 challenging the manner in which the consent was entered. However, no response to the said protest letter was attached in her affidavit to deny the said allegation.

13. The applicants submitted that their averment that the consent was secretly filed in court without their knowledge has not been challenged by the petitioner and their previous counsel on record. It was further submitted that it was wrong for applicants' former advocates to enter into a consent with the petitioners' advocate without instructions. This court should therefore find that there was fraud and collusion by their former advocate and the advocate for the petitioner and thus the said consent is irregular and illegal for all purposes.

14. The applicants urged this court to find merit in the summons and set aside and/or review the consent order entered on 8th May 2019 by Mrs. Sally Mbeche, advocates for the petitioners and Mrs. Gathecha counsel for the applicants. Should the court find that the order is valid, then the court should review and/or rectify the mode of distribution contained in the certificate of confirmation of grant dated 8th May 2019 by having Maela/Ndabibi Block 2/773 subdivided into two equal parts and shared by the petitioner and Elizabeth Wangui, beneficiary.

Petitioners' submissions

15. The petitioners submitted that in **Flora N Wasike v Destimo Wamboko [1988] eKLR** the Learned Judge concurred with the position of Winn LJ as cited in **Purcell v F C Trigell Ltd [1970] 2 All ER 671, at 676** which states;

“it seems to me that, if a consent order is to be set aside, it can really only be set aside on grounds which would justify the setting aside of a contract entered into with knowledge of the material matters by legally competent persons, and I see no suggestion here that any matter that occurred would justify the setting aside or rectification of this order looked at as a contract.”

16. It was submitted that the salient features of a valid and enforceable contract are capacity of the parties, offer, acceptance, intention, consideration and certainty. The Applicants/Beneficiary are challenging the lack of acceptance or intention to be bound by the consent order as they aver that they had no knowledge of the consent order as it was secretly filed.

17. The petitioners placed reliance in **Kenya Commercial Bank Ltd V Specialized Engineering Co. Ltd [1980] eKLR**, Harris J correctly held inter alia, that

“A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set 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 for a reason which would enable the court to set aside an agreement.”

18. The Applicants/Beneficiary did not submit any evidence to show illegality in the consent giving rise to the judgment, and the allegations of collusion and connivance do not have a scintilla of evidence to support them. They therefore remain mere allegations. In addition, the Applicants/Beneficiary herein on one side wants the consent to set aside and on the other wants the land to be sold. The Petitioners submit that the application is mischievous with no merit and aimed to cause undue delay.

19. Further the petitioners relied on the case of **Kenya Commercial Bank Ltd V Specialized Engineering Co. Ltd** (supra) where the court held

“A duly instructed advocate has an implied general authority to compromise and settle the action and the client cannot avail himself of any limitation by him of the implied authority to his advocate unless such limitation was brought to the notice of the other side.”

It was their submissions thus, that the applicants/ beneficiaries never served the petitioners advocate with protest letter, therefore failing in their mandate to give any notice of limitation of advocate's power to the petitioner's Advocate. It has also not been demonstrated that Mrs. Gathecha had no authority to enter into the consent that was recorded. Further, no action has been brought since October against the former Advocate on record.

20. The petitioners relied on the case of **Paul Mwaniki v National Hospital Insurance Fund Board of Management [2020] eKLR**, as cited in **Re Estate of Simoto Omwenje Isaka (deceased) [2020] eKLR** and submitted that from the order issued by the Court on 14th May 2019, the applicants/beneficiary have failed to demonstrate an error or omission on the part of the Court that is self-evident and is therefore not entitled to apply for review.

21. It is trite law that an application for review should be made without unreasonable delay. The applicant has advanced no reason for the three years' delay. The said delay is gross and unreasonable and therefore the orders sought in the application should not be granted. See the case of **Stephen Gathua Kimani v Nancy Wanjira Waruingi t/a Providence Auctioneers [2016] eKLR**.

22. The court was urged to dismiss all prayers sought in the Summons with costs.

Issues for determination

23. I have considered the Applicant's Summons, the grounds, the supporting affidavit by the beneficiary, the replying affidavits by the petitioners and Mrs., Gathecha the previous applicant's advocate on record, and both parties' submissions. The only issue for determination is whether the applicants/beneficiary have met the threshold for review and/ or set aside of the consent order dated 8th May 2019.

24. The Court of Appeal in **Isaac Kinyanjui Njoroge v National Industrial Credit Bank Limited [2018] eKLR** reiterated the principles for setting aside a consent order as set out in **Flora N Wasike v Destimo Wamboko [1982-88] 1 KAR 625** when it held that:

“The principles upon which an application for review is considered are well settled. As the Judge correctly stated, this Court held in Flora N Wasike v Destimo Wamboko [1982-88] 1 KAR 625 that a consent judgment can only be set aside on the same grounds as would justify the setting aside of a contract, for example fraud, mistake or misrepresentation. In that case, the Court affirmed the principle in Hirani v Kassam (1952) 19 EACA 131 that:

“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 misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement.”

25. **Order 45 of the Civil Procedure Rules** provides that:

“(1) Any person considering himself aggrieved—

a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

b. by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

26. The Court of Appeal in **National Bank Ltd v Ndungu Njau NRB CA Civil Appeal No. 211 of 1996; [1997] eKLR** laid out the principles governing the exercise of the power of review by a court as follows:

“A review may be granted wherever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.”

27. It is not in dispute that Mrs. Gathecha was the applicants’ previous advocates on record and that there was constant communication between the said advocates and the applicants herein. The applicants contend that Mrs. Gathecha entered into a consent order with Mrs. Sally Mbeche, the petitioners advocate without their knowledge, and that the said consent was secretly filed in Court without the applicants’ blessings and in collusion with the petitioner’s advocates.

28. It is also not disputed that after recording the consent in court on 8th May 2019, Mrs. Gathecha and as confirmed from her affidavit, wrote a letter dated 10th May 2019 directed to the applicants informing them of the consent, after which they later had a meeting in her office and signed a mutual agreement in relation to the terms of the said consent dated 8th May 2019. If at all they didn’t have knowledge of the consent, they should have contested its terms immediately and they should not have executed the mutual agreement attached to Mrs. Gathecha’s replying affidavit. The applicants have not disputed the fact that they executed the mutual agreement before their previous advocate on record.

29. The applicants have also indicated that they wrote a letter of protest dated 29th October 2019. No reason has been advanced to this court why the protest letter was not written immediately when they became aware of the consent and when they were signing the mutual agreement. Further in paragraph 3 of the protest letter the applicants have indicated that they did not consent to the selling of LR MAELA/NDABIBI BLOCK 2/773 and for valuation to be carried out, yet in their supporting affidavit they have agreed to having this Court order that the valuation charges as per the grant be shared equally and paid to M/S Muthoni Gathecha and Company Advocates. If at all they did not give Mrs. Gathecha instructions, then they should have opposed the valuation payment.

30. In addition, Mrs. Gathecha had also through her letter dated 6th November 2019 informed them that they should first refer to the mutual agreement between Mrs. Gathecha and the applicants before writing any protest letter. Indeed, the applicants never replied to Mrs. Gathecha letter dated 6th November 2019 till 27th April 2021 more than two years later when they filed these summons in court.

31. This court can comfortably infer that whatever the applicants are telling the court is far from the truth since in paragraph 12,13 and 14 of their supporting affidavit they have indicated and I quote;

“12. THAT in any event, the consent order was conditional to the extent that the suit property was to be sold to the highest bidder and proceeds shared equally between the Petitioner and Elizabeth Wangui Kibuthu which is yet to be complied with by the Petitioners three (3) years down the line.

13. THAT the non-compliance of the consent order has far reaching consequences and is prejudicial to the interests of the Beneficiary.

14. THAT the Petitioner herein is mischievous as she has never showed any intent to comply with the consent order.”

32. These averments indeed confirm that the applicants were aware of the terms of the consent order and they should not be allowed to disown it at this point in time.

33. As Justice Harris J (as he then was) said in Kenya Commercial Bank Ltd V Specialized Engineering Co. Ltd (Supra), a consent order or judgment 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 or in general for a reason which would enable the court to set aside an agreement or consent judgment. The applicants have not proved the existence of any of the ingredients which would merit the review of the consent orders, arrived at with their full participation.

34. Similarly, no material has been brought forth to show that there was an error apparent on the face of the record to warrant review and/ or setting aside of the consent order dated **8th MAY 2019**. Consequently, it is my humble view that this is but an attempt by the applicant to have a second bite at the cherry and the court is not convinced that this application has substance.

35. In view of the above observations this court does not find any merit in the application and the same is hereby dismissed with costs.

DATED SIGNED AND DELIVERED AT NAKURU VIA VIDEO LINK THIS 16TH DAY OF DECEMBER , 2021

H K CHEMITEI

JUDGE