



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MAKUENI**

**SUCC APPEAL NO. 34 OF 2018**

**IN THE MATTER OF THE ESTATE OF NATHAN KIIO ITINGA (DECEASED)**

**REUBEN KIOKO KAKYEMA.....APPELLANT/RESPONDENT**

**VERSUS**

**MBOYA WAMBUA ITINGA.....1<sup>ST</sup>RESPONDENT**

**KIOKO WAMBUA ITINGA.....2<sup>ND</sup>RESPONDENT/APPLICANT**

**JAMES KYALO WAMBUA.....3<sup>RD</sup>RESPONDENT/APPLICANT**

**ANASTACIA MUTINDI WAMBUA.....4<sup>TH</sup> RESPONDENT/APPLICANT**

**RULING**

1. The application for determination is dated 27/03/2019 and was filed under certificate of urgency. It is brought under Order 12 Rule 7, Order 51 Rules 1 & 3, Order 10 Rule 11, Order 22 Rule 52, Order 45 of the Civil Procedure Rules 2010, Sections 3A, 1A & B of the Civil Procedure Act and all other enabling provisions of the law. It seeks the following orders:

a) **THAT** the court be pleased to set aside the orders issued on 17<sup>th</sup> January 2019 and reinstate the orders of 24/10/2018 in Succession No. 139 of 2016.

b) **THAT** costs be in the cause.

2. The application is supported by the grounds on its face and the supporting affidavit of the 2<sup>nd</sup> Respondent/Applicant sworn on the same day. The principal ground is that the Appellant who is neither their kin nor beneficiary filed this appeal against the orders issued by the trial court (*Makueni PM Succ. No. 139 of 2016*) and proceeded to obtain consent orders without participation of the Applicants. He deposes that this appeal is a conspiracy between the Appellant and 1<sup>st</sup> Respondent to ensure that the Applicants do not benefit from their father's estate.

3. The application is opposed through the Appellant's replying affidavit sworn on 03/04/2019. He deposes that he is the beneficial owner of the estates' properties known as Mavindini/Mavindini 1238 and 1239 (*the properties*) which he purchased from the deceased in 2002 and entered possession in 2003.

4. He deposes that in 2016, the properties were listed for compulsory acquisition by the National Land Commission (NLC), on behalf of the Tanathi Water Services Board, for purposes of the Thwake Multipurpose Dam project and being the beneficial owner, it was agreed that the NLC would hold the compensation (*Kshs.8,332,035/=*) pending the processing of the grant of letters of administration.

5. He deposed that he applied for a special grant *ad Colligenda Bona Defuncti* which the Applicants opposed and he later learnt that the family had registered a consent in court on 24/10/2018 without involving him as the beneficial owner. He filed a certificate of urgency requesting the trial court to set aside the consent whereupon the trial court delivered a ruling and ordered the NLC to have the compensation registered in the joint names of the Applicants. The court also directed that the funds should not be used.

6. It was also his deposition that he instructed his advocates to file this appeal because he was apprehensive that the Applicants would deplete the funds. That on 17/01/2019, his advocates appeared before this court and by consent of the parties present, the court directed the NLC to deposit the compensation in court.

7. It's also his deposition that the Applicants will not suffer any prejudice if the funds are deposited in court and that they are seeking reinstatement of orders which have been overtaken by events as they were subsequently reviewed by the same court.

8. Directions were given that the application be canvassed through written submissions. Accordingly, the parties complied and filed their respective submissions.

### **The Applicants' submissions**

9. The Applicants submit that the order of 17/01/2019 was a scheme by the Appellant/Respondent and 1<sup>st</sup> Respondent to deprive and deny them the right to benefit from their father's estate. They contend that the orders were obtained unprocedurally/fraudulently and should therefore be rendered null and void.

10. They submit that they were never served with the application and memorandum of appeal as required by law and only found out their existence after perusing the court file.

11. They submit that the Appellant/Respondent is not a beneficiary of the deceased's estate and that in his endeavor to disinherit them, he colluded with the 1<sup>st</sup> Respondent, Joyce Wanza Wambua (*their mother*) and public officers including an advocate at the NLC-Wahome Murakaru, chief of Mbooni location and chief of Mavindini Location.

12. They submit that the sale agreement alluded to by the Appellant/Respondent is a forgery, null and void and that its actual Kamba to English translation cannot be interpreted to have any effect of transferring or modifying any interest in land.

13. They submit that the properties are still registered in the deceased's name and they were not aware of any claim by the Appellant/Respondent. They contend that the Appellant's claim emerged after gazettement of the properties by NLC showing that they were among the properties to be compulsorily acquired.

14. They submit that the Appellant/Respondent was not a party in the lower court but he colluded with the 1<sup>st</sup> Respondent and financed him.

15. They reiterate that the orders of 17/01/2019 were obtained without their knowledge and rely on **James Kanyiita Nderitu & Anor. –vs- Marios Philotas Ghikas & Anor (2016)** where the Court of Appeal cited the decision in **Craig –vs- Kanseen (1943) 1 All ER 108** and stated as follows;

*“Where an order is improperly made without serving a person known to be affected by it and having a statutory right to be served before it can be made, the order is a nullity in the sense that it must be set aside ex debito justitiae and that in cases of nullity, procedure is unimportant, since the court has inherent jurisdiction to set aside its own order.”*

16. They have also cited the case of **Brooke Bond Liebig (T) Ltd –vs- Maliya (1975) E.A. 266** where the circumstances under which a consent judgment may be interfered with were considered.

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

17. They submit that the orders of 17/01/2019 were obtained by fraud and collusion between the Appellant and 1<sup>st</sup> Respondent and should therefore be set aside.

### **The Appellant/Respondent's submissions**

18. The Respondent submits that the orders of 24/10/2018 have been reviewed on two occasions *to wit* 29/11/2018 and 21/01/2019. He contends that whereas the Applicants have a problem with the second review done by this court, they have no problem with the first review done by the lower court. It's also his contention that the orders of 24/10/2018 ceased to operate by virtue of having been reviewed on 29/11/2018.

19. He submits that there was participation of the Applicants in arriving at the consent orders of 17/01/2019 because the memorandum of appeal and hearing notice were duly served on their advocates.

20. It's also his submission that reinstatement of the orders of 24/10/2018 is will not be in his best interests since it gives the Applicants absolute control of the money in issue.

21. He submits that consent orders and judgments can only be set aside on exceptional circumstances and when the same is justified. He relies on the case of **Intercountries Importers & Exporters Ltd –vs- Teleposta Pension Scheme Registered Trustees & 5 Others (2019) eKLR** where the Court of Appeal stated that a consent order will only be set aside if it can be demonstrated that it was procured through fraud, non-disclosure of material facts or mistake or for a reason which would enable a court set it aside.

22. He submits that the application does not demonstrate either of the grounds outlined in the leading authorities on setting aside of consent judgment

23. Having considered the application, the replying affidavit and the rival submissions, it is my considered view that the only issue for determination is whether the court should set aside the orders issued on 17/01/2019 and reinstate the orders of 24/10/2018 in Makueni PM

Succ. No. 139 of 2016. I however, find it important to highlight the chronology of events in this matter.

24. The 1<sup>st</sup> Respondent applied for special grant *ad colligenda bona defuncti* under certificate of urgency, *vide* Makueni PM Succ. No. 139 of 2016, in his capacity as the deceased's son. The reason for the urgency was said to be the compensation due to the deceased's estate from the NLC for compulsory acquisition of the estate properties. According to him, the compensation could not be released without grant of letters of administration.

25. In the liabilities section, the petition indicated that the properties had been sold to the Appellant/Respondent. The petition also indicated that the only persons surviving the deceased were Joyce Wanza Wambua (*wife*) and Mboya Wambua Itinga (*1<sup>st</sup> Respondent*).

26. The Applicants objected to issuance of the limited grant and a consent involving the Applicants and 1<sup>st</sup> Respondent was recorded on **24/10/2018** in the following terms;

1. *The entire proceeds of compensation in respect of compulsory acquisition of land parcels number Mavindini/Mavindini 1239 and 1238 be released to Mboya Wambua Itinga, Kioko Wambua and James Kyalo Wambua.*
2. *The money be deposited into a joint account in the names of Mboya Wambua Itinga, Kioko Wambua and James Kyalo Wambua.*
3. *The parties to apply for a full grant within 30 days from today.*
4. *Mention on 5<sup>th</sup> day of December 2018.*

27. Aggrieved by that consent, the Appellant/Respondent applied to have it set aside on the ground that he had been left out yet he was a beneficial owner of the properties. On **29/11/2018**, the trial court ordered as follows;

*“The money directed to be deposited in the joint account in the names of Mboya Wambua Itinga, Kioko Wambua Itinga and James Kyalo Wambua should not be utilized in any way pending the hearing of the application interpartes.”*

28. In what looks like jumping the gun, the Appellant rushed to this court and filed this appeal against the trial court's order of 29/11/2018. Among his grounds of appeal is that the trial Magistrate erred by failing to recognize that he is the actual and beneficial owner of the properties. It is noteworthy that such recognition can only be arrived at after a proper hearing involving all parties.

29. Together with the appeal, the Appellant filed a chamber summons application dated 06/12/2018 seeking *inter alia* to restrain the Applicants from receiving the compensation in their joint names. When the application came up for hearing on **17/01/2019** before Kariuki J, the record shows that only counsel for the Appellant and 1<sup>st</sup> Respondent were present. There was no appearance by the Applicants. The court ordered as follows;

- 1) **That**, by consent of the advocates for the parties, the orders of 24/10/2018 in Succ. No. 139/2016 be and are hereby stayed until further orders of this court.
- 2) **That**, the amount Kshs.8,137,309/= subject of matter herein and in Makueni SPM Succ. 139/2016 to be deposited in court by the National Land Commission as compensation for Mavindini/Mavindini/1238 and Mavindini/Mavindini/1239 until further orders of the court.
- 3) **That**, the money shall not be withdrawn or utilized without court orders.
- 4) **That**, parties to expedite matter on entitlement of the same monies.
- 5) **That**, mention on 28/03/2019.

### **Analysis and determination**

30. Even without delving into whether the application and appeal were served, it is clear from the record that the Applicants were absent on 17/01/2019 when the consent was recorded by counsel for the Appellant and 1<sup>st</sup> Respondent. The Applicants were directly affected by the order in that it stopped the compensation from being deposited in their joint account. On that ground alone, my considered view is that the consent is incompetent.

31. Secondly, the Appellant is behaving as if ownership has already been determined yet the properties are still in the deceased's name and the alleged sale agreement is highly contested. Actually, after looking at the orders issued by the trial court and the grounds in the memorandum of appeal, I am of the firm view that this appeal is premature, unnecessary and is derailing the determination of the real issues.

32. Contrary to the Appellant's submissions, the order of 29/11/2018 was an addition to the orders of 24/10/2018 and not a review. Reading the two together has the effect of preserving the compensation award pending the determination of the rightful heirs. The trial court had already directed the parties to apply for a full grant within 30 days from 24/10/2018 and that is the forum where the Appellant should canvass his case of being a creditor of the deceased's estate.

33. By appealing against the trial court order of 29/11/2018, the Appellant wants this court to prematurely delve into the arena of a highly contested issue which the trial court has jurisdiction to hear and determine.

34. **Section 79B Civil Procedure Act** provides that:

***“Before an appeal from a sub-ordinate court to the High court is heard, a judge of the High court shall peruse it, and if he considers that there is no sufficient ground for interfering with a decree, part of a decree or order appealed against, notwithstanding section 79C, reject the appeal summarily.”***

35. Upon consideration of the facts placed before me I find that the lower court should be given an opportunity to hear and determine the matter before it. The money from the National Lands Commission is safely protected by the order issued on 24<sup>th</sup> October 2018 which order MUST be complied with by the concerned parties.

36. The order made by this court on 17<sup>th</sup> January 2019 was made without the participation of the Applicants and cannot be said to be a consent order involving ALL parties herein.

37. I therefore find no sufficient ground for interfering with the order appealed against and summarily reject the appeal under section 79B of the Civil Procedure Act with costs to the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents. That automatically vacates the orders of 17<sup>th</sup> January, 2019. The matter Makueni SPM succession cause No. 139 of 2016 should resume for hearing and determination as soon as possible.

Orders accordingly.

**Delivered, signed and dated this 27<sup>th</sup> day of February, 2020 in open court at Makueni.**

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**H. I Ong’udi**

**Judge**