REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NO. 585 OF 2016

IN THE MATTER OF THE ESTATE OF JOHN EZEKIEL KIBOIT alias JOHN KIGEN

EVALINE CHERUTICH KUMIN..PETITIONER

VERSUS

SOLOMON BOIT..OBJECTOR/APPLICANT

RULING

1. Mzee John Kiboit Ezekiel (Deceased) passed on on 26/11/2013. His widow, Evaline Cherotich Kumin (Administrator) filed for letters of administration intestate with respect to the Deceased's estate. Therein, she named nine children of the Deceased besides herself as the other heirs to the estate. Among the nine is Solomon K. Boit – the Applicant herein.

2. In her Petition for Letters of Administration, the Administrator included a letter from the Acting Chief of Sabatia Location, Benjamin Sitienei confirming her as the legal wife of the Deceased. She also included a Consent to the Making of a Grant of Administration Intestate to a Person of Equal or Lesser Priority dated 02/09/2016. The Consent is signed by seven of the nine children of the Deceased. The Applicant is one of the two children who did not sign the Consent. Instead, against his name is handwritten the word: "objection."

3. It is unclear if the Applicant was aware of the Petition for the Letters of Administration or whether he is the one who appended the word "objection" next to his name in the Consent. In any event, the Consent made it clear that he had not freely consented to the grant of the Letters of Administration to the Administrator. Nonetheless, probably because the Administrator, as the widow, enjoys priority or because the Applicant and his sibling took no further steps to action their objection to the grant of the letters of administration when it was duly gazetted, the Court granted letters of administration to the estate of the Deceased to the Administrator on 12/06/2017.

4. There was a lull in activities in the file until a little more than a year later when the Applicant, through his then advocates, Tarus & Company, filed an Application dated 09/07/2018. The Application had four prayers as follows:

> *1) That the [Application] be certified urgent and service …be dispensed in the first instance.*
>
> *2) That "the Certificate of Confirmation of confirmation of grant (sic) issued on 12th July, 2017 (sic) be revoked by the Court".*
>
> *3) That the Court be pleased to restrain the Petitioner from "transferring, leasing out and or in any way or manner dealing with the estate property in a manner that will disenfranchise the applicant herein pending the determination of the summons application herein.*
>
> 4) *That the costs of the application be provided for*.

5. The parties' respective advocates appeared before the Court on 18/10/2018. The Court granted the Petitioner leave to respond to the Application within 30 days and granted corresponding leave to the Applicant to file any supplementary affidavit. Hearing was set for 28/01/2019.

6. On 28/01/2019, the parties' respective advocates appeared before the Learned Judge again. The Petitioner's lawyer requested that the matter be dispensed by way of viva voce evidence, a request which was acquiesced to by the advocate for the Applicant. The Court so ordered and scheduled a hearing date for 10/06/2019.

7. On 10/06/2019, a Mr. Geke was present for the Applicant – holding brief for Ms. Tarus. Mr. Lagat was present for the Administrator. The following consent was recorded:

By Consent, the 2nd prayer in the application dated 09/07/2018 is abandoned.

The estate is preserved pending the filing of Summons for confirmation of grant. The administrator to file Summons for Confirmation within 21 days. If a protest is desired, to be filed within 21 days of service of the summons for confirmation.

8. A new mention date of 29/07/2019 was assigned. By that date, the Learned Justice A. Ndung'u who was seized of the matter had been transferred out of the station and the file was assigned to my Court. A Ms. Ndinda was present on that day holding the brief of Mr. Odoyo for the Applicant/Protestor. I noted that Summons for Confirmation had been filed and directed that directed the Applicant/Protestors to file and serve their protests and return for directions on hearing of the Summons for Confirmation. The Summons for Confirmation of Grant is dated 24/09/2018. It was filed in Court on 05/07/2019.

9. One more party – a Mr. Tom Kipkosgei Boit – filed an Affidavit of Protest dated 22/11/2019 and filed in Court on 25/11/2019. Mr. Tom Kipkosgei Boit is also a son to the Deceased.

10. Meanwhile, on 27/11/2019, the Applicant brought the present Application. It seeks two substantive prayers namely:

> *1) That this Honourable Court be pleased to set aside the orders made on 10/06/2019 abandoning prayer 2 of the Application dated 09/07/2018.*
>
> 2) *That this Honourable Court be pleased to reinstate prayer 2 of the Application dated 09/07/2018*.

11. The Application has been filed through the Applicant's new lawyers – Ms. Kipkenda & Co. Advocates. The gist of the Application is that the Applicant claims that his former advocates, Ms. Tarus & Co. Advocates entered into the consent dated 10/06/2019 without his consent, instructions or authority. The Application is supported by the Affidavit of the Applicant. The four important paragraphs read as follows:

> 9) *That the firm of M/s Tarus & Company Advocates abandoned prayer number 2 of the Application dated 09/07/2018 without my consent, instructions or authority.*
>
> *10) That I am still keen and desirous of proceeding with the Application dated 09/07/2018 to its logical conclusion.*
>
> *11) That my erstwhile Advocates acted without authority or instructions from me hence their actions should not bind and/or are not binding on me.*
>
> *12) That my erstwhile Advocates maliciously misdirected the Honourable Court to record consent of the parties on prayer number 2 of the Application dated 09/07/2018*.

12. The Application is opposed by the Administrator. Through her advocates, she filed Grounds of Opposition raising seven grounds as follows:

> *1) That the Application illustrates clear intention by the Applicant to mislead this Honourable Court by deliberately concealing material fact that he was aware of, and was a party to the proceedings before the Court that led to the recording of the Consent on 10/06/2018.*
>
> *2) That the Applicant is misleading and crafty in that he has now instructed a different firm of advocates to represent him in an attempt to get out of the consent he willingly executed.*
>
> *3) That the Applicant has not substantiated any particulars of fraud, coercion or undue influence to warrant setting aside of the said consent order.*
>
> *4) That the Application seeks, through the back door, to ask this [Court to] nullify consent voluntarily entered [into] by the Applicant to the detriment of the Petitioner.*
>
> *5) That in view of paragraphs 1, 2, 3 and 4 above, the Chamber Summons Application is an abuse of the Court process and should be dismissed with costs.*
>
> *6) That this whole Application is baseless and a shot in the dark and in the event it is allowed it has the effect of setting a dangerous precedent allowing recanting of consents freely given.*
>
> 7) *That the orders sought ought not to issue as the Application is incompetent, devoid of merits, a blatant abuse of the process of the Court and is unenforceable*.

13. The Application was argued by way of written submissions. I have carefully read the submissions as well as Application, supporting affidavit and the responses thereto. I have also carefully appraised myself of the Court record as rehashed above.

14. The matter for determination is simple enough: should the Court set aside the Consent Order entered on 10/06/2019 by the parties' respective advocates?

15. In support of the Application, the Applicant insists that he never gave his advocates instructions to compromise the Application dated 09/07/2018 in the manner that they did. He insists that the consent was a produce of fraud, collusion or worse. He says that he should not be made to suffer for the fraudulent actions of his former lawyers.

16. The Petitioner's main argument is that the consent was freely and knowingly entered into and that the Applicant does not meet the threshold for the setting aside of consent orders.

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.*

22. In the present case, I am only called upon to apply these principles to the facts. Has the Applicant met the high threshold akin to grounds for rescinding a contract? Here the Applicant alleges fraud and claims that his previous advocates acted without his authority. He does not proffer any theory why the advocate do so or why the advocate elected to compromise only the aspect of the case going to the grant of Letters of Administration while preserving the question of distribution of the estate for determination by the Court on merits.

23. What is even more telling, in my view, is that other than mere reiteration that the former advocate acted without authority, there is little else by way of details to persuade the Court that the threshold has been met. There are no alleged tale-tell signs of collusion of fraud. There was no attempt to show that the Applicant has taken any action against the lawyer who allegedly entered into the consent without authority. Not even a complaint or protest letter let alone a criminal complaint! In short, it stretches credulity to make the claim that the advocates compromised the aspect of the suit they did without the Applicant's consent. As the Petitioner points out in her submissions, if all a party who develops "buyer's remorse" after entering into a Consent had to do was to change advocates and then make a bland claim that the previous advocate did not have authority to compromise the suit like she did, no Consent Order will enjoy the degree of certainty which is necessary for the due stability and integrity of Consent Orders.

24. In any event, there has been no demonstration that the advocates were not permitted as part of their professional duties as advocates to compromise the suit as they did. Differently put, as the Court of Appeal in the Kenya Commercial Bank Case (supra) said: *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.*

25. **So it is here. The Applicant has failed to reach the high threshold required by our case law in order to undo a Consent Order. The Application dated 27/11/2020 is hereby dismissed with costs.**

26. Orders accordingly.

Dated and delivered at Nakuru this 17th day of September, 2020.

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JOEL NGUGI

JUDGE