



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D. K. Kemei - J

SUCCESSION CAUSE NO. 386 OF 2000

IN THE MATTER OF THE ESTATE OF MUKITA MUVINGO ALIAS MUKITA MWANIKI (deceased)

MALILA MWANIKI)

KANYELE MWANIKI)

KIOKO MWANIKI).....OBJECTORS/APPLICANTS

VERSUS

MBULU MUKITA)

MUKONYO MUKITA)

MUTINI MBITHI).....PETITIONERS/ADMINISTRATORS

RULING

1. The ruling relates to two applications that shall be addressed chronologically. The 1st Application is dated 21.7.2020 that is a notice of motion brought under section 33 and 40 of the Law of Succession Act and Rule 49 of the Probate and Administration Rules where the following orders are sought:

a) Spent

b) The deceased 1st, 2nd and 3rd objectors/applicants be substituted as follows; -

*i. Malila Mwaniki be substituted by **Willy Malilia Mwaniki***

*ii. Kanyelee Mwaniki be substituted by **Julius Ngesa Kimonyi and***

*iii. Kioko Mwaniki be substituted by **Isaac Mung'ala Kioko and Muendo Kioko.***

c) The costs of the application be in the cause.

2. The Application is premised on the grounds that the applicants/objectors are since deceased having died on 7.12.2011, 21.12.2015 and 16.7.2011 respectively. It was stated that the objector's case could not proceed without substituting the deceased objectors. The application is supported by three affidavits. The 1st affidavit is sworn by Willy Malili Mwaniki who is stated to be the son of the deceased 1st objector. It was averred that the 1st objector died on 7.12.2011 before the conclusion of the pending objection proceedings and that the other beneficiaries of the estate of Malila consented to him being substituted for the deceased objector and it is in the interest of justice that the order for substitution is granted. The 2nd affidavit is sworn by Julius Ngesa Kimonyi who is stated to be the son of the deceased 2nd objector. It was averred that the 2nd objector died on 21.12.2015 before the conclusion of the pending objection proceedings and that the other beneficiaries of the estate of Kanyelee Mwaniki consented to him being substituted for the deceased objector and it is in the interest of justice that the order for substitution is granted. The 3rd affidavit is jointly sworn by Isaac Mungala Kioko and Muendo Kioko who are stated to be the sons of the deceased 3rd objector. It was averred that the 3rd objector died on 16.7.2011 before the conclusion of the pending objection proceedings. It was averred that they applied for limited grant which grant was issued by the Chief Magistrates Court of Kenya at Machakos on 10th May, 2017 vide Succession Cause 15 of 2017. The deponents averred that they applied to this court for substitution vide notice of

motion dated 27.12.2018 and the court in its ruling delivered on 3.7.2020 did not grant the order of substitution as it did not address the application for substitution of the 3rd objector as prayed for in the application. The deponents averred that it is in the interest of justice that the application is allowed

3. In reply to the application is an affidavit deponed on 27.7.2020 by Gedion Kisinga Mukita stated to be a son of the deceased. According to the deponent, he was substituted by consent of the administrators since the original 1st and 2nd administrators are deceased. According to the deponent, the application is intended to delay the conclusion of the matter as none of the objectors or substitutes are interested in the suit land. It was pointed out that none of the substitutes are personal representatives of the deceased objectors and that the 3rd objector's earlier application was dismissed hence his prayer is *res judicata* the ruling delivered on 3.7.2019. It was pointed out that Muendo Kioko is already part of the proceedings having testified on 1.11.2005 as OW2 hence there was no need to substitute him; that further Isaac Mungala Kioko is a witness in the matter vide a witness statement. The court was urged to dismiss the application.

4. In rejoinder is an affidavit deponed on 14.9.2020 by Muendo Kioko who is stated to be a son of the deceased 3rd objector and he averred that an application for ad litem was presented before the High Court Probate registry and his advocates on record were directed to take the petition to the Chief Magistrates registry. It was averred that the Chief Magistrates court issued the grant ad litem on 10.5.2017 and the deponent emphasized that he had a valid grant ad litem that is limited to prosecute the instant proceedings; that he ought not to be locked from the proceedings. It was pointed out that the defect in management at the Registry ought not to be visited on the deceased objectors. It was averred that various judges had handled these objection proceedings therefore the application ought to be allowed.

5. The 2nd application is dated 14.9.2020 brought under Rule 49 of the Probate and Administration Rules. The following orders are sought:

a) Spent

b) Spent

c) *The consent entered on 14.7.2020 on the substitution of the deceased 1st and 2nd petitioners with Gideon Kisinga Mukita be set aside*

d) *The draft replying affidavit in opposition to the petitioners' summons dated 2.7.2020 sworn by Muendo Kioko and marked as exhibit MK5 be deemed as properly on record upon payment of the requisite court filing fees; and*

e) *The costs of the application be in the cause*

6. The application is supported by the affidavit of Muendo Kioko who is stated to be the son of the deceased objector who admitted that on 14.7.2020 the objectors instructed their counsel to enter into a consent and substitute the deceased 1st and 2nd petitioners with Gideon Kisinga Mukita. The deponent lamented that the petitioners refused to reciprocate the consent that was given by them and instead opposed the application dated 21.7.2020 by the objectors for substitution of the deceased 1st to 3rd objectors. The court was urged to allow the application.

7. In reply to the application was an affidavit deponed by Gideon Kisinga Mukita who averred that no legal or sufficient grounds had been presented to warrant the setting aside of the consent. The deponent denied the reciprocity that was stated to have been promised and the court was urged to dismiss the application.

8. Directions were given that the applications be canvassed vide written submissions. In respect of the 1st application, counsel for the applicants' singular issue is whether the deceased 1st, 2nd and 3rd objectors can be substituted as proposed. The court was urged to allow the application. In respect of the 2nd application, it was submitted that there was misrepresentation on the part of the respondents in indicating that they would consent to the applicants' application and this was not done hence the consent ought to be expunged from the court record. Reliance was placed on the case of **Kuldip Singh Rihal v Jaswinder Singh Rihal (2016) eKLR**.

9. In opposition to the 1st application, counsel for the respondents submitted that the application was incompetent as the applicants did not hold valid letters of administration. The court was urged to dismiss the application. Reliance was placed on the case of **Alexander Mutunga Wathome v Peter Tumbo Lavu (2015) eKLR**. It was reiterated that the 3rd applicant's prayers ought not to see the light of day as the ad litem that he had was issued by a subordinate court that was not seized of jurisdiction in the instant matter. It was further pointed out that the 3rd applicant's prayer is *res judicata*.

10. In respect of the 2nd application it was submitted that the applicants had not demonstrated sufficient grounds to warrant the setting aside of the consent order entered on 14.7.2020. Reliance was placed on the case of **Kericho Guest House Enterprises Ltd v Kenya Breweries Ltd (2018) eKLR**.

11. The record shows that there are two valuations reports that were filed in court pursuant to the directions of the court on 3.7.2020. The reports seem to speak to the fact that the approximate value of the suit property is about Kshs 20m/- on average and therefore this court will not consider the transfer of the succession cause to the Magistrates court for determination. The record also speaks to the fact that this court declined an application for substitution by the 3rd objector on the grounds that he had an adlitem that was issued in the Chief Magistrates Court in Machakos and not the high court hence this court had no jurisdiction to grant an order of substitution of the said 3rd respondent on the footing of the mentioned grant. On record is what is stated to be a consent by the parties to substitute the 1st and 2nd respondents who are deceased with a one Gideon Kisinga Mukita.

12. The issues for determination are as follows;

- a. **Whether the application for substitution has merit.**
- b. **Whether the court may set aside what was stated to be the consent that was entered into on 14.7.2020.**
- c. **What orders the court may make**

13. In addressing the first issue, I am guided by section 54 of the Law of Succession Act which provides that a Court may limit a grant of representation which it has jurisdiction to make in any of the forms described in the Fifth Schedule. Paragraph 14 of the Fifth Schedule provides:

“When it is necessary that the representative of a deceased person be made a party to a pending suit, and the executor or person entitled to administration is unable or unwilling to act, letters of administration may be granted to the nominee of a party in such suit, limited for the purpose of representing the deceased in the said suit, or in any other cause or suit which may be commenced in the same or in any other court between the parties, or any other parties, touching the matters at issue in the cause or suit, and until a final decree shall be made therein, and carried into complete execution.”

14. The import of the above provision is that a deceased in a succession suit may be substituted by an applicant who has a limited grant of representation for the estate of the deceased and as such may represent the deceased in the suit herein. In addition, Rule 40(6) of the Probate and Administration Rules allows any person wishing to object to the proposed confirmation of a grant to file an affidavit of protest against such confirmation stating the grounds of his objection. The options available to the parties are either to obtain a limited grant from this court or in their own right and on behalf of other beneficiaries they may file an affidavit of protest without necessarily substituting the deceased Protessor.

15. The record bears witness that there is no ad litem granted by this court and therefore the applicants had no locus standi to appear before this court. In the same limb I have examined what is stated to be a consent that was entered into on 14.7.2020 and this is the consent that the applicants in the 2nd application seek to be set aside.

16. The principle upon which the court may interfere with a consent judgment was outlined by the Court of Appeal of East Africa in **Hirani v Kassam [1952] EACA 131**, in which it approved and adopted the following passage from **Seton on Judgments and Orders 7th Edition Vol.1 page 124**;

“prima facie, any order made in the presence and with a consent of counsel is binding on all parties to the proceedings or action, and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to 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 court to set aside an agreement.”

17. Reasons that would enable court to set aside an agreement are fraud, mistake, misapprehension or contravention of court policy.

18. According to the applicants, there was misrepresentation on the part of the respondents that led to the applicants entering into the consent. The Law dictionary defines Misrepresentation as:

“An intentionally or sometimes negligently false representation made verbally, by conduct, or sometimes by nondisclosure or concealment and often for the purpose of deceiving, defrauding, or causing another to rely on it detrimentally; also: an act or instance of making such a representation” See also **Esso Petroleum Company Limited Vs Mardon [1976] 2 All ER 5**.

19. My take is that misrepresentation is a false statement of fact or law which induces the representee to enter a contract. There must be a false statement of fact or law as opposed to opinion or estimate of future events (See **Bisset v Wilkinson [1927] AC 177**). Once it has been established that a false statement has been made it is then necessary for the representee to demonstrate that the false statement induced them to enter the contract (See **Horsfall v Thomas [1862] 1 H&C 90**). If the representee does an act to adopt the contract, or demonstrate a willingness to continue with the contract after becoming aware of the misrepresentation they will lose the right to rescind (See **Long v Lloyd [1958] 1 WLR 753**).

20. The questions that come to my mind are, what was the statement that was made by the respondents? Has the statement been presented to the court? I note that there are no such statement that form part of the documents attached to the application. I am of the view that in the absence of such proof, it cannot hold that the respondents induced the applicants to enter into the consent. The evidence by the applicants is not enough to meet the legal criteria for setting aside the consent judgment.

21. Be that as it may, Gideon Kisinga Mukita is not exempt from applying for a fresh grant as there is no room for substitution of a deceased administrator. I am guided by the case of **Julia Mutune M’mboroki v John Mugambi M’mboroki & 3 others [2016] eKLR** where the Court held;

“There is absolutely no room of substitution of the deceased administrator under the Law of Succession Act. In my view, therefore, where the sole administrator is a natural person, and he or she dies, the grant becomes useless or inoperative by reason of subsequent event of his demise.....

Accordingly, in such case, the proper procedure is to apply for revocation of grant of letters of administration under section 76(e) of the Law of Succession Act on the reason that the grant has become useless and inoperative through subsequent circumstances and a grant to be made to another person named in the application.”

22. Therefore, there could not be any substitution in the manner envisaged by the consent that was entered on 14.7.2020 and this court notes that it went into error in allowing the consent and accepting the effect thereof. The said consent ought not to stand as the effect is void.

23. In answering issue 3, the court in *suo moto* sets aside the consent and directs the said Gedion Kisinga Mukita to follow the procedure in paragraph 21 above. I am guided by the observation by Lord Denning in ***Macfoy v United Africa Company Ltd [1961] 3 All E.R. 1169 at 1172***; thus:

'If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.'

The mentioned consent is therefore null and void as it was entered into contrary to the provisions of the law. The same must be set aside. Even without being prompted by the parties this court has inherent powers vide Rule 73 of the Probate and Administration Rules to make such orders as are expedient to meet the ends of justice or to prevent abuse of court process. The court can do this *suo motto*. Now that the court has noted the anomaly in the entry of the impugned consent then it must act by setting it aside.

24. In this regard, the court finds that the application dated 21.7.2020 lacks merit and the same is dismissed. The application dated 14.9.2020 has merit and is allowed as prayed vide **(3)** and **(4)** however not in the manner envisaged by the applicants. Each party to bear their own costs.

It is so ordered.

Dated and delivered at Machakos this 17th day of November, 2020.

D. K. Kemei

Judge