



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

SUCCESSION CAUSE NO. 12 OF 2007

IN THE MATTER OF THE ESTATE OF COSMA DAMIANO FRANCO CEINO (DECEASED)

BETWEEN

TUKERO OLE KINA.....APPELLANT

VERSUS

ALEX SHUHULI CEINO...RESPONDENT

RULING

1. The summons dated 7th June, 2018 taken out by the Applicant, Tukero Ole Kina is in pursuance to Section 47 of the Law of Succession Act, Rules 63(1) and 73 of the Probate & Administration Rules, Order 45 Rule 1 of the Civil Procedure Rules and any other enabling provisions of the law for orders of review, variance or setting aside of the consent order dated 17th May, 2018.

2. The application is supported by the supporting and supplementary affidavits of Tukero Ole Kina and is premised on the grounds that the counsel for the Respondent (Alex Shuhuli Ceino) recorded a consent on 17th May, 2018 in court which was then adopted as a court order; that the will of the deceased, Cosma Damiano Franco Ceino dated 10th February, 2003 designates Tukero Ole Kina as the executor and trustee of the estate of the deceased; that the will does not refer to Alex Shuhuli Ceino anywhere in it; that the grant of probate in the succession cause having been confirmed on 30th March, 2009, there has never been an appeal or review preferred against that confirmation; and that the counsel who recorded the consent also represented Stella Saumu and Pasquale Ceino who were not parties to the succession cause or the pending application and neither have they been joined as parties by consent or by an order of the court hence there is an error on the face of the record. In addition, it is said that they lacked legal capacity to enter into the consent and neither was the executor involved in the recording of the consent.

3. On the Respondent's claim that the Applicant has complied with the consent order by release of money to the Respondent, it is averred that the money released to Pasquale Ceino was because he had attained the age of 21 years and it became unbearable to handle the same due to his spending habits and not as a result of the consent order; and that Pasquale Ceino was the only son of the deceased.

4. It is also averred that the properties referred to in paragraphs 1 to 5 of the consent do not form part of the estate of the deceased Cosma Damiano Franco Ceino making the consent fraudulent in that it forces the hand of Pasquale Ceino to part with his property that does not form part of the estate; that the titles in the possession of the executor were in his custody in his capacity as the testamentary guardian and not that the estate had an interest in the said properties hence he cannot distribute them; and that the executor has no authority over the said properties. According to the Applicant, the fact that there is a misapprehension in regard to the true ownership of the properties should by itself lead to the setting aside of the consent order. Further, that there is no appeal preferred against the consent and there is therefore good and sufficient ground to review, vary and/or set aside the consent.

5. In response, the Respondent filed a replying affidavit stating that Pasquale Ceino is a step brother to Stella Saumu and himself. The will left the entire estate to Pasquale Ceino and the Respondent has sought to have the will varied so that he can inherit a portion of the estate. The Respondent's averment is that Pasquale Ceino did reach out to the executor and his advocate so as to resolve the issue to no avail. Therefore, in order to settle the dispute they reached the consent in issue. The Respondent therefore avers that the instant application is made in bad faith and against the spirit of reconciliation. It is further the Respondent's averment that Pasquale Ceino is an adult of sound mind and disposition and has not raised an issue over the consent. Also that it is not unusual for a beneficiary to cede part of the estate or abandon the inheritance all together.

6. It is further averred that the executor has released money to Pasquale Ceino in part compliance of the consent order which fact he has failed to disclose. The Respondent avers that the executor cannot partly comply and abandon the rest of the terms of the consent. It is also averred that the emerging trend is for courts to abandon procedure in order to expedite a matter including putting pressure on an advocate

where they feel the advocate is impeding the matter.

7. The parties filed written submissions to dispose of the matter. The Respondent indicated that he was fully relying on his pleadings on record in opposition to the application. He therefore did not file any submissions.

8. The Applicant submits that as per Rule 63 of the P& A Rules, Order 45 of the Civil Procedure Rules applies in succession matters. It is pointed out that a consent has a contractual effect and 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 or on account of a mistake or error apparent on the face of the record or any sufficient reason and the application ought to be made without unreasonable delay. To buttress this point he relied on decisions in the cases of **In re Estate of Kamau Macharia (Deceased) [2018] eKLR** and **James Muriungi M'mwirichia v Agnes Nthangi Mwirichia Bundi [2014] eKLR**.

9. According to the Applicant, the error apparent on the record is that Stella Saumu and Pasquale Ceino are not parties to the suit and that it is an error apparent on the record for Pasquale Ceino to have fired the Applicant's counsel by purporting to file a notice to act in person. The Applicant asserts that the fraud is that Pasquale Ceino is the beneficiary and proprietor of Portion 2214 (Original No. 1935/86) Malindi hence the property does not form part of the estate for inheritance. Counsel for the Applicant submitted that the consent becomes fraudulent for forcing the hand of Pasquale Ceino to part with his property which does not form part of the estate.

10. It is further submitted that equity follows the law as was held by the Court of Appeal in **David Sironga Ole Tukai v Francis Arap Muge & 2 others [2014] eKLR** and that the primary duty of the court in a succession cause is to distribute the estate. It is submitted that as per Section 30 of the Law of Succession Act no application shall be brought after a grant of representation has been confirmed. As such, the grant having been confirmed in this cause on 30th March, 2009, the instant application does not lie.

11. It is further submitted that in a testate succession the estate is distributed as per the wishes of the deceased. According to the Applicant, neither Stella Saumu nor the Respondent have challenged the Applicant's assertion that they are not dependants of the deceased. It is the Applicant's case that the assertion that Stella Saumu and Pasquale Ceino are not parties has not been controverted nor has the Respondent denied the assertion that the Applicant is represented by his counsel and not by Pasquale Ceino.

12. The impugned consent adopted as an order of the court on 17th May, 2018 indicates that it was adopted upon the hearing of the counsel for the Applicant, Stella Saumu, Pasquale Ceino and Alex Shuhuli Ceino who were all present at the time.

13. 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.”

14. The salient features of a valid and enforceable contract are capacity of the parties, offer, acceptance, intention, consideration and certainty. The Applicant has pointed out that two of the parties lacked capacity for not being parties to the cause. Further, that they were not dependants of the estate of the deceased and that as the executor of the estate he is not represented by Pasquale Ceino. Also that the properties in question do not form part of the estate. All these facts according to the Applicant point to misrepresentation.

15. 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.”

16. 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.”

17. The Applicant’s argument is that Pasquale Ceino and Stella Saumu are not parties to the cause and as the properties in question do not form part of the estate of the deceased the consent cannot hold. The Applicant is the testamentary guardian of the titles to the properties and submits that there is pending an application by the Respondent for revocation of the confirmed grant.

18. A perusal of the file shows that the Applicant, Tukero Ole Kina was issued with a grant of probate to the estate of the deceased Cosma Damiano Franco Ceino on 26th June, 2008. The grant was confirmed on 30th March, 2009. The Will upon which the grant of probate is premised shows that the deceased appointed Mr. Tukero Ole Kina as the executor and trustee of the Will. The deceased also appointed Mr. Tukero Ole Kina as the guardian of his son Pasquale Ceino.

19. In the circumstances it would be wrong to enter into an consent in respect of the matters touching on the estate of the deceased without involving the executor and trustee. What we have before the court is not a consent since the same cannot be enforced without forcing the Applicant’s hand. He was not a party to the consent.

20. The purported consent entered on 17th May, 2018 is therefore irregular. Although Pasquale Ceino had on 14th December, 2017 filed a notice to act in person by firing the firm of Binyenya Thurania & Co. Advocates who was on record for Tukero Ole Kina, his actions could not bear any fruits as Tukero Ole Kina remained the executor of the Will of his father. Secondly, Pasquale Ceino had no capacity to sack the advocate appointed by the executor.

21. From the pleadings it appears that Pasquale Ceino has a problem with Tukero Ole Kina but he cannot use shortcuts to get the desires of his heart. He must comply with the law.

22. The consent entered by Stella Saumu Kadilo, Alex Shuhuli Katana and Pasquale Ceino amounts to nothing without the blessings of the executor of the Will of the deceased. Consequently, the order of this court issued on 17th May, 2018 is set aside as there is an error apparent on the face of the record. The Applicant’s application to set aside the said consent succeeds.

23. In my view, this is not a proper case for awarding costs. As such, I order each party to meet own costs of the proceedings.

Dated, signed and delivered at Malindi this 21st day of February, 2019.

W. KORIR,

JUDGE OF THE HIGH COURT