



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 1337 OF 2005

IN THE MATTER OF DIVISION OF THE ESTATE OF KINYANJUI MWANGI ALIAS WANGURU MWANGI (DECEASED)

PATRICK WANGURU KIRUTHI.....APPLICANT

VERSUS

MARY MURUGI GICHURU.....RESPONDENT

RULING

1. The application that is the subject of this ruling is the Applicant's Summons dated 27th September, 2018, in which the Applicant seeks to set aside and/or vary the Consent Order dated on 1st July, 2014 and issued on 21st August, 2014. The Summons is supported by the grounds set forth on the face thereof and on the Supporting Affidavit sworn by the Applicant dated 27th September, 2018.
2. The Application is premised on the grounds that the Consent Order that was recorded in Court on the 1st of July, 2014 by the then Counsel for the Applicant together with Counsel for the Respondent, was done without the knowledge and involvement of the Applicant, the administrators and the beneficiaries of the deceased's estate.
3. The Applicant argues that there was no consensus in recording of the said Consent and that it was contrary to his express instructions to his then Counsel and in conflict with the terms of the amended Certificate of Confirmation of Grant issued by the Kiambu Court in **Succession Cause No. 76 of 1990**. The Applicant alleges that the Consent was therefore procured through misrepresentation and fraud.
4. The Applicant deponed in paragraph 9 of his Supporting Affidavit dated 27th September, 2018 that the Deceased, who was the grandfather to the Applicant, bequeathed the Applicant a parcel of land known as Kiambaa/Waguthu/T.21 absolutely and directed his sons to ensure that his father's portion of the inheritance was bequeathed to the Applicant.
5. It was the Applicant's sworn testimony that from the year 1997 when the amended Certificate of Confirmation of Grant was issued until 2005, the Respondent, his sister, did not raise any objection on the distribution of the estate of the deceased. She later demanded a share of the property title number Kiambaa/Waguthu/T.21 in this Court.
6. The Applicant deponed that on 1st July, 2014 when the matter came up for hearing, he attended Court together with his then advocate who had informed him that owing to time constraints, he would seek the Court's indulgence to allow him to peruse the **Kiambu Succession Cause** and this cause to enable him to prepare for the hearing of the suit. It was his testimony that when the matter was called out, his then advocate and the Respondent's advocate stood up and addressed the Court and while the Applicant was waiting for the Court's directions, his then advocate called him out of the Court room and informed him that his request to peruse the Court files had been granted. The Applicant deponed that the proceedings of the said day did not raise any suspicion since he had dully instructed his advocate and had been briefed on the intended action.
7. It is the Applicants contention therefore that the said consent was unlawfully and fraudulently entered into and ought to be set aside and/or varied as shown hereunder:
 - a. The administrators of the estate of the late Kinyanjui Mwangi alias Wanguru Mwangi were not involved in recording the said Consent
 - b. The beneficiaries of the estate of the late Kinyanjui Mwangi alias Wanguru Mwangi were not involved in the recording of the said consent
 - c. The said consent was recorded without the Applicants knowledge and instructions

d. The parties whose shares were varied by the consent and the parties whose shares were taken by the Respondent were not consulted and did not consent to the said variation and removal as heirs

e. The estate of the late Karanja Kinyanjui, a deceased joint administrator of the estate of the late Kinyanjui Mwangi alias Wanguru Mwangi was not represented in the recording of the said Consent

f. The consent was fraudulently procured and in a clandestine manner

8. The Respondent filed a Replying Affidavit dated 12th November, 2018 in opposition to the application, stating that the Application dated 27th September, 2018 is an abuse of the Court process having been brought four years after the said Consent was entered. It was the Respondent's assertion that all parties in the suit agreed to enter the Consent and that the Applicant was misleading the Court by alleging that he was not informed of the contents of the said Consent.

9. In submissions dated 9th November, 2018, the Respondent argued that the Consent was regularly entered and cannot be varied in any other way unless it is found to have been obtained by way of fraud, collusion or by an agreement contrary to the policy of the Court. The Respondent cited the case of **Flora N. Wasike v Destimo Wamboko [1998] eKLR** where the Court held as follows:

“It is now settled law that a consent judgment 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: see the decision of this Court in J. M. Mwakio v Kenya Commercial Bank Ltd Civil Appeals 28 of 1982 and 69 of 1983.”

10. It was the Respondent's submission that both parties were in Court when the Consent Judgment was entered and that both parties had instructed their advocates, hence, the application as filed by the Applicant is an abuse of the Court process. The Respondent further submitted that the court became *functus officio* after delivering its judgment and cannot therefore sit and interrogate the validity of its decision.

11. In support of this submission, the Respondent cited the Supreme Court case of **Raila Odinga & Others v IEBC & Others [2013]** where the Court made reference to an article by Daniel Malan titled **“the Origin of the *Functus Officio* Doctrine, with Special Reference to its Application in Administrative Law” (2005) 122 SALJ 832** in which the author states:

“The *functus officio* doctrine is one of the mechanisms of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicating or decision making powers may, as a general rule, exercise those powers only once in relation to the same matter.....The (principle) is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision maker.”

12. The Respondents also cited the case of **Abdul Rehman v Fredrich Deldfer & Anor C. A. No. 112 of 1992** wherein the Court of Appeal stated that the burden of proving fraud especially against an advocate is very heavy and that fraud must be specifically pleaded and proved strictly. The Respondent urged the Court to dismiss the Application since the Applicant had not demonstrated to the Court that the existence of fraud or collusion in the recording of the Consent between the parties.

Analysis and Determination:

13. Having carefully considered the rival arguments of the parties to this matter, it is my view that the following issues arise for determination:

a. Whether the Consent Order dated 1st July, 2014 and issued on 21st August, 2014 should be set aside and/ or varied?

b. If the Application meets the threshold, what orders should the Court issue?

14. It is trite law 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 collusion, or by an agreement contrary to the policy of the Court, or where the Consent was given without sufficient material facts, or in representation or ignorance of such facts or in general for a reason which would enable the court to set aside an agreement. In the case of **Kenya Commercial Bank Ltd Versus Specialized Engineering Co. Ltd [1982] KIR 485**, Justice Harris at page 493 opined as follows:

“The marking by a court of a consent order is not an exercise to be done otherwise than on the basis that the parties fully understand the meaning of the order either personally or through their advocates, and when made, such an order is not lightly to be set aside or varied save by consent or one or other of the recognized grounds.”

15. In the case of **Hirani vs Kassam (1952) 19 EALA 131** the Court held as follows:

“Prima facie, any order made in the presence of the counsels is binding on all the parties to the proceedings or action and on those claiming under them and cannot be varied and discharged unless obtained by fraud and collusion or by an agreement contrary to public policy or if the consent was given without material factors and generally for a reason that would enable the court to set aside an agreement.”

16. In the instant case, the Consent was entered into on 1st July, 2014 as regards the mode of distribution of various assets of the deceased to

the beneficiaries. The particulars of the mode of distribution were captured as follows:

“1. L.R NO. BLOCK 2/GAKOE/47 be shared by:-

- a. Mary Murugi to get 0.88 Hectares**
- b. Patrick Wanguru Kiruthi to get 0.88 Hectares**
- c. Joseph Karanja Kinyanjui to get 1.0208 Hectares**
- d. Lucy Wanjiku Kinyanjui to get 0.7392 Hectares**

2. L.R KIAMBAA/WAGUTHU/254 to be shared between:-

- a. Joseph Karanja Kinyanjui to get 0.3 Acres**
- b. Karanja Kinyanjui to get 0.225 Acres**
- c. Mary Murugi to get 0.113 Acres**
- d. Lucy Wanjiku Kinyanjui to get 0.150 Acres**

3. L.R. KIAMBAA/WAGUTHU/T.14 to be inherited by:-

- a. Patrick Wanguru Kiruthi to get 0.110 Acres**
- b. Joseph Karanja Kinyanjui to get 0.055 Acres**
- c. Lucy Wanjiku Kinyanjui to get 0.055 Acres**

4. L.R. KIAMBAA/WAGUTHU/T.21 to be shared equally between:-

Patrick Wanguru Kiruthi and Mary Murugi”

17. The Court observes that the mode of distribution of the properties contained in the Consent Order only differs from the amended Certificate of Grant issued on 9th May, 1997 as regards the share of the Applicant herein. The other beneficiaries have not been affected by the terms of the said Consent and their portions have remained intact.

18. On the day the Consent was entered into, both parties were present in Court with their respective advocates who signed the said Consent. There is nothing on record to show that there was any limitation on the authority of both advocates. Further, the Applicant has not demonstrated proof of fraud or collusion as he has alleged. The issue regarding the quality of legal services and advice rendered by Applicant’s then Counsel on record cannot therefore be visited on the Respondent owing to the fact that the Applicant has not proved the existence of any of the ingredients which would merit the review of the consent order. The Court also observes that the Applicant has brought his application four years after the Consent Order was recorded.

19. 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.

20. The upshot of all the above is that I do not find any justifiable or sufficient ground placed before me to warrant varying and/or setting aside the Consent Order being challenged. Consequently, the summons dated 27th September, 2018 be and is hereby dismissed with no order as to costs.

It is so ordered.

SIGNED DATED and DELIVERED in open Court this 28th day of March 2019.

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L. A. ACHODE

JUDGE

In the presence ofAdvocate for the Applicant

In the presence ofAdvocate for the Respondent