



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

PROBATE AND ADMINISTRATION CAUSE NO. 74 OF 2000

IN THE MATTER OF THE ESTATE OF THE LATE KIPKURUI SEREM(DCD)

ALEXANDER KIRUI)

JEROP BOT CHEBET).....PETITIONER

VERSUS

JEMAIYO BOT CHEMWOR.....OBJECTOR

RULING

1. By an application dated 6th September 2018 the objector/applicant (**JEMAIYO**) **BOT CHEMWOR PRAYS FOR REVIEW** and setting aside of a consent letter dated 19th August 2013 purportedly signed by her. Further there be stay of any registration of entries whatsoever in the Land Register of parcels **No NANDI/LESSOS/462** and **NANDI/ARWOS/452**.

2. It is premised on grounds that;

- (a) **The consent was obtained by fraud and/or misrepresented.**
- (b) **The consequence of the consent was intended to prejudice the applicants.**
- (c) **The respondent took advantage of the applicant's inability to read the documents**
- (d) **The applicants were coerced into signing a document whose contents they could not read.**

3. In the applicant's supporting affidavit, she deposes that she is one of the widows of the Late **KIPKURUI SEREM**, and was shocked to learn that, she had purportedly signed a consent for the distribution of the deceased's estate. It is her contention that the said consent is a creation of the deponent and the same was obtained by fraud and misrepresentation and she never signed it. She denies ever visiting the respondent's office to sign the document as the only visit to government office was in response to a notice to show cause for a debt of **Kshs23,767/-** arising from a suit **Eld HCCC No 91 of 2006** in relation to the advocates fees.

4. When she attended court on 23/4/2013 accompanied by **CIRILUS KUURUI** , **KIPSANG** and **KIPROP**, the 1st petitioner/respondent who was in the company of his lawyers met her at the gate and told her that they were in the process of obtaining a warrant to arrest her on account of the unpaid debt.

5. They suggested that they all go the respondent's office to agree on how the debt would be paid – to which the applicant consented. At the offices she agreed to repay the debt within 30 days and she was told to sign a blank piece of paper.

She was told that they would put into words her commitment to pay as agreed – so she thumb printed as did **CIRILUS** and they left. Later on, her children paid the debt and that ended the matter, so the contents of her consent relating to distribution is fraudulent- at worst, a misrepresentation intend to mislead the court into believing that she had consented to the distribution of the estate. **CIRILUS KIPKEMBOI** has given a similar version of events saying he had accompanied the applicant with a view to giving her assistance where he could.

6. In opposing the application, the respondent, the 1st petitioner **ALEXANDER KIRUI** deposes in a replying affidavit that the applicant is employing delaying tactics and abusing the court process yet she personally appeared before **TOM MUTEI** advocate where a written consent was recorded and subsequently filed on 18th December 2013.

7. Subsequent to that, the grant was confirmed and it is in the interest of justice that the subdivision be carried out and transfers effected to the respective beneficiaries so as to bring the matter to a close, as applicant has not proposed an alternative mode of distribution and has taken over 5 years to come to court.

8. The matter was canvassed through written submissions in which the applicant gave a history of the matter saying the deceased had 5 wives – the 1st petitioner (**ALEXANDER**) was a son from 2nd house while the 2nd petitioner **JEROB BOT CHEBET** is the 4th widow.

9. The deceased had left behind a vast estate but with a clear arrangement on how the widows would live on each of their respective parcels that is:-

a. TAMINING BOT CHELIMO (House No 2 one brother of the respondent) had earlier been residing on parcel No NANDI/ARWOS/440 but was later transferred to parcel No. NANDI/KISIGAK/382.

b. TAPNYOLEI BOT KATIYA (HOUSE NO. 1) who initially occupied part of NANDI/KIPSIGAK/382 was later transferred to NANDI/ARWOS/440

c. JEROB BOT CHEBET (House No 4) who initially occupied part of NANDI/OLLESOS/461 was shifted to parcel No NANDI/ARWOS/440.

d. The Objector (JEMAIYO BOT CHEMWOR (House No.5) and ELISEBA BOT TINA (ouse No. 3) remained on parcel no NANDI/OLLESOS/461

10. The families later engaged in negotiations in an attempt to settle the matter out of court, and it emerged that part of the assets had been transferred from the deceased's estate and the objectors moved to court seeking declaration that the said assets formed part of the estate in **ELD HCCC NO 91 of 2016 JEMAIYO SEREM BOT CHEMWOR VS ALEXANDER KEIYO KIRUI**, but the suit was dismissed for want of prosecution.

She maintains that she was misled into signing the consent.

11. It is contended that the respondent's do not deny actions of fraud on misleading the applicant. While acknowledging that there has been delay in bringing this application to court, the applicant nonetheless argues that the delay does not change the facts of fraud and misrepresentation.

12. On the other hand, the respondents argue that the applicants have not met the test set out to warrant the court's interference with the consent citing the case of **SAMEUEL IKUMBU V BARCLAYS BANK OF KENYA LTD (2015) eKLR** which is to the effect that consent order is binding on all the parties to the proceedings and cannot be set side or varied unless it is proved that it was obtained by fraud or contrary to public policy, or without significant material facts, or in ignorance of the facts. They castigate the applicant on her claim of fraud, saying the parties appeared before an advocate and to now whip out claims of fraud is misrepresentation and attract on the character of the advocate and which would attach censure from a professional body.

13. That there was no consent regarding a warrant of arrest as the applicant has not exhibited such warrant or even a copy of the purported notice to show cause.

14. The respondent argue that the applicants have not shown any aspect of illegality on the contested orders saying the consent was presented to and endorsed by the court, what's more **CIRILUS** is a retired teacher who cannot now claim to have been unaware of the contents of the document he signed.

15. In any event, the applicants are accused of being guilty of laches having waited for 5 years before acting and no explanation is given for the delay.

That the applicants fully participated in the proceedings including agreeing on and approving the consent. It is also pointed out that the application does not refer to the issue of listed properties for distribution or that some beneficiaries were left out. Of greater significance is that the applicants are from one house, and their position is not supported by the other 4 remaining houses.

16. The contested consent is vide a letter dated 19th August 2013 duly signed by Tom Mutei & Co. (Advocates for the petitioner) and the two applicants (**JAMAIYO BOT CHEMWOR AND CIRILUS KIPKEMBOI KORIR**). It reads as follows.

“By Consent.

1) The objection proceedings filed in this matter be and is hereby between the petitioner and Objector/applicants withdrawn by the objectors for all purposes.

2) The renouncement and abandonment of the objection proceedings by the objectors/applicants refers to any and all objection proceedings for all purposes.

3) The estate of late Kipkurui Arap Serem owns two assets namely Nandi/Lessos/461 – 11.8 ha and Nandi/Arwos/452-12.5 acres.

4) That the 1st house having already received and obtained its properties inter vivos- the said two properties shall be distributed among the 2nd, 3rd, 4th and 5th houses in equal shares or proportions.

5) The petitioner do proceed to implement and effect the said distribution and the grant of letters of administration intestate of late KIPKURUI SEREM, issued on 13th March 2006 to JEROB BOT JEBET, JEMAIYO SEREM BOT CHEMWOR and ALEXANDER KIRUI be confirmed following lapse of six months.

6) For the avoidance of doubts, the parties hereto agree that this objection shall stand withdrawn for all purposes including appeals upon adoption of this consent without further orders.

7) Petitioners costs to be paid by the objectors/applicants

8) In default of payment of petitioner's advocate's costs, the petitioners advocate shall be at liberty to institute recovery proceedings against the objector/applicants."

17. The issue here is simply whether the applicants have demonstrated that the consent order recorded was obtained through a fraudulent misrepresentation mistake or any of the principles that would rescind a contract as has been discussed in many court decisions including **FLORA N WASIKE V DESTIMO WAMBOKO [1988]eKLR** that:-

"It is now settled law that a consent for or order has contractual effect and can only be set aside grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled which are not....."

18. Cirilus does not deny that he is a teacher, and has confirmed in his own affidavit that the reason he accompanied the 1st applicant was so as to assist her, yet in all this he too consented to signing a blank piece of paper. That is unlikely and not persuasive.

19. If indeed the discussions were about an outstanding debt, I would expect to see an order of the court, a warrant of arrest or even a notice to show cause that would not be difficult to access from the court file alluded to.

If such had been availed then the claim of misrepresentation would find a footing, but as it is, the same remains just a claim with nothing to confirm and the applicants fail to meet the threshold set out in the already discussed past decisions.

20. The upshot is that the application lacks merit and is dismissed with costs to the respondent's.

DELIVERED, SIGNED AND DATED THIS 27TH DAY OF JUNE 2019 AT ELDORET.

H. A. OMONDI

JUDGE