



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

SUCCESSION CAUSE NO 69 OF 2013

IN THE MATTER OF THE ESTATE OF JACKTON MUKABI KIHARA alias JACKTON MUKALI - DECEASED

MINNIE WANGECHI KANOGO.....APPLICANT

VERSUS

1. GEOFFREY KIHARA MUKABI.....ADMIN/1ST RESPONDENT

2. JOSEPH G. GATUNI.....2ND RESPONDENT

RULING

1. A grant of letters of administration intestate in this cause was made on 17/07/2013 and issued on 11/09/2013 to **Geoffrey Kihara Mukabi** (hereinafter called the **Administrator/1st Respondent**). The grant was subsequently confirmed and a certificate of confirmation of grant dated 10/04/2014 issued. Under that certificate of confirmation, **Joseph G. Gatuni** (2nd Respondent) was named as the sole beneficiary (as buyer) of land title **No. B2/63, Murang'a Municipality**, apparently the only property comprising the Deceased's estate.

2. A summons dated 05/02/2015 for revocation of that grant was subsequently filed by **Minnie Wangeci Kanogo** (hereinafter called the Applicant). When that application came up for directions on a number of occasions, the court was informed that the matter was under discussion with a view to recording a settlement.

3. On 19/04/2017 a consent letter dated 17/03/2017 signed by two counsels and addressed to the court was filed. The letter read in its body

“The above matter refers.

We the undersigned counsels for the parties herein wish to record the following consent:

- 1. That Minnie Wangeci Kanogo's summons for revocation dated 5th February 2015 be compromised in the following terms.**
- 2. That the grant issued to Geoffrey Kihara Mukabi on 10th April 2014 be revoked and a fresh grant be issued in the joint names of Minnie Wangeci Kanogo and Geoffrey Kihara Mukabi.**
- 3. That the property Murang'a Municipality Block 2/63 shall be sold by Geoffrey Kihara Mukabi and the other nominees to any willing buyer at a price to be determined by a registered land valuer, and the proceeds of the sale shall be deposited in a joint account to be held in the names of Minnie Wangeci Kanogo and Geoffrey Kihara Mukabi and their nominees.**
- 4. That Joseph Gathonjia Gatuni shall be refunded in full (the) amount of Kshs.1,900,000/00 and all other costs subsequently incurred by him in this case from the proceeds of sale of the property Murang'a Municipality Block 2/63.**
- 5. That all other costs incurred by all the parties in this case prior to and in the course of the sale of Murang'a Municipality Block 2/63, including and not limited to renewal of the government land lease, legal costs incurred by all parties in this suit and all costs relating to Block 2/63 incurred by other involved parties shall be paid out of the sale proceeds of the property.**
- 6. That the balance of the sale proceeds from Murang'a Municipality Block 2/63 shall be distributed to the beneficiaries to be determined by a committee to be established by Minnie Wangeci Kanogo and Geoffrey Kihara Mukabi.**

Dated at Murang'a this 28th March 2017.

(Signed by) T.M. Njoroge & Co. Advocates for the Applicant Muchoki Kang'atta, Njenga & Co., Advocates for the 2nd Respondent

4. By a letter dated 04/04/2017 addressed to the Applicant's advocates and copied to court, the Respondents' advocates advised that their client had **"...withdrew the consent dated 17th March 2017..."**.

5. The Applicant then filed the summons dated 19/04/2017 which is the subject of this ruling. She seeks the main order that the **"consent dated 28/03/2017 duly signed by counsel for the Applicant and counsel for the Respondent be granted as a judgement/order of the court"**. The application is supported by the affidavit of the Applicant. She deposes that after successful negotiations between the parties and their advocates, the consent in issue was executed on 28/03/2017, and that it is mete and just that the same be adopted as a judgement or order of the court.

6. The Respondents filed a joint replying affidavit on 28/06/2017 in which they deposed –

(i) That the consent in issue is "ambiguous and its terms are uncertain."

(ii) That the consent was entered into in error or by mistake.

(iii) That soon after entering into negotiations the Applicant and some of her co-claimants ".....have taken over the property (L.R.) Murang'a Municipality Block 2/63 which in itself compromises our position, and therefore we are apprehensive that there is no good faith".

(iv) That material issues relevant to succession in this matter "have not been wholly addressed – for example, there is no provision as to the mode of distribution of the assets of the Deceased upon revocation of the grant".

(v) That the consent does not provide for "timelines on when the matters agreed upon are to be settled, and its implementation may lead to ambiguity which will greatly prejudice the 2nd Respondent who awaits a refund of the monies invested in the suit property".

(vi) That the consent "does not disclose appropriate alternatives or procedures to be implemented in case one of the parties is at a disadvantage during implementation of the consent".

7. At the hearing of the application learned counsel for the Applicant made his submissions. There were no submissions made on behalf of the Respondents.

8. I have considered the supporting and replying affidavits. I have also considered the submissions of the Applicant's learned counsel.

9. It is trite law that a duly executed consent in legal proceedings is in the nature of a contract and can ordinarily be set aside only upon grounds similar to those upon which a contract will be set aside. Such grounds include mistake, misrepresentation, fraud, etc.

10. The substantive matter before the court in this cause was an application to revoke a grant that had been made, issued and confirmed. Any consent purporting to dispose of the summons for revocation must thus necessarily properly take care of all the aspects of such grant, including the certificate of confirmation. The order of disposal must also give necessary directions regarding disposal of the summons for confirmation of grant, which necessarily would be taken back to square one by revocation of the grant.

11. A quick look at the consent in issue will show that beyond revocation of the grant, there was no order regarding the certificate of confirmation of grant. Beyond the order for issuance of a fresh grant jointly to the Applicant and 1st Respondent there was no provision for hearing afresh the application for confirmation in order for the court to properly distribute the estate of the Deceased. Instead the consent purported to order sale of the property comprising the Deceased's estate and disposal of the proceeds thereof without the court first determining the persons beneficially entitled to the Deceased's estate and their respective shares thereof.

12. I am satisfied that the consent in issue is not at all appropriate for the proper disposal of the summons for revocation of grant, and in its present form the court would decline to adopt it as a judgement or order of the court.

13. In the circumstances I decline the summons dated 19/04/2017. It is hereby dismissed with no order as to costs. It is so ordered.

DATED AND SIGNED AT MURANG'A THIS 12TH DAY APRIL 2018

H P G WAWERU

JUDGE

DELIVERED AT MURANG'A THIS 13TH DAY OF APRIL 2018