



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**SUCCESSION CAUSE NO. 220 OF 2000**

IN THE MATTER OF THE ESTATE OF SAMUEL KABUI MUKORA (DECEASED)

**RULING**

1. By a Notice of Motion dated 15/11/2016 filed under certificate of urgency on 16/11/2016, the applicant herein Lewis Mwangi Mukora sought for several orders.
2. The application which is brought under Rules 49, 63 and 73 of the Probate and Administration rules, Order 12 rule 7, Order 40 rule (1) (b) 4(1) and (2) of Civil Procedure Rules 2010 sought for orders as follows
  - (i) That this application be certified urgent.
  - (ii) That a temporary injunction do issue restraining the respondent, whether by himself, his servants, employees, agents, and or those claiming under him or by whomsoever, from sub-dividing, selling, alienating, transferring, mortgaging, leasing, renting and/or otherwise disposing of all that parcel LR No. Chania/Kanyoni/908 or otherwise dealing with any portion thereof at all pending interparte hearing and determination of the application.
  - (iii) That the honourable court be pleased to order a stay of execution of the orders by consent herein dated 24/11/2009 and issued on 15/2/2010 pending the hearing and determination of this application.
  - (iv) That this honourable court be pleased to review, vary or set aside the orders by consent herein dated 24/11/2009 and issued on 15<sup>th</sup> February 2010.
  - (v) That costs of the suit be provided for.
3. The application is supported by grounds on the face of it and a supporting affidavit sworn by Lewis Mwangi Mukora. The applicant herein is a son to Edward Mukora Kabui one of the two administrators of the estate who is now deceased.
4. The gist of the application herein is centered on the genuiness of a consent entered on the 24/11/2009 and issued on 15/2/2010 in the presence of both counsels then representing various parties among them Edward Mukora Kabui father to the applicant.
5. The said consent which was entered before Judge Nambuye on 24/11/2009 in the presence of both counsels, provided that parties had agreed to share the property of the estate of the late Samuel Kabui Mukora as follows:
  - (a) That LR Chania/Kanyoni/908 be registered in the name of Paul Njoroge Kabui to hold the same absolutely.
  - (b) That LR Chania/Kanyoni/912 do remain in the name of Edward Mukora Kabui.
  - (c) That LR Muguga/Gitaru/333 be registered in the name of Nahashon Ndungu Kamau as a purchaser.
  - (d) That Edward Mukora Kabui to facilitate the transfer of LR No. Chania/Kanyoni/908 by obtaining Land Control Board consent and produce all other transfer documents to Paul Njoroge Kabui and LR No. Muguga/Gitaru/333 to Nahashon NdunguKamau.
  - (e) That Paul Njoroge Kabui do remove the cautions placed in all the above mentioned properties.
  - (f) That each party to bear his own costs.
  - (g) That matter be mentioned on 8/2/2010 to confirm compliance.

6. It is the applicant's contention that the consent referred to herein was fraudulently entered as his father was suffering from mental illness and therefore incapable of making any reasonable judgment leave alone giving consent that was meant to disinherit him. He annexed a letter dated 24/9/2009 but cancelled again to indicate 24/12/2009 (annexure "LMM2") in which DR. Mwaura diagnosed the late Edward Mukora as suffering from long standing diabetes and mild senile dementia.
7. It is on the basis of this letter that the applicant is alleging that the advocate on record then appearing for his father had without authority from his father entered into an illegal consent culminating into a court order which was relied on by his uncle Paul Njoroge a co-administrator to Edward Mukora to transfer the property in question to Paul Njoroge Kabui in respect of LR Chania/Kanyoni/908 absolutely, Edward Mukora Kabui LR No. Chania/Kanyoni/912 absolutely and Nahashon Ndungu Kamau LR Muguga/Gitaru/333/ absolutely.
8. It is the applicant's contention that the purported consent was entered irregularly and without the consent of his father hence should be set aside and any transactions pertaining to land parcel No. Chania/Kanyoni/908 be halted until the court determines their proprietary rights thereof.
9. Although application was served after ex parte interim orders were granted on 16/11/2016 in terms of prayer two, the respondent did not file any reply nor grounds of objection.
10. The application came for interparte hearing on 21/2/2017 but Nyangena Advocate for the respondent was not present. The court then directed for Nyangena to be served and hearing date be taken at the registry.
11. On 27/3/2017 when the matter came up for hearing, Nyangena did not turn up and instead Mr. Gitau held his brief requesting for adjournment on grounds that Mr. Nyangena had not adequately prepared. The court could not find the reason advanced satisfactory and therefore directed for hearing to proceed ex parte. During the hearing, Mr. Angwenyi for the applicant simply urged the court to allow the application as prayed since the same was not opposed.
12. I have gone through the pleadings in the court file and the proceedings thereof. May I briefly bring out and shade some light on the background of this case.
13. The original petition/application was filed by one Edward Mukora Kabui on the 8/12/2000. In Form P & A 5 the petitioner indicated that he was the sole survivor of his father's estate and only listed L.R. No. Chania/Kanyoni/912 and Gitaru/Muguga/333 as the only property constituting the estate.
14. Equally, the Chief's letter dated 12/5/2007 confirmed that the petitioner was the sole survivor of his father's estate. Contrary to his petition/application, the petitioner filed a consent to making of a grant which is undated but purportedly signed by other deponents namely Henry Kimemia Kabui, Joel Mbugua, Lucas Mungai, Teresia Murugi, John Kamachia and Paul Njoroge.
15. Consequently, the petitioner obtained a grant of letters of administration on the 18/7/2000 and confirmed on 20/3/2002 and land parcels Chania/Kanyoni/912, Chania/Kanyoni/908 and Muguga/Gitaru/333 inherited by the petitioner absolutely. It is not clear however from the record as to when Plot No. Chania/Kanyoni/908 got introduced so as to form part of the estate.
16. The grant was however revoked on 4/2/2004 by Judge Koome after Paul Njoroge a brother to the petitioner filed summons dated 4/6/2003 seeking to revoke the grant on grounds that it was fraudulently obtained and through false misrepresentation. Upon nullification of the grant, the Hon. Judge directed grant of letters of administration to jointly issue to the petitioner Edward Mukora Kabui and Paul Njoroge Kabui.
17. On 30/8/2007, Njoroge Paul Kabui applied for confirmation of grant and proposed to share the estate as follows: Chania/Kanyoni/908 to be shared amongst Edward Ndungu Kabui and Paul Njoroge Kabui, Chania/Kanyoni/912 Edward Mukora Kabui and Muguga/Gitaru/333 to Paul Njoroge.
18. Aggrieved by the proposed mode of distribution to which he did not consent, Edward Mukora filed affidavit of protest. From the record again, it is not clear at all whether the protest was ever heard.
19. Meanwhile, on 19/9/2008 Paul Njoroge filed an application seeking to commit Edward Mukora to civil jail for disposing parcel No. Muguga/Gitaru/333 to one Nahashon Ndungu Kamau and Chania/Kanyoni/908 into his name contrary to Judge Koome's order of 4/6/2003.
20. Before the protest could be heard, counsels appearing for both parties appeared before Judge Nambuye on 24/11/2009 and recorded a consent which is now the subject of the application herein. Based on that consent, Paul Njoroge Kabui was given LR Chania/Kanyoni/908 absolutely. Edward Mukora Kabui LR Chania/Kanyoni/912 absolutely and Nahashon Ndungu Kanyi (a purchaser) absolutely. On 17/5/2010 Edward Mukora again made an application for confirmation of grant. He swore an affidavit deponed the same day the application was filed.
21. The key question for determination is, was the consent order of 24/11/2009 regularly and lawfully entered. Was the late Edward Mukora's mental faculties in good shape: was he capable of making consent or giving authority to enter consent by his advocate. There is no dispute that consent was entered by both advocates among them Edward Mukora's advocate one Gatumuta. The only issue for determination is whether the consent emanated from Edward Mukora Kabui.
22. According to Lewis, his father was declared diabetic and having developed features of mild dementia. The doctor's report dated 24/9/2003 but altered by use of a pen to read 24/12/2009 is attached. The question is, if his father was senile all that long, how come that he participated in all proceedings preceding the consent order and even thereafter. He is the same person who has sworn an affidavit on

17/11/2010. Was that a sick person who could not give consent on 24/9/2009?

23. How come the medical report is timeseously prepared on 24/9/2009 the same day the consent was entered? This medical report is suspect given the fact that the late Edward Mukora had participated in subsequent proceedings after the consent order which proceedings are not challenged. I am persuaded to believe that he was not incapacitated by the 24/9/2009 when the consent order was made.

24. I am aware of the law and circumstances under which a consent can or may be set aside or varied. The fact that an application is not opposed is no guarantee that it must be allowed as prayed. This is an old matter in which property has kept changing ownership time and again and litigation must come to an end.

25. In the case of **Hirani vs Kassam (1952) 19 EALA 131** the court held

**“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”.**

26. In the case of **Kenya Commercial Bank Ltd. vs Specialized Engineering Co. Ltd. (1982)eKLR 485** the court held as follows:-

**“a consent order entered into by counsel is binding on the parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud 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 in general for a reason which would enable the court to set aside an agreement”.**

Similar principle was upheld in the case of **Samuel Mbugua Ikumbu vs Barclays Bank of Kenya Ltd Civil Appeal 91 of 2015 Nairobi** where the court rejected an application for review and setting aside a consent order which counsel holding brief for another counsel appearing for the respondent entered in open court.

27. In the instance case there is no proof of fraud or collusion as alleged nor is

the consent against public policy. The applicant herein simply wants to re-open litigation which his father and uncle now deceased had litigated on and concluded by signing a consent. Even prior to the filing of this succession cause, there was litigation among family members and agreements arrived at. In the interest of justice, I do not find any justifiable or sufficient ground placed before me to warrant varying and or setting aside the consent order being challenged. Accordingly, application dated 15/11/2016 be and hereby dismissed with no order as to costs.

**DATED AT NAIROBI THIS 11<sup>TH</sup> DAY OF APRIL, 2017.**

**J.N. ONYIEGO (JUDGE)**

In the presence of:

.....for the applicant

.....for the respondent