



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
SUCCESSION CAUSE NO. 2923 OF 2004
IN THE MATTER OF THE ESTATE OF MAINA KARIUKI- (DECEASED)

RULING

1. The application for determination is the summons for revocation of grant dated 20th May 2013. It is brought at the instance of the applicant, Hannah Wairimu Kariuki, who is the step-mother of the administrator/respondent. She was married as a second wife by the deceased. The 2nd applicant and the administrator/respondent are the stepsons of the applicant.
2. She founds her application on the ground set out on the face of the application, as well as in the facts deposed to in her affidavit in support sworn on 20th May 2013 she seeks orders that there be a temporary stay of execution of the grant of letters of administration intestate of the estate of the deceased, confirmed by this court on the 4th June 2012 and the said grant be revoked.
3. She also relies on other two affidavits. One sworn by John Mwangi Kariuki, who is the brother of the respondent, sworn on the 20th May 2013. The other one is by Mr. J. N. Kirubi, who was the former advocate of the applicant, sworn on 26th August 2013, filed herein on the 27th August 2013.
4. The applicant argues that she did not give her former advocate any instruction with regard to the consent recorded, and that she is not to be bound by that consent, as she was not a party to it, hence the grant should be revoked. Her arguments are supported by the affidavit sworn by the brother to the administrator, who contends that the administrator acted in bad faith when he recorded the consent and it was actuated by malice as he wanted to dispossess his stepmother her land where her matrimonial home is located. He also argues that the distribution of the estate was not fairly done as the administrator allocated himself a larger portion of land.
5. The applicant's former advocate, in his affidavit, urges the court to allow the revocation of grant on grounds that he acted without authority and he gives the circumstances which led to his actions. He cites the proceedings of 4th June 2012, in which the Judge gave him fifteen (15) minutes to either call his witnesses or the matter was to proceed without his client adducing any evidence. He tried to call his clients but they were not available. This circumstance led to him agreeing to the consent agreement.
6. The application for revocation is contested by the administrator who contends that the consent was entered into by all the parties, all of whom were represented by able counsel, who were acting within their authority, either ostensible or express.
7. The issues that emerge from the pleadings, and which ought to be what I am called upon to determine are: whether a consent recorded by an advocate without express authority by client binds the client,

whether the stay order sought in the application should be granted, and whether the grant should be revoked.

8. The consent in question is in the following terms;

“By consent

(1) The Grant of Letters of Administration Intestate dated 8th December, 2009 be and is hereby confirmed.

(2) The estate of Kariuki Maina be distributed as follows:

(a) Parcel no. Block 2/Gacharage/399 be registered in the name of John Mwangi Kariuki absolutely.

(b) Block 9/Ichichi/849 be registered in the name of John Maina Kariuki absolutely.

(c) Block 2/ Gacharage/691 be registered in the name of Hannah Wairimu Kariuki in trust or herself and John Maina Kariuki, Harrison Gathambo Kariuki and Isaac Ndirangu Kariuki.

(d) Block 2/Gacharage/676 to be subdivided and registered as follows:

(i) 5.1 acres to Hannah Wairimu Kariuki in trust for herself and John Maina, Harrison Gathambo Kariuki and Isaac Ndirangu Kariuki.

(ii) The remaining balance of 5.2 acres to be registered as follows:

- 3.2 acres to Joseph Maina Kariuki

- 2 acres to John Kariuki Maina

(3) Each party to bear own costs of the application.”

9. The law on the setting aside of consents recorded in court by counsel on behalf of their clients has been set out in a number of decisions. One of the more commonly cited among them is *Flora N. Wasike vs. Destimo Wamboko* Kisumu Civil appeal No. 81 of 2984, where the Court of Appeal held that –

“It is settled law 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 entered into with knowledge of the material matters by legally competent persons...”

It was further stated that –

“The fraud, mistake or misrepresentation envisaged here is between parties, not between an advocate and client. An advocate is presumed to have authority of his client.”

10. In another decision, *Kenya Commercial Bank Limited vs. Specialized Engineering Company Limited* (1982) KLR 485, it was stated 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 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.”

It was further stated by the same court that –

“An advocate has general authority to compromise on behalf of his client as long as he is acting bona fide and not contrary to express negative direction. In the absence of proof of any express negative direction, the order shall be binding.”

11. **From the foregoing, and the facts of the case before me, it is evident that the consent in question is binding on the applicant as there is no letter on record by her showing that the advocate who entered into the consent on her behalf had ceased to act for her or that the applicant was representing herself. There is no material presented to court that shows there are new facts that have come to light that were not in the knowledge of advocate then.** It is on the foregoing that I hold the opinion that the consent is binding on the applicant and she cannot purport to disown it now.

12. On the issue of fraud and collusion, no material has been provided by the applicant to show that there was fraud between her erstwhile advocate and the respondent. This is further buttressed by the fact that the advocate swore an affidavit showing that indeed he acted without express instructions, but as he had general authority to act for her, he acted on ostensible to apparent authority. I believe that the advocate was within the general authority when he so acted hence the consent is binding on the applicant.

13. In *Re: The Matter of The Estate of Wilson Mwangi Karogo (Deceased)* [1999] eKLR, the advocate for one of the parties stated that he had entered into the consent without in fact consulting his client. It later on emerged that there were new and important facts which were not within his knowledge at the time, and he consequently sought for a review. The court in relied on the English decision of *Little vs. Spreadbury* (1910)2 KB 658, and held that –

“ In this particular case the advocate for the 2nd wife and applicant in this current application had authority as an advocate to compromise on behalf of his client, his client’s suit. This is if he acted bona fide and not contrary to express negative direction.”

14. On the second issue, whether an order for stay of execution of grant of letters of administration intestate should issue, I have noted that the estate has been partially distributed since the grant was confirmed on 4th June 2012 and both parties admit that the only subdivision remaining is that with respect to the parcel of land Block 2/Gacharage/676. In my view revocation of the grant may not serve any purpose.

15. The applicant seeks revocation of a certificate of confirmation of grant. Under Section 76 of the Law of Succession Act, Cap 160, Laws of Kenya, it is provided that -

“A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—

(a) that the proceedings to obtain the grant were defective in substance;

(b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;

(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;

(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—

(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow;

or

(ii) to proceed diligently with the administration of the estate; or

(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or

(e) that the grant has become useless and inoperative through subsequent circumstances.”

16. The provisions sets out the grounds upon which may cause the court to annul or revoke a grant if any of the circumstances set out therein are proved. In the present case, fraud and collusion have been pleaded but the parties did not present any material to the court to substantiate their claim. the court cannot act on mere allegations.

17. In conclusion, looking at both the facts, the law and the submissions by the parties, it is my opinion that the application should be dismissed and I hereby dismiss the same with costs.

DATED, SIGNED and DELIVERED at NAIROBI this 26TH DAY OF FEBRUARY, 2016.

W MUSYOKA

JUDGE