



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
FAMILY DIVISION
SUCCESSION CAUSE 140 OF 2014
IN THE MATTER OF THE ESTATE OF KABIRU KABUNGU

GRACE WANJIRU NDURU.....APPLICANT

VERSES

SIMON KAMAU KIBIARU.....RESPONDENT

RULING

PLEADINGS

The deceased died on 4th July 2012.

This Court's ruling of 8th May 2015 revoked the grant issued in Kiambu **Succession Cause 245 of 2013** due to non-disclosure of material facts and appointed Grace Wanjiku Nduru and Simon Kamau Kabiari. The administrators were to file summons for confirmation within 90 days and any party could file protest with an alternative mode of distribution for the court to determine the same.

Pursuant to these orders, the Co-administrator Simon Kabiari filed summons for confirmation of grant on 27th August 2015 and listed all beneficiaries, the list of assets and the proposed mode of distribution which was reached after the family meeting held on 19th August 2015. All beneficiaries consented to the proposed mode of distribution as per their late father's wishes. The copy of minutes of the meeting was attached with the beneficiaries written consents appended to the minutes.

Grace Wanjiku Nduru, Co-administrator/Applicant filed an alternative mode of distribution of the deceased's estate on 20th August 2015. The Co-administrator attached a letter to the Affidavit outlining reasons for protest against the mode of distribution.

APPLICANT'S CASE

On 29th October 2015, the parties filed Consent compromising the summons for confirmation of grant of 27th August 2015 as follows (among other terms);

“That this Honourable Court does confirm a partial Grant in respect of L.R. NO Nairobi/Eastleigh 36/VII/596 which shall be sold off and proceeds thereof shared out by the Court.”

Advocates representing the parties to the estate signed the Consent. On 2nd November 2015 the advocates requested this Court to adopt the said consent as a Court order. The Court issued orders on 11th December 2015 pursuant to the hearing on 2nd November 2015 that the suit property was to be sold and the Court shall share out sale proceeds. The rest of the assets of the deceased's estate would await *viva voce* evidence by beneficiaries upon filing witness statements so as to determine protests to confirmation of grant before distribution of the estate.

On 12th January 2016, Grace Wanjiku Nduru Co-administrator through her advocate Messrs. Chuma Mburu Advocates filed under certificate of urgency, an application for stay of execution of the Consent filed on 29th October 2015. The basis of her application was that she was not consulted informed and she did not give consent to the terms of the Consent.

RESPONDENT'S CASE

On 29th January 2016 J. J. Wahome Practising Valuer and Proprietor of Paramount Valuers filed an affidavit and deposed that he received instructions from Grace Wanjiku Nduru to carry out valuation of the assets that comprise of the deceased's estate. He carried out valuations between the 13th and the 14th August 2015 and attached the valuation reports of each of the properties and a summarized version of all reports.

The Applicant's former Advocate on record Messrs. Michael Kamau Kinga Advocates filed affidavit on 29th January 2016 and deposed that he advised the administrator Grace Wanjiku Nduru to facilitate sale of suit property L.R.No Nairobi/Eastleigh 36/VII/596 which according to both proposals of mode of distribution was to be sold and proceeds shared amongst all beneficiaries by the Court.

The Applicant's former advocate deposed that the Co administrator was aware of the proceedings. She instructed the Valuer, she sent her advocate then an email attached as **MKK3** proposing her mode of distribution of the estate. She approved and instructed him to negotiate with the advocate of the Co administrator and agreed to the Consent. In January 2016 she visited his office with her sister Agnes and took a copy of the Consent and Court Order. He discussed with her filing of witness statements and relevant documents for the *interpartes* hearing of protests and confirmation of grant.

The Co administrator Simon Kabiaru filed a Replying affidavit on 4th February 2016 and opposed the Applicant's stay of execution application for the following reasons;

- a. The Applicant was served with hearing Notice for hearing on 2nd November 2015
- b. The Co administrator sought agreement on some issues where there was agreement; the sale of the above mentioned suit property so that the sale proceeds would distributed by the Court amongst all beneficiaries
- c. The Consent filed on 29th October 2015 is manifestly clear that it does not envisage distribution of the suit property but avail sale proceeds for distribution by the Court to all beneficiaries. Therefore there is no prejudice to any of the beneficiaries.
- d. The sale shall be conducted upon ascertaining the market value of the suit property and its market price. The Applicant undertook the said exercise and she appointed and instructed the Valuer whose reports are in Court.
- e. As Co administrator the sale of the suit property can only be completed with the Applicant as Co administrator signing the Agreement of Sale. So her rights are not vitiated in any way.
- f. As Co administrator the Applicant shall safeguard the rights of their deceased's sister's children with regard to the deceased's estate. Therefore the Consent does not prejudice their rights.
- g. The matter should be expedited so as to have the estate distributed hence the Consent to facilitate sale of the suit property and not to distribute the same.

Agnes Wanjiru Kabiaru filed an affidavit on 29th February 2016 and reiterated that she was not informed of the Consent of 29th October 2015. She was not represented in the Consent signed only by advocate of

the Co administrators Grace Wanjiku Nduru and Simon Kamau Kabiari. All other beneficiaries to the deceased's estate were not consulted and their consents were not obtained and Counsel in the signed Consent did not represent them. The mode of distribution of the sale proceeds of the suit property is still in dispute.

This Court has considered written submissions of both beneficiary Agnes Wanjiru Kabiari and Respondent Simon Kamau Kabiari, through their respective Counsel.

ISSUE

1. Is the Consent filed on 29th October 2015 adopted by this Court on 2nd November 2015 and orders issued on 11th December 2015 valid legal and regular?

2. Should the said Consent be affirmed, set aside and revoked?

DETERMINATION

As submitted by Respondent's Counsel it is settled law as provided by the case of **HIRANI vs KASSAM (1952) 19 EACA 13** the basis of setting aside Consent is as follows;

“Prima facie, any order made in the presence and with consent of Counsel is binding on all parties to the proceedings or action and on those claiming under them.... And cannot be varied or discharged unless obtained by fraud or collusion or consent was given without sufficient facts or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the Court to set aside the Court to set aside an agreement.”

In the instant case the Consent filed on 29th October 2015 was between advocates of the Co administrators signed thus;

Kamau Kinga & Company Advocates for Grace Wanjiku Nduru and Kimani Kiarie Associates for Simon Kamau Kabiari.

The Applicant stated she did not know of the consent and she was not informed or consulted of the same. The former Advocate Mr. Kinga briefed her on the ongoing negotiations as deposed in his affidavit. She was informed of 2nd November 2015 as the date for confirmation of grant proceedings, the hearing Notice is attached by the Co administrator's advocate of the said hearing date.

On 2nd November 2015, both administrators were represented and the Consent confirmed as an order of the Court. This Court is satisfied from the affidavits filed that the Applicant was in touch and was informed of the Consent. This Court wonders why she instructed a Valuer to value properties before hearing of summons of confirmation of grant if she had not compromised the suit by the Consent. She appointed Valuer as evidenced by the Valuer's affidavit and attached valuation reports of all properties.

The Applicant was in agreement to sale of the suit property and she changed her mind thereafter for undisclosed reasons and retracted her consent.

This Court finds from the pleadings, the former advocate of the Applicant acted in due diligence, he negotiated the consent with knowledge of the Applicant and agreed to signing the Consent on her behalf. There was no fraud, concealment of facts or ulterior motive. After all, the sale of the suit property would only be successful upon signing by both administrators of the Agreement of Sale on behalf of the other beneficiaries. So the sale would not take place without the Applicant's consent. Her rights and those of beneficiaries were not prejudiced in any way.

However, in spite of the Consent being with the knowledge and approval of both administrators on behalf of all beneficiaries; upon reading **Section 82 and 83 of the Law of Succession Cap 160** it turns out that

personal representatives (administrator or executor of the deceased person) duties entail as prescribed under **Section 82 (a) & (b)** as follows;

Personal representatives shall subject only to any limitation imposed by their grant have the following powers;

- a. ***to enforce by suit or otherwise, all causes of action which by virtue of any law , survive the deceased or arise out of his death for his estate;***
- b. ***to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them as they think best;***
- c. ***provided that; the purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchased; and***
- d. ***no immovable property shall be sold before confirmation of grant;***
- e.

Therefore, in the instant case, although former Counsel acted in good faith. The Respondent Co administrator through his advocate broached the proposal of sale of the suit property. Counsel advised the Applicant to agree to sale of the suit property and hold sale proceeds pending the Court hearing and determining the summons for confirmation of grant and protests thereto; with a view to distributing the sale proceeds and the rest of the deceased's estate.

From the above -cited provisions of law, it is a mandatory requirement that any sale of immovable property shall only take place after confirmation of grant. The Consent of 29th October 2015 cannot stand in light of breach of mandatory provisions of law. The Consent cannot hold to facilitate an illegal transaction of sale of the suit property before confirmation of grant of the deceased's estate.

The summons for confirmation has not been agreed upon by the beneficiaries and they have not consented.

The Co-administrators are not working in concert or in tandem and have parallel modes of distribution.

COURT ORDERS

1. **The Consent filed on 29th October 2015 adopted by this Court on 2nd November 2015 and orders issued on 11th December 2015 are revoked and declared null and void by virtue of Section 82 (d) of Law of Succession Act Cap 160.**
2. **The matter shall be set down for hearing *interpartes* through *viva voce* evidence on the protests to confirmation of grant.**
3. **All beneficiaries shall be present to offer alternative proposal of mode of distribution of the estate.**
4. **Each party to bear its own Costs.**

READ AND DELIVERED IN OPEN COURT AT NAIROBI THIS 14th DAY OF JUNE, 2016

MARGARET W. MUIGAI

JUDGE