



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

PROBATE AND ADMINISTRATION DIVISION

SUCCESSION CAUSE NO. 1548 OF 2011

IN THE MATTER OF THE ESTATE OF SALAT ABDILLE MUHAMED (DECEASED)

AHMED SALAT ABDILLE.....OBJECTOR/APPLICANT

VERSUS

MOHAMED SALAT ABDILLE.....RESPONDENT

R U L I N G

1. In his Notice of Motion dated 2nd July, 2015 brought under **Section 76** of the **Law of Succession Act , Cap 160, Order 25 Rule 2, Order 45 Rule 1** and **Order 51 Rule 1** of the **Civil Procedure Rules** and **Section 1A, 1B & 3A** of the **Civil Procedure Act** the Applicant Ahmed Salat Abdille seeks the following orders. First, that the Court do set aside the Consent Order issued at Nairobi by Hon Justice L. Achode on 12th March, 2015. Second, that the court do reinstate the objector's application dated 11th November, 2011 seeking to have the ad litem grant of letters of administration by the court issued on 17th August , 2011 to Mohamed Salat Abdille hereinafter the Respondent, revoked.

2. The grounds of the Application as contained on the face of the application are that the parties herein did record a consent whose thrust was to settle the matter out of court in an amicable way. That as soon the consent order was adopted, a limited grant was issued and thereafter Respondent became hostile towards the Applicant.

3. The Applicant alleges that the Respondent refused and or did not abide by the aforesaid Consent Order. Further that the respondent misled the applicant into believing that he would agree to settle the matter but is instead using the grant ad litem aforesaid to unfairly take away the disputed property **No. RI65-WAJIR TOWN.**

4. The Applicant states that whereas he will be greatly prejudiced if the application is not allowed, the respondent on the other hand will suffer no such prejudice.

Applicant's Submissions

5. The Applicant supported his arguments by way of submissions filed on 11th April, 2016 by Ms. Odiya who contends that the Applicant filed Civil Suit Case No.3 of 2011 before the Wajir Principle Magistrate against the Respondent for alleged trespass on the suit land. That the Respondent moved to the High Court on 21st July 2011 seeking to be issued with a limited grant in respect of the estate of the deceased, who is father to both the Applicant and the Respondent.

6. The limited grant which was subsequently issued to the Respondent on 17th August, 2011 was intended to enable him to defend the aforesaid civil suit. The Applicant applied for revocation of the limited grant alleging that the grant was obtained through misrepresentation of facts and apparent forgery of signatures of other beneficiaries of the deceased's estate. By consent of the parties the objection proceedings seeking the revocation of grant ad litem was withdrawn.

7. The Applicant argues that during the pendency of the civil suit in the Wajir Magistrate's Court, the Respondent took possession of the suit property without the Applicant's knowledge. During the trial of the aforesaid civil suit the respondent is said to have alleged that the property belonged to him having been granted to him by the consent recorded in the High Court.

8. Consequently, the trial court ordered the parties to resolve the consent issue before the High Court as it was issued by the superior court. Counsel argues that the Respondent has during the pendency of the civil suit insinuated that pursuant to of the consent order, grant of letters of administration could be issued in favor of the Respondent. She therefore contends that the Respondent tricked the Applicant into entering into a consent, in order for the court to issue letters of administration ad litem.

9. Counsel urges that the Applicant was not given a chance to have the dispute resolved in an amicable manner, or through the court process contrary to **Article 50 (1)** of the **Constitution**. Further that the Respondent having not responded to the grounds set out by the applicant seeking to have the court set aside the consent order, should be taken to have agreed with the averments made by the Applicant which states that he has been hostile and unwilling to cooperate in the settlement process.

10. Counsel relied on the cases of:

i) Flora N. Wasike vs Destimo Wamboko [1982 – 1988] 1 KAR page 625;

ii) Brooke Bond Liebig Ltd v Mallya [1975] EA 266 at 269;

iii) Hirani v Kassam (1952) 19EACA 131.

Respondent's Case

11. In a replying affidavit dated 19th October, 2016 the Respondent denies the applicant's grounds for the setting aside of the consent order terming them as flimsy and an abuse of the court process. He alleges that the Applicant is misusing the court to compel the Respondent to relinquish his legally entitled claim without giving him audience. The Respondent avers that the applicant has not provided evidence showing that the grant was grounded on misrepresentation or concealment of facts.

12. The Respondent contends that the suit property was family property belonging to the deceased. He thus sought the leave of the court to acquire a temporary grant to enable him to defend the suit brought by the Applicant who sought to have him evicted from his childhood home.

13. The Respondent states that on the 17th of March 2014, the Applicant instructed his advocate to withdraw his objection against the petition for grant ad litem as he was convinced that his grounds were not substantive and were merely delaying the case in Wajir. He asserts that this application has no merit and has not been brought in good faith as it is seeking to set aside consent orders that were freely entered between the two parties.

14. In his submissions for the Respondent learned counsel Mr. Wanyoike recapped the history of this matter as set out above and reiterated that the application to vacate the consent order lacks merit and should be disallowed.

15. Counsel contended that the grounds of the application are flimsy and an abuse of the process of the court. That the applicant is trying to misuse the court to set aside consent orders which were granted by this honorable court after both parties agreed in writing. In support of his arguments, he relied on the case

of HCCC No. 34 of 2009 at Meru, Kahagi Ndirangu v KP&L Company.

Issues for Determination

16. Upon considering the pleadings I have set out the issues for determination as follows:

a) When a consent order can be set aside

b) Whether there was misrepresentation that led to the issuance of the consent order.

When a consent order can be set aside

17. In the case of **Hirani vs Kassam (1952), 19 EACA 131**, the following passage from Seton on Judgments and Orders, 7th edition, Vol.1 p.124 was quoted with approval:

“prima facie ,any order made in the presence and with the 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 by an agreement contrary to the policy of the court..... or if consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement.”

A consent judgment or order therefore, has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out.

Was there Misrepresentation by the Respondent?

18. **In the case before me the consent letter written to the court and which was adopted as the order of court, was signed by both advocates on record. The consent read thus:**

“We the undersigned should be pleased, if the following consent is set on record: ‘By consent, the objection proceedings filed herein be and are hereby withdrawn with no orders as to costs.’”

This statement was open ended and did not bear any conditions thereto.

19. The Applicant argues that Respondent used the consent order, to take possession of the suit property without the Applicant’s knowledge. That during the trial of the civil suit with Wajir court the Respondent claimed that the property based on the aforesaid consent.

20. Counsel for the Applicant contends that the Respondent has during the pendency of the civil suit insinuated that by issuance of the consent order, a grant of letters of administration should be issued in his favor. She therefore contends that the Respondent tricked the Applicant into entering into a consent, in order for the court to issue letters of administration ad litem.

21. I note that the Respondent was silent on the issues set out above. It would appear that the Applicant misapprehended the Respondent’s intention for moving the court to have a consent entered to withdraw the objection in the High Court. Clearly the withdrawal of the objection was to allow the Respondent to be issued with the grant of letters of administration ad litem.

22. The court can infer the Respondent’s intent from what he has done with the grant. To begin with the case referred to in the Wajir court was not against his late father and the Respondent was not, in that case stepping into his deceased father’s shoes so as to require the special grant. Obviously his reasons for seeking and obtaining the special grant were either misadvised or plainly mischievous as the case against him personally.

23. The Applicant may therefore have a point in thinking that the Respondent tricked him into entering into a consent, in order for the court to issue the Respondent with letters of administration ad litem. **It is noted that to the Respondent’s replying affidavit is attached a note by the Applicant, indicating that he had instructed his advocate Messrs Arthur Ingutya “to withdraw the entire objection proceedings so that a way can be paved for further out of court agreement”.**

24. The Applicant has further stated that the Respondent has been hostile and unwilling to cooperate in the out of court settlement process. It can thus be stated that the objectives of the consent as the Applicant had intended have not been met.

25. Once a consent order has been adopted by a court it becomes a judgment or an order. It can however be set aside if the conditions stipulated therein were not fulfilled. In the case of **Edward Acholla v Sogea Satom Kenya Branch & 2 others [2014] eKLR** the court held that:

“Consent becomes a judgment or order of the court once adopted as such. Once consent is adopted by the court, it automatically changes character and becomes a consent judgment or order with contractual effect and can only be set aside on grounds which would justify setting aside, or if certain conditions remain unfulfilled, which are not carried out.”

26. It is my view that for the interests of justice to be met the consent order herein must be set aside and the objection to the petition allowed to be determined on merit. In the premise I find that the prayers sought in the Notice of Motion dated 2nd July, 2016 have merit and are hereby granted with no orders as to costs.

SIGNED DATED and DELIVERED in open court this **29th** day of **November, 2016.**

L. A. ACHODE

JUDGE

In the presence ofAdvocate for the Objector

In the presence ofthe Respondent