



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI AT NAIROBI

FAMILY DIVISION

SUCCESSION CAUSE NO.2111 OF 2001

IN THE MATTER OF THE ESTATE OF WANJIKU KARUNGURU (DECEASED)

RULING

1. JUDY WAMBUI KIRONYO, the applicant/objector, on 24th July 2009 applied by summons of even date seeking to set aside the consent recorded in this cause on 24th June 2009. The main prayer in the application sought an order that:-

“the consent order on distribution of the Estate of Wanjiku Karunguru, deceased, entered into on 24th June 2009 be set aside and this cause do proceed to hearing as previously intended.”

2. The grounds on which the application was made were, inter alia, that the consent sought to be set aside was recorded in error and/or due to inadvertence or mistake as it was without the concurrence and consent of the applicant and further, that the applicant’s advocate on record, Mr. Zakayo Kimani Maina of the firm of Mwaure & Mwaure Waihiga, advocates, conceded to the recording of the consent in Court on behalf of the applicant without the latter’s express instructions but otherwise due to a mistaken belief that the applicant who was in court during the recording of the consent was not averse to the consent as the court had asked questions to which the applicant did not appear to object to but when parties left the court room the applicant raised objection.

3. In his affidavit in support of the application sworn on 24th July 2009, the applicant’s counsel averred that it was his mistake in failing to seek instructions from the applicant that led to the recording of the consent and he “greatly regrets” the same.

4. The application was subsequently amended and the main prayer was varied to read

“that the consent order on distribution of the estate of Wanjiku Karunguru (deceased) entered into herein on 24th June 2009 be reviewed and thereby set aside and the case do proceed to hearing as previously intended.”

5. Two grounds were added to the grounds for making the application. These were:-

“A. that there are sufficient reasons warranting this review including the inclusion of the appropriate legal provisions and prayers.”

“B. that there is discovery of new and important matters from new witnesses.”

6. An amended summons was subsequently filed on 2nd March 2012 introducing a further prayer for review of the consent order and further grounds for making the application namely (i) *that “there are sufficient reasons warranting the review sought”* and (ii) *that there is “discovery of new and important matter from new witnesses...”* and (iii) further that

“the applicant ought not to be punished for the mistake of his advocate.”

7. The affidavits filed by the applicant and her witnesses in support of the application and the replying affidavit and further affidavits filed by the parties show that

- i. On 24th June 2009, the grant of representation to the estate of the deceased, the late Wanjiku Karunguru, issued to Hanna Njeri Mariga, Mary Wanjiru Nganga, and the applicant, Judy Wambui Karonyo, was confirmed by this court pursuant of Section 71 of the Law of Succession Act, Cap 160, and the two parcels of land Nos. Kiambaa/Kihara/1640 and LTK/Lolarash/Olgullui/698 which constituted the estate were distributed to Hannah Njeri Mariga, May Wanjiru Nganga, Judy Wambui Koronyo (the applicant) and Wambui Njoroge Kamay in the manner shown in the certificate of confirmation of the Grant which shows that the applicant, like her co-administratrices, got two acres comprised in the title Kiambaa/Kihara/1640 while Wambui Njoroge got ½ an acre. In addition, the applicant alone got the entire plot comprised in the title LTK/Lolarash/Olgulului/698.
- ii. The certificates of official search filed in this cause show that land title No.Kiambaa/Kihara/1640 measures 6.50 acres while Plot No.LTK/Lolarash/Olgulului/698 measures of a 0.81 hectare, or approximately 2 acres.
- iii.the deceased (Wanjiku Karunguru) was married to Karunguru Mariga who had four wives including the deceased who was the second wife. These were Nyambura, Wanjiku the deceased, Wairimu and Esther Kegio.
- iv. During his lifetime, the deceased’s husband informally subdivided land title No.Kiambaa/Kihara/1640 among his four wives and the applicant took possession of her portion which turned out to be much larger than each of the other portions given to her co-wives. That distribution was not formalized and no Land Control Board consent was obtained or transfer instrument executed to give effect to the

“distribution” and no subdivision ensued and hence no title was forthcoming.
- v. The affidavit evidence further shows that the applicant in turn informally marked with plants the boundaries of her much larger portion which she divided into three pieces each of which she gave to each of her three sons all of whom later died and were each buried on their respective portions.
- vi. The affidavit evidence also shows that the allocation of the land No.Kiambaa/Kihara/1640 by the deceased’s husband to his four wives was not equal as no survey was carried out to determine the sizes and the applicant’s share turned out to be much larger as she settled on it while her co-wives did not.

8. The implementation of the consent that resulted in the confirmation of the grant which gave equal shares to the applicant and her co-wives in the land comprised in Kiambaa/Kihara/1640 will result in equal distribution of that land and correction of the imbalance in the ownership of the land comprised in that title. It does not require a lot of imagination to see from the affidavit evidence that the applicant has now realized that survey of the land comprised in the title No.Kiambaa/Kihara/1640 to give effect to the confirmed grant will force her to surrender some of the land she may have fenced and considered as her inheritance.

9. Miss Siaji, learned counsel for the 1st and 2nd administratrices, and Mr. K. Njuguna, learned counsel

for the 3rd administratrix consented to the application being determined on the basis of affidavit evidence and written submissions which they filed. I have perused the affidavits and the submissions. Mr. Ndumu Kimani, learned counsel for the objector, Wambui Njoroge Kamau, did not attend court when the consent was recorded to have the application determined on the basis of affidavit evidence and written submissions. But the record shows that he had been served with notice to attend court and had notice of the consent requiring the parties to file affidavits and submissions and for the matter to be determined on affidavit evidence. No prejudice has therefore been occasioned to his client.

10. In his affidavits sworn and filed in court on 24th July 2009, and in his further supplementary affidavit sworn and filed in court on 6th November 2009, advocate Zakayo Kimani Maina shows that he was involved in negotiations with the firms of Elizabeth Sijaji Advocate and Ndumu Kimani & Co. Advocates to settle the issue of distribution of the estate in this cause and that he exchanged correspondence on that subject with the said advocates. The affidavits also show that advocate Zakayo Kimani Maina discussed with the applicant for whom he acted the correspondence exchanged between him and the said firms. Although the said advocate deposes that he had instructions to have the matter heard, he endorsed the consent sought to be set aside because he thought that his clients were in agreement with it. He also alludes to titles No.LTK/Lolarash-Olgulului/452 but this is not borne out by the original record in which the Honourable Judge recorded the proceedings when the consent was recorded on 24th June 2009. It does not also form part of the estate of the deceased. What is vivid is the fact that after the consent was recorded, all the counsel endorsed their signatures to it on behalf of their clients. It was not impossible for any of the advocates to liaise with his/her client before signing the consent as the litigants were present in court and ostensibly followed the proceedings.

11. Advocate Zakayo Kimani Maina avers that after the recording and signing of the consent and after leaving the court room, his clients

“disagreed with him” and one “Cyrus Maina shouted in the court corridors” in disagreement. In paragraph 21 of his affidavit sworn on 24th July 2009 the said advocate avers that “...the consent as recorded was therefore not from the instructions got from (sic) our clients which mistake is greatly regretted.” He further deposes that ... “an advocate’s mistake ought not to be occasioned (sic) on an innocent client, more so in a matter as this where the subject matter is land, a very sensitive subject in our country and elsewhere.”

12. In his further supplementary affidavit, advocate Zakayo Kimani Maina, ostensibly in an effort to reinforce his earlier affidavit sworn on 24th July 2009, deposed that he did not have instructions to record and signing the consent as he did. But this was glaringly a departure of what he had deposed and it requires no imagination to see that if he had no ostensible instructions, he would not have endorsed the consent.

13. The record shows that the administratrices in this cause are elderly ladies. In the year 2001, (i.e. 13 years ago) Hannah Njeri Mariga, Mary Wanjiru Nganga, and Judy Wambui Kironyo were aged 66 years, 42 years, and 60 years respectively, and except for Mary Wanjiru Nganga who is now 55 years, the other two administrators are well above 70 years.

14. Mr. Cyrus Kamau Kironyo, a grandson of the deceased and a son of Wambui Njoroge Kamau swore an affidavit on 24th July 2009 in which he stated in paragraphs 11, 16, 20, 21 and 22.

“11. the bone of contention has been that the allegation that my mother occupies a bigger portion than each of the two administrators out of L.R. No. Kiambaa/Kihara/1640.

16. that I am aware that there have been attempts to settle this Succession Cause out of court but the parties could not agree because the 2 administrators just want the land given to our mother close to fifty years ago be reduced to equal their portions without addressing the other properties forming part of the estate.

20. that the Honourable court sought to know how many properties belong to the estate of the deceased and of which apparently the only documentary evidence is for two properties namely L.R. No.Kiambaa/Kihara/1640 and plot 698 Ololocha.

21. that we wish to have this matter heard in court so that we could adduce evidence to the fact that each party occupies their distinct portion, on L.R. No. Kiambaa/Kihara 1640 and that the estate has other properties that have been interfered with.

22. that we urge the court to vacate and set aside the consent judgment made on the 24th June 2009 as it would cause a great injustice and disturb boundaries that have existed for over fifty years, parties to demolish permanent buildings, a situation that has obtained for all my lifetime.”

15. The deceased died intestate. The distribution of her estate is governed by the provisions of the Law of Succession Act, Cap 160. The evidence presented to the court shows that the deceased died owning only two properties, to wit L.R. Kiambaa/Kihara/1640 and LTK/Lolarash/Olgulului/698 which were the subject of distribution pursuant to the certificate of confirmation of the grant dated 24th June 2009. The relief sought in the application before the court is review and/or setting aside of the consent recorded on 26th June 2009 by the parties through their counsel on record. Is there a case made out for the order sought?

16. For starters, the consent was recorded with ostensible authority of the advocates on record for the parties including advocate Zakayo Kimani Maina. It cannot be said to be a nullity and the decision in the case of **KAFUMA V. KIMBOWA BUILDERS AND CONTRACTORS (1971) EALR** cited by the applicant’s counsel can easily be distinguished. In **FLORA N. WASIKE V. DESTIMO WAMBOKO (1982 – 88) I KAR 625** the Kenya 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.”

The court in **FLORA N. WASIKE’S** case referred with approval to the decision of Widham J, as he then was, in *Hiram V. Kassam* (952) 19 EACA 131 at pg 134 where the learned Judge stated:

“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 the consent was given without sufficient material facts, or in misrepresentation or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement.”

17. In my ruling dated 24th June 2005 in **Gerishon Likechi Kitungulu (substituted with Babrara Aseyo Kitungulu) versus Patel Prabhakariserbhai** H.C. Civil Case No.148 of 1999 at Kakamega, I expressed the view that: *“a mere word of mouth that an advocate had no instructions to act, without more, even if it be on oath, cannot in my view discharge the burden that an advocate on record had been disengaged and had no authority to act in litigation especially when such allegation comes much later.”* That case can be distinguished from the instant one on the ground that the applicant in that case sought to set aside the consent on the ground that his advocate on record had been fired. It however transpired that the applicant had not placed before the court sufficient evidence to prove on the balance of probabilities that he had fired his advocate on record when the consent compromising the suit was recorded.

18. To buttress his arguments, counsel for the applicant also cited the case of **Moses Masika Wetangula v. John Koyi Waluke & 2 Others** (C.A. Civil Application No. Nai 280 of 2008) (UR 182/2008) in which the single appellate Judge allowed an application for extension of time to file notice of appeal. That case can be distinguished from the instant one in that the reasons for failure by counsel in that case to file the notice of appeal in time have no bearing to the issue in the instant case whether or not the consent sought to be set aside or reviewed was recorded pursuant to instructions given to counsel by the applicant.

Alleged want of instructions to record a consent as alleged in this case cannot be equated with counsel's failure to file timeously notice of appeal as in the latter case where counsel has instructions act and the reasons for this failure to act with dispatch have nothing to do with instructions or absence of instructions.

19. But the applicant's advocate claims that he made a mistake in endorsing the consent without instructions of the applicant. Madan JA, as he then was, in the memorable statement in **MURAI V. MURAI** (No.4) [1982] KLR 38 said:-

“A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel though in the case of a junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule. It is also not unknown for a final court of appeal or reverse itself when wisdom accumulated over the course of the years since the decision was delivered so requires. It is all done in the interests of justice. A static system of justice cannot be efficient. Benjamin Disraeli said change is inevitable. In a progressive country change is constant. Justice is a living, moving force. The role of the judiciary is to keep the law marching in time with the trumpets of progress.”

20. The issues that the court has to determine in this application are (1) whether there are grounds for setting aside the consent order and

(2) whether there are grounds for reviewing the consent order as prayed in the application and (3) whether justice will be served by grant or refusal of the order sought.

21. The prayer for setting aside is predicated on the allegations that the applicant's counsel had no instructions from the applicant to endorse the consent recorded on 24th June 2009. The application to set aside was made one month after the consent was recorded, yet the applicant claims that immediately after the recording of the consent on 24th June 2009, the applicant vehemently rejected the step taken by counsel in endorsing the consent. One would have expected the applicant to move swiftly and immediately apply to set aside if the applicant so vehemently and passionately held that his advocate had no instructions to endorse the consent as he did. The affidavit evidence clearly shows that the applicant's counsel had ostensible authority to endorse the consent. It is quite evident from the evidence that when the full import of the consent dawned on the applicant, namely that the portion of land excised from title No.Kiambaa/Kihara/1640 held by the applicant would be subjected to survey and new boundaries would be marked and in all probability would result in diminution of the amount (of land) the applicant would ultimately be entitled to, the application to forestall that prospect was formulated. It was an afterthought. Yet the applicant, unlike her co-wives, took more land because in addition to the two acres comprised in the title Kiambaa/Kiharu/1640, she also took the plot known as LTK/Lolarash/Olgululu/698 which measures 0.8 of a hectare (or approximately 2 acres).

22. Counsel for the applicant and the applicant point out in their affidavits that there are other parcels of land which were part of the estate of the deceased but were not included as part of the estate. In particular, land No.LTK/Lolarash/Olgululu/699 was referred to. But the documents presented to the court show that that parcel of land was registered on 18th December 1990 in favour of Mary Wanjiru Nganga, the widow of the last son of the deceased, as the proprietor. The deceased in this cause died on 15th August 1996, and that land was not part of the estate left behind by the deceased. There is no evidence that it belonged to the deceased and was given to Mary Wanjiru Nganga as part of her legacy for then it would only be fair to take it into account in the distribution of the estate.

23. There would be no legal basis for setting aside the consent and clearly as deposed by Cyrus Kamau Kironyo, if the consent is not set aside, the result would be survey and marking of new boundaries as per

the confirmed grant with the effect that those with more land would have to surrender the excess to others. I observe that no evidence of fraud or collusion was availed to support the prayer for setting aside nor was evidence of mistake adduced. The applicant's counsel seemed to have authority to endorse the consent as he did. The confirmed grant is an order of the court and the mere fact that its implementation will inconvenience some parties is not sufficient ground to set it aside. Parties may have lived on the portion they occupy, but the law requires that the land be distributed as per the confirmed grant and hence in accordance with the provisions of the Law of Succession Act, Cap 160. I see no legal basis for the order for setting aside.

24. As regards review of the consent, order 45 of the Civil Procedure Rules has not been complied with. There is no discovery of new and important matter or evidence nor is there sufficient reason for the review sought. In effect, the application for review does not meet the threshold set by Rule 1 of Order 45. It fails.

25. In the result, I find no merit in the application and I decline to grant the orders sought. I dismiss it. As the litigation involves family members, I order that each party shall bear its own costs.

G.B.M. KARIUKI, SC

JUDGE

Delivered at Milimani Law Courts, Nairobi, on this 16th day of February 2015 by the Honourable Justice W. Musyoka on behalf of Justice G.B.M. Kariuki.

JUDGE

COUNSEL APPEARING

Ms E. A. Siaji advocate, of E Siaji & Co. Advocates for the 1st and 2nd administrators Mr. K. Njuguna advocate, of Mwaura Waihiga & Co. Advocates for the 3rd administrators No appearance by Mr. Ndumu Kimani for the interested party

Court clerk – Mr. Wahinya Kugwa