



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 2326 OF 2008

IN THE MATTER OF THE ESTATE OF JOEL CHERUIYOT RONO (DECEASED)

RULING

1. Directions were given on 1st October 2014 that the application dated 6th August 2014 was to be disposed of by way of written submissions. In compliance thereof the parties hereto filed their respective submissions on 29th October 2014 and 20th January 2015.
2. I have perused the record during the process of preparing this ruling and noted that the application dated 6th August 2014 was placed before Muchelule J, who was then the Duty Judge, and allowed.
3. After going through the written submissions filed by the parties as stated in paragraph 1 above, I noted that the submissions on record are on the application dated 5th May 2014 and not that dated 6th August 2014. As the application dated 6th August 2014 has been disposed of the matter for me to determine is the Summons dated 5th May 2014.
4. The said Summons seeks the setting aside of the order made by consent of the parties on 31st October 2012 and all the consequential orders emanating from it, the setting aside or review of the orders on confirmation of grant made on 29th October 2012 and revocation of the certificate of confirmation of grant issued in this matter so far as it related to [particulars withheld] .
5. The grounds upon which the application is predicated are set out on the face of the application as well as in the affidavit in support sworn on 5th May 2014 by John Koe. It is averred that the consent order of 31st October 2012 had not been sanctioned by the applicant, that mistake of counsel ought not be visited on an innocent litigant, that the applicant was likely to be dispossessed of his home and livelihood, and that [particulars withheld] had been fraudulently transferred to the name of the deceased.
6. In his affidavit, the applicant avers that consent of 31st October 2012 was a misappreciation and misrepresentation of the facts as what was intended was a consent for the administrators to continue with the administration of the rest of the estate save for. What was recorded in court was not what the parties through counsel intended. The consent as entered was wrongful and regrettable. He avers that he had not even given express instructions to his advocate to record the consent and that he only became aware of it after the ruling of the court. He states that there was innocent misrepresentation, error of court in the recording of the consent and lack of consensus *ad idem* between the advocates and the court.
7. He avers that the grant was made on 16th February 2012 without his participation and his grievances being considered as objector. He prays that the confirmation orders made on 29th

February 2012 be reviewed and set aside so far as they relate to [particulars withheld]. He would like the grant made on 16th February 2012 revoked and the certificate of confirmation of grant issued on 29th February 2012 cancelled. The applicant has given a background to the ownership of the property in question, to bring out the fact that the same was subject to several suits.

8. The reply to the application is in the affidavit sworn by the first respondent on 10th July 2014. She asserts that the orders sought to be set aside were founded on a consent order signed by both sides to the dispute. She avers that the applicant was represented in the matter by able counsel and the applicant suffered no prejudice. She adds that there has been inordinate delay in the bringing of the application.
9. In his written submissions, the applicant states that the consent order of 31st October 2012 was founded on a mistake of his counsel, who was not aware that the application had been disposed of by consent hence he continued to attend court on it and eventually argued it believing that the critical prayer was still intact. He has cited to me several authorities to support his case for the setting aside of the order of 31st October 2012.
10. The respondents, in their written submissions, have set out the law on the setting aside of consent orders or decrees; and have cited ample authority to support their contention. They submit that the applicant has not made out a case for review of the consent order. They further submit that the applicant has not made out a proper case for review of the confirmation orders made on 29th February 2012. It is argued that the matter of the revocation of grant is *res judicata* in view of the consent orders made by the court on 31st October 2012.
11. The application dated 5th May 2014 raises two matters. The first issue is on the orders made on 31st October 2012 and the second one is on the grant made on 16th February 2012 and the certificate of confirmation of grant issued on 29th February 2012.
12. I have carefully examined the record before me and especially the orders recorded by consent on 31st October 2012. I am convinced that the parties erroneously stated the wrong prayer for withdrawal to the court. In my view the situation cannot be otherwise.
13. The application before court was for revocation of the grant on record, it cannot be that the withdrawal of the applicant could withdraw the prayer for revocation of the grant and leave intact the prayer for injunction which was itself dependent on the prayer for revocation.
14. A case in my view has been made out for the review of the orders made on 31st October 2012. To do justice in the matter I do not think the other orders sought in the application dated 5th May 2014 ought to be granted
15. The orders that I am disposed to make are-
 - a. **That I do hereby vacate the orders made on 10th October 2013 and reinstate the application dated 21st March 2013.**
 - b. **That the consent orders made on 31st October 2012 are reviewed and amended in the following manner:-**
 - i. **Order 1 to be amended so that the reference to prayer 3 should read prayer 2;**
 - ii. **Orders 3, 4 and 5 to be amended so that reference to prayer 2 should read prayer 3;**
 - c. **That the directions given by this court on 6th May 2013 are hereby reviewed to read that prayer 3 of the application dated 21st March 2012 shall be determined on the basis of the**

written submissions placed on record by the parties;

- d. That ruling on the said application shall be delivered on a date to be given at the delivery of this ruling; and**
- e. Costs to be in the cause.**

DATED, SIGNED and DELIVERED at NAIROBI this 23RD DAY OF OCTOBER, 2015.

W. MUSYOKA

JUDGE