



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
FAMILY DIVISION
SUCCESSION CAUSE NO. 207 OF 2009
IN THE MATTER OF THE ESTATE OF HARRY LOUIS NANGURAI (DECEASED)
RUTH HELLEN SEMPEYO NANGURAI.....APPLICANT
VERSUS
JOHN P. NANGURAI.....1ST RESPONDENT
ANDREW LOUE NANGURAI.....2ND RESPONDENT
GEORGE M. NANGURAI.....3RD RESPONDENT

JUDGMENT

1. The deceased Harry Louis Nangurai died intestate on 12th August 1984 at Nairobi. He left an estate that comprised of land parcels Ngong/Ngong/289 measuring about 74.8 acres and Ngong/Ngong/274 measuring about 5.6 acres. On 12th February 2009 his sons John P. Nangurai (1st respondent), Andrew Loue Nangurai (2nd respondent) and George M. Nangurai (3rd respondent) petitioned the court for the grant of letters of administration intestate. The letters were issued on 28th April 2009 and confirmed on 9th March 2010. The grant was subsequently revoked upon the successful application of Ruth Hellen Sempeyo Nangurai (the applicant) whose case was that she was a daughter of the deceased who had been fraudulently excluded from the petition, grant and the distribution of the estate. A fresh grant was jointly issued to her, the 1st respondent and the 2nd respondent.

2. This matter was set down for hearing to determine whether or not the applicant was the daughter of the deceased and therefore entitled to benefit from the estate. In the course of her evidence, the parties entered into a consent and accepted that she was a daughter of the deceased who was one of the beneficiaries of the estate. They began to negotiate a settlement on distribution. A Deed of Settlement dated 30th July 2013 had been executed by eight (8) of the nine (9) beneficiaries. The beneficiary who declined to sign it was the 2nd respondent. What was proposed in the distribution was that the 2nd and 3rd respondent to equally share Ngong/Ngong/274, so that each gets 2.6 acres. In respect of Ngong/Ngong/289 the 2nd and 3rd respondent was to each get 11 acres, the 1st respondent was to get 14 acres, the applicant 7 acres, and Catherine Onyango, Lucy Angwenyi, Hadija Nangurai, Grace Tukai and the estate of Ananna Mutangurwa were to each get 5 acres. The Deed of Settlement acknowledged that these nine (9) were the beneficiaries of the estate of the deceased.

3. On 8th June 2015 when the parties entered into a consent to acknowledge the applicant was a beneficiary of the estate of the deceased, they were all represented. The 2nd respondent was represented by Mr. Naiku. The matter was adjourned for the parties to go and agree on distribution. Mr Naiku continued to represent the 2nd respondent up to 3rd November 2015 when the latter informed the court that the two had disagreed that morning. He sought time to get another advocate. The parties had agreed to file written submissions on distribution. All the parties, except the 2nd respondent filed written submissions agreeing with the Deed of Settlement. The 2nd respondent filed his submissions to say that he still stood by his replying affidavit sworn on 1st March 2012 to deny the applicant was the daughter of the deceased, or that she was entitled to benefit from the estate as she was not a beneficiary. In any case, he submitted, the parties are Maasai from Kajiado and that under **sections 32 and 33 of the Law of Succession Act (Cap.160)** a daughter could not inherit his father's agricultural land or livestock. This is because of the applicable customary law among the members of the tribe that excludes daughters from such inheritance.

4. To begin with, any customary law that states that a daughter cannot inherit her father's estate would be repugnant, offensive and discriminatory. It would offend **Articles 2(4) and 27** of the Constitution of Kenya 2010. **Article 2(4)** abolishes all customary laws that are repugnant to justice and sense of morality, and **Article 27** abolishes all forms of discrimination and views male and female to be equal.

5. Secondly, when on 8th June 2015 the parties consented that the applicant was a beneficiary of the deceased they were all represented. The 2nd respondent was represented by Mr Naiku. There is no application on record that has been filed to vary, review or set aside that consent. Written submissions are neither an application nor are they evidence. They cannot vary a consent that the party has entered into. In **Hirani –v- Kassam (1952) 19 EACA 131** it was held that:-

“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 courtor 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.”

It is now settled that an advocate on record for a party has ostensible authority to compromise a suit or enter into a consent therein (**Williams & Kennedy Limited –v- Post Bank Credit Limited (W. Liquidation) & Others, High Court (Commercial and Admiralty Division at Nairobi) Civil Suit No. 710 of 2009**). It is also trite that a consent judgment can only be set aside by either another consent or by demonstrating through evidence the grounds that would justify the setting aside of a contract such as fraud, mistake or misrepresentation (**Flora N. Wasike –v- Destimo Wambuko [1982-88] IKAR 625**).

6. Thirdly, the 2nd respondent asked in his submissions that the court should go back to the earlier distribution; the distribution that was done at the time the grant was confirmed on 9th March 2010. To start with, that grant has now been revoked. That distribution gave the entire estate of the deceased to only the respondents. It gave the entire estate to the three because they were the sons of the deceased. It excluded not only the applicant but also all the daughters of the deceased. That was an unfair, illegal and unconstitutional distribution of the estate. The court cannot go back to it. Other than the quarrel that the applicant is not the daughter of the deceased, and therefore not a beneficiary, the 2nd respondent has no other quarrel with the distribution in the Deed of Settlement. He has got more or less the same share as his brothers. In fact, the respondents should count themselves lucky that their sisters are accepting for less shares in comparison. The law would entitle each child, son or daughter, an equal share. The constitution entitles each child, irrespective of sex, equal treatment.

7. In conclusion, I dismiss the allegations by the 2nd respondent that the applicant is not a daughter of the deceased, or that she is not the deceased's beneficiary. If eight (8) members of the nine (9) accept the applicant to be the daughter of the deceased it would be difficult for one (the 2nd respondent) to continue

to allege that she is not a daughter in the home. The eight have supported her case on paternity and that is material.

8. I adopt the distribution that is contained in the Deed of Settlement dated 30th July 2013 and on that basis confirm the grant that was issued jointly to the applicant, the 1st respondent and the 2nd respondent on 17th October 2013. For avoidance of doubt, the distribution that was done following the confirmation of grant on 9th March 2010 is set aside and the new titles that were issued subsequently are all revoked. This is to allow for the distribution in accordance with the Deed of Settlement.

DATED and DELIVERED at NAIROBI this 14th December 2015.

A.O. MUCHELULE

JUDGE