



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 1871 OF 2002

AND

IN THE MATTER OF THE ESTATE OF WAGIKO NDIBARU

(DECEASED)

RULING

1. There are two applications before court. The first in time is summons for further directions dated 12th October, 2009. In it the Applicants seek orders that the 3rd and 4th defendants be commanded to pay to the Applicant Kshs. 2,609,052.00 within 14 days, in default of which execution to follow. He also asks that a rectified certificate of confirmation do issue in terms of order number. 9 of the orders made by the court on 4th February 2009. The application is founded on the reasons that the 3rd and 4th Respondents have furnished accounts as ordered on 4th February 2009, yet they have not paid the monies they admit as being due to the Applicant as per their own accounts. The applicant also argues that it is in the interests of justice that the distribution of the deceased's estate takes place expeditiously. The application is based on the affidavit of Beth Nyambura Wagako sworn on 12th October 2009.
2. The second application is by way of summons for further directions dated 10th August 2010, and is taken out under Sections 82 and 83 of the Law of Succession Act (Cap. 160) Laws of Kenya and Rule 49 of the Probate and Administration Rules. In it the applicants ask for directions or orders for the distribution of the estate with respect to the shares held by the deceased in Nyakio Investments Limited between the houses of Ruth Njeri Wagako and Esther Njoki Wagako on the one hand and the house of Beth Nyambura Wagako on the other. They propose that each of the parties do appoint a reputable and registered valuer to value the shares of the company and the two main assets of the company namely L.R. 209/1496 and L.R.2211/2. There are several other proposals touching on the process and conduct of the valuation. After the valuation one house shall buy out the shares that the other house is entitled to they would like the court to superintend over the exercise of buyout. There are also proposals on how the two assets of the company should be shared out between the two houses, and how the family should thereafter deal with the company accounts and tenants.
3. The application is supported by the annexed affidavit of Esther Njoki Wagako the 2nd Applicant herein sworn on 10th August 2010. She avers among others that the assets of the company herein thus do constitute a life time of effort on her part as well as her co-applicant herein Ruth Njeri as widows of the deceased; that John Mwangi Wagako who is her step son and so to Beth Nyambura Wagako, has moved the High Court in Winding Up Cause No. 10 of 2007 seeking the winding up

of the Company on account of disagreements between him and his step brothers who are the directors of the company which in effect has brought in a lot of bad blood into the entire family and especially between the house of Beth Nyambura Wagako on the one hand and the houses of Ruth Njeri Wagako and herself (Esther Njoki Wagako) on the other hand; that in seeking the winding up of the company the petitioner is thus seeking the sale (at forced sale prices) of the company and/or its assets; she further avers that the winding up and sale of the company and its assets which also comprise the main assets in the estate herein, would derogate from the noble intentions of the deceased, who having acquired and ran the properties under his name over his lifetime only transferred the same to the company two months before his demise. That, the company was thus intended only as a vessel to assist his polygamous family in managing the assets; it is her averment that the sale of the assets comprised in the company would deprive the entire family of the inheritance from their husband and father; further that in view of the acrimony in the family it would be difficult for the family to manage the assets jointly; that the houses of Ruth Njeri Wagako and herself are still willing to run their affairs jointly in the company and are willing to have either a full buy-out of the house of Beth Nyambura Wagako from the company or a partial buy out where they transfer their shares in the company in return for the transfer of one of the two main assets of the company to them, and differential in value can then be offset monetarily; she avers the buy-out would result in a win-win situation for all protagonists in the estate instead of the deceased's and our lifetime efforts benefitting strangers as would if the company was wound up.

4. Opposing the application, Alice Wanjiru Wagako, the 1st Respondent herein filed in a Replying Affidavit. In that affidavit she avers that the said application resembles a similar one which was filed by the Applicants in Milimani Winding Up Cause No. 10 of 2007 in which the 2nd Respondent has petitioned for the winding up of Nyakio Investments Ltd; that the said affidavit reveals the panic in which the applicants are in, following the discovery that it is no longer possible for them to continue denying her mother's house a share of the wealth left to it by the deceased; further that the applicants are callous step-mothers who harassed her late mother and denied her the kind of comfortable life her father had arranged for her and the applicants to have upon his demise; that the houses of the applicants are comfortable because they are still in control of the assets of the deceased and her house is not, and that the applicants do not want a rectified grant to issue in this cause or the winding up cause to be disposed of quickly because it will remove them from the exploitative position they presently enjoy; that despite the fact that during her father's lifetime, the applicants did not claim to be co-owners of the above mentioned properties and have not done so after the grant was issued in this case in 2003, the applicants are now claiming to be co-owners; it is further her averment that since 2002, the applicants have not questioned the ownership of the two properties by Nyakio Investments Ltd.
5. The parties herein have filed their respective written submissions.
6. The applicants submit that the Respondent confirmed to the court that they had no interest in buying any of the assets and that they were willing to be bought out by the applicants. As a result, consent orders were recorded on 16th May, 2011, 21st June, 2011 and 6th December, 2011. It is their contention that by the consent order dated 16th May, 2011, it was agreed *inter alia* that the house of Beth Nyambura Wagako would be bought out by the other two houses; that by the same order valuers were to be appointed and the same were duly appointed and carried out their valuations and the valuations submitted to court on 12th July, 2011 when the same were accepted by all the parties; further that by the consent order of 6th December, 2011, parties agreed that the umpire valuer would ascertain rent owed to the estate by members of each house to be factored in settling accounts after the buy-out so that the entire matter can be resolved.
7. They further submitted that from the foregoing prayers 1a) to g) and i) are spent having been issued by consent; that the only issue that remains is the completion of the buy-out as agreed by the parties which would fall under prayer 1(h). It was further their submission that the applicants seek the buy-out of shares in the company which are the assets liable to distribution in the estate;

that the Respondent has since the filing of this application consented to the foundation of the same which is the buy-out process and even gone as far as to engage in the valuation process, and that they cannot now be heard to lay objection as such objection is overtaken by events namely the grant of orders by consent.

8. On their part the Respondent submitted that the application dated 10th October, 2010 was filed after two crucial decisions had been taken by this Honourable Court regarding the distribution of the deceased's estate herein and removal from management on 15th December, 2009 of the sons of the Applicants. It was the Respondent's submission that the real objective of the applicants is to prevent the distribution of the deceased's estate in accordance with the orders made by Rawal J on 2nd February, 2009; further that the applicants being the only surviving executrices of the will of the deceased, are in control of the assets and are not in a hurry to comply with the order five years after it was made and it is clear they want the court to review or set aside the order on distribution.
9. It was the Respondent's contention that paragraph 15 of the applicants' submission is based on a misapprehension of the nature of the contract in law; that a contract embodies a bargain struck by the parties to it, and that the applicants had made offers which have not been accepted. It was their submission that between May, 2011 and December, 2011 consent orders were recorded by the parties on a possible settlement, but contend that no agreement has been made to alter the position on distribution as per the order of 4th February, 2009 and further that the provisional consents recorded herein on 16th May, 2011, 12th July, 2011 and 6th December, 2011 concerned a possible purchase by either the applicants' houses or the Respondent's house purchasing shares in Nyakio Investments Limited and no complete bargain has been made, and the applicants cannot in law compel the Respondent to accept any offer they may be having in mind.
10. The Respondent argued that a consent order is in the nature of a contract, relying on *Brooke Bond vs. Malya* (1975) EA 266 where the court held that consent orders are like contracts whose validity can be challenged on the very grounds on which validity of contracts. It is stated,

“Prima facie any order made in the presence and with the consent of the council is binding on all parties to the proceedings....and cannot be varied or discharged unless obtained by fraud or collusion or by an agreement contrary to public policy of the Court or if the 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.”
11. It was the Respondent's contention that the consent orders are not capable of enforcement as contracts as the terms are not certain. She submitted that the applicants are seeking for the re-writing of the will and indirectly the re-writing of the ruling of Rawal J, and that the family court has no power to do so; that as regards what is to be done with the company in which the deceased held shares, that is the task of the company's court and that the family court is being asked to usurp the jurisdiction of the company's court.
12. I have carefully read the pleadings as well as the rival written submissions by counsel of the respective parties. My understanding is that both the Applicants and the Respondent do agree that consent orders were recorded by the parties for a possible settlement. Indeed the Respondent has admitted that the said consents recorded herein on 16th May, 2011, 12th July, 2011 and 6th December, 2011 concerned a possible purchase by either the applicants' houses or the Respondent's house purchasing shares in Nyakio Investments Limited. My difficulty though is that the Respondent seems to be unhappy with the said consent orders recorded, and has submitted that the applicants' offer had not been accepted and that no complete bargain has been made. However, it is imperative to note that the Respondent has not moved the court to have the said consent orders reviewed.
13. Certainly, the court has powers to review consent orders, but the guiding factors are now well

settled. The same were well laid down by the Court of Appeal in *Greenfield Investments Ltd vs. Baber Alibhai Mawji* Nairobi CA No. 160 of 1997, where it was reiterated that the circumstances under which a consent judgment may be interfered with. They took into account the decision in *Hirani vs. Kassam* [1952]19 EACA 131 where the following passage from *Seton on Judgments and Orders*, 7th Edn. Vol. 1, P. 124 was approved:

“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 or those doing 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 misapprehension or ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement.”

The court also considered with approval the decision in *Flora Wasike vs. D. Wamboko* [1982-88] 1 KAR 625, where it was said that a consent judgment or order 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.

14. On the first application I do note that the applicants’ application is principally based on the terms of the said consent orders. I find that the Respondent has not stated if there are certain conditions that remain to be fulfilled. Regarding the second application, I find that Nyakio Investments Limited is a separate legal entity from its shareholders, therefore it had a separate legal existence from that of the deceased, and consequently this court is not the appropriate place to deal with the issues affecting it. The only matter of interest to the probate court is the distribution of the shares held by the deceased in that company. All other matters concerning the company ought to be placed before the Commercial Court.

15. In view of the foregoing, I find merit in the application dated 12th October 2012. I hereby direct the 3rd and 4th defendants to pay to the applicant the sum of Kshs. 2, 609, 052.00 within the next thirty (30) days of the date of this ruling, in default of which the applicant shall have liberty to take out execution proceedings. The application dated 10th August 2010 should have been filed elsewhere. I have no jurisdiction to entertain it within a succession cause, and I therefore dismiss. The applicant in the application dated 12th October 2012 shall have costs of the application. There will be no orders as to costs on the application dated 10th August 2010.

DATED, SIGNED and DELIVERED at NAIROBI this 21ST DAY OF MARCH, 2014.

W. MUSYOKA

JUDGE