



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
FAMILY DIVISION
SUCCESSION CAUSE NO.1298 OF 2011

IN THE MATTER OF THE ESTATE OF G K K (DECEASED)

RULING

1. The issue that I am to determine as regards the Chamber Summons dated 8th May 2014 is whether there is a valid reason to amend and/or rectify Order No.1 in the Consent Order dated 30th October 2013 executed by all the parties to this Cause. The Application is premised on **Sections 29 and 40** of the **Law of Succession Act** and **Rule 49** of the **Probate and Administration Rules**.

2. To put matters into perspective, although this Court appointed T K and A K as Administratrixes to the estate of G.K.K by an order issued on 30th October 2013, for various reasons, the estate has not yet been distributed and in any event, on that day, beneficiaries to the estate, through their advocates and by themselves, crafted and executed a Consent order regarding certain interim payments for their upkeep and for management of the deceased's assets. One of the Consent orders and of relevance to the present Application reads as follows;

“G W shall be treated as a beneficiary of the estate to the extent that a reasonable provision shall be made for her at the time of distribution of the estate of the Late G K , to cater for her living expenses for her lifetime.”

3. The above part of Order No.1 of the Consent order should be read together with the grounds in support of the Application which are the following;

“(1) The said order was entered by mistake in that it recognised a predeceased person, the late A W K, as a beneficiary of the estate.

(2) Mrs. G W K being a wife of the late G. K. K should have been recognized as such and not otherwise as provided therein.

(3) Section 29 of the Law of Succession Act (Cap 160 LOK) recognizes G W K as a wife for purposes of intestate succession.

(4) It in the interests of justice to amend the said order in order to correct a mistake in the proceedings.”

4. In addition to the above, S K K, son of G W aforesaid, swore an Affidavit on 8th May 2014 and stated *inter-alia* that;

(i) his mother was properly married to the late G.K.K under Kikuyu Customary Law and should be recognised as a wife and beneficiary of the estate although she had long separated from the deceased prior to his death.

(ii) his mother is 75 years old and is in constant need of medical attention which issue can best be addressed by recourse to the estate of G.K.K (deceased).

(iii) A W K died on 26th August 2007 well before G.K. K who died on 21st December, 2010 and her estate cannot benefit from the estate of G.K. K as the Consent Order purported to do.

(iv) G W is therefore entitled to the Kshs.2 Million paid to each of the estate's beneficiaries pursuant to the Consent orders of 30th October 2014.

5. Mr. Kyalo Mbobu in submissions added that under the law, a Consent order can only be set aside on the grounds of fraud, collusion or because it is contrary to the policy of the Court. He relied on the decision in **Hirani vs Kassam [1952] EACA 131** to make that point and further submitted that the mistakes of law cited above were sufficient to warrant a setting aside of the Consent order.

6. Lastly, that the Application was properly made and on the facts and the law, it should be granted.

7. Mr. Nyamu and Mr. Assa, Advocates, supported the Application while Mr. Ochieng, Mr. Mungla, Mrs. Mutisya, Mr. Kalii, all Advocates for some beneficiaries to the estate opposed the Application as did M K, R K and S K who are all acknowledged beneficiaries of the estate. I should also add that C N and R N, widows of two of the deceased's sons, supported the Application.

8. In a nutshell, those opposed to the Application have raised the following issues;

(i) that there is no conclusive evidence that G W was a wife of the deceased at the time of his death and therefore entitled to any part of his estate. That although she was initially married to the deceased, she left him and went on to have two other children with another man and was not dependent on the deceased at the time of his death.

That therefore her inclusion as a beneficiary of the estate was made on purely humanitarian grounds and not on the basis of an existing legal obligation by the estate towards her.

(ii) there is no mistake in the Consent order as each beneficiary to the estate, including G W's representative, voluntarily and willingly acceded to it.

(iii) It would be in bad faith for one party later in the day to seek to overturn a consent order recorded after deliberations and consensus by the family.

(iv) the prayer to "correct" the order is improper as it does not state clearly what part of the order ought to be corrected.

(v) the consent order was a contract where there was forbearance of rights and parties engaged in a trade off with a view to settling issues.

(vi) following the decision in **Bilbie vs Lumley [1802] 2 East 469**, in law there are no mistakes and so once payments were made as agreed by the parties, no mistake can have arisen.

(vii) G W should be treated as a dependant under Section 29 of the Law of Succession Act and not a beneficiary.

(viii) Regarding the estate of A W, that she had left behind the A W Foundation to educate children and upgrade women and so it was proper that her estate was enjoined as a beneficiary.

(ix) In any event, that other deceased persons including E K were listed as beneficiaries although they had no children.

9. I have considered the rival submissions made and certain facts cannot be disputed. Firstly, the Consent order that is the subject of this Application was recorded after lengthy discussions between all the Parties to this dispute. They included I and S K, children of G W who were ably represented by Counsel. Secondly, in my Ruling on 6th June 2013 in which I invalidated the two Wills allegedly executed by the deceased, G.K.K, I stated that the deceased “*had also been married and later separated with G W with whom he had two children, namely I and S*” This statement was borne out of evidence tendered at the time and which was again repeated at the hearing of the present Application. As of now, there is no evidence that at the time of his death, the deceased was supporting G W as a dependant and there is also no evidence that she either ceased to be a wife by known legal channels and whether she qualifies either as a “*wife*” or “*former wife*” as is the language of **Section 29** of the **Law of Succession Act**. This notwithstanding, parties consented to her being provided for at the point of distribution of the estate and not to benefit from any interim payments to be made from the estate pending distribution.

10. With that context in mind, it is generally agreed that a Consent order is akin to a contract and can only be set aside on the following grounds;

(i) *that it was obtained by fraud, mistake or misrepresentation.*

(ii) *that it was obtained by collusion.*

(iii) *that it was an agreement contrary to the policy of the Court.*

11. The above grounds were well expressed in **C.A. No.7/2014, Samuel Wambugu Mwangi vs Othaya Boys' High School** where the Court of Appeal stated that where a Consent order was properly recorded and the Appellant was ably represented, then he was bound by the terms of the Consent order and is estopped from denying the said terms.

12. Similarly Azangalala, J. (*as he then was*) in **Charity Kamama vs East African building Society, HCCC No.1754/1995** quoted with approval the holding of **Hancox J. A**, who while determining the celebrated case of **Flora Wasike vs Destimo Wamboko (1982 – 1988) I KAR 625** stated as follows and following **Hirani vs Kassam (1952) 19 EACA 13**;

“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 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.”

13. In the present Application, none of the above grounds has been cited even remotely and therein begins the Applicant's difficulties. If none of the known legal grounds for setting aside the Consent order have been quoted to support the Application, then S K who was party to its crafting and who was ably represented by Mr. Kyalo, Advocate, is estopped from denying its contents and terms. In any event, S K is a beneficiary of the Consent order having received Kshs.2 Million that each beneficiary of it was paid. If the Consent order was obtained and recorded other than by a lawful consensus, why did he take his benefit from it and then raise a cry regarding his mother, months later?

14. But that is not the end of the matter because I also heard Mr. Kyalo to have submitted that the Consent order was unlawful because for example the estate of A W received certain interim benefits from the estate of G.K.K while the said A W had predeceased G.K. K aforesaid. That claim deserves no more than a very short answer; the estate has not been distributed and the interim payments were made to cushion beneficiaries from hardship because of the long time that was being taken to distribute the estate.

15. If indeed A W's estate is not entitled to any part of the estate, the issue will be properly determined at

distribution. Her survivors are known and whoever receives any monies on behalf of that estate may well account for it should it be found that it was unlawfully paid out. I am not seized at this point with sufficient material to determine that issue. Similarly, although the Applicant did not raise the issue, E K is deceased and her estate was paid an interim benefit. Her estate must similarly be addressed at the point of distribution.

16. In the end, looking at the law and the unique facts of the estate before me, to re-open the Consent order of 30th October 2013, would merely delay the finalisation of the gathering and distribution of the estate of G. K. K and I see no merit in the Application dated 8th May 2014.

17. The same is hereby dismissed with no orders as to costs.

18. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 25TH DAY OF JULY, 2014

ISAAC LENAOLA

JUDGE

In the presence of:

Irene – Court clerk

Mr. Kyalo present

Mr. Mwenesi present

Mr. Nyamu present

Mr. Ojiambo present and holding brief for Mr. Mungla present

Mrs. Mutisya present

Mr. Ochieng present

Catherine Njeri present

Rachel Ndei present

Susan Kirima present

Ruth Kirima present

Order

Ruling duly delivered. Copies to be supplied to all parties.

ISAAC LENAOLA

JUDGE

