



IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NO. 89 OF 1989

IN THE MATTER OF THE ESTATE OF JOSEPH NJENGA KIMANI (DECEASED)

RULING

The application dated 26/2/2013 was filed by Musembi Ndolo Advocate on half of James Githinji Njenga, one of the beneficiaries of the estate of the late Joseph Njenga Kimani. The applicant seeks the following orders:-

- c. **That the consent order recorded on 14/2/2013 be set aside and vacated;**
- d. **The court do give further directions in the matter.**

The application is premised on grounds found on the face of the application and an affidavit sworn by James Githinji on 27/2/2013. The applicant deponed that the firm of Nyagaka and Ndeda Advocates filed and recorded a consent on 14/2/2013 in which the firm of Nyagaka purported to represent him. He denies having instructed the said firm of Nyagaka to record the said consent and that upon consultation, other beneficiaries have also denied having given the said firm such instructions. The applicant also contends that the consent order has been extracted and those named as administrators have started harassing others and subdividing the assets that belong to the deceased's estate. The firm of Ndeda which represents seven of the beneficiaries was represented by Ms Ndeda who did not oppose the application.

Ms Ayuma held brief for Mr. Achola of Nyagaka & Co. Advocates who represents two of the beneficiaries. Ms Ayuma told the court that Mr. Achola was ready to proceed. When the file was called out later, Mr. Achola was not in court but he entered when the application was being heard, was informed that it was ongoing but he left the court without a word. Mr. Nyagaka had filed a notice of preliminary objection to the application but it was not urged and the court will therefore disregard it.

The impugned consent dated 14/2/2013 reads as follows:-

“BY CONSENT:

The application dated 7th June 2011 be allowed under the following terms.

1. **THAT Gladys Gathoni, Jeniffer Nyambura, Lucy Wanjiru and Lewis Njenga Gachuhi be appointed the Administrators of the Estate of the late Joseph Njenga Kimani (deceased).**
2. **THAT the tenants in Njekims Building Plot No. 1317/316 Gilgil to deposit rent into account No.1138291455 Account Name GLADYS A. NDEDA and SAMSON M N J/A Kenya Commercial Bank Nakuru Branch with effect from 1st of March 2013. The Administrators to jointly do the supervision of rent collection.**

3. THAT mention on 14th March 2013.

DATED at Nakuru this 14th day of February 2013.

(signed)

NDEDA ASSOCIATES

ADVOCATES FOR:

1. ROSEMARY WANGARI NJENGA
2. ESTHER WAMBUI NJENGA
3. GLADYS GATHONI
4. LUCY WANJIRU MTUTRI
5. ELIZABETH MUTHONI
6. JENIFFER NYAMBURA
7. MARGARET WAMBEGA (ALL BENEFICIARIES)

(Signed)

NYAGAKA S.M. & CO

ADVOCATES FOR:

1. JAMES GITHINJI NJENGA
2. LEWIS NJENGA GACHOHI
3. TEDDY GITHINJI (ALL BENEFICIARIES)”

The consent was recorded on behalf of a total of 10 beneficiaries who include the applicant herein.

The law is that a consent judgment can only be set aside by another consent order of the parties or on grounds upon which a contract can be rescinded. In **Brooke Bond Liebig Ltd v Mallya (1975) EA 266** the court said:-

“A court cannot interfere with a consent judgment except in such circumstances as would afford good ground for varying or rescinding a contract between the parties.”

In **KCB Ltd v Specialized Engineering Co. Ltd. (1982) KLR 485, 493** Harris J is on record as having said:-

“The making by the court of a consent order is not an exercise to be done otherwise than on the basis that the parties fully understand the meaning of the order either personally or through their advocates, and when made, such an order is not lightly to be set aside or varied save by consent or on one or other of the recognized grounds.”

In **Flora Wasike v Destimo Wamoko (1982-1988) KLR 626** Hancox JA said:-

“It is now settled 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 certain conditions remain to be fulfilled; which are not carried out.”

Applying the principles set out in the above cases, a contract can be rescinded on the basis of fraud, misrepresentation mistake, collusion or frustration or by consent of the parties. In this case, it is apparent that there are more than 10 beneficiaries. In the grounds to the application, the various houses are set out plus their members. They are said to be 47 beneficiaries in total. The consent order did not include the views of the other 37 beneficiaries and the court was not made aware of that fact.

Secondly, as of 9/11/2012, Mr. Bosire had filed notice of appointment, to appear for the applicant herein. The applicant has denied having instructed Mr. Nyagaka. Mr. Nyagaka has not filed any response to counter or rebut that allegation and he failed to appear or address the court on this application. Ndeda Advocates are agreed to the consent being set aside and the court is satisfied that the consent was obtained based on misrepresentation and non disclosure of material facts and does not represent the views of all the beneficiaries. It is hereby set aside and vacated and all the consequential orders thereto. Costs be in the cause.

DATED and DELIVERED this 28th day of August, 2013.

R.P.V. WENDOH

JUDGE

PRESENT:

Mr. Ndolo for the applicant

Mr. Kanyi holding brief for Ms Ndeda for the respondent

Ms Wachira holding brief for Mr. Nyagaka for the respondent

Mr. Mwangi – Court Clerk