



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO
SUCCESSION CAUSE NO. 56 OF 2001

IN THE MATTER OF THE ESTATE OF WILLY KIPTANUI NGASURA – (DECEASED)

AND

JANE TAPSABEI NGASURA.....1ST APPLICANT

JANE CHELANGAT NGASURA.....2ND APPLICANT

VERSUS

SAMUEL KIPRONO TONUUI RESPONDENT

RULING

The subject matter of this ruling is the Notice of Motion dated 28th February, 2011. The aforesaid Motion was taken out by **Jane Tapsabei Ngasura** and **Jane Chelangat Ngasura**, hereinafter referred to as the Applicants in which they sought for the following orders:

- 1.THAT service of this application be dispensed with in the first instance.**
- 2.THAT the order dated 9th November 2010 be reviewed and set aside upon such terms as are just.**
- 3.THAT the Petitioner/Respondent be ordered to release the certificate of title in respect of L.R.NO. 8939/40 to the Applicants herein to facilitate transfer of the same to Philip Kimutai Tonui who had earlier purchased the same.**
- 4.THAT necessary directions be made.**

The Motion is supported by the affidavit of Jane Tapsabei Ngasura sworn on 15/02/2011. **Samuel Kiprono Tonui** hereinafter referred to as the Respondent filed a replying affidavit to oppose the Motion. When the Motion came up for interparties hearing, learned counsels from both sides recorded a consent order to have the motion determined by written submissions.

I have considered the grounds set out on the face of the Motion and the facts deponed in the affidavits filed for and against the Motion. The history behind this Motion appears to be straightforward. A consent order was recorded on 28th October 2004 in which the parties concerned agreed to sell one of the assets of the Estate i.e Plot No. 40, Bomet Municipality. Samuel Tonui was given first priority. The proceeds of the sale was to be shared equally between the three houses. The order was recorded before Hon. Mr. Justice Kimaru. Learned advocates from both sides duly executed the consent. It said Samuel Kiprono Tonui, the Respondent herein failed to pay the purchase within the time fixed. In 2008, the Applicants aver that due to the post election violence they suffered losses therefore they needed urgent

funds to cushion the deceased family thus they gave the Respondent a notice of seven (7) days to take the purchase option but he failed to do so. The Applicants aver that they had to instruct their advocate to apply for leave to sell the plot to Philip Kimutai Tonui in place of Samuel Kiprono Tonui. The court gave the order on 6th July 2009 thus opening the way for the applicants to sell the plot to Philip Kimutai Tonui and thereafter informed the Respondent of the developments. The applicants aver that they were later surprised to learn that the Respondent had obtained an order authorising him to purchase the plot in December 2010. It is said their advocate informed them that she had given consent to the Respondent's application believing they had not sold the plot. The applicants aver that they did not authorise Mrs. Bett, their advocate to consent to the application. The applicants stated that all the beneficiaries have received their share of the proceeds of sale except for the Respondent. For the above reasons this court was urged to grant the orders sought in the Motion.

The Respondent denied having failed to pay the purchase price to the applicants. He stated that he later came to learn that the lease over the plot had lapsed and had not been renewed at the time of recording the consent of 28/10/2004. He also claimed he was forced to pay land rates which had accumulated for over 10 years. The Respondent annexed correspondences showing the steps he took to have the lease renewed. He claimed that before any legal transaction could take place over the plot the lease should be renewed. He said that his immediate concern was to regularize the process before making payments leading to the renewal of the lease. The Respondent admitted having received the seven (7) day's notice but he avers by that time the estate had no interest to sell as the lease had expired. The Respondent stated that the sale transaction between the estate and Philip Tonui was irregular since it was not ordered by the Court. He claimed he was kept out of the picture together with the Applicant's advocate Bett&Co.Advocates. The Respondent urged this court to find that the conduct of the applicants using another advocate other than the firm of Bett & Co. Advocates meant there was something the Applicants were hiding from him yet he was one of the administrators. The Respondent urged this court to find that the consent order cannot be interfered with because it was entered by the applicants' advocate who had full instructions hence they are bound by it.

I think the main question which has been posed to this court to grapple with is whether or not the consent order recorded on 9/11/2010 should be reviewed and set aside? It is said that the consent was procured without instructions and by mistake on the part of the firm of Bett & Co. Advocates. It is not in dispute that the Applicants gave instructions to the firm of Bett & Co. Advocates to make an application to authorise them to sell the property in question to i.e Philip Kimutai Tonui instead of the Respondent. The application is dated 22nd May 2008. It was served upon the Respondent. The application was fixed for interparties hearing before Hon. Mr Justice G.B.M.Kariuki (as he then was) on 8th October 2008. On that date the Respondent appeared in court in person as noted in the ruling delivered on 6th July 2009. He is said to have kept quiet hence the application was allowed thus paving way for the Applicants to sell the property to Philip Tonui. By an application dated 23rd July 2009, the Respondent through the firm of Ogaro Orayo & Co.Advocates applied for the aforesaid order to be reviewed and set aside. The aforesaid application was served upon the firm of Bett & Co.Advocates. The Application was fixed for interparties hearing on 9th November 2010. On that date Mrs. Bett for the Applicants herein and Mr. Ngetich holding brief for Mr. Orayo for the Respondent recorded a consent order allowing the application thus setting aside the orders of 6th July 2009. I have been told to rule that Mrs. Bett acted without instructions. I am convinced that the firm of Bett&Co.Advocates acted with full instructions. If Mrs. Bett had made a mistake, the Applicants should have secured an affidavit from her or in the alternative to at least show what steps they have taken against that firm for compromising their rights without express instructions. I have come to the conclusion that the Applicants are bound by the consent order which was duly executed on their behalf by their erstwhile advocate. They cannot run away from it. There is no evidence that Mrs. Bett acted without instructions nor was she mistaken in any way.

In the final analysis I see no merit in the application dated 28th February 2011. The same is dismissed. Since the disputes involves members of the same family, I direct that each party meets his or her own costs.

Dated, Signed and delivered this 29th day of November, 2013.

J.K.SERGON

JUDGE

In open court in the presence of

Mr. Akinyi for the Petitioner

Mr. Mutai holding brief for Mr. Koko for the Objector

Mr. Korir- court clerk