



REPUBLIC OF KENYA

High Court at Machakos

Succession Cause 96 of 1999

IN THE MATTER OF THE ESTATE OF DANIEL MUIYA MAWEU (DECEASED)

SUCCESSION CAUSE NO. 96 OF 1999

PRISILA KAKII MAWEU.....PETITIONER

VERSUS

LUCY KARIMI.....RESPONDENT

RULING

**DANIEL MUIYA MAWEU** “deceased” passed on intestate on 20<sup>th</sup> November, 1998. He was survived by 2 widows, **Prisila Kakii Maweu** “the applicant” and **Lucy Karimi Maweu** “the respondent”. His estate comprised of land parcel numbers 403 and 336 in Mutiyambua Adjudication Section, shares in Malili Ranch, Standard Chartered Bank, ½ share in land parcel Number L.R. 54294 and motor vehicle registration number KAA 460A.

On 8<sup>th</sup> March, 1999, the applicant petitioned this court for a grant of letters of Administration intestate. In the petition she only mentioned herself, her sons, **Thomas Maingi Muiya**, **John Kioko Muiya** and her daughter, **Susan Matindi Muiya** as the sole surviving beneficiaries of the estate of the deceased. There was no mention at all of the respondent. She was duly issued with a grant which was subsequently confirmed on 9<sup>th</sup> July, 2004.

By an application dated 17<sup>th</sup> February, 2005 the respondent sought to revoke and annul the grant aforesaid on the grounds that it was obtained fraudulently by the making of a false statement and or by concealment from court of something material to the case, and secondly, that the grant was obtained by means of an untrue allegation of fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.

When served with the application, the applicant did not bother to file papers in opposition to the application. Instead on 10<sup>th</sup> July, 2008, she filed Notice of Intention to act in person. Hitherto she had been represented by **Messrs Mulwa & Mulwa** Advocates. Contemporaneously with the filing of the aforesaid notice; the applicant too filed a consent letter dated 17<sup>th</sup> June, 2008. The consent was to effect that;-

**“the applicants’ application dated 12<sup>th</sup> February, 2005 and filed in court on 17<sup>th</sup> February, 2005 is hereby allowed and the grant of letters of administration issued to Prisila Kakii Maweu on 20<sup>th</sup> May, 2000 and which was confirmed on 9<sup>th</sup> July, 2004 is hereby revoked. There be no order as to costs...”**

On 21<sup>st</sup> October, 2011, the court adopted the above consent as an order of this court thereby bringing the application to a closure.

Not content with what had happened the applicant on 30<sup>th</sup> December, 2011 took out a chamber summons application seeking, *inter alia*, that the Honourable Court be pleased to review and/or set aside the consent orders of 21<sup>st</sup> October, 2011 revoking the grant of letters of Administration to the applicant and reinstate the said letters of Administration issued to the applicant on 20<sup>th</sup> May, 2000 and confirmed on 9<sup>th</sup> July, 2004. In the alternative she prayed that this court do make such orders as it may deem fit just and expedient to preserve the estate of the deceased. Lastly she asked for costs.

The application was hinged is based on the following grounds, among others;-

1. The applicant did not voluntarily sign the consent letter dated 17<sup>th</sup> June, 2008 but was duped to sign the same by the then advocate for the respondent **Ms S. Mwirigi M'Inoti** believing that the same would confer on her, the deceased's husband's estate as she had been informed.
2. This honourable court made orders adopting the said letter dated 17<sup>th</sup> June, 2008 to the effect that the confirmed grant of letters of administration issued to the applicant with regard to her deceased's husband's estate stood revoked.
3. The applicant had been in darkness regarding this cause since the filing of the notice to act in person which she signed on the same date, with the aforesaid letter at the then respondent's advocates.
4. Lastly, she contended that the application had been filed without undue delay.

She also swore an affidavit in support of the application in which she merely reiterated the grounds aforesaid. Suffice to add that being illiterate she took what the advocate told her to be the truth. However, she had since learnt that she had been duped to sign the consent which had adverse effect to her interest. She would not have signed the consent had she known the true implication. The intention of the respondent through her advocate was to disinherit her of land parcel number 54292, Nanyuki on which she has a home. In the premises the alleged consent was obtained through fraud and misrepresentation. Accordingly, it should be set aside.

In response, the respondent deponed that the applicant was only taking advantage of the death of her counsel to mislead the court, she had all along been represented by counsel, that she had appeared before her counsel voluntarily. The applicant was accompanied by her brother, **Philip**, one **Muyambi Karesia** and herself. After long deliberations the consent was arrived at. Thus the applicant has not come to court with clean hands as she knows very well that she has disposed off 2 parcels of land in Ukambani. The property LR 54294 belongs to her as she bought it solely though the title was registered in her joint name with the deceased. Since purchase of the same in 1991 she had lived in it with the deceased and their son exclusively. On these grounds, she prayed that the application be dismissed.

When the application came before me for *inter partes* hearing on 18<sup>th</sup>, June, 2012, **Mr. Mulei** and **Mr. Wanjohi**, learned counsel for the applicant and respondent respectively agreed to canvass the application by way of written submissions. Those submissions were eventually filed and exchanged by 20<sup>th</sup> July, 2012. I have carefully read and considered them.

The application is brought under Section 47 of the Law of Succession Act and Rules 49 and 63 of the rules thereunder, as well as order 45 rules 1 and 2 and order 51 rule 1 of the Civil Procedure Rules.

Section 47 of the Law of Succession Act provides that the High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient.

Rule 49 of the Probate and Administration rules provides that applications in respect of estates of

deceased persons for which no provision is made elsewhere in the rules shall be by way of summons supported if necessary by an affidavit.

Rule 63 provides *inter alia* that Orders 5,10,11,14,18,25 45, and 49 of the Civil Procedure rules, and the High Court (*Practice and Procedure*) Rules apply so far as they are relevant to proceedings under Probate and Administration rules. The effect of the above provisions is to confer power on this honourable court to hear and determine this application.

Order 45 Rule 1 provides that;-

***“Any person considering himself aggrieved;-***

***a. By a decree or order from which an appeal is allowed, but from which no appeal has been preferred ; or***

***b. By a decree or order from which no appeal is hereby allowed.***

***And who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.***

In the present case, the applicant brought the application on the basis that the consent order recorded in the cause was obtained by means of fraud and misrepresentation. The applicant contends that she did not voluntarily sign the consent letter dated 17<sup>th</sup> June, 2008 that formed the basis of the consent order but was tricked into signing the same on the basis that it would confer her deceased’s husband’s estate on her. Obviously this is a new and important matter that was not within her knowledge at the time and or it is sufficient reason. It is unfortunate that the lawyer accused of tricking the applicant is no longer with us. The deceased tell no tells. The applicant claims to have been duped into signing the consent letter by the lawyer. On the other hand, the respondent claims that the applicant executed the consent letter voluntarily. The only person who could have told us what actually transpired is the lawyer. But he is not in a position to do so. In the circumstances, I would give the benefit of doubt to the applicant.

The principles on which the court may be justified in setting aside a consent judgment were first laid out in the case of **Ismail Sunderji Hirani vs Nooralil Esmail Kassam[1952] 19 EACA 31** where at page 134 the Court quoted the following passage from **Seton on judgment and Orders 97<sup>th</sup> edition] Vol. I page 124-**

***“Prima facie, any order made in the present 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 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”.***

In the present case, it would appear, the consent agreement was obtained by fraud and trickery perpetrated upon the applicant by the respondent’s counsel. It was also obtained in misapprehension and ignorance of material facts in that the applicant honest thought that what counsel represented was the truth. The consent also appears was also obtained in the respondent’s advocates’ chambers. This alone speaks volumes on the conduct of the respondent and her counsel. It smacks of some sort of mischief

The above case has been cited with approval in a number of cases, including that of **Flora Wasike versus D. Wamboko [1982] 88 1KAR 625**, where the court stated that;

***“it is now settled law 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.”***

In my view the application has met the criteria which form the basis of a review application. In the premises, I allow the application in terms of prayer 2. There shall be no orders as to costs.

**RULING DATED, SIGNED, and DELIVERED at MACHAKOS this 31ST day of OCTOBER, 2012.**

**ASIKE -MAKHANDIA  
JUDGE**