



IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NO. 115 OF 1996

IN THE MATTER OF THE ESTATE OF (DECEASED)

IN THE MATTER OF THE ESTATE OF JOHN GITAU NJAU (DECEASED)

REGINA MUGURE GITAU.....PETITIONER/APPLICANT

VERSUS

MONICA WATHITHI.....OBJECTOR/RESPONDENT

RULING

The summons dated 8/4/2010 was filed by Regina Mugure Gitau seeking orders that this court be pleased to review and/or set aside the consent order issued on 22/2/2010. The application is based on grounds found on the face of the application and Regina's supporting affidavit. Regina is the petitioner in this matter. Her former advocate on record was Mr. Gordon Ogola. She contends that the consent order entered into between Gordon Ogola Associates and Mr. Nyairo, counsel for the objector, was so entered without her consent as she never agreed to revoke the grant of the letters of administration that were issued on 24/1/1997 and sealed on 29/7/97. It is her contention that she only learnt of the order from the Chairman of Theluji Drycleaners which forms part of the deceased's estate, on 22/3/2010 and the consent was to the effect that a new grant be issued in the names of the petitioner and objector. She further depones that even though the order pended that they filed affidavits on their respective claims of dependence and proposals on the mode of distribution of the deceased's estate within 30 days, she was never called upon to sign any affidavit by the former advocate. She denies being party to the consent not being consulted by the advocate on making of the consent and that the advocate ceased acting for her when she inquired about the consent order. It is her contention that her former counsel colluded with the objector and requests that this matter be heard on merit.

Mr. Karanja, counsel for the petitioner also submitted that all the parties to this case were not present when the consent order was made. He urged that each beneficiary should have been notified. Counsel submitted that once an application for revocation is filed, notice is issued to all beneficiaries to appear, file their affidavits and the court then gives directions on how to proceed and any stays. Counsel relied on **MUIRURI V NDUNGU (1985) KLR 370** and **REF V DISTRICT LAND REGISTRAR (2005)1 KLR 521** where a consent order was challenged and the court set it aside. Reliance was also made on **AHAMED ADAM V JIMMY TOMINO NKU HCC NO. 244/1998**. It is contended that the order, will not prejudice the objector's case.

Mr. Kathili who appeared on behalf of some 5 beneficiaries who describe themselves as children of the deceased supported the submissions made by Mr. Karanja. An affidavit was sworn by Joseph Njau Gitau dated 22/11/2010 in support of the application to set aside the consent order. He claims to be the biological son of the deceased and came into these proceedings to protect their interests. He deponed that

they are opposed to the consent order between the objector and petitioner because it does not take into account the interests of all the beneficiaries. They were not party to the consent and they had not been heard and they have their own person who will represent their interests as an administrator.

Two affidavits were sworn in opposition to the summons. One was filed by the objector on 3/6/2010 and another by Antony Njau Gitau, who describes himself a son of the deceased. The said Antony Gitau urged that the petitioner having omitted him from the list of beneficiaries, he is agreeable that the objector and petitioner be joint administrators. According to the objector, both the petitioner and objector were in court when the consent was recorded after they agreed on how to proceed. She described this application as an abuse of the court process and that the applicant is intent on delaying this matter and yet she is wasting the deceased's estate. The objector urged the court to set aside the order only if satisfied that there are sufficient reasons to do so. Mrs Khayo appearing for the objector urged that a consent order can only be set aside for fraud, collusion or on grounds for setting aside a contract. She relied on **BROOKE BOND LIEBIG (T) LTD V MALYA (1975) EA 266**, and **ISMAIL SUNDERJI HIRANI V NOORALI ESMAIL KASSAM (1952)19 EA CA 131**.

The grant had been confirmed to the petitioner on 29/7/1997 but the objector filed the application dated 3/9/97 seeking to have the grant revoked. On 19/10/99, the court gave directions that the dispute be determined by way of viva voce evidence and the hearing commenced on 11/4/2000. The consent order, the subject of this application was recorded in court on 16/7/08 and issued on 22/2/2010. It reads in part as follows:-

“(a) That the grant of letters of administration earlier on issued to the petitioner herein on 14th January 1997 and sealed on 15th January 1997 and the subsequent confirmation signed and sealed on 29th July 1997 be and are hereby revoked with no orders as to costs.

(b) That a new grant of letters of administration be issued to the petitioner and the objector jointly.

(c) That both parties herein do file affidavits on their respective claims of dependence and proposals on the mode of distribution of the estate within thirty days of this order.

(d) That the matter be mentioned on 17th September 2008 for directions on how to dispose of the remaining issues.”

I have seen the court record for 16/7/2008. Mr. Ogola, counsel for the Petitioner and Mr. Orege holding brief for Mr. Nyairo for the objector were present. It is not clear whether the other beneficiaries had come on record then, but it is evident that there are many more beneficiaries involved in this case than the petitioner and the objector or whoever the two represent. This is demonstrated by the affidavit of Joseph Gitau sworn on 22/11/2010. In my view, it seems the consent did not represent all the beneficiaries of the deceased's estate.

Mr. Ogola who was counsel for the applicant is blamed for having recorded a consent without instructions. Ideally he should have been asked to swear an affidavit as to what instructions he got. He did not and there is no evidence that he was asked to do so and failed. However, it is clear that the relationship with the applicant is no more. It is trite law that a consent order will not be set aside unless it is demonstrated that it was obtained fraudulently, by misrepresentation, collusion or mistake. A consent order recorded by counsel is binding on the parties to the proceedings. However, I wish to observe that in succession matters, there are instances where counsel cannot record consent in the absence of the beneficiaries to an estate. In this instance, the confirmed grant had been challenged, the court gave directions that the issue of revocation be disposed of by way of viva voce evidence and the case had been substantially heard – with 9 witnesses testifying. The said consent order was recorded on 16/7/2008 and the order was only extracted on 22/10/2010. I have seen on record an affidavit filed by the objector dated 13/8/2008, on distribution and a reply thereto by the petitioner, dated 9/9/08. None of the affidavits makes reference to the consent order although they were made within 30 days of recording the disputed consent. However, it is clear that the other beneficiaries do not seem to have filed any affidavit. The effect

of the consent order is that the petitioner had accepted that the objector was a wife of the deceased and that the beneficiaries were appointing the Petitioner and objector as the administrators to the deceased's estate. I am persuaded to find that there should have been some form of evidence to show that all the beneficiaries were consenting to the objector and petitioner to be the administrators of the deceased's estate and that they had all agreed to dispose of the matter by way of affidavit evidence.

As observed earlier, this matter had substantially been heard with the evidence of 9 witnesses being taken. The hearing was to determine both the issue of whether the objector was a wife to the deceased or not, and the issue of distribution. This is a matter that has been greatly contested since 1997. I find that it seems that the consent recorded on 16/7/08 was so recorded in error because not all the beneficiaries were present nor is there evidence that they were party to the consent that was recorded by only two counsel. This matter having proceeded to hearing substantially, I am persuaded to find that there will be no prejudice that will be occasioned to the objector, if the consent order is set aside. Further, this being a succession matter, with all the parties not agreed on the way forward, it is in the interest of justice that the consent order be set aside so that the matter can proceed to full hearing as earlier directed by the court and thereafter the court will make a determination on the issues. It is my view, that the ends of justice will be better served by the parties being given their day in court and I hereby set aside the consent order recorded on 16/7/08 and direct that the hearing proceeds to full hearing as per earlier directions. The application is granted with costs being in the cause.

DATED and DELIVERED this 29th day of March 2011.

R.P.V. WENDOH
JUDGE

PRESENT:

Ms Muthoni for the petitioner/applicant

Mr. Kibet holding brief for Mr. Chemtei for the objector/respondent

Kennedy – Court Clerk.