



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET

SUCCESSION CAUSE NO. 10 OF 1985

IN THE MATTER OF THE ESTATE OF KAMAU GICHUI (DECEASED)

THROUGH

LEAH MUKAMI ICHUHIPETITIONER/RESPONDENT

AND

MONICAH WAMBUI KAMAU OBJECTOR/APPLICANT

RULING

This is an application by **Monicah Wambui Kamau** under Rules 49 and 73 of the Probate and Administration Rules seeking three (3) main orders of the Court namely:-

- 1). That the Certificates of Lease over Land parcel numbers **Eldoret Municipality Block 6/95** and **Eldoret Municipality Block 14/5** be deposited in Court pending the hearing and determination of this application and thereafter pending the distribution of the estate herein.
- 2). That the Certificates of Confirmation of Grant issued on 17th February 1997 and 28th October, 1997 be set aside, cancelled and expunged from the record.
- 3). That a proper Certificate of Confirmation of Grant be issued in terms of the consent order entered herein by the Honourable Justice **V. V. Patel** on 16th October, 1985.

The applicant rests her case on the grounds that:- a consent order was recorded on 16th October, 1985; the consent order has never been set aside; the consent order settled the issue of the administration and distribution of the estate; the respondent extracted two Certificates of Confirmation in respect of the same cause; the certificates contravene the consent order; there is a clear abuse of the court process; the objector's advocates are holding the original Certificates of Confirmation of Grant and the title documents over the estate; that the objector may enforce the Certificates of Confirmation of Grant which are not in conformity with the consent order and that the Deputy Registrar has no jurisdiction to sign a Certificate of Confirmation of Grant and the said Certificates are therefore null and void.

Evidence in support of the application is set out in an affidavit sworn by the applicant. The gist of the applicant's case is that the consent order recorded, on 16th October, 1985 before **V.V.Patel J** is still in force as it has never been set aside. However, the applicant's co-wife, **Leah Mukami Gichuhi**, the respondent, changed advocates more than once, the last such change being filed by **Jim Choge & Company Advocates**. The said advocates extracted several certificates of confirmation of grant all of

which were signed by the Deputy Registrar and which certificates purported to distribute the estate in a manner which contravened the consent order. The said Certificates, according to the applicant, are nullities and should therefore be recalled and a proper Certificate of Confirmation of Grant issued in terms of the Consent Order. The applicant is apprehensive, the applicant may interfere with the original documents which apprehension is based on the fact that the respondent has sold or is in the process of selling Eldoret **Municipality Block 14/5** to which the applicant is entitled pursuant to the said Consent Order.

Annexed to the affidavit are various exhibits including the impugned Certificates and the said Consent Order.

The application is opposed by the respondent on the basis of her replying affidavit sworn on 7th May, 2011. It is deposed in the said affidavit, inter alia, as follows:- That the application is made in bad faith, without basis and too late in the day; that a Certificate of Confirmation of Grant in respect of the estate of the deceased was issued on 16th October, 1987; that pursuant to the same, a Certificate of Lease was issued to both the applicant and the respondent on 21st July, 2000; that the applicant has never challenged the same; that the Consent was overtaken by the Certificate of Confirmation of Grant issued on 29th October, 1987; that on 17th March, 2009, the respondent and the applicant instructed **M/s Kibichiy & Company Advocates** to liaise with Integrity Property Consultants for formal sub-division of the property into two equal portions, and that the applicant is not candid.

Annexed to the replying affidavit are two exhibits: A copy of the Certificate of Lease in respect of **Eldoret Municipality/ Block 6/95** and a letter from the applicant and the respondent addressed to **M/s Kibichiy & Company Advocates** instructing them to liaise with **M/s Integrity Property Consultants** regarding sub-division of the said title.

When the application came up for hearing before me on 9th May, 2011, counsel agreed to file written submission which were on record by 30th May, 2011. For the applicant, it was submitted that two certificates of confirmation of grant signed by the Deputy Registrar were sought by counsel for the respondent without the knowledge of her advocates or herself and that the two Certificates were not in accordance with the consent order the parties recorded before **V.V. Patel J.** Those Certificates were therefore nullities and could not be acted upon. For the proposition, counsel relied upon the cases of **Graig –vrs Kansen [1934] 1 ALL E.R. 101 and Macfoy –vrs United Africa Limited [1961] 3 ALL ER 1169.**

It was also argued for the applicant that as the respondent is selling off portions of **Eldoret Municipality Block 14/5** to which the applicant is entitled, the administration of the estate of the deceased is incomplete and the respondent is stealing a march on the applicant.

For the respondent, it was submitted that this application is not for revocation or annulment of grant but seeks the same result. According to the respondent, there is a valid Certificate of Confirmation of Grant issued on 28th October, 1997 which Certificate has been in existence for over 14 years and on the basis of which both the applicant and the respondent are registered as proprietors on transmission in respect of **Eldoret Municipality Block 6/95**. According to the respondent, that property is no longer the subject of these succession proceedings. It was also submitted on behalf of the respondent that as the consent was not signed by the parties, it is a nullity and that the parties did not intend to act on the same otherwise, a Certificate of Confirmation would have been extracted to that effect. In the respondent's view, the applicant has filed this application in bad faith as she has all along been aware of the Certificates of Confirmation of grant issued on 28th October, 1997, and as lately as 17th March, 2009, instructed **M/s Kibichiy & Company Advocates** to undertake the sub-division of the said property. The respondent therefore contends that the matter has been finalized by the said Certificates of confirmation of grant of 28th October, 1997. Reliance was placed upon two High Court decisions in **Nairobi HCCC Succession Cause No. 2480 of 2000 – Re: Haran Muhia Mugonyi Deceased** and **Nairobi HCCC Succession Cause NO. 1146 of 1997 – Re: Stephen Chege Kimotho & Hamida Bana.**

I have endeavoured to extract the pertinent parts of the parties' pleadings, the evidence and the submissions of counsel. Having done so, I take the following view of the matter. The applicant and the respondent are widows of the late **Kamau Gichui** (deceased) who died on 4th August, 1984, intestate. The deceased's estate comprised, among other assets, **Eldoret Municipality Block 6/95** and **Eldoret Municipality Block 14/5** which are the subject of the present dispute. On 5th August, 1985, the respondent applied for a Grant of Representation to the deceased's estate and on 30th August, 1985, the applicant lodged her petition by way of cross application for a grant of representation to the same estate.

On 16th October, 1985, the two widows entered into the following consent before **V.V. Patel J. .**

“By Consent, let the Letters of Administration be issued to the two widows of the deceased, viz. (1) Leah Mukami Kamau and (2) Monicah Wambui Kamau.

Let the estate of the deceased be distributed as follows:-

Eldoret Municipality Block 6/95 be shared as follows:-

All residential quarters at the back thereof will exclusively belong to Monicah Wambui Kamau. The front shop will be shared equally by both widows.

Four acres of L.R. 10492 to belong to Monicah Wambui Kamau exclusively.

Two acres in Eldoret Municipality Block 14/5 and all the improvements thereon to belong to Leah Mukami Kamau exclusively.

The rest of the acres in the said Block 14/5 which have been sold or to be sold and the balance of the proceeds of the purchase price thereof to be shared equally between the two widows herein.

The Loan of Kshs 540,000/= plus interest chargeable on said loan which was taken by one Njoroge Gichuhi for which loan Eldoret Municipality block 6/95 was charged should be paid exclusively by Njoroge Gichuhi and no other loan should be taken on the said property without the consent of the two widows.

Any other liquid cash lying in any bank or elsewhere be shared equally by the two widows.

No Orders as to costs.

V.V. PATEL

JUDGE

16/10/85”

The consent was recorded in the presence of all the parties and their advocates. The terms of the consent were as clear as crystals. Yet, the subsequent documents filed imported confusion into the crystal-clear consent. The consent in one stroke granted to the widows a grant of representation to the estate of the deceased and also identified their shares in the estate. In other words, it was both a grant of Letters of Administration of the Estate of the deceased and a distribution of the assets thereof. It is not easy to appreciate the subsequent ambiguity. Sample these: On 8th June, 1987, **M/s A.G.N. Kamau Advocates** applied for confirmation of a grant dated 16th October, 1985. I have not traced such a grant on the record. On 30th June, 1987, a Certificate of Confirmation of Grant was issued. The Certificate did not state the beneficiaries' shares. On 29th June, 1988, another Certificate of Confirmation was issued without identifying the shares of the beneficiaries. Nearly ten (10) years later, on 17th February, 1997, another Certificate of Confirmation of Grant was issued. This time round, only, the respondent's shares were identified. The confirmation was probably pursuant to an application for the same by **M/s Jim Choge & Company Advocates** dated 4th November, 1996.

On 17th July, 1997, **M/s Kibichiy & Co. Advocates** came on record for the widows. They applied to have the said application of 4th November, 1996 fixed for hearing. It would appear that it was indeed heard on 7th October, 1997 and allowed as prayed – giving rise to another Certificate of Confirmation dated 29th October 1997. For the first time, the Certificate identified the shares of both beneficiaries in title number **Eldoret Municipality block 6/95** as half share each. That is the Certificate which the respondent relies upon in her argument that **Eldoret Municipality Block 6/95** should be shared on a 50/50 basis. The respondent further relies upon a letter dated 17th March, 2009, addressed to M/s

Kibichiy & Company Advocates in which both widows appear to instruct the said advocates to liaise with M/s Integrity Property Consultants to sub-divide **Eldoret Municipality Block 6/95** into two equal portions. Also exhibited is a copy of a Certificate of lease of the same property in the names of the widows which indicates the shares of each widow as half each.

The status of **Eldoret Municipality Block 14/5** is however not clear. The applicant now complains that the intended sub-division is contrary to the consent order recorded before **V.V. Patel J.** on 16th October, 1985. She also complains that the respondent is selling to other parties what she is entitled to in **Eldoret Municipality Block 14/5**.

The respondent's answer is that the said consent is void as it was not signed by both parties and that the applicant's complaints are an afterthought. In my view, the challenge made against the consent order was not well taken. The parties were present when the consent order was recorded and so were their Legal advisers. The failure to sign the consent by the parties did not invalidate the consent. The record of the Judge cannot be challenged in the manner the respondent has chosen to do. In my view, **V.V. Patel J.** validly entered the consent of the parties on 16th October 1985. That Consent as I have found decided the twin issues of administration and distribution. The consent was never set aside. The parties' letter dated 17th March, 2009, in my view did not set aside their said consent and the fact that a Certificate of Lease was issued in the names of the parties indicating a 50/50 shareholding, does not vitiate the Consent. In my view, the Certificate of Lease was issued pursuant to an incorrect Certificate of Confirmation of Grant. The identities of the beneficiaries and their respective shares were clearly set out in the Consent Order and required no magnifying glass to ascertain.

Heavy weather was made of the fact that the applicant is guilty of laches. That may very well be true but as I have already observed, the distribution of the deceased's estate is far from complete. Besides **Eldoret Municipality/Block 6/95**, there is **Eldoret Municipality Block 14/5** whose status has not been clarified. Furthermore, the dispute involves the estate of a deceased person and such an estate attracts interest from many parties including not only the parties hereto but their respective estates too. It is not surprising that disputes involving beneficiaries and other interested parties in a deceased's estate take time to resolve. The court retains the power and the jurisdiction to resolve such disputes all the time. The power and jurisdiction is inherent and does not depend on any Act or code. It is alive and would have been alive without reference to Rule 73 of the Probate and Administration Rules. I am not therefore surprised that the applicant moved the Court under the said Rule and Rule 49 of the same Rules.

In the end, I allow the application dated 11th February, 2011 in terms of prayers (b) (c) which order shall infact include all Certificates of Confirmation issued therein which are all hereby cancelled and prayer (d).

Each party shall bear her own costs.

Orders accordingly.

**DATED AND DELIVERED AT ELDORET
THIS 4TH DAY OF JULY 2011.**

**F. AZANGALALA
JUDGE**

Read in the presence of:-

- (1) **Mr. Omusundi** for the Objector
- (2) **Ms Sang** holding brief for **Yego** for the Petitioner.

**F. AZANGALALA
JUDGE
4/7/2011**

