



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU
?SUCESSION CAUSE 147 OF 2010

SILAS KAGINA GICHONI.....DECEASED

VERSUS

CHRISTOPHER NDARU KAGINA.....PETITIONER

R U L I N G

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This is the application dated 14/4/2011. It's seeking to set aside the consent orders given on 29/3/2011. It's supported by the affidavit of Tabitha Ikamba Kagina and Esther Mbandi Kagina.

In this affidavit the Applicants have stated that they never gave authority to their advocate to enter into the kind of consent that he did on their behalf. They have also said that kind of arrangement would pity the Respondent against the other children who have equal rights with him. They further say the consent has become impossible to perform.

In his Replying Affidavit the Respondent depones that the consent order is just, fair, prudent and satisfactory and captures the interest of both the Applicant and Respondents. That if the consent order is set aside he will be disadvantaged.

Mr. Nabutete says the Applicants are not able to pay to the Respondent Shs.10,000/= per month as per the consent order, owing to their age and many responsibilities. The consent order if continued to be performed would be stressful, as the Respondent was not dependant on the deceased during his life time.

He cited some 4 authorities to butteress his submission. He said there was a mistake on the face of the record as was the case *JOHN KAMAU KARUMBA HCCC NO. 246/05 – Milimani Nairobi*.

The Respondent being the eldest son must act responsibly. The letters of administration have not yet been granted. The Respondent has opposed the Application relying on the previous orders of the court. He says the money to be given to him is not money from the Applicants but from his father's estate. He mentioned some properties which the Applicants have disposed off.

The Applicants have come for Review under Order 45 of the Civil Procedure Rules of this court's

order dated 29/3/2011.

Order 45(1)(b) sets the conditions upon which Review may be entertained by the court. These are:

(a) *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.*

(b) *Or on account of some mistake or error apparent on the face of the record, or any other sufficient reason.*

The consent being contested was entered into before this honourable court in the presence of Mr. Mungai for the present Respondent and Utuku for the current Applicants. It was signed by Mr. Mungai, Mr. Utuku, Christopher (Respondent) and Esther Mbandi (Applicant).

The argument is that the Applicant's counsel then entered into the consent without full instructions. Apparently the only bit of the consent that appears to be biting the Applicants is the one where they should pay the Respondent Shs.10,000/= per month. The consent is quite detailed and involves a lot of other properties which are not being mentioned.

In the case of ***WASIKE VS WAMBOKO [1988] KLR 429*** which dealt with a consent judgment it was held:

1. A consent Judgment or order has contractual effect and can only be set aside on grounds which would justify setting aside a contract, or if certain conditions remain to be fulfilled which are not carried out.

This was followed in ***GICHUKI VS MINJUA & 2 OTHERS [2004] 2 KLR 112*** which stated that; the only condition the non performance of which could give rise to the setting aside of a consent judgment would be conditions precedent to the coming into force of the consent and not the terms of the consent itself.

Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action and on those claiming under them.

In this case Esther Mbandi one of the Applicants here was present during the entry of the consent and so was her counsel. She is an adult of sound mind and I want to believe the contents of the consent were explained to them. She can't therefore say she did not understand what she signed. Her counsel was present! The terms are very clear. The 2 applicants however say it has become impossible to adhere to the terms of the consent involving the payment of Shs.10,000/= to the Respondent monthly.

Counsel says there is an error apparent on the face of the record. I do not see which is the error on the face of the record. The inability of the Applicant to pay the money is not an error. It's a condition that has occurred after the consent had been entered into. The Honourable Judge Warsame stated on 29/3/2011 that the Shs.10,000/= is to be paid from the rents collected from all properties by the Applicants. It is therefore not right for the Applicants/Respondents to come before this court and claim they are so poor that they are even unable to take care of themselves. There is money in terms of rents from properties they are receiving!

The consequence of the default by the Applicants would lead to the imprisonment of the two Applicants who are elderly women and step mothers to the Respondents.

The main suit here is a succession cause where the administrators of the deceased's estate have yet to be determined. Considering that the two applicants are the widows of the deceased and the Respondent a son to the deceased but a biological son to non of the Applicants, I do find that there exists a relationship to maintain only if the parties are willing. It is only his relationship and the age of the two applicants

which will make me make a slight variation to the consent otherwise it does not meet the test of setting aside a consent order as set out in the case of **GICHUKI VS MUNJUA & 2 OTHERS – SUPRA.**

I therefore uphold the consent order entered into on 29/3/2011 with a variation in the mode of payment. And the variation is that the monthly payment of Shs.10,000/= be paid in arrears to the Respondent from the estate of the deceased once administrators have been appointed and the estate administered.

It therefore becomes one of the liabilities to the estate. The payment runs from 5/4/2011 (as earlier ordered) till the hearing and determination of the dispute (also as earlier ordered). Save for that variation the consent remains intact and the parties are bound by it.

DATED, DELIVERED AND SIGNED AT EMBU THIS 15TH DAY OF NOVEMBER 2011.

**H. I. ONG'UDI
JUDGE**