



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

SUCCESSION CAUSE 17 OF 1988

(IN THE ESTATE OF ANNAH WAMBUI WAINAINA – DECEASED)

FRANCIS K. WAINAINA.....PETITIONER/APPLICANT

VERSUS

LUCY W. WAINAINA.....OBJECTOR/RESPONDENT

RULING

The applicant is a brother to the respondent. A temporary grant of representation in respect of their deceased mother's estate was issued on 20th January, 2005, even though the cause was filed in 1988. The delay may be attributed to the dispute surrounding one property RARE/TERET BLOCK 1/116 (the suit property). That property although registered in the name of the respondent was included as part of the estate of the deceased.

The respondent raised an objection and filed an application for revocation of the grant on 14th November, 2005 on the grounds that the grant was obtained fraudulently and by means of untrue allegation of material facts; that the respondent is the registered proprietor of the suit property.

On 12th May, 2008, while that application was still pending, advocates for the parties recorded a consent to the following effect:

a) THAT title number RARE/TERET BLOCK 1/116 registered in the names of LUCY WAIRIMU WAINAINA

be excluded from among the list of the properties of the late HANNAH WAMBUI WAINAINA.

b) THAT court's order of 20th January, 1988 be discharged by the court.

c) THAT the objector's application dated 14th November, 2005 be withdrawn with no orders as to costs.

It is this order that has prompted the present application. In it the applicant seeks that the said consent order be set aside or discharged for the reason that the applicant's erstwhile advocates M/s. Karanja Mbugua & Company Advocates recorded the consent without instructions from the applicant; that the consent is prejudicial to the applicant; that the applicant was not present in court when the consent was recorded on 12th May, 2008.

To these averments, the respondent has deposed in her replying affidavit that the applicant was indeed present in court when the consent was recorded; that the suit property is not part of the estate of the deceased and therefore could not be treated as such; that the applicant's occupation of the suit property is unlawful and a suit has been filed being Nakuru H.C.C.C.No.14 of 2009 for orders of eviction of the applicant; that the applicant's advocate had authority to record the consent.

The law on the setting aside or discharge of a consent order or judgment is settled and summarized in the case of **Flora Wasike Vs. Destimo Wamboka**, (1982-88) 1KAR 625, in the following words:

“There is ample authority that a decree passed by a court with the consent of the parties may in appropriate circumstances be challenged on grounds that it was obtained by fraud or mistake or misrepresentation or on any other reason which could persuade a court to vary or set aside the consent decree”

(Per Nyarangi, JA)

Are the grounds set out in the above case present in the instant dispute?

On 12th May, 2008 when the consent was recorded, the record is clear that both counsel for the parties were present and in fact endorsed, as is the practice, on the court file, the said consent. The record, however does not show if the parties were present. The practice for counsel to endorse on the court file the consent recorded is a good practice but should now perhaps extend to requiring parties to similarly endorse the same to avoid the rise in parties disowning their counsel even when they were present. The court may in the circumstances issue a certificate that the import of the consent was explained to the parties before they signed it before the court and witnessed by their counsel. In this matter, it is the word of the applicant that he was not in court against that of the respondent that he was in attendance. In terms of the provisions of **section 112** of the **Evidence Act**, the respondent must prove that the applicant was in attendance.

A letter by the applicant's then advocate addressed to the former seem to suggest that he was in court on 12th May, 2008. It is either that the applicant was present but did not understand the import of the consent or he was not present. Be that as it is may, there is no doubt, however, that his advocate was present.

In the case of **Kenya Commercial Bank Limited** Vs. **Specialized Engineering Company Ltd.** (1982) KLR 485, relied on by the respondent, it was held that an advocate has a general authority to compromise and settle a suit on behalf of his client, as long as he is acting *bona fide* and not contrary to express negative direction.

The exchange of letters between the applicant and his then counsel, immediately the consent was recorded leaves no doubt in my mind that that consent was contrary to express negative direction. It is clear from that letter that the applicant's advocate was convinced that the suit property ought to be excluded from the estate of the deceased as it was not registered in her name.

The advocate advised the applicant that he could only stake a claim on the property by a separate civil suit. The letter talks of the applicant's resistance to excluding the suit property. It talks of several discussions to resolve this matter between the applicant and his advocate. It concludes by asking the applicant to go to the advocate for discussion.

For these reasons, I come to the conclusion that the advocate, although acting *bona fide* went against the applicant's express wish that the property should not be excluded from the cause. The compromise complained about also discharged restraining orders thereby exposing the property for disposal, even if a separate suit was to be filed.

In the result, this application is allowed. The consent order set aside and the *status quo ante* the consent order restored. The respondents suit, Nakuru H.C.C.C.No.14 of 2009 which will resolve the question of ownership to be listed urgently by the parties after concluding pretrial formalities.

Costs in the cause.

Dated, Signed and Delivered at Nakuru this 26th February, 2010.

W. OUKO

JUDGE