



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Succession Cause 2191 of 2004

IN THE MATTER OF THE ESTATE OF KARANJA GATURU (DECEASED)

NANCY WAMBUI KARANJA.....APPLICANT

VERSUS

AMOS MWANGI KARANJA.....RESPONDENT

RULING

The court, has been informed that there is on record a confirmation order made by Onyancha J on the 16/4/2008. There is also a consent order on record setting aside the confirmation order of 16/4/2008. This order was also made by Onyancha J on the 30/9/2008. The signatories on the said consent are indicated as follows:-

1. E. Wachira for Applicant/protestor
2. Amos Mwangi Karanja- applicant
3. Edie W. Karanja- Respondent administrator.

The applicant in the application subject of this ruling dated 27/10/2009 has come to this court, by way of chamber summons (general form). It is brought under Rules 49, 59, 63 and 73 of the probate and administration rules and order XLIV rules 1 and 2 of the CPR. Five prayers are sought namely:-

1. *That this application be certified urgent and be heard exparte in the first instance.*
2. *That the consent entered herein on 30th September 2008 setting aside the order of confirmation herein dated 16th April 2008 be and is hereby set aside.*
3. *That the order herein dated 15th October 2009 is a nullity.*
4. *That this Honourable court, do grant any other or further orders as the justice on the matter may require.*
5. *That the costs of this application be granted for.*

The grounds in support are set out in the body of the application, supporting affidavit, oral submissions in court, as well as case law. The major complaints are that:-

1. The applicant is a beneficiary of the estate of the deceased.
2. The applicant is also a confirmed administrator of the said estate in her capacity as the widow of the deceased.
3. She is a stranger to the application which set aside the confirmation order as she was not served with the said application.
4. She is a stranger to the endorsement of the resultant consent whereby the confirmation order was set aside as she did not authorize any one to endorse the same on her behalf.
5. That she learned of the proceedings leading to the consent from her counsel.

When the matter came up for interparties hearing after the date had been taken by consent, counsel for the respondent was not present when the file was called up first. The court, was told he was in the court of appeal. Following that revelation the file was placed aside for him to attend court. Later on at around 12.00 noon a counsel from the same firm of advocates for the Respondent appeared and informed the court, that he was not in a position to proceed with the matter because the counsel who is seized of the matter, in their firm had taken the file with him, and that it was not known where he was as they had failed to reach him on his mobile.

Counsel for the applicant resisted an adjournment and since there was no valid reason for his non attendance of the respondents counsel, the court, allowed the applicant to proceed with the application. The counsel who was standing in for the respondents counsel excused himself and the matter proceeded exparte.

In his oral submissions, counsel for the applicant reiterated the salient features of the grounds in the body of the application, and content of the supporting affidavit already set out herein on the record. To fortify their stand, they referred the court, to case law. the judgement of Nyarangi JA as he then was in the case of **KASMIR WESONGA ONGOMA AND PASCAL ONYANGO OTUCHI VERSUS ISMAEL OTOICHO WANGA** whose central theme is as follows:-

“A consent judgement is a judgement, the terms of which are settled and agreed by the parties to the actions.It would have made all the difference if each party had signed or thumb printed.”

The case of **KAFUMA VERSUS KIMBOWA BUILDERS AND CONTRACTORS (1974) EA 91**, a high court decision where the entry of judgement was faulted because the advocate who entered the judgement had no authority to do so from the defendant.

The case of **BROOK BOND LELBIG (T) LIMITED VERSUS MALLYA (1975) EA 266** where the court of appeal held interalia that:-

“A consent judgement may only be set aside for fraud, coercion or for any other reason which would enable a court, to set a side an agreement.”

The Respondent though he did not make any representations had a replying affidavit on record deposed by one Amos Karanja Gaturu on the 25th day of November 2009. The salient features of the same are that:-

- The applicant was a step mother.
- The order of confirmation was obtained by fraud.
- That the application which led to the setting aside of the confirmation order was personally served.
- On the day the consent was endorsed a purported Co administrator Edie Wambua Karanja and Cyrus Mutahi Karanja a son of the applicant were present when the consent order was endorsed. Annexed to the replying affidavit as annexure B is a purported return of service vide which the applicant was allegedly served. A perusal of the R/S reveals that the same is not dated, neither is it commissioned. It therefore offends the provisions of section 5 of the oaths and statutory declarations Act which requires that the date and place be given. It reads:-

“Section 5. Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act, shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made”

The command in this section, is mandatory signified by the words “**shall**”. It therefore means that non compliance is fatal, as there is no election for compliance or non compliance. There is only requirement for compliance. Since the provision was not complied with, it means that the service stands faulted once faulted; there is nothing to show that the applicant had notice of the said application and proceedings. This finding has been fortified by the fact that paragraph 7 of the replying affidavit names those who were present among whom the applicant is not.

Indeed the purported Co administrator and a son of the applicant may have been present, but does presence alone signify authority?. The law is clear on the issue of authority to act for another. This is found in the provisions of order 1 rule 12 (2) CPR it reads:-

(i) The authority shall be in writing, signed by the party giving it and shall be filed in the case”

It has not been stated that the applicant has counsel on record whom she has authorized to act for her. The Respondent only mentions his counsel in the replying affidavit. There is no mention that there was an authority in writing, signed by the applicant, filed in the case, authorizing any other person other than herself to sign on her behalf. It also follows that this findings too faults the consent.

For the reasons given in the assessment, this court, is inclined to allow the applicants application dated 27/10/2009 and filed on 28/10/2009 and set aside the consent orders made by Onyancha J on 30/9/2008 for the following reasons:-

1. There is no demonstration that the applicant was served with the application which led to the issuance of the consent orders as the R/S is not commissioned or dated.
2. The said R/S offends the provisions of section 5 of the oaths and statutory declaration Act cap 15 laws of Kenya in that the same is not dated or commissioned.
3. The replying affidavit has mentioned those who were present namely Eddie Wamera Karanja and Cyrus Mutahi

Karanja and not the applicant.

4. There is no authority in writing signed by the applicant and given to a party in the proceedings and filed in court, authorizing that other person to sign on her behalf.
5. There is no mention that she had counsel who could so Act.
6. This being a succession proceeding, it is prudent to order that costs be in the cause and it is so ordered.

DATED, READ AND DELIVERED AT NAIROBI THIS 12TH DAY OF FEBRUARY

2010.

R.N. NAMBUYE

JUDGE