



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
SUCCESSION CAUSE 189 OF 1998
IN THE MATTER OF THE ESTATE OF TWERANDU NCAUDECEASED
HUMPREY STEPHEN NTOGAI TI PETITIONER

RULING

This cause has a long history but what concerns me in this ruling is an aspect of it relating to a consent which was recorded on 6th June, 2005 before Onyancha, J.

It is necessary to reproduce the same as I do here-below'

“1. By consent the petitioner and objector be confirmed as administratrix of their deceased husband.

2. The estate of the deceased be distributed as follows:

(a) Land parcel No.Nkuene/Mikumbune/79 be registered in the name of Gladys Nchoro Ayub to hold in trust for herself and her children.

(b) Land parcel No.Nkuene/Kithongori/557 be registered in the name of Hellen Kaimuri Ayub to hold in trust for herself and her children.

(c) Plot No.44 Nkubu Market be registered in the name of Gladys Nchoro Ayub to hold in trust for herself and her daughter Judith Nkirote Ayub.

(d) Plot. No.91 (B) Nkubu Market to be registered in the name of Hellen Kaimuri Ayub to hold in trust for herself and her two daughter (sic) Benedicta Kathuni and Faith Mugune.

(e) Parcel of land No.Nkuene/Taita/285 to be shared equally among the following, i.e

1. Margaret Chaku Ayub

2. Antony M’Ithinji M’Njala

3. Gladys Nchere Ayub(to hold in trust for the estate of Samson Gikunda Ayub)

4. John Marangu Ayub

5. Jacob Kaburu Ayub

6. Julius Muriungi Ayub”

There are two signatures and two thumb prints representing the parties and their counsel to signify, as is usually the practice, that they accept the terms of the consent.

I have stated that that consent was recorded on 6th June, 2005. On 20th January, 2006 the applicant herein, Hellen Kaimuri Ayub-(Hellen) brought the instant application for order of inhibition restricting dealings in the following properties;

- (i) Nkuene/Kithunguri/557
- (ii) Plot No.44B Nkubu Market
- (iii) Plot No.91 Nkubu Market
- (iii) Nkuene/Taita/285
- (iv) NKuene/L.Mikumbune/79

She also sought that the consent order dated 6th June, 2005 and the subsequent confirmation of grant be reviewed or set aside. That all the transactions subsequent and pursuant to the consent order be nullified. That the above listed properties revert to the name of the deceased Ayub M’Kwaria. The application is based on the grounds the consent order and the grant were obtained unprocedurally. That the applicant was not consulted before the signing of the consent and is indeed not a party to the same. That there is an error apparent on the face of the record. That the effect of the consent order is the unfair distribution of the deceased’s estate. That part of the estate have been distributed to beneficiaries who are deceased.

In reply the objector, Gladys Nchoro Ayub (Gladys) states that the parties agreed to record the consent in question after going through the estate step by step. That the distribution was fair and equitable. The terms of the consent were further read to them by the Judge through a Meru language interpreter. The objector further states that the applicant is under pressure from her grandsons, Kirimi and Kaburia to disown the consent order in order for the two to continue receiving rent from the front shop No.44B. It was submitted by counsel for the objector that the consent order can only be set aside by another consent order or for a reason which would enable the court to set aside an agreement. For this proposition counsel cited the case of In the Matter of the Estate of Twerandu Ncau(Deceased)and Humprey Stephen Ntugaiti(Petitioner) HC Succession Cause No.37 of 2002.

I have duly considered the foregoing arguments and the above authority. I need to observe that Hellen, the petitioner/applicant and Gladys the objector are widows of the late M’Kwaria Mbiria whose estate is in issue.

It is also clear to me from the fact that both thumb -printed the consent that they are not literate. It is further on record that the cause was filed by the firm of V.P. Gituma Advocate who remained on record all along for Hellen the petitioner/applicant. The firm of Mithega & Co. Advocates came on record with effect from 2nd October, 2002. But after the controversial consent order the firm of V. P. Gituma Advocate filed a notice of appointment which, on realizing that he ought to have filed a notice of change of advocate was withdrawn and proper notice filed.

I have gone into this to confirm that at the time the consent was recorded it is the firm of Mithega & Co. Advocates who acted for the petitioner/applicant. The petitioner/applicant does not deny that she thumb printed the consent order but argues that she did not understand the contents.

Order 24 rule 6(1) of the Civil Procedure Rules stipulates that;

“ 6.(1) Where it is proved to the satisfaction of the court, and the court after hearing the parties directs, that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the

defendant satisfies the plaintiff in respect of the whole or part of the subject-matter of the suit, the court shall, on the application of any party, order that such agreement, compromise or satisfaction be recorded and enter judgment in accordance therewith”

Parties are therefore at liberty at any time to compromise the dispute between them in terms acceptable to them. On the authority of the following decisions, such a compromise can only be set aside if it was obtained by fraud, collusion, misrepresentation, an agreement contrary to the policy of the court or if it was given without sufficient material facts. Generally speaking a consent judgment/order can only be set aside for a reason which would enable the court to set aside an agreement.

See Hiram V Kassam (1952) E.A CA 1341, Flora Wasike V Destimo Wamboka(1988) 1KAR 625; Brooke Bond Liebig(T) Ltd V Mallya(1975) EA 266.

The petitioner/applicant’s contention is that an advocate from the office of Mithega & Co.Advocates “purported” to act for her but did not seek instructions from her. She also avers that she did not understand what she was thumb printing. Was there fraud, misrepresentation or did the petitioner/applicant endorse the consent order without sufficient material facts?

It is instructive to note that the advocate from the firm of Mithega & Co. Advocates who purported to act for the petitioner/applicant has not been named. There is no affidavit from him to buttress the petitioner/applicant’s contention. Instead the petitioner/applicant rushed to her erstwhile advocates to challenge the consent order. I have already observed that the firm of Mithega & Co.Advocates were properly on record for the petitioner/applicant.

They were present in court and signed the consent order. It has been held in Kenya Commercial Bank Ltd V Benjoh Amalgamated Ltd And Another, HCCA No.266 of 1997 that

“a Solicitor has a general authority to compromise, on behalf of his client, if he acts *bona fide* and not contrary to express negative direction and it would seem that a Solicitor acting as an agent for the principal Solicitor has the same power(Re Newen(1930) I CL.PP 817, 818, Little V Spreadbury (1910) 2 KB 658. No limitation of the implied authority avails the client as against the other side unless such limitation has been brought to their notice – See Welsh V Roe(1918) – (97) ALL ER 620”

I find that the firm of Mithega & Co.Advocates had the petitioner/applicant’s full authority to compromise the cause. It is not controverted that the consent was first explained to the petitioner/applicant’s by her advocate outside the court. Its contents were also explained to her through a Meru Interpreter by the Judge.

One Samson Gikunda was already deceased, a fact the petitioner/applicant was aware of. But Jacob Kaburu died after the consent. The fact that part of the estate was distributed to them is neither here nor there in this application, save to note that it is not disputed that they were beneficiaries to the estate. The petitioner/applicant in her further supporting affidavit has deposed that the deceased had actually left a will in which he distributed his estate. She annexed a copy of the will. It is illogical to bring the will at this time yet she brought this cause as intestate.

Finally, to demonstrate that the petitioner/applicant understood the contents of the consent order, on 14th October, 2005, four months after the consent was recorded, she deposed in a replying affidavit to the objectors affidavit dated 21st September, 2005 as follows:

“2. THAT I confirm I entered into the consent of 6th June, 2005 and I have no problem with the same.

3. THAT since entering into the said consent the applicant has never requested me to sign any documents to facilitate distribution of the estate as per the grant”

In conclusion the petitioner/applicant changed her mind after committing herself. That cannot be allowed except as set out elsewhere in this ruling. This application must fail and the same is dismissed with costs

to the objector.

Order accordingly.

DATED AND DELIVERED AT MERU THIS 22ND DAY OF JUNE, 2007

W. OUKO

JUDGE