



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

Succession Cause 39 of 2003

IN THE MATTER OF THE ESTATE OF GLADYS GACHERI (DECEASED)
DAVID NDUMBA M'MUGUONGO PETITIONER
VERSUS
DAVID MURIITHI INTENDED OBJECTOR/APPLICANT

RULING OF THE COURT

This ruling concerns an oral application by counsel for the petitioner/respondent herein which he seeks to have the applicant's further affidavit sworn on 24.9.2005 and filed in court on 26.9.2005 on the ground that the same was not served upon the said petitioner's counsel within the time stipulated as per the parties' consent order recorded in court on 19.9.2005.

A brief history of the facts will shed some light on this matter. The petitioner herein David Ndumba Muguongo was issued with the grant of letters of administration intestate to the estate of the deceased on 3.4.2003. The same were confirmed on 17.5.2004, with the deceased's only immovable property being land parcel No. NYAKI/KITHOKA/762 being distributed to the petitioner (1/2 share) and Erick Mbaabu and Samuel Miriti a ¼ share each.

On the 16.9.2004, David Muriithi the applicant/intended objector filed his summons for revocation of grant under the provisions of section 76 of the Law of Succession Act, Cap 160 Laws of Kenya and Rule 44 of the Probate and Administration Rules made thereunder.

On the 19.9.2005, the parties appeared before me. On that day, the court was informed that there were two other applications filed on behalf of the applicant but by different firms of advocates. There was in particular the application dated 29.6.2004. The court was also informed that since applicant's counsel had only that morning been served with the replying affidavit, she needed time and leave of the court to file a further supporting affidavit. On the basis of that request, the parties recorded a consent in court. First, the application dated 26.9.2004 was withdrawn with costs to the petitioner/respondent. Secondly, the applicant was granted leave to file and serve a further affidavit within seven (7) days from 19.9.2005. The said further affidavit was thus supposed to be filed and served by 26.9.2005.

The applicant did file the further affidavit by the due date, i.e. 26.9.2005, but the same was not served until the 6.10.2005. This fact of not having served the further affidavit within the terms of the consent order of 19.9.2005 is admitted by counsel for the applicant. It is however contended that the reasons for the failure to serve as agreed was occasioned by the ongoing negotiations on a proposal that was put forward by counsel for the petitioner in high court civil case No. 92 of 1995 as counsel for the

applicant sought confirmation from the applicant on the proposal put forward to her. It was contended further that so long as a settlement was expected, the applicant (read his counsel) did not deem it necessary to serve the further affidavit and that it only became absolutely clear that the same should be filed when the negotiations broke down.

In Mr. Mithega's view, the failure by the applicant to serve the further affidavit within the stipulated period is not excusable, and particularly so when the further affidavit had been filed within time. Relying on the decision in the case of **Jiwani V. Going Out Magazine & Another (2002) IKLR 856**, Mr. Mithega contended on behalf of the petitioner that no matter how harsh or unfair it may be, the further affidavit ought to be struck out and expunged from the record since there has been no variation by another consent order of the consent order dated 19.9.2005. Mr. Mithega dismissed the applicant's contention that exchange of correspondence between his firm and the applicant's advocate's firm can be used as a reason for the failure to serve the further affidavit. Finally, Mr. Mithega contended on behalf of the petitioner that this court has no power to extend the time limited by consent. It was further contended on behalf of the petitioner that even after admitting that the applicant's further affidavit filed on 26.9.2005 was served out of time, the applicant has made no effort whatsoever to either ask the court to extend the time for service of the said affidavit or to ask for a further consent order extending the time within which to serve the said further affidavit.

It is true that no such request has been made by or on behalf of the applicant. The only point that has been ventilated is that there was good reason for failure to serve. Further, that the petitioner having contributed to the delay is estopped from raising an objection to the late service of the further affidavit.

I have carefully considered the arguments for and against Mr. Mithega's objection to the admission of the applicant's further affidavit which was served upon the petitioner's counsel outside the terms of the consent order of 19.9.2005 and I am persuaded that the same ought not be admitted and should be expunged from the record. It is now settled and trite law that a consent judgment/order "has contractual effect and can only be set aside on grounds which would justify setting a contract aside." See the case of **J.M. Mwakio V. Kenya Commercial Bank Ltd – Civil Applications No. 28 of 1982 and 69 of 1983** as applied in the case of **Flora Wasike V. Destimo Wamboko (1982 – 88) IKAR 625**.

In effect therefore, if the further affidavit were to be allowed to remain on record, that in my view would amount to a variation of the consent order of the 19.9.2005 by one party without the involvement and/or consent of the other. The applicant has not made any effort whatsoever to seek an extension of the time limited by the consent for service of the further affidavit. The consent entered into by the parties on 19.9.2005 was a consent of the parties and not of the court. This court therefore has no power either express or inherent to enlarge that time limited by the litigants themselves.

In the result, I find that the further affidavit dated 24.9.2005, filed in court on 26.9.2005 and served upon the petitioner on 6.10.2005 is not validly on record. The same is expunged from the record and shall therefore be ignored by the court when dealing with the applicant's application dated 25.7.2005.

Orders accordingly.

Dated and delivered at Meru this 15th day of November 2005.

RUTH N. SITATI

JUDGE

15.11.2005