REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

Succession Cause 164 of 2001

IN THE MATTER OF THE ESTATE OF NJUE EREMANO alias NJUE ELEMANO M'IRUBUA alias NJUE HELMANO DANIEL JOHANNES

SEVERINO MUTEGI DANIEL

JAPHET GITARI DANIEL……..…… JOINT ADMINISTRATORS

NJUE ELEMANO M'IRUBUA……..… APPLICANT

VERSUS

SEVERINO MUTEGI DANIEL

JAPHET GITARI DANIEL.....…… RESPONDENTS

RULING OF THE COURT

This is an interesting case. The respondents herein filed this succession cause on the 24.7.2001 seeking letters of administration intestate to the estate of the applicant herein. The grant was issued on the 12.11.2001 and subsequently confirmed on 11.11.2002. Following the confirmation of grant, land parcel No. KARINGANI/MUGIRIRWA/409 was shared out between the two respondents in the ratio of 1.17 and 1.30 acres respectively. Land parcel No. KARINGANI/MUGIRIRWA/713 was also shared out equally between the two respondents. Each was got 0.39 acres.

On the 20.8.2003, the "deceased" herein who is also the applicant, Njue Elemano M'Irubua filed a chamber summons under the provisions of section 76 of the Law of Succession Act Cap 160 Laws of Kenya and Rule 73 of Probate and Administration Rules seeking among others, an order of inhibition against land parcels KARINGANI/MUGIRIRWA/409 and 713. He also sought an order that the Letters of Administration issued to the respondents in respect of the said parcels of land be revoked and the whole of the succession cause be dismissed. He also sought an order committing the respondents to jail for uttering false documents and swearing of false affidavits.

The application was premised on the grounds on the face thereof one of which was that the applicant who had been presumed dead on 13.10.1969 was actually alive and well contrary to the respondents' allegations in their application for the grant. It was also stated that the applicant was the registered owner of the two subject parcels of land which the respondents had shared out between themselves.

The "deceased" also swore a supporting affidavit and deponed that he only discovered the

respondents' fraud when he went to collect his title deeds from the lands office. He deponed further that the respondents did not go through the chief of Mugwe Location before filing the succession cause and thus smartly duped everyone along the way by pretending that the "deceased" was presumed dead.

That application filed in court on 20.8.2003 was heard and temporary orders of inhibition were granted on 17.9.2003. Interpartes hearing was fixed for 30.9.2003. When the application came up on 30.9.2003 (Hon. Mr. Justice Kasanga Mulwa), the court noted that the position regarding who the deceased person in the case was not clear. He extended the interim orders of inhibition and ordered that the application proceeds by way of viva voce evidence.

The application came up again before my brother Hon. Mr. Justice D.A. Onyancha on the 15.3.2004. No viva voce evidence was adduced but after Njue Elemano M'Irubua had stated his case, informing the court that he was not deceased but alive. He also stated that the respondents herein had feigned his death and obtained the grant in the matter of his estate. Further that respondents had proceeded to share out his two parcels of land aforesaid. The two respondents through the 1st respondent Severino Mutegi Daniel admitted that they had filed the application for grant of letters of administration to the applicant's/objectors estate through falsely representing to the court that Njue Elemano M'irubua was deceased. The parties then agreed to the following consent order:-

1. By consent of the petitioners and the objector, the grant of letters of administration dated 12.11.2002 be and is hereby revoked.

2. Njue Elemano Murubia (sic) to file his objection within 14 days and serve the petitioners within 14 days after such filing.

3. Costs in the cause.

By a letter dated 29.3.2004, the second respondent herein, Japhet Gitari Daniel applied for certified copies of the judgment delivered on 15.3.2004. The judgment referred to by the writer was the consent order dated 15.3.2004.

It was after that that he proceeded to file his application dated 20.4.2004. The application was is orders:-

1. That the honourable court be pleased to review or set aside its orders made by court on the 15th day of March 2004.

2. That further the court do find it fit to restore the orders issued for grant of letters of administration dated 12th day of November 2002.

3. That the court to (sic) issue the said letters of administration being no valid objection filed.

The grounds upon which the application was based were that the objector had flatly refused to enter an objection within the time stipulated and further that the objection was now belated, and therefore that the grant issued to himself and his brother Severino Mutegi Daniel should be reinstated in favour of the two of them.

The applicant swore an eight paragraph affidavit in support of the application. He has deponed therein that the grant of letters of administration issued to him and his brother was annulled by consent of the parties on 15.3.2004. That the objector who is also the "deceased" herein has failed to comply with the consent order requiring him to file and serve his objection within 14 days of the making of the orders, and finally that there is inordinate delay in filing the said objection. That for those reasons, he wants the consent orders of 15.3.2004 reviewed and/or set aside.

A number of pertinent issues spring to mind in this application, the most important of which is whether the original application for grant of letters of administration was valid in the first place. Section 2 of the Law of Succession Act, Cap 160 Laws of Kenya, defines estate as follows:-

"Estate" means the free property of a deceased person."

This cause was said to be filed in the matter of the estate of the objector Njue Eremano alias Njue M'Iribua who told the court on 15.3.2005 that he was indeed alive and not dead. Both the applicant and his brother admitted that fact. The two also admitted that they had represented to the court that the objector was dead. With that information before this court, I have no hesitation in finding that this cause was void abuituo since the objector was indeed not dead and therefore there was no estate. The applicant and his brother acted fraudulently in this case by first of all misleading the court into making the orders granted on 2.5.2001 to the effect that the objector was presumed to have died on 13.10.1969. It was on the basis of that order of 2.5.2001 that the applicant and his brother proceeded to file this cause on the 24.7.2001.

It is my considered view that if the court had been given the true picture before the orders of 2.5.2001, those orders would not have been made and this cause would not have been filed in the first place.

Where does this leave the orders of 15.3.2005? Having found that this cause was void abinitio, the grant issued to the applicant and his brother was properly revoked as the same ought not to have been issued in the first place. There was no estate of a deceased person that was to be administered by the applicant and his brother. There was no deceased person. There is no doubt in my mind that the applicant and his brother intended to defraud the objector of his parcels of land. As it were, they wanted to reap where they had not sown. The pair admitted that they had applied for a grant of letters of administration in order to distribute the objector's two parcels of land which are still registered in the objector's name. What greater fraud could there be? In the circumstances, there would be no good reason for me to want to interfere with that consent order as regards the revocation of the grant issued to the applicant and his brother on 12.11.2001.

At this point, it is important to consider the principles that are applicable to setting aside and/or varying of consent orders. It has been held by the highest court in this land and other courts in the commonwealth that a consent order/judgment is a serious matter between the parties that enter into it. Such an order/judgment carries the same weight as a contract agreement between them and should it be desired to vary and/or set aside the same, it can only be done by the consent of those parties that entered into the first consent. See **Flora Wasike V. Destimo Wamboko (1982 – 1988) IKAR 625.** In reaching the decision in the **Flora Wasike** case (above) the Court of Appeal quoted part of the judgment of Winn LJ in the case of **Purcell V. FC Trigell Ltd (1970) 3 ALL ERALLER 671** at page 676, where the learned judge said:-

> **"It seems to me that, if a consent order is to be set aside, it can really only be set aside on grounds which would justify the setting aside of a contract entered into with knowledge of material matters by legally competent person, and I see no suggestion here that any matter that occurred would justify the setting aside or rectification of this order looked at as a contract."**

This general principle was also applied in the earlier decision by the East Africa Court of Appeal in the case of **Hirani V. Kassam (1952) 19 EACA 131** at page 134 where the learned judges expressed themselves thus:-

> **"The mode of paying the debt, then, is part of the consent judgment. That being so, the court cannot interfere with it except in such circumstances as would afford good ground for varying or rescinding a contract between the parties. No such ground is alleged here. The position is clearly set out in SECTION ON JUDGMENTS AND ORDERS (7th edn) Vol I, p 124 as follows:-**
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> **"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 ……. or if the consent was given without sufficient material facts, or misapprehension or ignorance of**

material facts, or in general for a reason which would enable the court to set aside an agreement."

In the present case, it is not in dispute that the objector herein has never died. It follows therefore that letters of administration could not and cannot be taken out in respect of the objector. The applicant and his brother admitted as much – all they wanted was to share out the objector's parcels of land. My finding therefore is that there was fraud in this mater right from the beginning. The court cannot be used by the applicant to perpetrate that fraud against the objector. It is my considered view that if the objector had a full appreciation of what he was consenting to on 15.3.2005, he would not have entered into that consent. Secondly, I believe that if the court fully appreciated the circumstances surrounding this whole cause, the second limb of the order recorded on 15.3.2004 would not have been given. The blatant frauds committed by the applicant and his brother go to the root of this whole cause. The cause was void abinitio. I would therefore set aside the second limb of the consent order of 15.3.2004, and I do so now without hesitation.

In the result, the entire cause is dismissed for being tainted with fraud. The applicant, Japhet Gitari Daniel and his brother Severion Mutegi Daniel should be arrested and charged with frauds committed and utterances made by the two of them in connection with this case. The applicant's application has no merit and the same is dismissed.

The objector/respondent shall have the costs of this application and costs of the entire

cause.

Orders accordingly.

Dated and delivered at Meru this 14th day of November, 2005.

RUTH N. SITATI

JUDGE

14.11.2005