



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA
AT KERICHO
SUCCESSION CAUSE NO. 2 OF 1998**

**IN THE MATTER OF THE ESTATE OF THE LATE ELIJAH KIPKERICH ARAP CHEBOMUI
(DECEASED)**

AND

**IN THE MATTER OF REFERENCE TO ARBITRATION BY THE DEPUTY REGISTRAR –
HIGH COURT – KERICHO – THE HON. MR. ONGANYI, SPM**

R U L I N G

This is rather an unusual ruling where the court has been asked to determine whether a consent recorded on 8th July, 2002 disposed of an application dated 20/8/2001 and filed on 13/9/2001 by the applicant – Jacob Kerich.

In the said application the applicant sought two substantive orders:-

1. That the Arbitrator's Award dated 10/11/99 and corrected/modified/reviewed on 26/6/2001 read in court on 26/7/2001 be and is hereby set aside to the extent of the distribution of the assets of the deceased alone.
2. That the court do supercede the Arbitration and hear this Succession Cause on the issue of distribution alone.

The first, third and fourth respondents opposed the said application and through M/S Karigo Thuo & Co. Advocates filed a Notice of Preliminary Objection to the said application as well as a replying affidavit.

Before the said application was heard, the petitioners through Karigo Thuo & Co. filed an application dated 27/6/2002 which was subsequently amended on 1/7/2002. They prayed that the order of injunction consented to by the parties on 28/7/99 be vacated or alternatively the same be varied in the following terms:-

- (a) The parties abide by the award read on 26th July 2001 till determination of the pending application to set aside.
- (b) The distribution of the parcels Kericho/Kipsonoi/227 and Kericho/Chesoan/1002 be not disturbed till the hearing and determination of the application to set aside.
- (c) The Petitioners – Sarah Chebomui, Annah Chebomui and Peter Kerich do continue to tend and pluck tea at Kericho/Kipsonoi/227.

This application dated 27/6/2002 and amended on 1/7/2002 was set down for hearing on 8/7/2002 before

Justice Visram and on that day both advocates, Mr. K'opere for Jacob Kerich and Mr. Karigo Thuo for the said petitioners recorded a consent in the following terms:-

1. That the tea on the suit land L.R. KERICHO/KIPSONOI/227 be and is hereby divided into FOUR (4) equal shares between the 2nd, 3rd, 4th and 5th houses.
2. That the tea on the suit land L.R. KERICHO/CHESOEN/1002 be and is hereby ordered to remain in the hands of the first house. 3. That the second house be and is hereby allowed to plough 10 acres from title number L. R. KERICHO/KIPSONOI/227 and 10 acres from Title No. L.R. KERICHO/CHESOEN/1002.
4. That subdivision herein be and is hereby ordered to be supervised by the area chiefs of Kaptolua and Chesoen Location.
5. That the District Tea Officer Silibwet do and is hereby ordered to issue the respective houses with new tea numbers.
6. That the complaint in Criminal Case No. 405 and 408 of 2002 in Bomet be and is hereby withdrawn by the parties.
7. That these orders do and hereby remain in force pending determination of other succession issues relating to this Estate.
8. That there be no order as to costs.

On 30/3/04 the two advocates aforesaid set down the application dated 20/08/2001 for hearing on 7/6/2004 but on that date the matter was adjourned to 7/7/04. The application was eventually set down for hearing on 30/9/2004.

Mr. K'opere submitted that the consent recorded on 8/7/2002 disposed of the two applications aforesaid. He told the court that when they appeared before Hon. Justice Visram on 8/7/2002, the Judge suggested that the parties agree on an arrangement on the way forward and they discussed and came up with a comprehensive consent which related to all the issues raised in the two applications but because the application that was coming up for hearing that day was the one by the 3rd, 4th and 5th Petitioners, in extracting the order, reference was made only to their application. He further submitted that the said consent set out all the issues and it was acted upon. The orders were to remain in force pending determination of other succession issues. According to him, the issues which Mr. Karigo Thuo wanted to raise were res judicata but any issue that was not covered by the consent order could be canvassed.

Mr. Karigo Thuo disagreed with the interpretation of the order by Mr. K'opere. He gave a history of the dispute from its inception upto the time when the said consent was recorded. He emphasised that the consent talked of the tea only and not the land.

He submitted that the consent recorded was interlocutory pending the hearing of the application seeking to set aside the modified award. He stated that Order No. 7 in the said consent was clear beyond any peradventure and should be read and interpreted as it was. He therefore urged the court to proceed to hear the application dated 20/8/2001.

I carefully perused the Arbitrator's award dated 10/11/99 and modified on 26/6/2001. I also considered the grounds upon which the application dated 20/8/2001 was made. The consent order recorded on 8/7/2002 referred to only the application that was coming up for hearing that day and that is the Notice of Motion dated 27/6/2002 and amended on 1/7/2002. If there was any mistake in extracting the same, the error, if any, should have been rectified accordingly and much earlier before it was acted upon. If the consent order was intended to dispose of the two applications as submitted by Mr. K'opere, that should have been stated expressly in the said consent which was also counter signed by both counsel for the respective parties. The court is unable to discern the intentions of the parties in negotiating the said

consent.

It is trite law that a consent cannot be varied and/or set aside unless it is shown that the same was obtained through fraud, misrepresentation or undue influence or for any other sufficient reason as would cause the setting aside of a binding contract. I cannot read any more into the consent than it reveals.

In my view, the application dated 20/8/2001 should proceed to hearing and if the applicant therein wishes to include and/or raise the issue of the consent order of 8/7/2002 he may do so. I therefore over rule the objection raised by the applicant, Jacob Kerich and award costs thereof to the 3rd, 4th and 5th Petitioners.

DATED, SIGNED & DELIVERED at Nakuru this 22nd day of October, 2004.

DANIEL MUSINGA

AG. JUDGE

22/10/2004