



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
SUCCESSION CAUSE NO. 293 OF 1990
IN THE MATTER OF ESTATE OF THE LATE JULIA MUMBI MBUTHIA (DECEASED)

PETER MAINA MBUTHIA
EVANS MWANGI MBUTHIAPETITIONERS
VERSUS
MARY WANGARI MBUTHIAOBJECTOR

RULING

On November 30, 1990 the Petitioners filed the Petition herein seeking a grant of Letters of Administration intestate over the estate of Julia Mumbi Mbuthia (Deceased). The only declared asset of the Deceased was Plot No. NAKURU/MUNICIPALITY BLOCK 2/284 (hereinafter referred to as “the suit land”). On June 21, 1991 the Objector lodged an objection to the Petition on the ground that she had been in occupation of half portion of the suit land.

On August 8, 1996 the following Judgment was recorded by consent:

- “1. THAT ... (the suit land) belongs to the Estate of Joshua Rwenji (Deceased) and not Julia Mumbi Mbuthia (Deceased)
2. THAT the said parcel of land should be sub-divided equally between the two houses left behind by the Deceased father aforesaid.
3. THAT the land registrar in Nakuru should forthwith withdraw the caveat lodged over the said land by the Objector herein.
4. THAT ... (the suit land) should be cancelled forthwith and two titles Issued in the names of Evans Mwangi Mbuthia representing the other house and Mary Wangari Mbuthia representing the other house.
5. THAT this suit be marked as settled and each party to bear its own costs.”

That consent Judgment was recorded pursuant to a document dated August 2, 1996 and filed in this court on August 7, 1996. It was executed by the two Petitioners and the Objector.

Over the years, subsequent proceedings have taken place apparently without notice of that consent. On

November 27, 2002 the 1st Petitioner filed an application under Rule 73 of the Probate and Administration Rules seeking to have that consent Judgment set aside on the grounds that it was reached by misrepresentation and or mistake; unenforceable; and “irregularly entered into the court record.” It is that application which is under consideration presently.

In his affidavit in support of the application, the 1st Petitioner stated that at the time of signing the consent, he believed that the Objector was a dependant of his “late mother” - the Deceased in this Petition. He has subsequently realised that that was not so. He went on to state, without elaboration, that the Objector misrepresented to him facts in order to obtain the consent. He also stated that at the time of filing the consent he was being represented by an Advocate. In his view, the consent Judgment could not, therefore, affect his case.

Looking at the consent in dispute, it is very difficult to believe the 1st Petitioner’s version of the case. Although the objection by the Objector was taken in a Petition concerning the 1st Petitioner’s “late mother,” the substance of the consent Judgment reveals more than that. One cannot fail to see what motivated the Objector. According to her Replying Affidavit sworn on March 6, 2003, the suit land did not belong to the Deceased alone. The suit land was registered in the names of the said Deceased and two other persons being one Mbuthia Rwenji and the 1st Petitioner as common proprietor in equal shares. According to the uncontroverted deposition of the Objector the suit land was registered in the names of the Deceased, the 1st Petitioner and the said Mbuthia Rwenji “as trustees for both houses and to avoid the same being sold by Mbuthia Rwenji’s creditors.” It is apparent that the person referred to as Mbuthia Rwenji was the husband of the Deceased herein and the Objector. The 1st Petitioner is the son of the Deceased and the said Mbuthia Rwenji. Mbuthia Rwenji is also deceased. That being the true version of the events, the substance of the consent Judgment becomes very clear. This Petition could not have proceeded on the basis that the suit land belonged to the Deceased. This is sufficient to dispose off the application under consideration. However, there was another issue raised which requires consideration if only for the conclusiveness of the record. It was alleged that since the 1st Petitioner was being represented by an Advocate, he was not bound by the consent in question. This is, in my view, an academic argument. The 1st Petitioner freely and voluntarily executed a document which he intended to define his rights and those of others. He can refer to that document to enforce his rights and the same must be applied with equal force against him. If he thought it necessary that his Advocate should be involved in its execution, nothing prevented him from getting his Advocate to do so. The same has been in place for over six years and he did not do anything about it. He has by conduct accepted it and this court cannot allow him to walk away from it now.

I, therefore, dismiss the 1st Petitioner’s application dated October 18, 2002 with costs to the Objector.

Dated and Delivered at Nakuru this 8th day of April, 2003.

ALNASHIR VISRAM

JUDGE