



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CIVIL CASE NO. 1235 OF 1981

ELIJAH GATU PLAINTIFF

VERSUS

SOUTH TETU HOTELS & BARS LTD DEFENDANT

R U L I N G

There is an application in this matter dated 27th July, 2001 which seeks an order of this court to set aside a consent order between the plaintiff – respondent and the defendant South Tetu Hotels and Bars Limited. The consent order was dated 1st October, 1993 and recorded in the court file on the same day.

This consent order related to some 650 shares one Wangui Ndungu (deceased) held in the defendant company and which the plaintiff wanted transferred to him as administrator of the estate of the said Wangui Ndungu, Mary Wambui and Peris Wairimu. The plaintiff wanted these shares in the names of these 3 persons.

Peris Wairimu must have been a co-wife of the deceased Wangui Ndungu and according to the submissions on this application, though she had some children, there was no son among them.

On 14th December, 2000 the applicant Lydia Njoki filed an application in this court seeking to be joined as a party to the suit. She was with another Rosemary Wambura. That application was grounded on the basis that the two were the beneficiaries of the estate of the late Ndungu Gatui.

According to paragraph 5 of the supporting affidavit to that application, the applicant and Rosemary Wambura were co-wives of Wangui Ndungu having all been married by the late Ndungu Gatui who died in 1951.

On the basis of this averment confirmed by paragraph 4 of the further affidavit, the matter was placed before a Deputy Registrar known as Njai who heard it on 2nd August, 2001 and delivered a ruling thereon on 27th August, 2001 allowing the application to:

“enable the applicants have the necessary capacity to apply to court for protection of their interests”.

On the basis of this ruling, the applicant filed an application at the High Court in Nyeri for letters of administration intestate in respect to the estate of one Phyllis Wairimu who had died on 10th September, 1990. She was issued with the letters on 8th May, 2001; and armed therewith, she came to this court and filed an application by Notice of Motion as stated in the first paragraph 1 of the Ruling for orders therein stated.

The grounds upon which the application was based were that the applicant had been joined to these proceedings; that at the time she was joined the consent judgement had already been recorded, that that judgement had deprived them of their interest in the subject matter of the suit and that it was only fair and just that the said judgement be set aside.

The supporting affidavit to this application sworn on 27th September, 2001 had this to say namely:

1. That I am party to this suit hence competent to swear this affidavit.
2. That the suit herein was filed without my knowledge by the plaintiff.
3. That when I became aware of the suit I perused the court file and it dawned on me that there was a consent judgement that had been entered between the plaintiff and the defendant in this matter.
4. That the said judgement was entered in terms of a joint letter dated 1st October, 1993. 5. That the judgement has deprived me of my interests in the subject matter of the suit.
6. That I applied to be joined as a party to the proceedings which application was granted but this was after judgement had been entered.
7. That unless the judgement herein is set aside I will loss (lose) my share of the deceased estate which is in issue in this case.

It is noted that this application was filed in this court in pursuance of an order of the Deputy Registrar, dated 27th August, 2001 wherein the applicant and one Rosemary Wambura were joined to the suit as personal representatives of the estate of the deceased Phylis Wairimu (I guess this is one and the same person as Peris Wairimu).

But while the applicant had obtained letters of administration in respect to the estate of the said Wairimu, Wambura had nothing and I do not know under what authority she was joined to the suit. But this is all I would state about Wambura.

Note also that in paragraph 5 of the affidavit in support of the application for being joined to the suit, the applicant said she was a co-wife of Peris Wairimu and the late Wangui Ndungu all of whom had married Ndungu Gatu who died in 1951.

This averment was enforced in a further affidavit sworn on 5th March, 2001 – see paragraph 4 thereof.

In that same first affidavit, the applicant as the deponent said she and Wairimu had authorised late Wangui Ndungu to have the shares transferred into her name since she was the eldest wife to hold the same in trust for them (see paragraph 7 of the affidavit sworn on 13th December, 2000).

Then further to her further affidavit of 5th March, 2001, the applicant swears a further affidavit on 20th June, 2001 in paragraph 2 of which she depones that:

“I was married to Peris Wairimu under Kikuyu customary law”.

This further affidavit as well as the one sworn on 5th March, 2001 were filed without leave having sought and/or obtained from the court and to my mind these so called further affidavits were of no legal effect and ought not to have been the basis of submissions before me.

Then in the supporting affidavit to this application the applicant makes no reference to his marriage either to Gatu Ndungu or Peris Wairimu but in submissions before court her counsel insists that the applicant had married Joel Ndungu and that when Ndungu died she married Peris.

I was not told who Joel Ndungu was but I suppose it is one and the same person as Gatu Ndungu.

Counsel said further that the consent order made no provision for Wairimu yet by paragraph 5 of the plaint she is a beneficiary in contravention whereof all the 650 shares had been given to the plaintiff solely in the consent Judgement.

That the applicant was entitled to 1/3 share in the 650 shares since she had a grant of letters of administration to the estate of Peris Wairimu.

Counsel for the respondent opposed the application because it had no merit and was an abuse of the court process. That the applicant was not a party to the consent order or that even if she was there was no evidence of fraud, misrepresentation or mistake to warrant the consent judgement being set aside.

That the applicant was not a wife of the late Ndungu and had no interest in the estate of the late Wairimu.

That the plaintiff, being the only son of Ndungu, the latter's properly reverted to him after the death of his mother.

That this application was intended to delay the finalization of this matter which was filed in court in 1981.

He repeated that as the applicant was not a party to the consent judgement she is incapable to apply to ask for it to be set aside and asked that the application be dismissed with costs.

Mr. Wamae who came in for the defendant submitted in favour of the application though to my mind his client has nothing to gain by either supporting or opposing the application.

He referred to paragraph 5 of the plaint which showed that the plaintiff respondent had filed the case subject to the consent order on his own behalf and that of Mary Wambui and Peris Wairimu.

According to him the plaintiff was an agent of Wairimu but that now she wishes to represent herself. That there is no indication that Wambui's interests have been taken care of anywhere.

These are the submissions made before me out of which a decision must or should be made.

If the deceased Wairimu was the wife of Ndungu who died in 1951 and she allowed Wangui Ndungu to transfer all the shares of their husband to her, the said Wangui Ndungu, I do not understand how she could keep silent all this long until Wangui died in 1972 and even stayed silent when the case was going on only to wake up after the shares in dispute have been transferred to the plaintiff to begin filing this litigation in the year 2001!

It is hard to be convinced that Wairimu was not aware of her interest in the shares during the lifetime of Wangui Ndungu who lived for over 20 years (21 years) after her husband's death!

Then the applicant bases her claim on her marriage to Wairimu. I do not know what custom this is?

Firstly I overruled the affidavit sworn by the applicant on 20th June, 2001 for lack of court's leave to file it in court.

And even if I accepted it I cannot understand a custom where Ndungu had married Peris and after he dies his bereaved wife marries another woman who now claims a share of the estate of Ndungu by virtue of this marriage?

I was told Peris had gotten 3 children, all daughters with Gatu Ndungu and I would expect these to be rightful heirs to a portion of the deceased Ndungu's estate even if married, but as I was told, in Kikuyu customs bar married women from inheriting their father's estate, then Ndungu had one son who would and did inherit his father's 650 shares from the defendant company.

That when the plaintiff filed the plaint he mentioned in paragraph 5 that Mary Wanbui and Peris Wairimu as well as himself are entitled to inherit from Wangui Ndungu cannot be the basis of setting aside a consent order.

It is also true that Peris Wairimu was not a party to the consent judgement recorded in court on 1st October, 1993 and as such the applicant has no capacity to set it aside on the basis that she has obtained letters of administration intestate to the estate of the said Peris Wairimu – deceased.

In my view the capacity in which the applicant brings this application to this court is doubtful. If she was a wife of Peris Wairimu, then it was not with consent of the deceased Ndungu. I would expect if the deceased had no children with Peris and really wanted some with her, he would get another woman in form of a wife through her, who would inherit his property but not Peris to wait to marry another woman for that purpose. If this practice was allowed to stand, it would be repugnant to justice.

If the court allowed these kind of applications to succeed, it would be opening up the law for riance.

I dismiss this application with costs from the applicant to the respondent.

Delivered this 23rd day of January, 2002.

D.K.S AGANYANYA

JUDGE