



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MILIMANI LAW COURTS

ELC CASE NUMBER 243 of 2017

JULIUS ARINAITWEPLAINTIFF

VERSUS

BALBIR SINGH KALSI1ST DEFENDANT

SATWANT SIGHN KALSI.....2ND DEFENDANT

HARDEV SINGH KALSI.....3RD DEFENDANT

RULING

1. This is a Ruling in respect of a Notice of Motion dated 18th December 2019 in which the Executor and Executrix of the Estate of Balbir Singh Kalsi seek stay of execution of proceedings arising out of a consent judgement dated 7th December 2017 and all consequential orders. The Applicants also seek the setting aside of the said consent.
2. The late Birbir Singh Kalsi who was the 1st Defendant in this suit owned LR No. 1870 /IV/82as tenants in common in equals shares with the 2nd and 3rd Defendants. The three had entered into a sale agreement with the Plaintiff/Respondent in respect of flat No.2 (Ground Floor) erected on LR No. 1870/IV/82. The three owners purported to rescind the agreement between them and the Respondent. This is what prompted the Respondent to file this suit in which he sought a declaration that the purported rescission of the agreement and issuance of an eviction notice were unlawful. The Respondent also sought an order of specific performance among other reliefs.
3. During the pendency of the suit, Balbir Singh Kalsi the 1st Defendant died on 21st April 2017. The Advocate for the Defendants and the Plaintiff entered into a consent judgement before grant of probate in respect of the Estate of Balbir Singh Kalsi could be given. The Applicants therefore contend that the consent which was entered into could not bind the estate of Balbir Singh Kalsi as the Advocate who entered into the same had no authority to enter into the consent which purported to bind his estate. It is on this basis that the Applicants are seeking to have the consent set aside as it adversely affected the deceased estate's interest in the suit property.
4. The Plaintiff/Respondent opposed the Applicants' application based on a replying affidavit sworn on 14th January 2020. The Respondent contends that the Applicants' application is brought maliciously in order to delay the execution of the decree in his favour. The Respondent contends that the consent was as a result of negotiations between the 2nd and 3rd Defendants and the family of the deceased Defendant and that the consent was signed by the respective Advocates after an agreement had been reached by the affected parties.
5. The Respondent further argues that the Applicants are seeking to stall the execution of the decree and put him at a loss because there are no known assets of the Defendants apart from the flat which is the subject of this suit. The Respondent states that the same Advocates who entered into the impugned consent are the same Advocates who were representing the Estate of the deceased in a succession cause in the Family Division of the High Court and that as such, the Advocates had authority to enter into the consent.
6. The parties agreed to dispose of the Applicants' application through written submissions. The Applicants filed their submissions dated 14th December 2020. The Respondent filed his submissions dated 18th February 2021. The 2nd and 3rd Defendants filed their submission dated 11th February 2021. I have gone through the Applicants' application as well as the opposition to the same by the Respondent. I have also gone through the submissions filed by the parties herein.
7. There are only two issues for determination in this application. The first is whether there should be stay of execution herein and should the consent judgement be set aside. These two issues are interrelated and will be dealt with together. There is no contention that Balbir Singh Kalsi signed the sale agreement with his co-owners on the one part and the Respondent on the other part. This agreement was signed on 24th January 2006.

8. When the vendors purported to rescind the sale agreement, Balbir Singh Kalsi was alive. This suit was filed while Balbir Singh Kalsi was still alive. The suit was filed on 10th April 2017 and Balbir Singh Kalsi died eleven (11) days later. The 2nd and 3rd Defendants as well as the family of the late Balbir Singh Kalsi did not file a defence to the Respondent's suit. They instead opted to enter into negotiations which culminated into the impugned consent.

9. Whereas the Applicants contend that the family of the estate of the late Balbir Singh Kalsi was not in the picture about the negotiations leading into the impugned consent until execution stage, the affidavit evidence shows the contrary. The Advocates who were acting for the three defendants are the same advocates who commenced the process of obtaining grant of letters ad litem three months after the demise of Balbir Singh Kalsi. They are the same advocates who again filed for grant of probate on behalf of the Estate of Balbir Singh Kalsi.

10. It is the same firm of Advocates who were engaged in the negotiations which led to the impugned consent. Correspondence from the advocates show that the wife of Balbir Singh Kalsi who was based in the United Kingdom was in touch with the Advocates and documents such as memorandum of acceptance of the loan which was to be advanced to the Defendants to enable them settle the decree arising from the consent Judgement were sent to her by courier for signature.

11. It is inconceivable that the Defendants Advocates could all along engage in negotiations without informing the family of Balbir Singh Kalsi until only at execution stage. The widow of Balbir Singh Kalsi M/s Kartaro Kaur kalsi was named in the will of Balbir Singh Kalsi as one of the Executors of the will of Balbir Singh Kalsi. This is the same person with whom the Advocates for the Defendants were contacting during the process of negotiations leading to the impugned consent.

12. Section 80(1) of the Law of Succession Act provides as follows: -

“A grant of probate shall establish the will as from the date of death, and shall render valid all intermediate acts of the executor or executors to whom the grant is made consistent with his or their duties as such”

13. During the lifetime of Balbir Singh Kalsi, he together with the 2nd and 3rd Defendants had purported to rescind the sale agreement they had signed with the Plaintiff/Respondent. Soon after his demise, negotiations for a settlement started. As has been clearly shown, the widow of Balbir Singh Kalsi, was put in the picture as regards negotiations for a settlement. As a named executor, she had the power to enter into such negotiations. She cannot claim that as she had not been substituted in place of Balbir Singh Kalsi, she had no lucus to engage in the negotiations culminating into the impugned consent.

14. The Applicants rightly agree with the interpretation of section 80(1) by Justice Musyoka in **Re-Estate of Agwang Wasiro (Deceased) eKLR** where he stated as follows: -

“ For a person dying testate, having made a valid will, section 80(1) applies the grant of probate is effective from the date of the death, in the sense that it relates back, and validates any acts of the executor that date back to the death of the testator. The office of a testator is established upon the death of the testator, and the executor named in the will begins to validly discharge his duties as such from the date of death. He is appointed by the will and not the grant. His acts after the death of the testator are valid, and he only needs the grant to authenticate or validate those acts or as evidence of his appointment”.

15. As clearly indicated in the case of **Re-Estate of Agwang Wasiro (supra)** any acts done by an executor are validated as from the time of death. Balbir Singh Kalsi died on 21st April 2017. Negotiations started after his death. What the widow of Balbir Singh Kalsi did even before grant of probate is valid as the actions of an executor date back to the date of death of a deceased.

16. The circumstances under which a consent judgement can be set aside were well captured in the case of **Brookbond Liebig (T) Ltd Vs Mallya (1975) EA 266** where the Court of Appeal for East Africa stated as follows: -

“ The circumstances in which a consent judgment may be interfered with were considered by this court in Hirani V Kassam (1952) 19 EACA 131 where the following passage from Seton on Judgements and orders , 7th Edition Vol 1 , P.124 was approved:

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 or those doing under them ... and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the Court, or if the consent was given without sufficient material facts or in general for a reason which would enable the Court to set aside an agreement”.

“As Windham J said in the introduction to the passage quoted above from Hiran's case, a court cannot interfere with a consent judgement except in such circumstances as would afford good ground for varying or rescinding a contract between the parties”.

17. It is clear from the above analysis that there exist no grounds upon which the consent can be set aside. I find no merit in the Applicants' application which is dismissed with costs to the Plaintiff/Respondent.

It is so ordered.

Dated, Signed and Delivered at **Nairobi** on this 13th day of **May 2021**.

E.O.OBAGA

JUDGE

In the Virtual presence of:-

M/s Mwaniki for Mr Kimathi for 1st Defendant/Applicant

Mr Mukhuyu for Mr Litoro for Plaintiff/Respondent

Mr Muthama for 2nd and 3rd Defendants

Court Assistant: Kevin

E. O.OBAGA

JUDGE