



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**SUCCESSION CAUSE NO. 584 OF 2013**

**IN THE MATTER OF THE ESTATE OF**

**THE LATE OKWANY ONGOYE (DECEASED)**

**SUMMONS FOR REVOCATION OF GRANT BY:**

**CHARLES OMONDI ODUOR**

**JANE ODHIAMBO ODUOR**

**CHARLES AKUMU ODUOR**

**GOFFRET OCHANDA OWINO.....OBJECTOR/APPELLANT**

**VERSUS**

**BARRACK OTIENO OWUOR**

**JULIUS OWINO HUARE.....PETITIONER/RESPONDENTS**

**RULING**

The application dated 29<sup>th</sup> September 2020 was brought by the Petitioners, **BARRACK OTHIENO OWUOR** and **JULIUS OWINO HUARE**. The Respondents to the said application are the Objectors, **CHARLES OMONDI ODUOR**, **JANE ADHIAMBO ODUOR**, **CHARLES AKUMU ODUOR**, and **GEOFFREY OWINO**.

1. The Applicants sought a review of the Orders which revoked their titles in respect to **L.R. NOs. NORTH UGENYA/YENGA/452** and **NORTH UGENYA/YENGA/367**.
2. The Applicants asked the Court to vacate the orders made on 25<sup>th</sup> September 2019 and on 28<sup>th</sup> October 2019.
3. It is the Applicants' case that they were the registered owners and/or the equitable owners of the 2 parcels of land which are the subject matter of the application herein.
4. According to the Applicants, they were issued with the requisite title documents for the 2 parcels of land after undertaking the process of succession in this case.
5. By his supporting affidavit Barrack Otieno Owuor indicated that on 25<sup>th</sup> September 2019, the case was supposed to proceed through viva voce evidence. However, he does not indicate what transpired on that date.
6. He also deponed that;

***“11. That on or about 28<sup>th</sup>/10/2019 the the matter proceeded in court in the absence of our advocate, and one Orodia purported to have been instructed by our advocate, entered a consent which was categorically disowned by our advocates. The instruction to hold brief and/or to enter the said consent is denied by our Advocates: Otieno C.O. Ayayo & Company Advocates.”***

7. The Applicant went on to state that the court had been misled in regard to instructions in respect to which the consent order was made.

8. The Objectors opposed the application, asserting that the Petitioners had failed to prove any basis for the setting aside of the consent order.
9. As far as the Objectors were concerned, the Applicants were represented by an advocate on 28<sup>th</sup> October 2019. Therefore, if the said advocate did not have instructions, the Objectors hold the view that the Petitioners' advocate ought to have sworn an affidavit to say so.
10. I have perused the record of the proceedings. I note that on 25<sup>th</sup> September 2019 Mr. K'Owino Advocate represented the Objectors, whilst Mr. Ayayo Advocate represented the Petitioners.
11. Mr. Ayayo said that the Ruling delivered on 22<sup>nd</sup> January 2018 was premature, and that therefore, his clients may need to file an application for review.
12. On his part, Mr. K'Owino said that there would be no need for review. His opinion was that there may be a need for the consolidation of the 2 separate Succession Causes which were at the Ukwala Court and at the High Court, Kisumu.
13. At that point, in order to give the parties an opportunity to give due consideration to their respective positions on the matter, the Court adjourned the case to 28<sup>th</sup> October 2019.
14. When the matter came up before the court on 28<sup>th</sup> October 2019, Mr. K'Owino represented the Objectors, whilst Mr. Orodi held brief for Mr. Ayayo, for the Petitioners. At the behest of the 2 Advocates, the court recorded a Consent Order, in the following terms;
- “1. PMC Succession Cause No. 18/2016 (Ukwala) be and is hereby consolidated with High Court Succession Cause 584/2013 (Kisumu).***
- 2. The Objectors herein do file an application for Confirmation of Grant issued on 15/03/2013 (in the Ukwala Cause); and shall serve the said application within the next 21 days.***
- 3. The Petitioners shall be at liberty to file and serve a protest within 21 days of service of the Summons Of Confirmation.***
- 4. Mention on 20/01/2020 to verify compliance and for further Directions.”***
15. On 20<sup>th</sup> January 2020, the Petitioners were not represented in court, whilst Mr. K'Owino Advocate appeared on behalf of the Objectors. As the Petitioners were absent, the court adjourned the case to 24<sup>th</sup> February 2020.
16. When the matter came up on 24<sup>th</sup> February 2020, Mr. Ayayo represented the Petitioners whilst Mr. K'Owino represented the Objectors. Mr. Ayayo Advocate told the Court that he had never given instructions to Mr. Orodi Advocate to record the consent orders which were recorded on 28<sup>th</sup> October 2019.
17. The Petitioners made it clear that they would be seeking to set aside the consent order, so that they could be heard by the court.
18. Mr. K'owino's response was that if Mr. Ayayo had a problem with the consent, he would need to move the court. It is within that context that the present application was brought.
19. In the light of what Mr. Ayayo stated in court on 24<sup>th</sup> February 2020, I find that there was no need for him to swear an affidavit, so as to restate something that he had already stated from the bar.
20. Law is a noble profession. Those who practice law are supposed to be honourable. In order to be honourable, an advocate must be a man or a woman whose word commands respect. That which he or she states from the bar is accepted as the truth!
21. It is a big honour to practice law. But the honour comes with a Big responsibility. The Advocate must be truthful always. For, if he or she should be shown to have told an untruth, everything that he or she states thereafter will not be believed by his/her client, colleagues and the court.
22. An advocate who is shown to have been untruthful will have the onerous task of having to tender verifiable evidence to prove the truth of everything he or she states thereafter.
23. Therefore, when Mr. Orodi Advocate told the court that he was holding brief for Mr. Ayayo Advocate, the court and Mr. K'Owino Advocate believed him.
24. However, Mr. Ayayo Advocate has now told the court that he never instructed Advocate Orodi. Unless there was shown to me a reason why I should not believe Advocate Ayayo, I will.
25. It might sound unfair to Advocate Orodi, if he was unaware of what Advocate Ayayo said about him. But the court can only use the material made available to it, in the proceedings.
26. Pursuant to **Order 45 (b) Rule 1** of the **Civil Procedure Rules**;

*“Any person considering himself aggrieved –*

*a. ....*

*b. by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of the judgment to the court which passed the decree or made the order without unreasonable delay.”*

27. If the advocate who entered into a consent, had done so without instructions from the advocate on whose behalf he was holding brief, that may be a sufficient reason to warrant a review of the consent.

28. However, that does not mean that whenever an advocate was Recording a consent order or signing a consent order, the other party must first verify that that advocate had the requisite Authority to do so.

29. An advocate is deemed to have ostensible authority from his client to represent the client in the case, including the execution of consent orders, where they should arise.

30. In the case of KUWINDA RURINJA COMPANY LIMITED Vs KUWINDA HOLDINGS LIMITED & 13 OTHERS CIVIL APPEAL NO. 8 OF 2003, the Court of Appeal said;

*“The Appellant has failed to demonstrate to our satisfaction any of the grounds for setting aside a consent judgement.*

*The allegation that the consent was procured by fraud remains just that, mere allegations; the contestation that the advocates who signed the consent order had no instructions has not been proved to our satisfaction.*

*We are convinced that a third party is under no obligation to ensure that the advocate of the opposite party is duly instructed.”*

31. I do agree that the opposite party and his advocate have no obligation of verifying that the advocate for the other party had been duly instructed to enter into the consent.

32. But in this instance, I do find that the advocate for the Petitioners has satisfied me that he did not give instructions to the advocate who held his brief, to record the consent order on 28<sup>th</sup> October 2019.

33. Accordingly, because the advocate who entered into the consent did not have instructions to take that step, that is sufficient reason to set aside the said consent order.

34. I therefore set aside the orders made on 28<sup>th</sup> October 2019.

35. However, the Petitioners have no reason that would justify an award of costs to them, as the Objectors cannot be held responsible for what had transpired. Therefore, each party will meet their own costs of the application dated 29<sup>th</sup> September 2020.

**DATED, SIGNED and DELIVERED at KISUMU This 17<sup>th</sup> day of May 2021**

**FRED A. OCHIENG**

**JUDGE**