



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 136 OF 2015**

**IN THE MATTER OF THE ESTATE OF PETER NGUGI MUCHAI (DECEASED)**

**CHRISTINE MWIKALI SAVANI.....OBJECTOR/APPLICANT**

**-VERSUS-**

**JUDY WANGECHI NJUGUNA.....PETITIONER/RESPONDENT**

**RULING**

**Background**

1. The deceased was a teacher with TSC Number 333918, at the time of his death on 3<sup>rd</sup> July, 2015. The Letters of administration was granted on 27<sup>th</sup> October 2015 and issued on 3<sup>rd</sup> November 2015 by this court. The administrator was indicated as Judy Wangechi Njuguna, indicated in the Petition as the deceased's wife. The only other survivor was indicated as Gerald Maison Njuguna, the son.

2. The administrator filed summons for confirmation of grant on 8<sup>th</sup> March, 2016, to which Gerald Maison Njuguna had consented. The deceased's assets, to which the wife/administrator was indicated as beneficially entitled, were indicated as:

- a) Death Gratuity/Survivors benefit from the Teachers Service Commission (TSC).
- b) Benefits from Mwalimu Sacco.
- c) Benefits from Kuppet Union.
- d) Account No. [xxxx] Faulu Kenya.
- e) Account No. [xxxx] Kenya Commercial Bank.
- f) Account No. [xxxx] Barclays Bank of Kenya.

3. The grant was confirmed and a Certificate of Confirmation issued by the court on 20<sup>th</sup> September, 2016. However, summons for revocation of grant was filed on 8<sup>th</sup> March, 2017 by Christine Mwikali Savani aka Christine Mwikali Ngugi, the Objector. She claims to have been the deceased's customary law wife, and that the two had a son, Martin Muchai Ngugi aka Martin Ngumbao Onywoki who was maintained by the deceased.

4. In addition, the Objector attached: Affidavit of marriage between the deceased and herself; Affidavit showing that the deceased was Martin Muchai Ngugi's father, Agreement of parental responsibility dated 10<sup>th</sup> September 2003; Affidavit by the deceased's brother evidencing that the brother recognized the deceased as the spouse of the Objector; a letter from the Chief Mutitu Location, asserting the deceased as the father and spouse of Martin Muchai; and letters showing the Objector was designated as next of kin in Teachers Service Commission documentation.

5. Equally, the administrator had supplied the court with information to the effect that: she was the wife of the deceased; a deposition by her father Gerald Njuguna Kungu had been introduced to the deceased and his parents, when they had come for dowry negotiations; that he was aware that the administrator and deceased were married; and that the deceased took care of his daughter's son Maison; that when the deceased died she was involved in his funeral preparations; that it was at about this time that she heard that the deceased had a relationship with another woman named Christine Mwikali, who also attended the funeral.

6. The administrator attached a document indicated as the funeral programme of the deceased. The document shows that he was married to

Christine Mwikali, the Objector, in 1996 and they had a son Martin Muchai Ngugi in 1997; that he met the Administrator later and they got married and were blessed with one son, Maison Njuguna in 2007.

7. When the parties came before Meoli, J. on 8<sup>th</sup> March 2017, they agreed to suspend the confirmed grant pending hearing of the application.

8. Subsequently, on 14<sup>th</sup> December 2017, the parties appeared before Meoli, J. and the following consent was entered following hearing of Summons for Revocation presented on 8<sup>th</sup> March, 2017 by the Applicant:

a) That the subsisting grant be revoked and a fresh grant be issued to Judy Wangechi Njuguna together with Christine Mwikali Savani.

b) The Objector/Applicant may apply for confirmation indicating the mode of distribution, while the Petitioner/Respondent can, if she opposes the said mode of distribution file an affidavit proposing [her] preferred mode of distribution.

c) The beneficiaries were agreed as: Judy Wangechi Njuguna, Gerald Maison Njuguna, Christine Mwikali Savani and Martin Muchai Ngugi aka Martin Ngumbao Onywoki.

9. Following the above consent, a fresh grant of Letters of administration was issued in the names of Judy Wangechi Njuguna and Christine Mwikali Savani on 22<sup>nd</sup> February, 2018.

10. On 11<sup>th</sup> April, 2018 Christine Savani, the Objector, changed counsel and, instead of filing distribution as ordered by the court, filed the present application under urgency to set aside the consent entered by the parties on 14<sup>th</sup> December, 2017. The basis of the application is that:

***a) The advocate then on record did not take into account or appreciate all the facts he had been instructed upon and entered the consent without the objector's authorization.***

***b) The said advocate did not take into account the objector's ideas before entering the consent and did not explain the contents of the consent to the objector before entering into the consent.***

***c) The petitioner is not and has never been a beneficiary to the deceased's estate as they were only drinking friends and she was not entitled to be a party to the grant.***

11. Whilst the application of 11<sup>th</sup> April, 2018 was pending, the parties on 21<sup>st</sup> May, 2019 entered into a further consent as follows:

1. The grant in the names of Judy Wangechi Njuguna and Christine Mwikali Savani be issued to the Administrators within seven (7) days.

2. The Applicant Christine Savani shall serve the grant on the Teachers Service Commission upon receipt thereof.

3. The TSC is ordered to provide a certified copy of all the contents of the file of Ngugi Muchai (Deceased) TSC No. 333918 to the said Christine Mwikali Savani within five (5) days of being served with the order.

4. The Applicant (Christine Savani) to file and serve on the Respondent an affidavit producing and exhibiting the said TSC file no later than seven (7) days before the next court mention.

#### **Issues for Determination**

12. The only issue that arises from the present application of 11<sup>th</sup> April 2018, under discussion, is whether the consent orders recorded on 14<sup>th</sup> December, 2017 should be set aside. The court had, for expedition, asked the parties to provide material to prove entitlement to the deceased's estate. Both parties filed affidavits and documents to this end.

#### **Analysis and Determination**

13. The Applicant filed written submissions on 21<sup>st</sup> February, 2019 and the Respondent filed an Affidavit and authorities on 8<sup>th</sup> October, 2018 in response.

14. Whilst the court did order the parties on 8<sup>th</sup> October 2018, to file further affidavits to show entitlement to the estate, the court did not dispense with the applicant's application of 11<sup>th</sup> April, 2018.

15. In the submissions, the Applicant did not submit on the issues raised in their application for revocation of the consent orders of 11<sup>th</sup> April, 2018. Instead, they concentrated their focus on proving the Applicant's entitlement to the deceased's estate by seeking to prove: Marriage, the birth of their Child, and Dependency under **Section 29** of the **Law of Succession Act**.

16. On her part, the Respondent's authorities focused on whether consent orders can be revoked in addition to availing information to prove entitlement to the deceased's estate. The case of **SMN v ZMS, MWS & 3 Others [2017] eKLR** was referred to. There, the Court of Appeal

went into great detail in analyzing the authority of an instructed counsel and the circumstances under which such counsel's entry into a consent can be revoked.

17. The Court of Appeal in **SMN v ZMS** case highlighted the following principles:

***“(i) Prima facie, an order made in the presence and with the consent of counsel is binding.***

***(ii) Although an advocate has ostensible authority to compromise his client's case.***

***(iii) If that authority is diametrically opposed to his clients written instructions, the authority cannot be upheld (Hirani v Kassan [1952] 19 EACA 131.***

***(iv) If it is clearly shown that the client was not aware of the application that gave rise to the consent, the authority will not stand.***

***(v) If the court would be entitled to conclude that there was feud or collusion the consent will not stand.***

***(vi) A consent will be set aside where;***

***“i. the consent was obtained fraudulently.***

***ii. there was collusion between affected parties.***

***iii. an agreement is contrary to the policy of the Court.***

***iv. Where the consent is based on insufficient material facts.***

***v. the consent is based on misapprehension or ignorance of material facts.***

***vi. there is any other sufficient reason.”***

*(For these principles See;*

***- Lenina Kemigisha Mbabazi Star Fish Limited vs Jing Jeng International Trading Ltd [HCT-00-MA-344-2012]***

***- M&E Consulting Engineers Limited vs Lake Basin Development Authority & Another [2015] eKLR;***

***- Kenya Commercial Bank Ltd vs Specialised Engineering Company Ltd [1982] KLR 485).***

18. Further, the court held that a consent judgment has contractual effect, and can only be set aside on grounds that would justify the setting aside of a contract; of if there is clear evidence that it was entered into without instructions.

19. Ultimately, on the strength of the authorities, I see no basis for revoking the consent orders entered into by the parties on 11<sup>th</sup> April, 2018, as no evidence was shown to the court to persuade it of any impropriety in entering the consent.

20. With regard to the evidence availed by the parties as to their respective entitlement to be beneficiaries, both parties have filed substantial evidence that shows that, if proved, each party is entitled as a beneficiary.

21. That evidence must now, in my view, be tested for its probative value through cross-examination. Accordingly, I order as follows:

1. The application for revocation of the consent orders is hereby dismissed.

2. The Parties' evidence produced through affidavits and documents shall be tested for proof through a viva voce examination of the deponents.

3. The hearing of deponents of the various depositions filed shall be tested through cross-examination on a date fixed in court but not more than sixty (60) days from the date hereof.

#### **Administrative directions**

22. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Teams tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

23. A printout of the parties' written consent to the delivery of this judgment shall be retained as part of the record of the Court.

24. Orders accordingly.

**DATED AND DELIVERED IN NAIVASHA BY TELECONFERENCE THIS 12TH DAY OF MAY, 2021.**

**R. MWONGO**

**JUDGE**

Attendance list at video/teleconference:

1. Ms Amani for the Objector/Applicant
2. Mr. P. K. Njuguna for the Petitioner/Respondent
3. Court Assistant - Quinter Ogutu