



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NUMBER 352 OF 1996**

**IN THE MATTER OF THE ESTATE OF THE LATE GEOFFREY MUGWE NG'ANG'A (DECEASED)**

**GEOFFREY KAMAU MUGWE....ADMINISTRATOR/APPLICANT**

**VERSUS**

**STEPHEN MAINA MWANGI.....RESPONDENT**

**RULING**

1. Vide an Amended Notice of Motion dated 19<sup>th</sup> August 2020 brought under **Order 22 rule 22(1), order 42 Rule 6 and order 51 of the Civil Procedure Rules**, the Applicants seek the following orders.

*(i) THAT this Honourable Court be pleased to stay the execution of the court orders issued on 23<sup>rd</sup> January, 2019 against the applicant pending hearing and determination of this application.*

*(ii) THAT this Honourable court be pleased to set aside in its entirety the orders issued on 23<sup>rd</sup> January, 2019 against the applicant herein pending the hearing and determination of the cause herein and/or full distribution of the Estate herein and that the distribution herein be as per the grant confirmed on the 8th December 2016.*

*(iii) THAT in alternative, this Honourable Court be pleased to order demarcation of the 1 (one) acre sold to the respondent herein to be hived from the Share of 9.4 acres of land issued to the surviving spouse of the late Stephen Kibuge Mugwe as per the grant confirmed on the 8<sup>th</sup> December 2016.*

*(iv) THAT this Honourable Court do issue a prohibition order to the Land registrar Nakuru County from dealing in any way with the parcel of land being Gilgil/Karunga Block 1/101 pending the hearing and determination of this application.*

*(v) THAT the costs of this Application be in the cause.*

2. The application is based on the grounds that this Honourable Court issued orders on 23<sup>rd</sup> January 2019 in favour of the respondent as against the applicant and the applicant has already fully complied with the said court orders.

3. That the applicant issued the respondent's counsel with a cheque dated 22<sup>nd</sup> February, 2020 amounting to Kshs. 305,892/= being full settlement of the outstanding amount and the said payment was done timely before the execution of the said court orders.

4. That the respondent with full knowledge of the above settlement is in the process of executing the court orders despite full payment of the outstanding amount.

5. That the surveyor demarcated the wrong parcel of the land as the same belongs to the applicant herein who did not sell the same to the respondent herein and the applicant stands to suffer grave prejudice that cannot be compensated by way of an award should execution proceed.

6. That the respondent will suffer no prejudice if this application is allowed.

7. The Application is supported by an Affidavit of the Applicant herein that was sworn on 19<sup>th</sup> August 2020. He deposed that he is the Administrator and he took over administration duties after the death of his mother Leah Gathoni Mugwe who was the administratrix and who died on 24<sup>th</sup> September, 2011.

8. He averred that his late brother Stephen Kibage Mugwe sold 1 acre from his share of the estate to the respondent herein and he received the proceeds of sale from the respondent with an agreement that once the estate is distributed, the respondent shall be compensated from the later brother's share.
9. He contended that the respondent placed a caution on the entire parcel of land known as Gilgil/Karunga Block 1/101 and it became hard to distribute the estate of his late father to the beneficiaries and that his late brother's share of 9.4 acres is now held by his surviving wife Florence Wairimu Kinyanjui.
10. He deposed that his late brother Stephen Kibage Mugwe died without compensating the respondent and it was hard as a family to raise the outstanding balance in order to settle the amount hence this instant application,
11. He averred that unfortunately they were unable to comply with the court orders issued on 23<sup>rd</sup> January 2019 for lack of money until recently after a long struggle as a family to raise the money, a well-wisher lent them money and which was paid to the respondent's advocate via a cheque dated on 22<sup>nd</sup> February, 2020 and which was forwarded to the respondent's counsel on the same day and he annexed copies of forwarding letters and cheque dated 22<sup>nd</sup> February, 2020.
12. He stated that the outstanding balance was paid three days prior to the survey exercise which was scheduled to take place on 25<sup>th</sup> February, 2020 and following timeous settlement of the debt to the respondent, they wrote a letter to the Regional Surveyor Dr. Kwalia stopping the excise and copied the same to the respondent's counsel, O.C.S Gilgil Police Station and the court notifying them of the timely settlement and he annexed a copy of the said letter.
13. He further deposed that unfortunately on the 25<sup>th</sup> February, 2020 the respondent's counsel wrote a letter to his advocates returning the cheque citing expiry of the period of payment and he annexed a copy of the said letter.
14. He averred that on 25<sup>th</sup> February 2020 the regional surveyor accompanied by the police went to the land and conducted demarcation on his land instead of his late brother's land and when the surveyor visited his land he tried explaining to him that the 1 acre excise was supposed to be from his late brother's land and not his land since it is his brother who sold it but he still went ahead to demarcated the same.
15. He deposed that the respondent herein had intent to disinherit them as he wants to be given an acre of land with the current market value of a million an amount way too far from what his late brother owed him being Kshs. 305,892/=.
16. He stated that the respondent should be considerate enough to take the money which his late brother owed him since the same was raised before the survey exercise was done and even if the respondent was to take one acre from the estate then the said acre ought and should be hived from his late brother's 9.4 acres share and which share is still held by his surviving widow and not from his share.
17. He contended that the respondent knew too well that the sale agreement was between him and his late brother and so any attempt to take his land was illegal.
18. The Application was opposed by the Respondent who filed his Grounds of Opposition on 16<sup>th</sup> November 2020 and Replying Affidavit of even date.
19. He stated that this application had no merit, is bad in law and an abuse of the court process since there were already consent orders which the applicant is clearly in contempt.
20. The respondent averred that the application was intended to deny him his legal rights to the land already ordered by the court to be his and in the event the court orders were set aside, he would suffer irreparable damage as he had incurred more expenses e.g police escort, paying the surveyor to excise his one (1) acre portion and paying legal fees receipts of which have been proved in court.
21. He stated that a stay of any nature would cause injustice to him as the Applicant had an ample time to repay him his dues but failed to do so.
22. He prayed that this Application be dismissed with costs.
23. The respondent vide his Replying Affidavit sworn on 16<sup>th</sup> November 2020 deposed that he filed an objection in the instant matter as he was owed money by the estate and the Petitioner was made aware of his claim for Kshs. 305,892/= early on 6<sup>th</sup> June 2018.
24. He averred that on 23<sup>rd</sup> January 2019 a consent was recorded in court that the petitioner pays him Kshs. 305,592/= within sixty (60) days and in default one acre be excised from Gilgil Karunga Block 1/101 and be allocated to him.
25. He said that the Petitioner did not pay the said amount for over one year and on 9<sup>th</sup> May 2019 the court activated the default clause and ordered that he be given one acre.
26. He stated that since he was financially challenged and he borrowed Kshs.17,000/= to pay for the survey work and his lawyer's outstanding fee of Kshs. 84,285/= and he annexed a copy of the receipt to support his contention.
27. He said that since the petitioner was confrontational he spent Kshs. 10,000/= to have police escort him and under the circumstances he rejected the cheque for Kshs. 305,892/= as he had spent much of it in legal costs, survey works and police escort.

28. He averred that the consent order could only be set aside when there was a mistake or fraud and that he felt aggrieved since his right of land ownership was violated.

29. He said that he is retired without land of his own while the petitioner continued to frustrate his quest for justice twenty five (25) years later he urged this court to come to his aid without further delay and in addition stated that the surveyor excised one acre at the place the deceased showed him and other arrangements on the ground should not affect his interest.

30. The Applicant filed his response to the grounds of opposition on 8<sup>th</sup> March 2020.

31. He averred that the entire contents of the Grounds of Opposition save for paragraph 1 address factual points instead of points of law.

32. He contended that the Application was not prejudicial to the respondent because he and his family members had not refused to pay up the monetary amount owed to him. That in the alternative the respondent be granted a portion of his late brother's share of the parcel of land subject to this Succession matter.

33. He stated that it was the Respondent who was frustrating the court process by refusing to accept the amount pledged in the Consent being Kshs. 305,892/= knowing fully well that they Applicant and his entire family are economically constrained.

34. He averred that the Respondent was further frustrating the court process by insisting on being granted his portion of the parcel of land subject to this suit even though he was fully aware that the consideration for the one (1) acre parcel only benefited his late brother and he denied employing delaying tactics as alleged by the respondent.

35. That the Respondent ought to obtaining his one (1) acre from Gilgil Karunga Block 1/101 excised from the portion owed to the estate of his late brother who benefitted from the proceeds.

36. Parties agreed to canvass the application through submissions.

## **SUBMISSIONS**

### **Applicants Submissions**

37. The Applicant filed his submissions on 8<sup>th</sup> March 2021. He submitted that the consent dated 23<sup>rd</sup> January 2019 that was adopted by this Honourable Court as an order indicated that the petitioner pays amount of Kshs. 305,592/= within sixty (60) days and in default, one (1) acre be excised from Gigil Karunga Block 1/101 and be allocated to the Respondent herein.

38. The applicant submitted that the respondent moved this Honourable court more than twelve (12) months later praying for orders for the survey and excision of one acre of land from the suit property without serving a notice to him.

39. He submitted that the consent order was complied with when the Applicant forwarded a cheque of Kshs.305,592/= to the respondent and he prayed that this court allows administration of the estate of the deceased to proceed in accordance with the Application for Confirmation of Grant that was heard in December 2016 prior to the respondent's inclusion in this matter.

40. He relied on the below cases:-

(a) **Brooke Bond Liebig 9t0 Ltd Vs. Mallya [1975]** where the court held that;

*“...A court cannot interfere with the consent judgment except in such circumstances as would afford a good ground for varying or rescinding a contract between the parties.”*

(b) **Gurdev Singh Birdi & Another vs Abubakar Madhbuti (1997) eKLR** where the Honourable Shah, J. A. held as follows;

*“...It cannot be denied that where a contract for sale does not make time the essence of the contract, equity requires that the vendor calls upon the purchaser to complete the contract within a reasonable time when time is not the essence of the contract. It is for this reason that I agree with the holding in the case of GRAHAN V. PITKIN [1992] 2ALL E.R 235 which stated that*

*“unreasonable delay by a purchaser in completing a contract for the sale of land does not entitle the vendor to rescind the contract without first serving a notice to complete, although delay may be an ingredient in deciding whether a party in default does not intend to proceed and has repudiated the contract”. ”*

41. The applicant submitted that based on the above authorities the respondent did not have a right to decline receipt of Kshs. 305,592/=. It was his position the respondent ought to receive the aforesaid amount.

42. The applicant further submitted that if this court finds that the respondent is entitled to one acre of the suit property then the same should be excised from the land belonging to the estate of the late Stephen Kibage Mugwe.

43. The Applicant argued that the respondent's grounds of opposition were improperly framed as they were not on points of law.

44. Applicant prayed this application be allowed.

### **Respondent's Submissions**

45. The respondent submitted that the case of **Flora N. Wasike vs Destimo Wamboko [1988] eKLR** settled the law on setting aside of the consent orders.

46. He submitted that a consent order cannot be set aside except on grounds of mistake, fraud, coercion or misrepresentation.

47. He averred that none of the above grounds exists in the circumstances of this case and none have been advanced by the Applicant.

48. Respondent contended that the applicant failed to honour the terms of the consent order and this court lacks capacity to interfere with the consent freely entered into by the parties and consequently the law must be allowed to take its course.

### **ISSUES FOR DETERMINATION**

49. After considering the instant Application, Supporting Affidavit, Grounds of Opposition and Replying Affidavit plus the parties' Submissions, I humbly opine that the only issue that stands out for determination is;

· ***Whether consent dated 23<sup>rd</sup> January 2019 should be set aside.***

50. On 23<sup>rd</sup> January 2019 parties entered into a consent as follows;

*“By consent the petitioners do pay Stephen Mwangi Maina through his advocate the sum of Ksh. 305,892 within 60 days and in default the administrators of the estate do give the said Stephen Mwangi Maina 1 acre to be excised from the parcel of land within GILGIL KARUNGA BLOCK 1/101.”*

51. This consent was adopted as an order of the court. The terms of the consent as outlined hereinabove are very clear. The Petitioners were to give the respondent one acre of land.

52. Our jurisprudence on setting aside of consent judgments is settled. A consent judgment can only be set aside or varied on grounds that would allow for a contract to be vitiated. These grounds are fraud, collusion, illegality, mistake, and an agreement being contrary to the policy of the court, absence of sufficient material facts and ignorance of material facts.

53. The celebrated **Flora Wasike Case, Hancox, JA** remarked:

***“It is now settled law that a consent judgement or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out.”***

54. The applicant has not stated that the consent that was adopted by this court on 23<sup>rd</sup> January 2019 was entered into fraudulently or mistakenly. There is no evidence also of collusion, illegality, an agreement being contrary to the policy of the court, absence of sufficient material facts and ignorance of material facts so as to warrant setting aside of the consent herein.

55. What is clear however is that the one acre was to be given to the respondent by the administrators. It was not stated that the respondent would go and take the land for himself. In addition the administrator who admitted the sale of the one acre, the mother to the beneficiaries clearly stated where the money she was paid went to and who was responsible in the estate to give a portion of the land. That information is given on oath. It was never rebutted or controverted by any of the beneficiaries, and specifically the said Stephen Kibage Mugo. Not even the respondent has controverted that averment by the then administrator. It simply means that if the administrator Leah Gathoni had not died before the distribution she would have ensured that the said Stephen Kibage Mugo had given out the one acre of land to the respondent. That Affidavit was sworn on 19<sup>th</sup> September 2001. In my view all that needed to happen then was for the Summons for Confirmation of Grant to be reviewed to accommodate the respondent accordingly.

56. It is my view that having considered the submissions by counsel, the authorities cited, the record in this file and the affidavits filed herein the applicant has a point. It was never the intention that he was to personally bear the brunt of the failure by the first administrator to settle the issue related to this one acre belonging to the respondent. She is the one who entered into the sale. She is the one who pointed who was to provide the land from his share of the estate and all that the applicant herein could do upon taking over the administration of the estate would be to complete that part.

57. Pursuant to Leah Gathoni Mugwe's affidavit of 19<sup>th</sup> September 2001 with regard to the respondent's entitlement to the one acre out of Gilgil/Karunga Block 1/101. I make the following order;

***i. That the Certificate of Confirmation of Grant made on 15<sup>th</sup> October 2001 be and is hereby reviewed to take one acre from the share of Stephen Kabage Mugwe. His share will be 8.1 acres, and the respondent's 1 acre.***

*ii. The Land Registrar is directed to ensure that the title documents for the share for Stephen Kabage Mugwe will show that his share is 8.1 acres only*

*iii. That upon demarcation of that one acre from the share of Stephen Kabage Mugwe, a title deed to issue in the name of the respondent. All transmission documents to this end be executed by the Deputy Registrar.*

*iv. Costs in the cause.*

**DATED, SIGNED AND DELIVERED BY EMAIL THIS 17TH DAY OF JUNE, 2021.**

**MUMBUA T MATHEKA,**

**JUDGE.**

CA Edna

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