



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

SUCCESSION CAUSE NO. 358 OF 2002

IN THE MATTER OF ESTATE OF KITHINJI M'RARIA (DECEASED)

KELLEN RUNJI.....PETITIONER/RESPONDENT

VERSUS

ESTHER WAMBOGO NGOROI.....1ST RESPONDENT

TABITHA WANJOVI NGOROI.....2ND RESPONDENT

AND

JOSEPH MURIITHI KITHINJI.....INTENDED INTERESTED PARTY/ APPLICANT

RULING

1. Before me is the application dated 19.04.2021 and wherein the applicant seeks that he be enjoined in this cause as an interested party and further that consent order issued on 23.11.2018 be set aside.
2. The application is premised on the grounds on the face of the application and further supported by the affidavit sworn by the applicant herein. The applicant's case is that vide the hereinabove mentioned consent, the parties herein consented to resolve the issue of ownership of land parcel Ngandori/ Kiriari/849 and Ngandori/Kiriari/834 through a consent and which consent had the effect of donating to this court the jurisdiction to determine issues of ownership of land and boundaries.
3. Further that the applicant occupies LR Ngandori/ Kiriari/834 which belonged to the applicant's late father but Kellen Runji purportedly entered into the said consent which has the effect of disinheriting them of their father's land whereas none of the deceased's beneficiaries were signatories to the said consent. Further that the said consent contrives the beneficiaries of the deceased herein to occupy LR Ngandori/Kiriari/849 yet the right parcel to occupy is Ngandori/Kiriari/834 in respect of which the grant was confirmed and further that he has already been issued with an eviction notice from LR Ngandori/Kiriari/ 849 by one Fridah Mbeere Kiura.
4. The application is opposed by way of the replying affidavit sworn by the 1st respondent herein and wherein she deposed that on 23.11.2018, the estate of John Ngoroi Gakuthi (her family) and that of Kithinji M'raria entered into a consent to maintain the status quo in relation to LR Ngandori/Kiriari/834 and LR Ngandori/Kiriari/849 and further that they have completed succession in relation to LR Ngandori/Kiriari/834 as had been directed by the court. Further that the 1st respondent, the late Peter Nyaga Ngoroi, Tabitha Wanjovi, Hellen Runji and the applicant all signed the consent herein and they were all represented by an advocate and the consent signed was adopted as an order of the court and has never been quashed, varied, set aside or in any other way rendered void. Further that the eviction notice alleged by the applicant herein is not in relation to Ngandori/Kiriari/849 but a different land parcel being Ngandori/Kiriari/5516 which is not part of the respondent's husband's estate.
5. The application was canvassed by way of written submissions. The applicant reiterated that this court in recording the consent in issue did not have jurisdiction over the issue and that the said issue should have been determined by the Environment and Land Court which is established pursuant to Article 162 of the Constitution as its the court with jurisdiction over land matters and issues touching on boundaries under Section 13 of the Environment and Court Act of 2011.
6. Reliance was made on the case of **Ndubi and Zipporah Mutiga –vs- Gerishon Gatobu Mbui, Meru Succession Cause No. 720 of 2013** to the effect that a probate court does not have jurisdiction over issues to do with ownership of property but only on distribution of the estate of a deceased. It was thus submitted that the said consent ought to be set aside *ex debito justitiae* as the court acted without jurisdiction. Reliance on this was made on the case of **Owner of the Motor Vessel Lillian S (1989) KLR**. Further, relying on the case of **Equity Bank**

Limited –vs- Bruce Mutie Mutuku t/a Diani Tour Travel Limited, it was submitted that parties cannot even by their consent confer jurisdiction on a court where no such jurisdiction exist.

7. On the applicant being enjoined as an interested party, it was submitted on behalf of the applicant that he indeed has an identifiable stake in the proceedings as he is a beneficiary of the estate of Kithinji M’raria whose estate is the subject of the proceedings herein. Reliance was made on the case of **Onesmus Sintole Saidimu –vs- Sane Ole Saidimu Nkikoora & 5 Others (2021) eKLR**.

8. On the part of the respondent, it was submitted that the applicant’s mother as the administrator of the estate of the deceased herein had the powers under section 82(a) of the Law of Succession Act to sign the consent and further that the intended interested party signed the same and thus the prayers for setting aside are not well supported. Further that no fraud, collusion or any other reason had been proved by the applicant herein to warrant setting aside of the consent. Reliance was made on the case of **Kenya Commercial Bank Ltd –vs- Specialized Engineering Co. Ltd (1982) KLR** to the effect that a consent entered into by a counsel is binding on all parties unless fraud or collusion is proved.

9. As to the issue of jurisdiction, it was submitted that the matter before the court was a succession cause and the court had jurisdiction to determine on issues relating to land on matters filed as succession cause on ownership and boundaries. Further that the court is *factus officio* as there is a consent judgment in which the issue of jurisdiction was not raised. It was submitted that this court has jurisdiction to determine on land rights and reliance made on the case of **Iddid Ole Tauta & others –vs- Attorney General (2015) eKLR**.

10. Further that this court does not have jurisdiction to set aside its own orders and that the right available to the applicant is to appeal to the Court of Appeal under Section 67(2) of the Civil Procedure Act and that setting aside the said orders would be injurious to the respondents as they have already administered LR. Ngandori/Kiriari/834 in Embu CM Succession Cause 584 of 2017 and thus setting aside would subject them to lengthy, tedious and expensive process.

11. I have considered the application herein, the response and the rival written submissions. The applicant seeks for orders that he be enjoined in these proceedings as an interested party. However, the cause herein relates to the estate of the applicant’s father and wherein he is provided as being part of the beneficiaries. In my view, the applicant by virtue of being a beneficiary of the estate is already an interested party in the cause.

12. The applicant further seeks orders for setting aside of the consent recorded by the parties herein, the basis of the same being that the court did not have jurisdiction to record the same.

13. The law on setting aside a consent order is now well settled. The Court of Appeal in **Isaac Kinyanjui Njoroge –vs- National Industrial Credit Bank Limited [2018] eKLR** held that; -

*“The principles upon which an application for review is considered are well settled. As the Judge correctly stated, this Court held in **Flora N Wasike v Destimo Wamboko [1982-88] 1 KAR 625** that a consent judgment can only be set aside on the same grounds as would justify the setting aside of a contract, for example fraud, mistake or misrepresentation. In that case, the Court affirmed the principle in **Hirani v Kassam (1952) 19 EACA 131** that:*

“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 on those claiming 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 misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement.” (emphasis court’s)

14. In **Brooke Bond Liebig (T) Ltd –vs- Malya (1975) E.A. 266**, Court of Appeal held that

“a consent judgment may only be set aside for fraud, collusion or for any reason which would enable the court to set aside an agreement.”

15. I have perused the court record and I note that the petitioner herein **Kellen Runji** petitioned for letters of administration and wherein the only property forming the estate is LR Ngandori/ Kiriari/834. The grant was issued on 3.10.2001 to her and she proceeded to file for confirmation of the said grant vide the application dated 12.04.2002. What followed was an affidavit of protest by one Ngoroi Gakuthi and which protest touched on the specific parcels each of the families occupied (there was confusion on which land parcel the parties were occupying). Vide the orders of 26.11.2002, this court (J.V.O. Juma, J.) noted that the grant cannot be confirmed as there is confusion on the title.

16. There was no activity in relation to this cause until 14.12.2012 when the application dated 2.07.2012 was fixed for hearing. The said application by Kellen Runji sought orders that the respondents herein be ordered to relocate to their land parcel No. Ngandori/Kiriari/849, the grounds in support of the application being that the said Kellen occupied land parcel No. Ngandori/Kiriari/849 which is registered under the names of Ngoroi Gakuthi (deceased) and the husband of the respondents. Indeed, the respondents herein filed a replying affidavit and wherein they blamed the applicant for the said mix up as she is the one who settled on the land first. Directions were taken that the application be canvassed by way of written submissions.

17. When the matter came up for mention on 23.04.2015, Mr. Adande for the petitioner informed the court that the parties were negotiating settlement and they needed two weeks. Mr. Mugo for the respondent confirmed the position. The matter came up in court for mention several times and the parties indicated to court that they were negotiating and all along, it is the same advocates who appeared for the parties.

18. This state of affairs proceeded until 6.09.2018 when the advocates for the parties herein were granted an adjournment to go and have the parties agree as to the dispute and wherein later on, the advocates informed the court that they had reached a consent. The consent (handwritten) which form part of the record is clear that the same was signed by the applicant herein (Kellen Runji), the 1st and 2nd respondents and witnessed by one Joseph Muriithi Kithinji the intended interested party herein as the applicant's witness and also Peter N. Ngoroi Gakuthi as respondents' witness. The said consent was adopted as an order of the court.

19. It is therefore clear that all along, the parties herein and/ or their advocates were involved in the said negotiations and were present in court when the same was adopted by the court. The same having been made **in the presence and with the consent of Counsel is binding on all parties to the proceedings or action and those claiming 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 consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement. As the Court of Appeal held in Kenya Commercial Bank Limited –vs- Specialized Engineering Company Limited [1982] KLR 485,**

the making by the court of a consent order is not an exercise to be done otherwise than on the basis that the parties fully understand the meaning of the order either personally or through their advocates and when made, such an order is not lightly to be set aside or varied save by consent or an order on one or either of the recognized grounds..."

20. It is my view that the applicant did not prove any of the above conditions to warrant the setting aside of the consent order in issue. The applicant did not even plead let alone prove fraud or collusion on the part of the respondents. What is clear from the record is that all the parties to the proceedings were present when the same was being recorded. As such, the said consent order cannot be set aside on the basis of the above.

21. The applicant deposed that the court in recording the consent usurped the jurisdiction which it does not have. It was submitted that the court exercised the jurisdiction which ought to be exercised by the Environment and Land Court. As I have already noted, the petitioner applied for letters of administration but the confirmation of the same was not possible as there was confusion on the specific land the two families occupy. The court (J.V.O Juma J) noted that the grant cannot be confirmed as there is confusion on the title. I appreciate that indeed the Constitution of Kenya 2010 under Article 162 established a specialized court to deal with land ownership and in actualization of this provision, Parliament enacted the Environment and Land Court Act of 2011.

22. Section 13 of the said Act provides for the jurisdiction of the said court and basically the court's jurisdiction is in relation to use and occupation to land. However, in the instant case, the issue which was before the court was not on the ownership of the land parcels Ngandori/Kiriari/834 and Ngandori/Kiriari/ 849. The same was not in issue as the parties had acknowledged in their pleadings as to there having been a mischief. It is my view that the court in allowing the parties to record the consent did not determine the ownership of the two land parcels and neither was that an issue before it.

23. I find that the court had jurisdiction over the issue. It should be remembered that the jurisdiction of this court is to distribute the free estate of the deceased to the beneficiaries. The court in doing so has the inherent powers to entertain any application and to make orders as it deems fit with the main objectives of ensuring that the estate is administered. As such, the consent order is not a candidate for setting aside on that ground as the applicant has not made a case for setting aside the said consent order.

24. Considering all the above, it is my considered view that the proposed interested party/applicant by virtue of being a beneficiary of the estate and having been provided for in the distribution, he is already an interested party and thus the prayer in that respect fails.

25. Further, the applicant herein did not make a case for setting aside of the consent order issued on 23.11.2018. As such, the application has no merit and it is dismissed with costs to the respondent.

26. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 7TH DAY OF JULY, 2021.

L. NJUGUNA

JUDGE

.....for the Petitioner

.....for the Respondents