



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 1 OF 2015**

**IN THE MATTER OF THE ESTATE OF KIMANI NZIOKI (DECEASED)**

**R U L I N G**

1. The ruling relates to the application dated 11.7.2019 and is brought under Sections 1A, 3 and 3A of the Civil Procedure Act, Order 51 Rule 1 of the Civil Procedure Rules seeking the following orders;

a. *spent.*

b. ***THAT consent dated 4<sup>th</sup> June, 2019 be set aside and the honourable court may be pleased to amend the consent to read that the property described as Donyo Sabuk Komarock Block 1/9195 measuring 4 acres be registered separately in the names of Joseph Gacheru Njororo and Janet Mutunga Gacheru, each getting equal share of 2 acres and title to each do issue forthwith.***

c. ***THAT the honourable court be pleased to order the objector to sign all relevant papers to give effect to the confirmation of grant and transfer 2 acres of land parcel described as Donyo Sabuk Komarock Block 1/9195 and a title deed be issued in the names of Joseph Gacheru Njororo.***

d. ***THAT in default of complying with prayer 3 of the order above, the Deputy Registrar, Machakos High court be authorized to sign all documents and instruments of transfer of the property described as Donyo Sabuk Komarock Block 1/9195 to get 2 acres on behalf of the petitioner and a title deed be issued to the petitioner.***

e. ***THAT costs of this application be provided for.***

2. The application is grounded on the grounds that the consent was based on an application that was supported by an affidavit by Benjamin Mutunga Kimani and Joseph Gacheru Njororo that was in agreement that Joseph Gacheru Njororo and Janet Mutunga Gacheru were to share 4 acres of the property in equal proportion of 2 acres each hence the inference would be separate and not joint registration as indicated in the consent. The application was supported by an affidavit deposed by Solomon Okeyo Awino, the advocate on record for the applicant. Counsel averred that an error arose out of a mistake on the part of counsel for the petitioner not appreciating the consequences of joint registration and that Joseph Gacheru Njororo who is ailing would like to sell his portion to cater for medical treatment. A copy of a letter from a medical practitioner was attached.

3. The application is opposed vide replying affidavit deposed by Andrew Makundi, the advocate on record for the objector who averred that he was in court together with counsel for the petitioner and they agreed that the property known as Donyo Sabuk Komarock Block 1/9195 be registered jointly in the names of Joseph Gacheru Njororo and Janet Mutunga Gacheru in conformity with section 14 of the Matrimonial Property Act 2013 regarding joint ownership of property by spouses. It was averred that the petitioner has not demonstrated sufficient reasons for setting aside the consent order of 4.6.2019 and the application be dismissed.

4. The application was canvassed vide written submissions and on record are submissions dated 31.10. 2019 that have been filed by advocates for the applicant. It was counsel's submission that the protestor is the spouse who had refused to accept division of the 4 acres and that Joseph Gacheru Njororo is unable to benefit. Counsel submitted that the consent be set aside for sufficient reason being the misapprehension by the parties hence the application be allowed.

5. There are no submissions on record for the objector.

6. The issues for determination are whether the consent judgement should be set aside; whether the consent should be reviewed/amended and whether the court should grant the orders for the transfer of 2 acres of land known as Donyo Sabuk Komarock Block 1/9195 in the names of Joseph Gacheru Njororo. The evidence on record shows that the grant in respect of the subject estate was confirmed on 18.9.2017 and rectified on 4.6.2019 and hence the court became functus officio in that regard as far as distribution of the estate of the deceased is concerned.

7. The record indicates that there was a notice of change of advocates filed on 7.3.2019 and vide consent dated 4.6.2019 that was signed by both advocates, the application dated 4.6.2019 was allowed and that the property described as Donyo Sabuk Komarock Block 1/9195 was registered jointly in the names of Joseph Gacheru Njororo and Janet Mutunga Gacheru and a title was to issue forthwith.

8. The judgment that was entered by consent was clear and the same need not be disturbed unless the threshold to warrant its setting aside are met. A consent judgement has contractual effect, and the same could only be set aside on grounds that would justify setting aside of a contract as was observed in the case of **Flora N. Wasike v Destimo Wamboko (1988) eKLR**. In **Brooke Bond and Hebig T Ltd versus Malya (1975) EA 265**; it was stated 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 by an agreement contrary to the policy of the Court .....or if consent was given without sufficient material facts or in the misapprehension or ignorance of material facts or in general for a reason which would enable the Court to set aside an agreement.....”*

9. In **Benjoh Amalgamated Limited & Muiri Coffee Estate Limited v Kenya Commercial Bank Limited [2014] eKLR**, the court declined to reopen a case and set aside the consent because the said applicant was represented by counsel and the said counsel was present though later passed on and there was no evidence of bias, or injustice and that if the said counsel had no authority to act, he should have deponed an affidavit to that effect.

10. The evidence on record indicated that counsel Awino participated in the proceedings and the consent was recorded on 4.6.2019. Learned counsel was present and signed against the consent.

11. Even if I were to consider the application, the evidence on record is rather scanty for it to be inferred that there was a misapprehension. This is because there is nothing in the supporting affidavit to show that there are serious issues surrounding the way the consent order was obtained. There is averment to the effect that the petitioner and or his advocate did not understand what the contents of the said consent judgment were. As indicated earlier, the law that governs consent judgments is that they can be set aside for fraud, collusion or any other reason which would enable Court to set aside an agreement. I note that the advocate who signed the consent has not given evidence to show that he entered the same by fraud and/or collusion. At the time the counsel entered the consent he is deemed to have been acting under instructions of his client. The Respondent has duly opposed the application and I am inclined to agree with their sentiments since no evidence has been tendered to establish that there was fraud, mistake or collusion which is against the policy of the court.

12. In this regard, I am unable to find that an illegality did happen or that the process of entering this consent was irregular. I am unable to find any evidence of collusion and acting contrary to the policy of the court. I am unable to find that the consent was signed in ignorance without knowing all the implications and hence there was no misapprehension of what was entailed in the said consent as alluded to by counsel in his submissions. I decline to set aside the consent as alluded in the first limb of prayer 2 in the application.

13. The 2<sup>nd</sup> limb of prayer 2 relates to what amounts to a prayer for review of the consent judgement. The operative law is Section 80 of the Civil Procedure Act that provides:

*“ Any person who considers himself aggrieved –*

*(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or*

*(b) by a decree or order from which no appeal is hereby allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.*

14. Order 45 rule 1(a) and (b) sets out the conditions that an applicant in an application for review must satisfy in order to get the application granted and reiterates the proviso of Section 80(a) and (b) of the Civil Procedure Act. The application is filed by the advocate on record for the petitioner and the advocate has given evidence in support of the application hence I would need to be satisfied that the said advocate is a person who considers himself aggrieved.

15. The expression “person aggrieved” was considered to mean a person who has been injuriously affected in his rights or has suffered a legal grievance in **Yusufu v Nokrach (1971) EA 104** where it was held that the term “any person considering himself aggrieved” under what is Section 80 of the Civil Procedure Act meant a person who has suffered a “**legal grievance**” What then is a “legal grievance”? Is it a grievance by the definition and standard of law? This expression was adopted from the case of **Ex parte Side Botham in re Side Botham (1880) 14 Ch. D 458 at 465** and the judgment of James L.J where he held that:

*“the words “person aggrieved” do not really mean a man who is disappointed by a benefit which he must have received if no other order had been made: A person aggrieved must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully affected his title.”*

16. From a reading of the above holding the word "disappointed" also imports the subjective test consideration in the phrase. It would follow that the expression "person aggrieved" is not completely subjective but imports an objective test qualified by use of the expression "a person who has suffered a legal grievance".

17. It also suggests that it is a person against whom a decision has been pronounced which wrongfully deprived him of something or wrongfully affected his title. This expression was specifically the subject of comment by Lord Denning in the Privy Council case of **Attorney General of Gambia vs. N'jie [1961] AC P 617 at page 634** where he held that:

***“But the definition of James L.J. is not to be regarded as exhaustive. Lord Esher M. R. pointed out in ex parte. Official Receiver in re Reed, Bowen & Company that the words “person aggrieved” are of wide import and not subject to a restrictive interpretation. They do not include of course a mere busy body who is interfering in things, which do not concern him, but they do include a person who has a genuine grievance because an order has been made which prejudicially affects his interests.”***

18. Lord Parker C.J, in **Ealing Borough Council v Jones [1959] 1 All E.R. 286** found that a person aggrieved is not a person who is disappointed or annoyed at the decision. In **R v London Court Sessions Ex Parte Westminster City Council (2) [1951] 1 All E.R. 1032** per judgment of Lord Goddard C.J. , it was found that a prosecutor was never a person aggrieved in a quasi -criminal case when he is annoyed at the finding that what he thought was a breach of the law was not a breach of the law. He concluded that the authority would be a person aggrieved if a burden was placed on them. In other words an order that required them to provide dustbins for instance made the authority an aggrieved person because it by the order would be required to provide dustbins in the place of the owner of the premises. The authority however dealt with an appeal from the decision of a Magistrate by the authority which had served a notice that had been quashed by the magistrate.

19. The deponent herein was at all material times the advocate on record for the petitioner. He is not a party to the suit and I am at pains to understand why the person who is at the root of the dispute has chosen not to give evidence. In light of the finding in the above authorities, I find that the deponent is not a person aggrieved within the meaning of section 80 or the Civil Procedure Act and Order 45 of the Civil Procedure Rules and without the said deponent providing proof by way of evidence in court that he suffered a legal grievance, his affidavit at best amounts to evidence at the bar from counsel which is unacceptable. It would have been appropriate for the client himself to swear the affidavit.

20. In all review cases, the Applicant should prove discovery of new matters or evidence which the Applicant alleges was not within his or her knowledge or could not be adduced by him or her when the decree or order was passed or made. During an application for review as per Section 80 of the Civil Procedure Act, it ought to be established that fresh evidence has been discovered which would have had material effect on the judgment or decision; that the evidence has been discovered since the judgment or decision; that such evidence could not with due diligence have been discovered before and that such evidence does not comprise events that have occurred for the first time after delivery of judgment.

21. I note from this case that the deponent had averred that the petitioner required to sell his portion of land for treatment. The letter that indicated that he was in need of treatment was authored in 2019 well after the consent was recorded and I am not convinced that this new evidence warrants a review. This means that the 2<sup>nd</sup> limb of prayer 2 fails.

22. Prayer two having failed, the remaining prayers that were hinged on prayer two fall on the wayside and I decline to grant the same. The parties herein are reported to be a couple and are expected to be candid with each other over the use of their properties. If indeed the applicant needs medication iam sure that the spouse will be ready and willing to accommodate him and vice versa.

23. The upshot is that the instant application lacks merit and is dismissed with no order as to costs.

It is so ordered.

**Dated and delivered at Machakos this 22<sup>nd</sup> day of January, 2020.**

**D. K. Kemei**

**Judge**