



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

WINDING UP CAUSE NO. 1 OF 2005

ABDUL AZIZ KANJIPLAINTIFF

VERSUS

CHETAMBE ESTATE LTDDEFENDANT

R U L I N G

M/s Were & Company Advocates for the Appellant Janet Eloise Mwangale filed this application against the Respondents Abdul Aziz Kanji (Petition in Winding up Cause) and Chetambe Estate Ltd (Respondent in Winding up Cause) seeking the following orders:

- 1. That the serviced of this application be and is hereby dispensed with at the 1st instance due to urgency.*
- 2. That the Respondents be and are hereby restrained from selling, wasting, disposing off property belonging to CHETAMBE ESTATE LTD pending the hearing and determination of this application interpartes.*
- 3. That the consent order herein dated 30th day of September 2009 be and is hereby reviewed, varied and/or set aside.*
- 4. That the Applicants share in land parcel no. LR NO. 3801/3 be specified and an order be issued directing the land to be surveyed, hived off and transferred into names of the Applicant.*
- 5. That costs of this application be in the cause.*

The application is premised on the grounds that:

- 1. The Applicant is a shareholder to the Respondent Chetambe Estate Ltd.*
- 2. The Directors of the company are the Petitioner herein together with one ELIJAH WASIKE MWANGALE now deceased.*
- 3. This cause was concluded vide a consent order which stated inter alia that 230 acres one of the company's land LR NO. 3801/3 be curved out and be transferred to the Petitioner.*
- 4. The Petitioner was on his part ordered to cease being a member of the company and to execute the share transfer from an do the necessary documents in favor of the Estate of the late ELIJAH WASIKE MWANGALE and/or the Applicant.*
- 5. The Applicant was not aware and/or a party to the consent order and did not instruct Counsel on record to enter into the said consent order.*
- 6. The consent order was obtained through misrepresentation, on disclosure and active concealment of material facts.*

The application is supported by the affidavit of Janet Mwangale the Applicant who depones that she is a shareholder of the company which his two directors Abdul Aziz Kanji and Elijah Mwangale deceased whose estate is administrated by Salome Mwangale. She deponed that a consent was entered between the directors which consent was unlawful and done without disclose and/or concealment of all material facts. Specifically in Paragraph 10 she depones:

“That I did not instruct any Counsel to enter into the said consent and the same was recorded without my knowledge, consent or instructions”.

The Respondent opposed the application by filing grounds of opposition.

By consent the application was canvassed by way of written submissions Mr. Were for the Applicant submitted that the Applicant is a shareholder of the company. A consent order in respect of the winding up was entered between the parties which had an effect of transferring 230 acres of land to the Petitioner without her consent. He submits that the said consent was obtained fraudulently in collusion with attached parties and was based on in satisfaction facts. He submits that the applicant did not instruct any advocate to represent her and as such any action by that advocate does not bind her.

M/s Gicheru for the Petitioner/Respondent submitted that the Counsel M/S Were Advocates are not properly on record, because the applicant having previously been represented by Wandabwa & Company Advocates, and judgment had been entered, counsel would only properly come on record by consent with previous advocate or with leave of the court. he submits that having not complied with Order 9 Rule 9 Civil Procedure Rules, the Counsel is not properly on record and therefore cannot purport to file and prosecute this application. Counsel further submits that this was a consent entered by the parties who are bound by the same. Finally Counsel submits that conditions for setting aside a consent have not been demonstrated in this application and the application ought to be dismissed.

The brief history of this cause is as explained by **Sergon Judge** in the Ruling dated 28/10/2005 thus:

“From the pleadings placed before this Court I gather the history of this matter as follows: On the 22nd day of January 1971, Abdul Aziz Kanji (the Petitioner), Elijah Wasike Mwangale and Janet Eloise Mwangale jointly cause Chetambe Estates Ltd to be incorporated with the main objective of purchasing or otherwise acquiring moveable and immovable property to enable it carry out the business of farming. Pursuant to that objective the company purchase L.R. NO. 4164 (L.R. NO. 3801/3) measuring 950 acres from the Lands Ltd using a loan advanced to the company by Kenya Commercial Bank Ltd. The company also purchased a considerable number of moveable assets.

It would appear Elijah Wasike Mwangale was left by the other directors to run the day to day affairs of the company until he passed away of 25th November 2004. Upon the demise of Elijah Wasike Mwangale, the petitioner took steps to establish the estate of affairs of the company. The Petitioner discovered that 450 acres was excised from L.R. NO. 3801/3 and sold to Hillbrooke Dairies Ltd without his knowledge on 25/2/98. He also discovered that the company had been struck off the register of companies by a gazette Notice of 28th July 1983. The Petitioner caused the company to be restored to the register of companies in a gazette Notice dated 18th February 2005. The Petitioner now complains that most of the activities of the company were done in secrecy without his knowledge. In view of these developments he then petitioned for the winding up of the company.”

At the inception of this cause by Aziz, the Petitioner was represented by the firm of Kalya & Company Advocates who filed the petition. The firm of Langat Wandambwa Advocates appeared for Janet Eloise Mwangale as shareholder and Salome Mwangale and Andrew Sarai Mwangale as administrators of the estate of Elijah Wasike Mwangale (deceased) by notice of appointment dated 9/2/2007 and filed in Court on 12/2/2007.

By consent made on 24/9/2009 between M/s Gicheru & Company Advocates for the Petitioner and M/s Wandambwa & Company Advocates for the Estate of the late Elijah Wasike Mwangale and Janet Eloise Mwangale; it was agreed.

“By Consent;

- a) Two Hundred and thirty (230) acres out of the said Company’s land parcel number L.R No. 3801/3 be curved out and be transferred to ABDUL AZIZ KANJI the Petitioner herein.
- b) A joint survey be carried out to equitably curve out the said two hundred and thirty (230) acres of the land and that a transfer of the land be affected upon such survey.
- c) The party in whose possession the title of L.R. No. 3801/3 to forthwith forward the same to the advocates on record to facilitate the aforesaid subdivision and transfer.
- d) Upon transfer of the said 230 acres of land to Abdul Aziz Kanji, he will cease from being a member of the said Company to wit Chetambe Estates Limited and shall execute the share transfer form and other necessary documents in favour of the Estate of the late Elijah Wasike Mwangale and/or Janet Mwangale.
- e) Upon compliance with the terms of this consent, this cause shall be marked as settled with Abdul Aziz Kanji having no further or other claims against the Company, the Estate of Elijah Wasike Mwangale or Janet Mwangale and each party shall bear his or her own costs.

Dated at Edoret this 24th day of September 2009.

M/S GICHERU & COMPANY

ADVOCATES FOR THE PETITIONER

M/S WANDAMBWA & COMPANY

ADVOCATES FOR THE ESTATE OF THE LATE

ELIJAH WASIKE MWANGALE AND JANET ELOISE MWANGALE.

The applicant in this application for setting aside, has stated as her main reason that she had not instructed Langat Wandabwa Advocate to represent her. She alleges that any purported representation was fraudulent. This in my view is a serious allegation bordering on commission of a crime. The applicant has not stated what steps she has taken against the Law Firm. Further she has not stated in her affidavit who had been representing her since this cause was filed 15 years ago in 2005. I am therefore satisfied that the Firm of Langat & Wandambwa were properly on record to represent the applicant and had full instructions from the appellant which included to enter into a consent as the one filed and adopted by court.

The grounds upon which a Court can set aside a consent order are now well settled. The court can only set aside a consent entered by the parties if it is demonstrated that;

- i. The consent was obtained fraudulently***
- ii. It was entered in collusion between affected parties***
- iii. Where an agreement is contrary to the policy of the Court***
- iv. Where the consent is based on insufficient material facts***
- v. Where the consent is based on misapprehension or ignorance of material facts.***
- vi. Any other sufficient reason.”***

The applicant has not demonstrated that there was collusion between the petitioner and the administrators of the estate of Elijah Mwangale nor has any fraud been established. I do not find that the consent as made was contrary to the policy of this Court. In the result I do not find any ground upon which to set aside the consent dated 24/9/2009 and adopted as order of the Court. in the result I find no merit in this application dated 22/11/2017 and dismiss it with costs

Dated at Bungoma this 5th day of February, 2020.

S. N. RIECHI

JUDGE