



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

SUCCESSION CAUSE NO. 2363 OF 2009

IN THE MATTER OF THE ESTATE OF NOAH

MUTURI KINUTHIA alias MUTURI KINUTHIA (DECEASED)

PETER KINUTHIA MUTURI.....APPLICANT

VERSUS

MARY WANJIRU KINUTHIA.....1ST RESPONDENT

MARGARET NJOKI THAIRU.....2ND RESPONDENT

BERNARD KINUTHIA MUTURI.....3RD RESPONDENT

RUTH WAITHERERO MUTONGA.....4TH RESPONDENT

RULING

1. In Summons dated 9th April, 2018 the Applicant herein, Peter Kinuthia Muturi, moved this Court seeking orders that the Court do review and set aside or vacate the Consent Order issued on 28th March, 2018. The application is premised on grounds on the face thereof and is supported by the Affidavit of Peter Muturi Kinuthia sworn on 9th April, 2018. The Applicant deponed that the said orders curtail, frustrate and make it impossible to carry out his duties as the 2nd Administrator mandated under **Sections 82 and 83** of the **Law of Succession Act**.

2. The Applicant averred that the said Consent Order was incapable of being enforced since the property known as Dagoreti/Kangemi/32 is owned by persons who are not party to the proceedings herein. Further, that neither the Applicant nor his Advocate on record knew the basis or the reasons for which the order was issued.

3. It was the Applicant's contention that the Consent Order was counterproductive and would lead to wasting of the property. Further that the rental income from the property was needed to service the loans taken to complete the development and pay the Contractor a sum of 1 million shillings.

4. In a Supplementary Affidavit dated 18th January, 2019 the Applicant deponed that the advocate holding brief had limited instructions to take a hearing date only and was not accorded time to consult with the advocate on record prior to the recording of the Consent Order. It was the Applicants argument that the Consent Order was obtained contrary to the policies of the Court and principles of law and the same should be set aside.

5. In submissions dated 18th January, 2019 the Applicant referred the Court to the case of **Hirani vs Kassam (1952) 19 EACA 131** and submitted that the said consent cannot bind the Applicant, or be enforced against him since the Applicant and/or his Counsel were not party to the consent order. If at all Mr. Keya, the Advocate holding brief did participate in the making of the consent order, then he did it in misapprehension, or ignorance of the material facts of the case, making the said consent order defective. It was the Applicant's contention that the subject property was a gift given to him by the Deceased during his lifetime and therefore qualifies as a gift *inter vivos*.

6. The Application is opposed by Mary Wanjiru Kinuthia and Margaret Njoki Thairu in a Replying Affidavit dated 25th April, 2019 wherein both beneficiaries deponed that the property subject matter of the Application forms part of the estate of the Deceased and the Applicant has had use and benefit of the property to the exclusion of all other beneficiaries hitherto.

7. Both beneficiaries contended that the Applicant had no mandate to continue with the development cited as the same amounted to intermeddling with the estate of the Deceased. Further, that the Applicant had no right to the property other than that which the Court will eventually determine.

8. In the written submissions of both beneficiaries dated 11th February, 2019, it was submitted that the order was recorded by consent of all parties. Further, that all the parties were represented including the Applicant, who's Advocate Mr. D. B. Osoro had instructed another advocate, Mr. Keya to hold his brief.

9. The beneficiaries challenged the Applicant's allegation that the Advocate holding brief on the date the consent order was recorded had no instructions and submitted that the Applicant's allegations had no basis owing to the fact that Mr. Keya had not sworn an Affidavit as to the extent of his instructions. The beneficiaries cited the case of **S M N v Z M S & 3 Others [2017]** wherein the Court made reference to the Ugandan case of **Lenina Kemigisha Mbabazi Star Fish Limited vs Jing Jeng International Trading Ltd [HCT-00-MA-344-2012]** and Court stated:

“The court cannot set aside a consent judgment when there is nothing to show that counsel for the applicant has entered into it without instructions. Furthermore, that even in cases where an advocate has no specific instructions to enter a consent judgment but has general instructions to defend a suit, the position would not change so long as counsel is acting for a party in a case and his instructions have not been terminated, he has full control over the conduct of the trial and apparent authority to compromise all matters connected with the action.”

10. The 1st Administrator, Bernard Kinuthia Muturi, filed submissions dated 8th February, 2019 wherein he submitted that the continuance of the said consent order will help all parties herein towards the quick finalization of this Court matter. Further, that the 2nd Administrator was dully represented by able Counsel, Mr. Keya, whom Mr. Osoro instructed on the material day to attend Court on his behalf.

11. It was the 1st Administrator's submission that the Applicant had not laid down a legal basis sufficient to warrant the setting aside of the stated consent order herein. Further, that it is trite law that a Counsel who holds brief should have full instructions to deal with the matter for all intents and purposes. Counsel for the Applicant cannot therefore choose which actions of a Counsel he deputized to hold brief on his behalf to abide by.

12. Ruth Waittherero Mutonga who is also a beneficiary filed submissions dated 4th March, 2019 wherein she fully associated herself with the submissions of her sisters, Mary Wanjiru Kinuthia and Margaret Njoki Thaitu. She further submitted that the estate should be preserved until the determination of the suit as ordered by the Court and that the Applicant's position that he is adding value to the estate amounts to intermeddling.

Analysis and Determination

13. Having considered the application, the rival submissions and the legal authorities annexed in support, the issue arising for determination is whether the consent order recorded on 28th March, 2018 should be reviewed and set aside or vacated.

14. The Court of Appeal in **Isaac Kinyanjui Njoroge v National Industrial Credit Bank Limited [2018] eKLR** reiterated the principles for setting aside a consent order as set out in **Flora N Wasike v Destimo Wamboko [1982-88] 1 KAR 625** when it 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.”

15. The Applicant's argument is that the said Consent Order is defective and unenforceable owing to the fact that the Advocate holding brief did not have instruction to enter into the said consent.

16. In the case of **Patrick Kenneth Muthuri & 2 others vs. Richard Karimi Nderitu (2015) eKLR** the Court held as follows:

“It is always presumed that an advocate who rises up in court and informs the Presiding Judge that he or she is holding brief has full instructions. It is therefore the responsibility of the principal advocate to fully brief his or her agent advocate.”

17. The advocate, Mr. Keya, who entered into the consent order of 28th March, 2018 had general instructions to act for the Applicant. If indeed the said advocate did not have instructions to enter into consent as alleged by the Applicant, he should have been enjoined in these proceedings to explain by way of Affidavit evidence the circumstances that led to the recording of the consent order of 28th March, 2018. That did not happen.

18. In that case of **Ismail Sunderji Hirani vs. Noorali Esmail Kassam [1952] 19(1) EACA** the East African Court of Appeal held 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.”

19. The Applicant has also argued that the property, Dagoretti/Kangemi/32, as described in the Consent order is owned by persons who are not party to the suit before the Court and that the property subject to these proceedings is in fact Dagoretti/Kangemi 32(a). Further, that the subject property was a gift bequeathed to him by the Deceased during his lifetime. The other beneficiaries on the other hand have contested the Applicant's averments and argue that the subject property forms part of the Deceased's estate yet the Applicant has been solely benefitting from the proceeds thereof.

20. The spirit of the consent order recorded on 28th March, 2018, was and is to allow for the preservation of the rental income that was being collected by the Applicant from the subject property, so that it may be divided amongst the rightful beneficiaries upon determination of the main suit. The general principle is that where there are serious conflicts of facts, the trial court should maintain the status quo until the dispute has been decided at the trial. [See **Ougo & Another vs. Otieno [1987] KLR 364**]

21. I am of the considered view that in the circumstances of this case, it is necessary and in the interest of justice to preserve the property subject matter of this suit, particularly given the conflicting facts as alleged by the parties to the Application herein. The mere fact that the description of the property as captured in the consent order describes the larger property Dagoretti/Kangemi 32 and not the subdivision subject matter to the suit, Dagoretti/Kangemi 32(a) is a simple typographical error not sufficient to persuade the Court to exercise its discretion to review and set aside or vary the Consent Order dated 28th March, 2018.

22. In view of the foregoing, I reach the conclusion that there is no merit in the application dated 9th April, 2018 and consequently hereby dismiss it with costs.

SIGNED DATED and DELIVERED in open Court this 11th day of June, 2019.

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L. A. ACHODE

JUDGE

In the presence of.....Advocate for the Applicant

In the presence of.....Advocate for the 1st and 2nd Respondents

In the presence of.....Advocate for the 3rd Respondent

In the presence of.....Advocate for the 4th Respondent