



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

SUCCESSION CAUSE NO. 1493 OF 2003

IN THE MATTER OF THE ESTATE OF KIVINDYO ISAI (DECEASED)

STEPHEN WAMBUA KIVINDYO..... 1ST APPLICANT/1ST RESPONDENT

ALICE NDUKU WAMBUA2ND APPLICANT/2NDRESPONDENT

VERSUS

SEMA STAGE MINIBUS OWNERS SAVINGS

& CREDIT SOCIETY LIMITED (I/PARTY) RESPONDENT/APPLICANT

RULING

1. On 17th March 2014 a grant of letters of administration jointly held by Stephen Wambua Kivindyo and Grace Nyambura Kivindyo in respect of the estate of Kivindyo Isai was confirmed. Among the assets distributed was L.R. No. 209/233/6 Kyethivo House which was to be sold and proceeds there from distributed equally between eleven units with Grace Nyambura Kivindyo (widow) having the first option to purchase subject to parties' agreement on the value and the valuation to be done within 30 days.

2. Consequently, the property was put on sale and Sema Stage Minibus Owners Savings and Credit Co-operative Society entered into a sale agreement with Stephen Wambua Kivindyo the 1st administrator alone to the exclusion of the 2nd administrator Grace Nyambura for the purchase of the said property at Kshs.100,000,000/=.

3. Subsequently, a down payment (deposit) of 10% equivalent to Kshs.10,000,000/= was made to Mutua Mboya Advocates representing Stephen Kivindyo (1st administrator) as the vendor.

4. That out of the Kshs.10,000,000/= deposit, Mutua Mboya Advocate disbursed 2.5 million to the administrator Stephen Kivindyo who in turn allegedly distributed the same to the beneficiaries as follows:

(a) Stephen Kivindyo 500,000/=

(b) Gideon Kivindyo 400,000/=

(c) Peter Isai Kivindyo 300,000/=

(d) Henry Kimatu 300,000/=

(e) Veronica Kivindyo 200,000/=

(f) Pamela Kivindyo 200,000/=

(g) Mary Mutinda 200,000/=

(h) David Kivindyo 200,000/=

(i) Property Valuer 250,000/=

5. Prior to the sale and distribution of part of the sale proceeds, Grace Nyambura the widow (2nd administrator) went to court seeking to be given priority to buy the property and when she failed to raise the purchase price it was offered to a 3rd party.
6. Grace Nyambura having refused to sign the sale agreement and any transfer documents in favour of Sema Sacco, the sale transaction was frustrated. Consequently, the purchaser (Sema Sacco) filed an application before this court on 22nd May 2018 seeking orders that:

(1) Spent.

(2) That the honourable court do issue a temporary injunction against the administrators of the estate of the late Isai Kivindyo from the intended sale of property L.R. 209/233/6 Kyethivo House pending hearing and determination of the application.

(3) that the administrators of the estate be ordered to refund the deposit of Kshs.10,000,000/= plus costs incurred in valuing the property and interest thereof.

(4) That tenants in occupation of the house in the said property be directed to pay rent to the applicants.

Subsequently the orders sought were issued on interim basis pending hearing and determination of the application.

7. Before the application dated 22nd May 2018 could be heard interpartes, parties entered into a written consent thus compromising the hearing and determination of the said application in the following terms:

1. That the interested party's application brought under certificate of urgency dated 22nd May 2018 by Mulandi Kisabit and Associates, be marked as settled in the following terms:

(a) That the sum balance of the purchase price less 10% deposit (since paid) to be deposited in a joint account between the 1st administrator's advocates Mutua Mboya Nzisi and Co. and the 2nd administrator's advocates Muoki Mutua and Associates, to facilitate release the completion documents to the purchaser's advocates J.M. Mugo and Co. Advocates and upon their further undertaking to the interested party's advocates Mulandi Kisabit and Associates in terms of Para 2.

(b) That upon completion by the purchaser's advocates of the successful registration and transfer of title in favour of the purchaser, the advocates for the administrators prior to any distribution, hereby undertake to jointly release the sum total of Kshs.10,000,000/= to the Advocates of the interested party herein Mulandi Kisabit and Associates in furtherance of settlement of the interested party's claim.

(c) That the sum of Kshs.10,000,000/= herein above stated shall be deducted from the shares due to the 1st administrator herein Stephen Wambua Kivindyo and his fellow beneficiaries and siblings.

8. On 3rd September 2018, Sema Stage Minibus Owners Savings and Credit Co-operative Society Ltd filed a notice of motion dated 29th August 2018 seeking a temporary order freezing the account of Stephen Wambua Kivindyo account No. [xxxx] Stanbic Bank Buruburu Branch where the proceeds of the sale of property No. 209/233/6 Kyethivo House sold to a 3rd party as per the consent agreement was deposited.

9. The applicant further prayed for orders directing the 1st respondent to refund a deposit of the purchase price of Kshs.10,000,000/= plus cost of valuation and interest thereof. It is the applicant's averment that the property having been sold to a 3rd party and money deposited in the 1st applicant's account, they should be refunded their money. Consequently, the Court issued exparte orders freezing the stated account on 3rd September 2018 and filed the matter for interpartes hearing.

10. Before the hearing of the said application could take off, Marie Muthoni daughter to the deceased filed a Chamber Summons dated 5th September 2018 against Nyambura Kivindyo (1st respondent), Stephen Wambua Kivindyo (2nd respondent) and Peter Kivindyo Isai son to Nyambura Kivindyo seeking orders as follows:

1. Spent.

2. That pending the hearing and determination of this application, this honourable court be pleased to issue preservative orders over account No. [xxxx] in the name of Stephen Wambua Kivindyo held at Stanbic Bank Buruburu Branch and account No. [xxxx] in the name of Peter Kivindyo Isai held at Barclays Bank Pangani Branch to restrain the 2nd and 3rd respondents, their agents and or servants from withdrawing, accessing, transferring or in any other way dealing with the funds in the said accounts.

3. That this honourable court be pleased to order the respondent to file in court a detailed account and documentary proof of all sale proceeds received, expenses incurred and preferred mode of distribution from the sale of the estate property (land reference No. 209/233/6).

4. That this honourable court be pleased to order the respondents to disburse to the beneficiaries their rightful share of sale proceeds of the estate property namely L.R. 209/233/6.

5. That the respondents be condemned to pay costs.

11. In support of that application, the applicant confirmed through the affidavit in support that the property in question had been sold at KShs.110,000,000/= to a 3rd party and that on 23rd August 2018 the 2nd and 3rd respondents received some substantial amount of money upon completion of sale of the said property. She claimed that the 2nd and 3rd respondents had misappropriated the money and have refused to release to the beneficiaries their rightful shares.

12. In a swift turn of events, on 17th September 2018, Stephen Wambua Kivindyo the 1st administrator and Alice Nduku Wambua his wife filed a notice of motion of even date seeking orders that:

(1) Consent order made on 6th June 2018 in this honourable court be reviewed and the same be vacated.

(2) That the law firm of Mutua Mboya and company be ordered to refund the interested party herein the sum of 7.5 million being the balance of 10 million deposited with it by the interested party as a 10% sale deposit for sale of L.R. No. 209/233/6 Nairobi.

(3) That the orders of this court dated 3rd September 2018 freezing the two applicant's joint account No. [xxxx] Stanbic Branch Buruburu branch be vacated forthwith.

(4) Costs of this application be provided for.

13. The basis of this application is that the KShs 10,000,000/= deposit claimed by the interested party was deposited in Mutua Mboya's Advocates' account out of which a sum of 2.5 million only was released to nine beneficiaries. That his joint account with his wife was illegally frozen as the KShs.7.5 million is still held by the firm of Mutua Mboya who acted for him as the vendor and who should be ordered to refund the money and the rest of the beneficiaries refund their shares.

14. That the firm of Mutua Mboya did not act in the best interest of the 1st applicant. He however acknowledged that after the property was sold to a 3rd party, he retained 2.5 million deducted from the beneficiaries' disbursements to cater for the interested party's money. That Mutua Mboya Advocates should be ordered to pay a sum of KShs 7.5 million which he has never released to the estate.

15. On 3rd October 2018, the ex parte preservative orders sought in the notice of motion dated 5th September 2018 were granted pending hearing and determination of the application.

16. On 4th December 2018 parties agreed by consent to proceed with the hearing of the applications dated 17th September 2018 and 29th August 2018 as they were interrelated and the outcome of one would affect the other.

17. Basically, the application dated 17th September 2018 is seeking review or setting aside of the consent order dated 6th June 2018 and an order directing the firm of Mutua and Company Advocate to refund a sum of KShs.7.5 million to the interested party and setting aside the orders freezing an account jointly held by the 1st applicant (1st administrator) with his wife Alice Nduku Wambua(2nd applicant). The application is premised on grounds on the face of it and affidavit in support sworn by Stephen Wambua Kivindyo on 17th September 2018.

18. The applicant averred that, after entering into a sale agreement with the interested party for the purchase of the land in question, the interested party deposited a deposit a sum of KShs.10 million with Mutua Mboya his advocate as a vendor. That Mutua Mboya only released KShs 2.5 million to him and his siblings which money was shared out and the balance of KShs 7.5 million is still with Mutua Mboya whom he wants ordered to release the same to the interested party.

19. He further claimed that the consent order entered by Mutua Mboya on his behalf to refund a sum of KShs 10,000,000/= to the interested party was meant to escape liability. He however admitted that the property has since been sold to a 3rd party and money shared out to all beneficiaries save for KShs.8,850,000/= lying in his frozen account being the share of his brother David Muisyo Kivindyo plus KShs. 2.5 million being deductions from beneficiaries who benefited from the interested party's part of deposit.

20. He contended that, a sum of KShs.4,000,000/= in the frozen account belongs to his wife and that 2.4 million is his money which was in the account before the alleged proceeds was deposited in the account.

21. In response, the interested party through the firm of Mulandi Advocates filed grounds of opposition dated 21st March 2019 and a replying affidavit sworn by himself on 21st March 2019 opposing the application on grounds that the consent order was properly and voluntarily entered without any fraud or coercion. Mr. Mulandi contended that, the applicants do not deny selling the plot to his client and a sum of KShs 10 million paid as deposit. That the consent order directing that the sale proceeds from the 3rd party purchaser was to be deposited in the joint account of the administrators' advocate's account for onward transmission of KShs 10 million to the interested party's account was not honoured as the administrators opted to do direct transaction and receipt of the sale proceeds from the purchaser and eventually distributed the proceeds amongst themselves leaving the interested party without anything. They therefore claimed refund of the full purchase price plus interest of KShs.4,800,000/=.

22. On the other hand, Mr. Francis Mutua Mboya filed a replying affidavit sworn on 15th October 2018 in which he admitted receipt of Kshs.10 million deposit from the interested party on behalf of the 1st administrator (1st applicant) and that he distributed and utilized the whole amount as per the 1st applicant's instructions.

23. Mr. Mutua Francis claimed that he released the entire amount to the beneficiaries of the estate and 3rd parties as per the 1st applicant's instructions.

24. He further stated that the consent order entered on 6th June 2018 was with the express instructions of the 1st administrator (1st applicant). He averred that the 1st administrator received Kshs 70 million from the sale of the plot and was supposed to refund Kshs 10 million first to the respondent before sharing the balance to the beneficiaries.

25. In his further affidavit sworn on 29th March 2019, the 1st applicant denied the allegation that Mr. Mutua Francis had disbursed the entire Kshs.10 million. He claimed that he had paid him a legal fee of Kshs.1.7 million yet his bill was taxed at Kshs 304,396 and no appeal has been filed.

26. During the hearing, M/s King'oo for the applicant merely reiterated the averments contained in the affidavit in support. Mr. Mulandi also adopted the averments contained in his replying affidavit and grounds of objection to the application dated 17th September 2018 and also affidavit in support of their application dated 29th August 2018.

27. Mr. Mutua Mboya also relied on the contents contained in his affidavit in support. He wondered why he was in court yet he was not a party in a succession cause which he ceased acting for the administrators long time ago.

28. He urged the court to find that he was wrongly served and if there was any claim of any money received as an Advocate on behalf of the 1st applicant, then he should be sued in a civil suit for recovery and not in this file.

29. Mr. Mutua dismissed the claim by the 1st applicant alleging that he had no knowledge of the consent order yet out of that consent the land was sold to Kibe and the proceeds received by the applicant shared out.

30. I have considered the applications herein, supporting affidavits, responses thereto and oral submissions. Issues that emerge for determination are:

(a) Whether the consent order signed on 6th June 2018 is null and void for lack of the 1st applicant's knowledge.

(b) Whether the 1st applicant sold and received a deposit of 10 million on behalf of the estate in respect of LR 209/233/6.

(c) Whether this court can order Mr. Mutua Francis to refund a sum of 7.5 million to the interested party.

(d) Whether this court can order for the refund of Kshs.10,000,000 to the interested party.

31. There is no dispute that according to the confirmed grant L.R. 209/233/6 was to be sold and proceeds shared amongst 11 beneficiaries of the estate. It is common ground that the 1st applicant (1st administrator) did enter into a sale agreement albeit illegally without the 2nd administrator's participation for the sale of the said land through the firm of Francis Mutua and Co. Advocates as his advocate and a deposit of Kshs.10 million paid.

32. Following the frustration of the sale transaction as the 2nd administrator refused to sign necessary transfer forms, parties through a consent recorded in court on 6th June 2018 agreed to sell the said land to a 3rd party and the sale proceeds be deposited in a joint account of both administrators' Advocates one Mutua Mboya representing 1st applicant and Nzioki Mutua representing the 2nd administrator and that before beneficiaries would share the sale proceeds, the interested party's deposit be refunded first.

33. Contrary to that agreement, the 1st administrator and his step brother a son to the 2nd administrator by passed everyone and ignored the consent agreement by having the sale proceeds paid to their accounts directly and straight away shared out the money before refunding the interested party's deposit.

34. The 1st applicant is now claiming that he had not given any instructions to his advocate Mr. Francis. Mutua Mboya to enter into any consent hence the prayer to set it aside. When can a court vitiate a consent order?

35. In the case of Samuel Mbugua Ikumbu vs Barclays Bank of Kenya Ltd (2015) e KLR the Court of Appeal succinctly set out conditions upon which a consent order can be set aside as follows:

“for a consent order to be vitiated there must be grounds that allow a contract to be vitiated. These grounds include but not limited to fraud, collusion, illegality, mistake, an agreement being contrary to the policy of the court, absence of sufficient material facts and ignorance of material facts”.

36. The 1st applicant has not proved any of the above ingredients to persuade this court set aside the consent order. It is inconceivable that the 1st applicant is seeking vitiation of the consent to which he is a beneficiary. It is the consent order that lifted an injunction issued in

favour of the interested party restraining any dealings in LR 209/233/6 before being refunded their money. Through the said consent the ex parte injunction order was lifted thus enabling the 1st respondent to sell the property on the understanding that his deposit was to be refunded first. Unfortunately, the 1st respondent did the opposite. He even went ahead and had the sale proceeds paid to his account directly instead of payment to a joint account managed by the administrators' advocates.

37. Mr. Fred Mutua Nzioki representing the second administrator in his affidavit filed on 15th October 2018 confirmed as such thus blaming the administrators for going against the consent. The 1st applicant is being dishonest and cannot be heard to deny knowledge of the existence of the consent order. To that extent it is my finding that the consent order is valid and binding and to set it aside will amount to perpetuating fraud against the interested party. He who seeks equity must approach the court with clean hands. The first applicant's hands are tainted hence cannot enjoy the fruits of equity.

(b) Whether the 1st administrator sold the land and received a deposit of 10 million from the interested party

38. It is not in dispute that it was the 1st applicant alone who purported to sell the land to the interested party to the exclusion of the 2nd administrator. He instructed Francis Mutua to sell the property and on his behalf Mutua received 10 million. This is not in dispute. The only bone of contention is how much did Mutua Francis disburse to the estate or the 1st respondent. According to Mutua F. he does not owe the 1st applicant anything as he disbursed the full amount as directed by the 1st applicant.

39. Mr. Mutua wondered why he was being drag to court in a case to which he is not a party. I do agree with Mr. Mutua that his relationship is fiduciary in nature with the 1st applicant on account of advocate – client relationship. If there is any monies received on behalf of the 1st applicant by F. Mutua the only recourse available is for the 1st applicant (1st administrator) to file a civil suit against Mutua for recovery. To entertain the recovery claim in this succession case will be un procedural as it will amount to opening a fresh suit within another and therefore embarrass the regularity and orderliness of the proceedings thereby introducing multiple parties with different causes of action.

40. For those reasons, this court cannot order Mr. Mutua Mboya to pay any money as that will be a matter of evidence which will be subjected to cross examination and a determination made on merit. Alternatively, if there is any complaint on non-disbursement of the sale proceeds, the 1st applicant can approach the Law Society of Kenya or Complaints Commission for redress.

(c) Whether the 1st interested party is entitled to a refund of his money

41. The interested party was by an order of the court through a consent order promised to be paid from the sale proceeds of the property. The property has since been sold to a 3rd party by the administrators and money spent. The 1st applicant is duty bound to refund the money to the interested party and thereafter seek recovery from the rest of the beneficiaries he may have wrongly paid or sue Mr. Mutua Francis himself whom he alleges has refused to refund Kshs 7.5million to the interested party. It is unfortunate that the money sought to be refunded was out of a transaction the 1st applicant singly entered into through an unsigned sale agreement with the interested party without the knowledge of the second administrator.

42. For those reasons, the consent order must be honoured and over Kshs.10 million being part of the sale proceeds already deposited in the 1st applicant's joint account with his wife now frozen, will be used to refund the deposit of Kshs.10,000,000/= to the interested party. Since the consent order had no provision of interest and other expenses, I will order a refund of Kshs.10 million only from the frozen account. In any event, the interested party wrongly entered into an unenforceable contract by paying a deposit on account of a sale agreement that was not signed by the 2nd administrator. Recovery of other expenses can be done through a separate suit or remedy and not through this succession cause.

43. Accordingly, the application dated 17th September 2018 be and is hereby dismissed and application dated 29th August 2018 allowed with orders that:

(a) The consent order dated 6th June 2018 be and is hereby confirmed as valid and binding.

(b) That the 1st applicant is hereby given 30 days within which to refund a sum of Kshs 10,000,000/= to the interested party in default the same amount shall be paid from the frozen account No. [xxxx] Stanbic Buruburu branch held in the joint names of the applicants.

(c) That the 1st applicant shall be at liberty to institute civil proceedings against Francis Mutua for recovery of any amount that may be due and owing to him or the estate on account of a purported sale agreement between himself and the interested party.

(d) That the 1st applicant shall pay costs of the two applications.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 6TH DAY OF JUNE, 2019.

J.N. ONYIEGO

JUDGE