



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

SUCC CAUSE NO. 39 OF 2017

IN THE MATTER OF THE ESTATE OF DAUDI MULWA MUTHUNGU (DECEASED)

BENSON MUSEMBI.....2ND ADMINISTRATOR/APPLICANT

ROSE MUOTI.....3RD ADMINISTRATOR/APPLICANT

-VERSUS-

WILSON MUTHUNGU.....1ST ADMINISTRATOR/RESPONDENT

RULING

1. The application for determination is dated 31/08/2018 and was filed under certificate of urgency. It is brought under Sections 47 & 74 of the Law of Succession Act and rules 49 & 73 of the Probate & Administration Rules and all other enabling provisions of the law. It seeks;

a) *Spent.*

b) **That**, the grant of letters of administration intestate issued on 29/06/2017 and certificate of confirmation of grant issued on 29/06/2017 be set aside.

c) **That**, the consent orders issued on 29/06/2017 be reviewed or set aside to the extent of distribution of those parcels of land numbers Makueni/Kikumini/67 and Makueni/Kikumini/68 and fresh distribution do issue for them to be registered in the names of Benson Musembi and Wilson Muthungu in equal shares.

d) **That**, upon grant of prayers 1 and 2 above, a fresh grant of letters of administration intestate and a certificate of confirmation of grant intestate be issued in the names of Wilson Muthungu, Benson Musembi and Rose Muoti.

e) **That**, costs be provided for.

2. The application is supported by the grounds on the face of it and the supporting affidavit of the 2nd administrator sworn on the same day. He avers that the grant of letters of administration and certificate of confirmation of grant erroneously indicate that Esther Ngina Daudi is the administrator. He also avers that it was erroneous for land parcels No.s Makueni/Kikumini/67 and 68 (*the parcels*) to be registered in the name of the Respondent instead of sharing them equally between him and the Respondent.

3. He also avers that his matrimonial home is on Makueni/Kikumini/68 and is apprehensive that the 1st administrator will dispose off the land together with the home and cause him irreparable harm.

4. There is a replying affidavit sworn on 20/12/2018 and filed on the same day. The application is partially conceded to the extent that the grant of letters of administration and certificate of confirmation should be rectified to reflect the proper Administrators. The prayer to set aside the consent is however opposed.

5. The Respondent deposes that it took the family over 5 years to come up with the consent which was signed by everyone on the advice of their respective counsels. According to him, allowing

the application is akin to sending so many years of effort to the drain for no apparent reason. It is also his deposition that the 2nd Administrator has not met the threshold for setting aside of a consent.

6. Directions were given that the application be canvassed through written submissions. Accordingly, the parties complied and filed their respective submissions.

The Applicants' submissions

7. The Administrators/Applicants submit that the consent should be reviewed or set aside because it contravenes the law and is contrary to the beneficiaries' interest. They contend that a court of law cannot sanction an illegality that has been brought to its attention. According to them, the parcels were erroneously registered in the Respondent's name and the registration is contrary to what the parties' had agreed prior to the formal agreement.

8. They submit that the Respondent has disposed of 5 ½ acres out of Makueni/Kikumini/67 and is in the process of disposing other portions of the parcels.

9. They submit that their reasons for seeking to review the consent fall in the ambit of "for any other sufficient reason" as per the provisions of Order 45 of the Civil Procedure Rules. They rely *inter alia* on the case of **Wangehi Kimita & Anor –vs- Mutahi Wakabiru (1982-88)1 KLR 977** where it was held that;

“any other sufficient reason- in the provision need not be analogous with the other grounds in the order and is therefore, not confined to the other kinds of reasons specified in the order.”

10. Further, it is submitted that the 1st Administrator/Applicant will be rendered homeless if he is evicted from Makueni/Kikumini/67.

The Respondent's submissions

11. The Respondent submits that a consent judgment can only be set aside on the same grounds as would justify the setting aside of a contract such as fraud, mistake or misrepresentation. He relies *inter alia* on **The Board of Trustees NSSF –vs- Mike Mwalo (2015) eKLR** where it was held that;

“A consent order or judgment has contractual effect and can only be set aside on grounds which would justify the setting aside of a contract or if certain conditions remain to be fulfilled, which are not carried out.”

12. The Respondent submits that the agreement alluded to by the Applicants was not adduced in court and contends that the consent was actually prepared by the Applicants' counsel who had full instructions on the best mode of distribution.

13. Having considered the application, the replying affidavit, the rival submissions and the entire record, it is my considered view that the following issues arise for determination.

a) Whether the grant of letters of administration intestate and certificate of confirmation of grant issued on 29/06/2017 should be rectified.

b) Whether the consent order issued on 29/06/2017 should be varied.

Issue no. (a) whether the grant of letters of administration intestate and certificate of confirmation of grant issued on 29/06/2017 should be rectified.

14. The record shows that the grant issued and confirmed to Esther Ngina Mulwa aka Esther Ngina Daudi in 1993 was revoked on 22/10/2012 and on 17/06/2014; a new grant was issued to **Wilson Muthungu, Benson Musembi and Rose Muoti**. The same was confirmed as per the consent dated 09/04/2017 and filed on 02/06/2017.

15. As rightly conceded by the Respondent, the errors on the grant of letters of administration and certificate of confirmation are self-evident and should be rectified in order to reflect the correct position.

Issue no. (b) whether the consent order issued on 29/06/2017 should be varied.

16. The Applicants allude to the existence of a preliminary agreement which required that the two parcels be shared equally between the 1st Applicant and Respondent. In my view, this argument is self-defeatist as it contravenes the parol evidence rule. In the case of **John Onyantha Zurwe –vs- Oreti Atinde Civil Appeal No. 217/2003**, the following passage from Halsbury's Laws of England 4th edition Vol. 12 was adopted;

“Where the intention of the parties has been reduced to writing it is, in general not permissible to adduce extrinsic evidence, whether oral or contained in writings such as instructions, drafts, articles, conditions of sale or preliminary agreements either to show that intention or to contradict, vary, or add to the terms of the document.”

17. Further, I find that if indeed there was such a preliminary agreement, nothing would have been easier than for the parties to record a new consent and automatically replace the one on record.

18. As rightly submitted by the Respondent, it is trite that a consent judgment is binding on the parties and cannot be set aside or varied except on grounds that would justify the setting aside of a contract. In my view, Order 45 of the Civil Procedure Rules does not apply to applications for varying or setting aside consent judgments. The Applicants did not adduce any evidence to justify the variation of the consent orders issued on 29/06/2017. The rectification does not affect the content of the consent.

19. Further, I am unable to see any illegality in the complaint that some portions of land have been disposed of. The consent judgment recognizes the respondent as the rightful owner and as such, he has the liberty to deal with the parcels.

20. The upshot is that the application **only** succeeds in as far as rectification of the names in the letters of administration grant and certificate of confirmation of grant is concerned in the following terms:

i. The grant and certificate of confirmation of grant issued on 29th June, 2017 shall be rectified and fresh ones issued in the names of Wilson Muthungu, Benson Musembi and Rose Muoti.

ii. The request to rectify the certificate of confirmation of grant which was based on a consent dated 9th April 2017 and signed by all beneficiaries in terms of distribution is declined.

iii. Each party to bear his/her own costs.

Orders accordingly.

Delivered, Signed & Dated this 5th Day of November, 2019 in Open Court at Makueni.

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H. I. Ong'udi

Judge