



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
FAMILY DIVISION
SUCCESSION CAUSE NO. 3033 OF 2015
IN THE MATTER OF THE ESTATE OF KAMAU KARIUKI (DECEASED)
GRACE WANGUI KAMAU.....APPLICANT
VERSUS
GICHUHI KAMAU KARIUKI.....RESPONDENT
RULING

1. The deceased died on 18th February 2006. He was survived by one widow, Grace Wangui Kamau (the applicant) and the following children:

- a) Faith Wanjiku Kahara (daughter);
- b) Catherine Wairimu Njuguna (daughter);
- c) Moses Njoroge Kamau (son);
- d) Stephen Wandiri Kamau (son);
- e) Gichuhi Kamau Kariuki (son) (respondent);
- f) Alex Nyaga Kamau (son);
- g) John Nyaga Kariuki (brother); and
- h) Peter Boro Kariuki (brother).

Letters of administration in respect of the estate were issued to Stephen Wandiri Kamau on 10th October 2011 and confirmed on 11th July 2012.

2. The following were the properties of the estate of the deceased:

- a) Maela/Ndabibi Block 2/698;
- b) Nyandarua/Kahuru/1603;
- c) Shares in Wiumiririe Farmers Co-op Society Limited ;
- d) Sigona/708;
- e) Maela/Ndabibi Block 2/85;

- f) Maela/Ndabibi Block 2/677;
- g) Kabete/Karura/1602;
- h) and Kabete/Karura/1602;
- i) Kabete/Karura/1208;
- j) Kabete/Karura/497; and
- k) Sigona/707.

3. The applicant filed summons dated 30th November 2015 seeking orders that:

- a) the confirmed grant issued in the Limuru Succession Case No. 123 of 2011 on the 11th July 2012 to Stephen Wandiri Kamau be annulled or revoked in the manner in which the estate has been distributed;
- b) the court makes provision for the widow to share in the assets of the deceased's estate and in particular to share in the portion of the deceased's estate that forms her matrimonial home which lies on one quarter ($\frac{1}{4}$) acre portion situated in the property known as Title No. Kabete/Karura/497;
- c) the property known as Title No. Kabete /Karura measuring approximately one acre which had been allocated to be shared amongst Moses Njoroge Kamau ($\frac{1}{4}$ acre), Stephen Wandiri Kamau ($\frac{1}{4}$ acre) and Gichuhi Kamau Kariuki ($\frac{1}{2}$ acre) be divided and shared in the following proportion:
 - Moses Njoroge Kamau to get $\frac{1}{4}$ acre;
 - Gichuhi Kamau Kariuki to get $\frac{1}{4}$ acre;
 - Grace Wangui Kamau to get $\frac{1}{4}$ for her lifetime and thereafter to be allocated to Alex Nyaga Kamau; and
 - Moses Njoroge Kamau to get $\frac{1}{4}$ acre;
- d) the property known as Title No. Kabete/Karura/1208 measuring approximately $\frac{1}{2}$ an acre which was to be shared between her sons Gichuhi Kamau Kariuki ($\frac{1}{4}$ acre) and Alex Nyaga Kamau ($\frac{1}{4}$ acre), be allocated to her son Gichuhi Kamau Kariuki ($\frac{1}{2}$ acre) absolutely;
- e) the court do issue an order restraining Gichuhi Kamau Kariuki from harassing, threatening, intimidating, assaulting, insulting and disrespecting the widow or any other beneficiary;
- f) the court do restrain the said Gichuhi Kamau Kariuki from in any manner dealing with, developing, improving, interfering and or alienating any portion of Title No. Kabete/Karura/497 pending the hearing and determination of this application;
- g) the court do direct for the urgent transfer of Limuru Succession Cause No. 123 of 2011 file at the Chief Magistrates Court at Limuru; and
- h) this court do set aside the injunction orders issued by the Chief Magistrate's Court on 6th October 2015 restraining the applicant and her sons from constructing a latrine.

4. The application was based on the ground that when the Chief Magistrate's Court at Limuru issued the certificate of confirmation of grant dated 11th July 2012 setting out the mode of distribution of the estate of the deceased, no provision was made for the applicant as widow of the deceased; that property comprised in Title No. Kabete/Karura/497 is the matrimonial property in which the applicant resides; that since the issuance of the said certificate of confirmation of grant Gichuhi Kamau Kariuki who was issued $\frac{1}{2}$ acre of land Title No. Kabete/Karura/497 has been harassing, intimidating, threatening, insulting and further denying access of the common areas and water source to the applicant and other beneficiaries living within the property; and that Title No. Kabete/Karura/497 has not yet been subdivided and transmitted into the names of the beneficiaries.

5. The application was opposed by the respondent. The summary of his case was that the application was incompetent and only brought as an afterthought over issues overtaken by events; that the proceedings being challenged were arbitrated and confirmed by all the beneficiaries of the estate of the deceased hence revocation or annulment should not be granted; that the applicants have already disposed of some properties while executing the confirmed grant; that the applicant should not be allowed to share the alleged $\frac{1}{4}$ acre portion situated on the property known as Kabete/Karura/497 as the same belongs to the respondent; that Alex Kamau Nyaga and the respondent agreed to exchange occupation of the properties in question and the applicant was not involved at all; that the mode of distribution proposed by the applicant will only cause discord and unending family wrangles ; that the revocation of grant will cause 3rd parties who have acquired properties already disposed of by beneficiaries untold turmoil; that in the event the revocation is allowed, the sold properties should be recalled from their current owners which will cause more litigation; and that the applicant's prayer for injunction has already been overtaken by events as there exists orders of injunction already in force acting for all beneficiaries.

6. When the matter came up for hearing on 22nd February 2018, the applicant was present in court with her counsel Mr. Kanyiri, and with

three other beneficiaries being Stephen Wandiri Kamau (the administrator), Alex Nyaga Kamau and Moses Njoroge. They all stated that they supported the application.

7. I have perused the record of the proceedings before the Senior Principal Magistrate Court. It is clear that when the administrator Stephen Wandiri Kamau applied for the confirmation of the grant on 13th June 2012 he filed, along with the affidavit in support, a consent to the confirmation of the grant. The consent was signed by, among others, the applicant. Alex Nyaga Kamau and Moses Njoroge Kamau who now support the present application each provided his consent. Stephen Wandiri Kamau supports the present application. He was also part of the consent. It is trite that a consent judgment or order has a contractual effect and can only be set aside on grounds which would justify the setting aside of a contract entered into with knowledge of material facts by legally competent persons (**J.M. Mwakio –v- Kenya Commercial Bank [1987] KLR 513**). Such contract can only be set aside if fraud, collusion or misrepresentation are shown, or if the consent was against public policy. A consent can only be varied or set aside by another consent.

8. In the affidavit sworn by the applicant to support the present application, her only complaint was that she was the deceased's widow, and a beneficiary, who ought not to have been excluded from the sharing of her late husband's estate. She knew she was the deceased's widow. She knew she had a claim to the estate. She apparently surrendered her claim to the estate. A party cannot be considered aggrieved by an order or a judgment that was made with her consent (**Ngure –v- Gachoki [1979]KLR 152**). There is no evidence to show that she was conned out of her entitlement, or that she did not know what she was consenting to.

9. In the same breathe, Alex Nyaga Kamau, Moses Njoroge Kamau and Stephen Wandiri Kamau cannot be allowed to resile from the agreement that was reached which was the basis of confirmation of the grant. There is no other agreement signed by all the beneficiaries to the estate of the deceased.

10. The result is that the application dated 9th December 2015 by the applicant lacks merits and is hereby dismissed.

11. This is a family dispute. I make no order as to costs.

DATED and DELIVERED at NAIROBI this 16TH day of MAY 2018

A.O. MUCHELULE

JUDGE