



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NUMBER 213 OF 2006

IN THE MATTER OF THE ESTATE OF KAMAU MACHARIA (DECEASED)

TERESIAH WAITHERA KAMAU.....APPLICANT

-VERSUS-

MARY WAMBU KAMAU

MARY NYAKIANDA KAMAU

JANE MBERE KAMAU.....RESPONDENTS

RULING

1. Teresiah Waithera Kamau (Applicant) has moved this Court vide a chamber summons dated 31/5/2017 for orders;

a) Spent

b) THAT the Honourable Court be pleased to grant an order to M/s G. A. Ndeda & Co. Advocates to access the bank account in the name of Estate of Kamau Macharia A/c No. [particulars withheld] and to withdraw therefrom Kshs. 30,000/= every month on behalf of Mary Wambui Kamau, Mary Nyakianda Kamau and Jane Mbeere Kamau the Petitioners herein for their maintenance.

c) THAT the Honourable Court be pleased to grant an order to M/s G.A. Ndeda & Co. Advocates to access bank A/c in the names of Estate of Kamau Macharia A/c [particulars withheld] and withdraw therefrom Kshs. 30,000/= for payment of school fees for the dependant.

d) Costs of this application be provided for.

2. The application is premised on the grounds;

i) THAT the Petitioners are in dire need for money urgently for school fees for the children and for their own upkeep.

ii) THAT the Petitioners herein have no other source of income.

iii) THAT unless the orders sought are granted, the children of the deceased who are the beneficiary of the estate will be sent away from school and the Petitioners will be turned into destitute.

iv) THAT the application is made in good faith and in the interest of good administration of the Estate of the deceased herein.

3. The same is supported by the sworn affidavit of the Petitioner/Applicant sworn on the 31/5/2017.

4. The gist of the supporting grounds is that the consent orders of 17/11/2006 was obtained through misrepresentation and fraud and that the Applicant was condemned unheard. It is averred that the consent purportedly recorded by the Advocates on 17/11/2006 in the Applicant's absence which made Jane Mbeere, the 3rd Objector, the 2nd Administrator in respect of the estate of the deceased Kamau Macharia was in total disregard of the order issued on 28/7/2006 which required the Court to determine the proper administrators and beneficiaries.

5. Pursuant to the consent orders, the 3rd Objector has proceeded to mess with the estate of the deceased causing it to lose thousands of shillings.

6. The said consent is alleged to have been obtained by fraud and misrepresentation as the Applicant was not aware of such consent and her Advocate had not consulted her.

7. The Application is opposed. Jane Mbeere Kamau (3rd Respondent) has sworn a replying affidavit with authority of other Respondents on her own behalf and on their behalf.

8. The gravamen of her case is that the consent recorded on 28/7/2006 in addition to ordering opening of account, the parties were at liberty to apply for interim dependency.

9. It is urged that on the 17/11/2006, in the presence of all the widows of the deceased together with their advocates, it was agreed after discussions that the Applicant and the 3rd Respondent be appointed administrators of the deceased estate. It is therefore a lie for the Applicant to state she was not present.

10. Interference with the bank account is denied and it is stated that the 3rd Respondent has never been a signatory to the account and her advocate cannot single handedly operate the account since it is a joint account.

11. The 3rd Respondent denies misusing the estate and to the contrary, it is urged that it is the Applicant who used the grant, obtained at Narasha to transfer all the properties of the estate to her name, sold some and withdrew all the cash from bank.

12. The Applicant made no submissions. Mrs. Ndeda for the Respondents made oral submissions in line with the grounds and the replying affidavit and I need not restate same here.

13. I have had regard to the application, the response and submissions by counsel. Of determination is whether the consent orders made on the 17/11/2006 should be set aside and whether a statement of account should be rendered in respect of the joint account opened to receive proceeds for the account.

14. The record of Court shows that on the 17/11/2006, a consent order was recorded by Court in the presence of Mr. Kigara for the Applicant Mrs. Ndede for Objectors and Mr. Mbeche for Objectors. The 3 Advocates have appended their hand on the Court record confirming the consent as recorded.

15. It is trite law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting aside a contract or if certain conditions remain unfulfilled which are not carried out. **(See J. M. Mwakio vs. KCB Civil Applications Nos. 28 of 1982 and 69 of 1983).**

16. For the Applicant to succeed in the prayer for setting aside the consent entered in this matter, it was incumbent on her to prove either that such a consent was not entered into or that the consent was arrived at through fraud, collusion or through a reason which would enable the Court to set aside an agreement.

17. The **Court of Appeal** in the case of **Brooke Bond Liebig vs. Mallya (1975) EA 266** laid the law clear what it stated;

“A consent judgment may only be set aside for fraud, collusion or for any reason which would enable the Court to set aside an agreement.”

18. The Applicant has stated that counsel then appearing for her in this matter had no instructions to enter a consent. What is clear from the record is that the said counsel was properly on record as representing the Applicant.

19. The acts of a Counsel on record bind a client. In my view unless there is concrete evidence of a counsel acting outside instructions to the detriment of the client, the Court will not rely on a mere allegation that such instructions were not given. Doing so would be an invite to anarchy in judicial proceedings. Any such act by a counsel is a serious breach of the Client/Advocate relationship, amounts to misconduct on the part of the Advocate (and which attracts specific sanctions) and being such a serious breach, concrete evidence must be laid that instructions were not given.

20. The Court of Appeal in **Samwel Mbugua Ikumbu vs. Barclays Bank of Kenya Limited [2015] eKLR** while quoting from **Hirani vs. Kassin [1952] 19 EACA 131** emphasized that an assertion that counsel had no instructions is not by itself sufficient to set aside a consent. The Court stated;

“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 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.”

21. The extent of the authority of an Advocate is aptly stated in the decision in **Kenya Commercial Bank vs. Specialized Engineering Company Limited [1982] KLR 485** where the Court stated;

“A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or by an agreement contrary to the Policy of the court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement.”

22. On the facts of this case, it has not been demonstrated that the Applicants erstwhile Advocate had no authority to enter the consent on record. I find no evidence of fraud or collusion of a reason that would warrant the setting aside of the consent.

23. As regards the taking of accounts, I note that 2 administrators were appointed on 7th day of November, 2006.

24. The powers and duties of an administrator are clearly set out under **Sections 82 and 83 of the Law of Succession Act (Cap 160 Laws of Kenya)**.

25. Under **Section 83(h)**, an administrator is required to give a full inventory of assets and liabilities of the deceased and to provide accounts. The section provides;

“83. Personal representatives shall have the following duties -

(h) to produce to the court, if required by the court, either of its own motion or on the application of any interested party in the estate, a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account.”

26. The Applicant herein seeks the rendering of accounts. It happens that she too is an Administrator. It follows then that any account to be rendered must be a joint endeavour by the 2 Administrators and where either of the 2 has sole custody of any necessary information or dealings, the other Administrator should be able to lay such facts before Court so as to compel the necessary party to render the explanations needed.

27. From the foregoing, and since one of the Administrators has sought the rendering of accounts, I am persuaded that the Administrators should provide and up-to-date statement of account in respect of the estate herein.

28. With the result that the prayer to set aside the consent entered on 7th day of November, 2006 fails. The Administrators are to render a joint account of the status of the estate within 30 days hereof and where any necessary information is solely in the custody of one of the Administrators, there be full disclosure for incorporation in the joint account to be rendered.

29. In the circumstances of this case, each party to bear its own costs of the application.

Dated and Signed at Nakuru this 7th day of May, 2018.

A. K. NDUNG'U

JUDGE