



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 478 OF 2012

CONSOLIDATED WITH SUCCESSION CAUSE NO. 1912 OF 2012

IN THE MATTER OF THE ESTATE OF FRANCIS MBUGUA MWIHIA (DECEASED)

WANGUI KATHLEEN MWIHIA.....APPLICANT

VERSUS

LUCY WANJIRU GITHAMBO.....RESPONDENT

RULING

1. The deceased Francis Mbugua Mwihia died on 16th October 2011 leaving a Will whose executors were his widow Wangui Kathleen Mwihia (the applicant) and Samuel Njonjo Kagiri. He had five children with the applicant who were acknowledged in the Will. The executors petitioned this court and on 21st March 2013 and were issued with grant of probate of written Will. It turned out that the deceased had had two children with the respondent Lucy Wanjiru Githambo. The respondent came to court following which a consent was recorded to acknowledge her two children as the children of the deceased who required to be provided for.

2. On 11th April 2016 the counsel for the parties consented to have the property in the estate of the deceased valued by an independent valuer to be agreed on and the report filed within 30 days. It was the firm of M/s Bowry & Co. Advocates which was then acting for the applicant. The consent was entered into by M/s Mamburi on behalf of the firm. The respondent was represented by Mr. Mukele in the consent.

3. On 7th September 2016 Judy Thongori & Co. Advocates came on record in place of Bowry & Co. Advocates. On 17th July 2017 the applicant filed the present application seeking to have set aside and/or varied the consent order recorded on 11th April 2016. Her case was that she was not aware of the consent. She stated that paragraph 3 of the deceased's Will stated as follows:-

“That I declare that no sale shall be made of the house in which I shall be residing at the date of my death during the widowhood of my wife without her consent in writing and shall until sale thereof my Trustees shall permit my wife to occupy the same as long as she so desires.”

She was of the view that since the house was not available for sale there was no need to value it; that valuing it would be to just add on the expenses of the estate. She had no problem with the rest of the estate being valued.

4. The respondent's response was that the consent followed an application by the executors to confirm the grant, and in the application the property of the estate had been grossly undervalued. It became necessary to have the court, and indeed the parties, to know the exact value of the properties of the estate before they could be distributed to the respective beneficiaries/dependants. The advocates voluntarily agreed to have the estate valued. The other reason why the application to set aside was opposed was because the second executor was not party to it. The second executor was party to the consent which cannot be set aside without his participation, it was argued.

5. The question to be determined is whether the applicant has offered sufficient grounds to warrant the setting aside and/or varying to the consent order that was entered into on 11th April 2016.

6. It is now trite that a consent order or judgment has a 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 (**Flora Wasike Destimo Wamboko [1988]IKAR 625**).

7. This consent was entered into by counsel for the parties, at their own instance. In **Brooke Bond Liebig (T) Ltd –v- Mallya [1975] EA 266** it was held that, *prima facie*, any order made in the presence and with the consent of the counsel is binding on all parties to the proceedings or action, and on those claiming under them. It cannot be varied or discharged unless obtained by fraud or collusion, misrepresentation, non-disclosure of material facts, or by an agreement contrary to the policy of the court. None of these was alleged, or proved.

8. The applicant alleged that she was not aware of the consent until she got to know about it through her new advocates. At the time of the consent she was represented by the firm of Bowry & Co. Advocates. They recorded the consent on her behalf. It is now accepted that an advocate who is properly on record has ostensible authority to compromise a suit, or consent to a judgment or order as far as the opponent is concerned (**Sofia Mohamed –v- Rodah Sitienei [1992]eKLR**).

9. It is material that the applicant did not oppose the valuation of the rest of the estate. She did not therefore challenge the entire consent.

10. In short, the applicant cannot be allowed to resile from the consent that was entered into on her behalf on 11th April 2016. In any case, at this stage, no party has indicated that she/he would wish the house in which the applicant is living to be sold, or given away to another beneficiary/dependant.

11. I dismiss the application dated 14th July 2017 with costs.

DATED and DELIVERED at NAIROBI this 1ST day of OCTOBER 2018.

A.O. MUCHELULE

JUDGE