



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**SUCCESSION CAUSE NO. 6 OF 1992**

**IN THE MATTER OF THE ESTATE OF NZIOKI WAMBUA – DECEASED**

**PAUL ITOTIA DAVID.....1<sup>ST</sup> ADMINSTRATOR/APPLICANT**

**VERSUS**

**MUTHIO NZIOKI.....2<sup>ND</sup> ADMINSTRATOR/RESPONDENT**

**RULING**

**Introduction**

The application that is the subject of this ruling is the 1st Administrator’s Summons dated 21st June 2016, which is supported by his Supporting Affidavit on the same date, and a Further Affidavit he swore on 6th February, 2017. The 1st Administrator is seeking to set aside the Orders of this Court contained in the ruling delivered on 7th May, 2015 and the Consent Order made on 15th November, 2010. The Applicant further seeks an order of injunction to restrain the Respondent from selling, transferring, charging, building, occupying or otherwise interfering with land parcels L.R. No. Mavoko Town/Block 2/3 and Mavoko Town/Block 2/104.

The application is opposed by the Replying Affidavit sworn by the 2<sup>nd</sup> Administrator, Muthio Nzioki on 5th October, 2016 and a Further Affidavit she swore on 15th February, 2017.

The pleadings filed by both the 1st Administrator and 2nd Administrator have both detailed out the proceedings herein upto the delivery of the ruling herein by Jaden J. on 7th May 2015. The salient aspects of the proceedings are that this Court (Mwera J. - as he then was) on 19th May 1999 issued a joint grant of letters of administration to Mbatha Nzioki (since deceased) and Muthio Nzioki as administrators of the estate of Nzioki Wambua (hereinafter referred to as “the Deceased”), after the two who were widows of the deceased filed separate succession causes. There were subsequent applications challenging this ruling which were heard and dismissed.

The issue of the appointment of administrators of the deceased’s estate having been finally laid to rest, Lenaola J. (as he then was) on 7th April 2008 gave directions that *viva voce* evidence on distribution be taken on 9th June 2008, which did not happen. On 7th July 2008, Lenaola J. then directed the parties to file affidavits on distribution, and despite further directions to this effect by the said Judge during various mentions, this had not been done by the time the matter was first mentioned before Waweru J. on 22nd February 2010. In the following two mentions before Waweru J. on 26th April 2010 and 5th July 2010, the parties indicated that they were negotiating a consent of distribution. On 15th November 2010, Waweru J. then recorded the following consent orders:

1. The Petitioner to file and serve a summons for confirmation of grant within 45 days of today.
2. The objector in her turn may file and serve an affidavit of protest within 14 days of service.
3. For the avoidance of doubt, the summons to confirm grant shall not include the disputed property, L.R. Mavoko Town/Block 2/3.
4. Directions regarding the disputed property shall be given after distribution of the Deceased's undisputed property.

What followed thereafter were proceedings before Dulu J. to substitute the 1st Administrator who died in the course of the proceedings. On 13th February 2013 the matter was first mentioned before Jaden J. who gave directions that parties agree on the number of the disputed properties of the deceased, after counsel for the 1st and 2nd administrators differed in their submissions as to whether there were one or two disputed properties.

The parties were thereafter on 2nd May 2013 and 18th November 2013 given leave to file submissions and documents on the disputed properties, and on 9th October 2013 Jaden J. reserved the matter for ruling. On 7th May, 2015 Jaden J. delivered a ruling stating in paragraph 9, 10 11 and 12 thereof as follows:

"9. It is common ground that the disputed properties are:

- (i) MAVOKO TOWN/BLOCK 2/03
- (ii) MAVOKO TOWN/BLOCK 2/104
- (iii) MAVOKO TOWN/BLOCK 12272
- (iv) MAVOKO TOWN/BLOCK 12088
- (v) MAVOKO TOWN/BLOCK 12316
- (vi) MAVOKO TOWN/BLOCK 12392

10. It is also common ground that the aforesaid properties are in the name of the 2nd Administrator. These properties are not free properties of the deceased as envisaged by section 3 of the Law of Succession Act (Cap 160 of the Laws of Kenya). Although the parties have submitted on whether the 2nd Administrator in the estate by transferring the said properties to herself following the demise of the deceased or whether the properties belonged to the 2nd Administrator, that is not the matter before this Court at this stage.

11. The issue before the court at this stage is to simply state which properties were meant to be the disputed properties covered by the consent entered by the parties on 15.11.2010. The disputed properties are the aforesaid six properties.

12. Consequently, as per the aforesaid consent orders, the summons for confirmation should not include the said six properties.

No further proceedings were taken by the parties after the said ruling, save for the present Summons filed by the 1<sup>st</sup> Administrator.

I shall now proceed to summarize the respective cases by the 1st and 2nd Administrators as stated in their pleadings and submissions as regards the orders sought by the 1<sup>st</sup> Administrator. This Court directed in this respect that that the summons dated 21<sup>st</sup> June 2016 was to be heard by way of affidavit evidence, and

parties to canvass their respective positions by way of written submissions. Kinoti & Kibe Company Advocates for the 1<sup>st</sup> Administrator filed submissions dated 28<sup>th</sup> March 2017, while Manthi Masika & Company Advocates for the Petitioners filed two sets of submissions dated 28<sup>th</sup> February 2017 and 6<sup>th</sup> April 2017.

### **The 1<sup>st</sup> Administrator's case**

The 1st Administrator in his pleadings sought to detail how the 2nd Administrator engaged in a fraudulent scheme to transfer the properties of the deceased to herself, and annexed evidence to support these allegations. He urged the Court to set aside the consent orders of 15th November 2010 on the grounds that they were founded on a mistake of the parties, as L.R. Mavoko Town/Block 2/3 which was termed as the disputed property was actually part of the free property of the deceased available for distribution and as such, this Court had no power to abdicate itself of jurisdiction in connection with any of the free property of the deceased.

As regard the ruling and orders given by Jaden J. on 7th May 2015, the 1st Administrator was aggrieved by the said ruling on three grounds. Firstly, that the ruling was not based on any application by any of the parties, but it effectively settled the dispute between the parties on the basis of giving directions, and the Court had no jurisdiction to determine a highly contested succession dispute.

Secondly, that after the consent order of 15th November 2010 specified only one property of the deceased that was the disputed property, the Court had no jurisdiction to state in the ruling of 7th May, 2015 that the properties in the said ruling were meant to be the disputed properties covered by the consent orders. Thirdly, that the order that the summons for confirmation should not include the said six properties contradicted the consent order of 15th November, 2010. Therefore that on the face of it, the ruling was illegal and defrauded the family of the 1st Administrator of their legitimate inheritance without hearing of the dispute as prescribed by law.

It was submitted in this respect that the ruling delivered on 7th May, 2015 constitutes illegal abdication of jurisdiction, and it determines the substratum of this dispute without hearing the parties as provided for by law. Reliance was placed on the decision of the Court of Appeal in **David Oloo Onyango v Attorney-General [1987] eKLR** where it was held the courts are not to abdicate jurisdiction merely because the proceedings are of an administrative nature or of an internal character. The 1st Administrator also cited various judicial decisions where courts have declined to issue substantive orders unless the dispute is substantively pleaded in the manner prescribed by the law.

### **The 2<sup>nd</sup> Administrator's case**

The 2nd Administrator on her part averred that she was registered as the owner of the parcels of land that are in dispute by virtue of her membership of, and being a shareholder of Mitaboni Katani Ltd, and that title deeds were issued to her in 1991 or 1992 before the Succession causes were filed in Court. Further, that she had lost the title deeds and was issued with fresh title deeds after the ruling made on 7<sup>th</sup> May 2015.

It was submitted by the 2nd Administrator that both parties agreed by consent to the procedure of trial by affidavits and not oral evidence or *viva voce* trial, and they then filed affidavits as regards the property of the Deceased and the ones that did not belong to the Deceased. Therefore, that the Court cannot be blamed for the procedure used, as the parties waived all the irregularities and the case was tried by affidavits and submission. As such no prejudice was caused to the 1<sup>st</sup> Administrator, and reliance was placed on the decision in **Ndegwa Wachira -vs Ricards Wanjiku Ndanjeru, KAR (1982- 88) 1 KAR 1062** for the position that courts must strive to do substantive justice undeterred by technical procedural rules.

It was further submitted that the Court had jurisdiction to deal with the issues raised in the pleadings, and could also deal with the issues raised by the parties that were not in the pleadings so long as each party

had a chance to converse the issue. Reliance was placed on Order 15 of the Civil Procedure Rules for the position that the Court did not abdicate its jurisdiction when it dealt with the issues framed by the parties.

Lastly, it was urged by the 2<sup>nd</sup> Administrator that a formal application was not needed to address the issue of the properties that were in dispute, as everything was done with the consent of the parties, and reference was made to the decision in **ODD JOBS vs Mubia (1970) EA 476** that a court may base its decision on an unpleaded issue. The 2<sup>nd</sup> Administrator asserted that the only remedy available to the Applicant was to appeal. Further that the procedural errors were not fundamental and did not prejudice the parties, and the Court had jurisdiction to change the procedure of the trial.

### **The Issues and Determination**

There are two main issues for determination. The first is whether the consent order entered into in Court on 15<sup>th</sup> November 2015 and the ruling delivered herein on 7<sup>th</sup> May 2015 should be reviewed and/or set aside, and if so what appropriate directions as to the hearing of this matter should be given. The second issue is whether the injunctions sought as against the 2<sup>nd</sup> Administrator should issue.

The applicable law on review or setting aside of a ruling and consent judgments is section 80 of the Civil Procedure Act, and Order 45 Rule 1 of the Civil Procedure Rules, which apply to succession matter by dint of rule 63 of the Probate and Administration Rules. Section 80 of the Civil Procedure Act provides as follows:

**“Any person who considers himself aggrieved—**

**(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or**

**(b) by a decree or order from which no appeal is allowed by this Act,**

**may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”**

Order 45 Rule 1 of the Civil Procedure Rules elaborates on the grounds on which a judgment or decree can be set aside as follows:

**“ (1) Any person considering himself aggrieved—**

**(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or**

**(b) by a decree or order from which no appeal is hereby allowed,**

**and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”**

In addition, the applicability of the above-cited provisions to consent judgments was decided on by the Court of Appeal in **Munyiri vs Ndunguya (1985) KLR 370** where it was held that the only remedy available to parties who want to get out of a consent order is to set aside the consent order by way of review, or by bringing a fresh suit in court. The Court of Appeal also affirmed in the case of **Tropical Food Products International Ltd -vs- The Eastern and Southern African Trade and Development Bank, Civil Appeal No. 253 of 2002** that the High Court has the jurisdiction to review, vary or set aside

a consent judgment under Order 45 Rule 1 of the Civil Procedure Rules and section 80 of the Civil Procedure Act.

Coming to the instant application, I find that there was an error on the face of the record as regards both the consent orders entered into in Court on 15th November 2015 and the ruling delivered herein on 7th May 2015, for the reason that the applicable procedures as to the raising of the issues in contention that were addressed by the said orders were not followed. Parties cannot in this respect consent to defeat express provisions of the law, and it was also held in **Re Katumo & Another (2003) 2 EA 502**, that although the High Court has the power to hear and determine applications and make such orders as may be necessary under section 47 of the Law of Succession Act, that jurisdiction has to be exercised within the provisions of the Act.

Rule 49 of the Probate and Administration Rules is clear in this respect that any party wishing an intervention of the Court relating to the estate of a deceased person for which no provision is made elsewhere in the Rules shall file an application by summons, supported if necessary by affidavit. No such application as to properties to be excluded from the estate was on record, or preceded the consent orders given on 15th November 2010 or ruling given on 7th May 2015.

In addition, section 71 of the Law of Succession Act and Rule 40 of the Probate and Administration Rules provide the procedure within which the properties of a deceased are to be ascertained, and any claim by any person on the said properties is made, by way of confirmation proceedings and protests. The procedure provided for confirmation proceedings is key in ensuring that the affected parties get justice, including the requirement for all the beneficiaries to give their consent to any decisions on the deceased's estate, and a perusal of the record shows that the other heirs and beneficiaries of the deceased were not involved in the procedures leading to the orders given on 15<sup>th</sup> November 2010 and ruling of 7<sup>th</sup> May 2015. Lastly, it is also in the interests of substantive justice under Article 159 of the Constitution that all the heirs and the beneficiaries of the deceased be given the opportunity to identify and ascertain the estate of the deceased before distribution.

As regards the injunctions sought against the 2nd Administrator, the provisions of section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules give wide discretion to the Court as to the orders it can make, including orders of injunction if the interests of justice so require.

The principles that are applicable for the grant of a temporary injunction are stated in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358**, which are that the applicant must establish a *prima facie* case, and that he or she would suffer irreparable loss which may not be compensated by an award of damages. If the Court finds that the two requirements are not satisfied, it may decide an application on the balance of convenience.

Applying these principles to the instant application, this Court notes that the 1<sup>st</sup> Administrator disputes the 2<sup>nd</sup> Administrator's ownership of the properties known as Mavoko Town/Block 2/3 and Mavoko Town/Block 2/104, which he claims belonged to the deceased. The title deeds presented as evidence of ownership of the two disputed properties show that they were registered in the 2<sup>nd</sup> Administrator's name in 1991 after the death of the deceased who died on 27<sup>th</sup> March 1988. The allegation that they said properties belonged to the deceased during his lifetime needs to be determined one way or another.

In addition, the overriding and common interest and duty of the Administrators in this regard is to protect the Deceased's estate, pending the hearing and determination of this succession cause. This Court therefore finds that there is need to give the necessary orders to preserve the said properties pending determination of their ownership.

I accordingly order as follows:

1. The consent orders entered into herein on 15<sup>th</sup> November 2010 by Waweru J. be and are hereby set aside.

2. The ruling and orders made herein by Jaden J. on 7<sup>th</sup> May 2015 be and are hereby set aside.
3. **The 1<sup>st</sup> Administrator shall within sixty (60) days of the date of this ruling file and serve a summons for confirmation of grant on the 2<sup>nd</sup> Administrator and all heirs and beneficiaries of the deceased's estate.**
4. **The 2<sup>nd</sup> Administrator is at liberty to file and serve an affidavit of protest within thirty days of service of the summons for confirmation of grant.**
5. **The *status quo* that shall obtain as regards all the properties and assets belonging to the estate of the deceased and the properties known as Mavoko Town/Block 2/3 and Mavoko Town/Block 2/104 registered in the name of the 2<sup>nd</sup> Administrator pending the confirmation of grant shall be that the Administrators and beneficiaries of the deceased's estate shall continue to be in possession and occupation of the properties and assets they currently occupy as at the date of this ruling, and the said Administrators and beneficiaries shall not sell, transfer, lease or in any manner dispose of or waste the said properties and assets,.**
6. Each party shall meet their respective costs of the Summons dated 21<sup>st</sup> June 2016 .

Orders accordingly.

Dated, signed and delivered in open court at Machakos this

2<sup>nd</sup> day of May 2017.

**P. NYAMWEYA**

**JUDGE**