



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
SUCCESSION CAUSE NO. 701 OF 2008

(IN THE MATTER OF THE ESTATE OF NDEGWA NGARI SAMUEL (DECEASED))

RAHAB N. NDEGWA.....PETITIONER/RESPONDENT

VERSUS

JOHN NGUGI NDEGWA.....APPLICANT

RULING

The deceased, Ndegwa Ngari Samuel, died on 19th January, 2008 domiciled in Kenya; prior to his demise, he was residing at Amboni in the then Nyeri North District. He was survived by his wife who is the petitioner herein and eight children one of whom is the applicant in the application, the subject of this ruling.

On 24th November, 2008 the deceased's widow and one of his children, Peterson Maina Ndegwa, jointly petitioned for letters of administration intestate of the deceased's estate; the grant was accordingly made to them on 14th April, 2008. Subsequently, and more particularly on 4th December, 2009 they filed a summons for confirmation of grant dated 3rd December, 2009 in which they expressed their proposal on how they intended to distribute the deceased's estate.

The applicant herein opposed the distribution of the estate as proposed by the administratrix and the administrator and filed an affidavit of protest in that regard on 27th January, 2010. However, the record shows that the protest was not heard as the parties filed a consent in court on 16th September, 2010 basically agreeing on how the deceased's estate should be distributed.

Before the certificate for confirmation of grant could be issued in terms of the consent, the same parties revised their consent and on 27th September, 2010, they filed what they described as "amended consent" on the distribution of the deceased's estate. A certificate of confirmation of grant was subsequently issued and in the schedule to the certificate this honourable court distributed the deceased's estate in terms of the "amended consent."

In spite of the consent, one of the joint administrators, Peterson Maina Ndegwa, was either reluctant or simply ignored, neglected or refused to execute the transmission documents and pave way for transfer of the assets comprising the estate to their intended beneficiaries. In the face of Mr Ndegwa's resistance, the applicant herein who, as noted, is a joint administratrix moved the court by way of summons general dated 4th April, 2011 seeking for an order that the deputy registrar of this honourable Court be authorised to execute the transmission documents on behalf of Peterson Maina Ndegwa; that application was allowed on 30th June, 2011.

One would have thought that with the parties having resolved their dispute amicably and agreed to share out the estate and, more pertinently, after a certificate of confirmation of grant was issued in terms of the amicable settlement, the succession cause would have been determined and the estate distributed accordingly; however, it was not to be because on 27th March, 2012, the applicant herein filed an application of the even date in which he principally sought the following prayers:

2. ***That the status quo be maintained with respect to parcel of land known as Nyeri/Mweiga/102 pending the hearing and final determination of this application.***
3. ***That the District Land Registrar and/or Surveyor do resurvey and redraft the sketch plan to allocate the applicant a share of three acres of the arable land.***

In a ruling delivered by this honourable Court (Wakiaga, J) on 31st October, 2013, the application was allowed and the District Land Registrar and/or surveyor were ordered to resurvey and redraft the sketch plan “taking into account the proposal made by Willy Kiama Muchemi filed in this court on 14th February, 2013” which in the learned judge’s considered opinion reflected the intention of the deceased.

By a summons general dated 10th December, 2013 which is the application before court and the subject of this ruling, the applicant has now sought for an order which more or less seeks to execute or give effect to the order of 31st October, 2013; in particular the applicant has urged:

That the Honourable Court be pleased to authorise the deputy Registrar to sign and execute the re-surveyed plan and mutation forms redrafted and any other necessary document required as per the orders of this Honourable Court on behalf of Rahab Nyambura Ndegwa and Francis Wachira Ndegwa (beneficiaries in Nyeri/Mweiga/102) to give effect to the ruling delivered on 31st October, 2013.

Amongst the grounds upon which the application is based is the ground that the resurvey was conducted on 13th February, 2013 but that the administratrix has declined to sign or execute the sketch plan and the mutation forms.

The respondent opposed the application and in her affidavit sworn on 16th January, 2015 and filed in court on 26th January, 2015, she acknowledged the decision of the Court of 31st October, 2013 but swore that being dissatisfied with the ruling delivered on that date she appealed against it to Court of Appeal; she deposed that it would only be fair that her appeal be heard before the distribution of the estate, apparently in terms of the order of the Court which the applicant is seeking to execute. In any event, so she swore, the applicant had not asked her to execute the forms in issue and thus the application is premature.

Exhibited to the respondent’s replying affidavit is a certificate of official search in respect of land parcel **LR No. Nyeri/Mweiga/ 102** demonstrating that the deceased’s estate has been distributed and therefore this court is *FUNCTUS OFFICIO*.

In the submissions which the parties filed in support of and in opposition to the application, they reiterated the positions they adopted in their respective affidavits.

Title No. Nyeri/Mweiga/102 which is the property in issue is amongst the assets that comprised the deceased’s estate and therefore available for distribution amongst his survivors and beneficiaries. It was proposed to be distributed in the following terms in the amended consent which, as noted, parties filed in court on 27th September, 2010:

1. ***The following issues arising herein be settled by the parties in the following terms as per the meeting held on 4th September, 2010.***

- a. *That land parcel NYERI/MWEIGA/102 be subdivided as follows:-*
- i. *That John Ngugi Ndegwa gets fourteen decimal three (14.3) acres located on the western side of the land running from the top to the bottom.*
 - ii. *Rahab Nyambura Ndegwa gets ten (10) acres located on the eastern side running from the top to the bottom.*
 - iii. *Francis Wachira Ndegwa gets 10 acres situated in the middle of the land running from the top to the bottom.*
 - iv. *Further the subdivision of the land should be done by a Government Surveyor.*
 - v. *That each party to be satisfied with the developments that will fall on his or her side and any party be at liberty to remove any structure that would have fallen on the allocated side within one year.*

This Honourable Court adopted the parties' consent as its order and in the schedule to the certificate of confirmation of grant it ordered the distribution of the **Title No. Nyeri/Mweiga/102** as agreed by the parties themselves. Subsequently, this particular parcel of land was transferred to the intended beneficiaries, including the applicant herein, apparently as proprietors in common with unequal shares.

I am cautious that the applicant's application 27th March, 2012 is beyond debate in this Court in view of the fact that a decision has already been taken on it. But if I have to make a few remarks on it only as far as is necessary for purposes of determination of the current application, I would say that that application essentially sought to vary the consent of 27th September, 2010 to the extent that it sought to introduce new matters that had hitherto not been captured in the previous consent. The introduction of these new matters would fundamentally vary the existing consent and this perhaps explains why the applicant's application was vehemently contested and also why the court had to retreat and deliver a considered decision on it.

Now, in the absence of agreement of parties to a consent, the grounds upon which a consent order can be set aside are well settled; **in**

Flora N. Wasike vs. Destimo Wamboko [1988] KLR 429 the Court of Appeal set out these grounds and reiterated that a consent order has a contractual effect binding all the parties to it and can only be set aside, varied or discharged on grounds that would justify setting aside of a contract. For example, where the consent is obtained by fraud or collusion, or by agreement contrary to the policy of the court or if the consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts then there exists sufficient ground or grounds to disregard the purported consent.

Whether any of the grounds for setting aside or varying a consent order obtained as to justify revising the consent of 27th September, 2010 in the manner proposed by the applicant in his application dated 27th March, 2012 is not for me to say as this point may well be a subject of debate and determination in the appeal filed against the order of 31st October, 2013.

Coming back to the application before me, all I can say is that a lot appears to have happened upon the adoption by the court of the parties' consent as its own order and the subsequent issue of the certificate of confirmation of grant. Most importantly, the proprietorship of the land parcel in issue, that is, **Title No. Nyeri/Mweiga/102** was transmitted to the deceased's survivors and beneficiaries to his estate on 14th September, 2011 almost five months before the applicant's application of 27th March, 2012 seeking orders in respect of the same parcel was filed.

It is not clear whether the issue of the change of the legal status of **Title No. Nyeri/Mweiga/102** was addressed in the applicant's application of 27th March, 2012 but as far as the application before me is

concerned I cannot proceed to issue orders in respect of this particular parcel of land as if it still remains the estate of the deceased; it simply isn't. The application, in my humble view, is mistakenly based on the wrong notion that **Title No. Nyeri/Mweiga/102** belongs to the deceased and can be dealt with in the context of the succession cause which for all intents and purposes was concluded upon confirmation of the grant of the letters of administration intestate of the deceased's estate. I think, for this particular reason, the application is misconceived and I am left with no other alternative except to dismiss it; it so dismissed except that parties will bear their own costs.

Dated, signed and delivered this 3rd day of June, 2016

Ngaah Jairus

JUDGE