



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO.621 OF 1984

IN THE MATTER OF THE ESTATE OF AJIT SINGH RIHAL (DECEASED)

KULDIP SINGH RIHALPETITIONER

VERSUS

JASWINDER SINGH RIHAL OBJECTOR /APPLICANT

RULING

1. The succession proceedings relate to the estate of the late **AJIT SINGH RIHAL** who died testate on 24th October 1983 in Weymouth Street, Westminster, London leaving a **will** dated **14th April 1977**. **Amrik Singh Rihal** one of the named executors of the deceased's will petitioned for grant of letters of administration estate on 24th October 1985. A grant of probate was made to **Amrik** on 6th November 1984. Via application dated 28th October 1985 he sought to have the same confirmed and the same was confirmed on 12th November 1985. **Surinder Singh Rihal** via summons dated 5th March 1992 sought to revoke the said confirmed grant on grounds that the executor did not give an account of the estate especially rental proceeds emanating from the deceased's property that had been remitted to the executor, Irregular transfer of properties forming the deceased's estate and failure to give accounts on the running of the deceased's estate as required under the Law of Succession Act. Via summons dated 1st November 2011 **Harban's Kaur Rihal** the widow to the deceased sought revocation of the said confirmed grant of probate on basis of failure on part of the executor to carry out his administrative duties as executor to the estate of the deceased and failure to lender account on the running of the deceased's estate. She also sought a temporary injunction restraining the representative of Mr. Amrik Singh Rihal from alienating or disposing L.R. NO. 209/136/245 Rihal House Tom Mboya Street, L.R. NO. 209/36/3 3rd Parklands Avenue and L.R.1870/1/342 Maua Close, Westlands, Nairobi. She sought to be made executor of the deceased's estate replacing the deceased executor **Amir Singh Rihal** who passed away on 26th December 2008 and his affairs were taken over by **Jaswinder Singh Rihal**.

2. **Harbans Kaur Rihal** in her power of attorney executed on 15th September 2011 appointed **Surinder Singh Rihal** to commence, prosecute, defend any action or suit in regards to the L.R.1870/1/342 Maua Close and succession cause no.621 of 1984 in matter of the estate of Ajit Sigh Rihal.

3. Harbans Kaur Rihal subsequently died testate on 5th July 2014 at Hospice of St. Francis North church, Berkhamsted, HP43GW in England, Wales leaving behind a **will** dated **19th March 2014**. In her said will, Harbans Kaur Rihal appointed her son **Kuldip Singh Rihal** and her daughter **Sukhvinder Baljit Sahib** as the executors of her will.

4. Kuldip Singh Rihal and Sukhvinder Baljit Sahib filed succession cause no. 35 of 2015 in the matter of

the estate of Harbans Kaur Rihal filed for sealing of the grant of probate of Harbans Kaur Rihal's estate with last will attached.

5. Kuldip Singh Rihal and Sukhvinder Baljit Sahib filed the current application dated **15th October 2015**. The applicant seeks to expunge from the record the **consent order** recorded in court on **19th June 2012** marking the matter as settled and reinstatement of the application dated **1st November 2011** a summons for revocation or annulment of the grant .The application is based on grounds that on 19th June 2012 the parties recorded a consent to the effect that LR. NO. 209/136/245 Nairobi be sold at market value of Kshs 40,000,000/- less costs to be given to Harbans Kaur Rihal through her son Surinder Shah, that the estate of Amrik Singh Rihal shall have no further claims on any other property jointly held by the two families and it be agreed that any share in such properties in favor of the estate of Ajit Singh Rihal shall belong to the estate of Amrik Singh Rihal upon the payment of the said amount. That Mrs. Charanjit Rihal will relinquish their share and 2 shares respectively in Bricon (Properties) Limited. That this matter be entirely marked as settled with no order as to costs. Subsequent to the said consent order the terms and conditions were amended to the detriment of the applicant to the extent that a sum of Shillings Forty Million (Kshs. 40,000,000) was never paid and LR. No. 209/136/245 Tom Mboya was never sold. That through correspondence parties agreed to forego the said consent order. That the application dated 1st November 2011 was yet to be heard and determined on merit, That prima facie the consent order in the instant suit was obtained or given sufficient material facts in misapprehension of the material facts and fraudulently hence it ought to be set aside. That the consent is an agreement can be set aside on grounds as would justify setting aside of a contract for example fraud mistake or misrepresentation, that there is serious maladministration of the estate of the late Ajit Singh Rihal including transfer of title to the executor of the will or his companies; that there are serious grounds of annulment and revocation of the grant and all subsequent transactions including transfer under section 76(d) Law of succession Act Rule 44(1) Probate and administration rules hence need for the application to be revived.

6. In his affidavit in support of the said application dated the 25th of September 2015 Kuldip Singh Rihal avers that he has since applied for the sealing of the grant of probate of the last will dated 19th March 2014 issued by High Court of Justice at District Probate Registry at Oxford on 26th September 2014 through succession cause no. 35 of 2015. That before the hearing of the said application parties purported to enter into a consent agreement on 19th June 2012 to have the property LR.NO. 209/136/245 sold at market value and Kshs. 40,000,000 be paid to Harbans Kaur Rihal from the sale proceeds thereof through her son Surinder Rihal and the matter be marked as finally settled. That to-date Kshs. 40,000,000/- is yet to be paid as the said property is yet to be sold and parties have intimated that they are ready and willing to set aside and expunge from the record the earlier consent agreement and allow the application dated 1st November 2011 to be reinstated for hearing and determination. That the executor to whom the probate was granted died leaving part of the testator's estate unadministered and that as per the Fifth schedule of the Law of Succession Act a representative can be appointed. That he is apprehensive that the undermentioned properties and or respective properties have been fraudulently sold, transferred, mortgaged or interfered with in a manner inconsistent with the deceased:

- a. L.R. No.209/136/245 Rihal House, Tom Mboya Street, Nairobi
- b. L.R. No.209/26/3 3rd Parklands Avenue
- c. L.R. No.1870/1/342, Mana Close Westlands Nairobi
- d. L.R. No.1/618 Hurlingham Nairobi
- e. L.R. No.3734/866 Lavington Jacaranda Avenue, Nairobi
- f. L.R. No.12325/9 Spring Valley, Nairobi
- g. L.R. No.12325/23 Spring Valley, Nairobi

- h. L.R. No.209/2490/39 Panipat Road, Ngara Nairobi
- i. L.R. No 209/2490/53 Jagondo road Ngara Nairobi
- j. L.R. No.209/1618/5 5th Parklands Avenue, Nairobi
- k. L.R. No. 209/2/298 Menelik Road Ngong area Nairobi
- l. L.R. No.209/7782 Lavington Nairobi
- m. L.R. No. 209/38/91 Duruma road Nairobi

7. The respondent filed a Notice of Preliminary Objection dated the 23rd of November 2015. He raises the objection that the applicants lack the locus standi to file the application dated the 15th October 2015 or in any other matter in the cause in the absence of a re-sealed grant probate to the estate of Harbans Kaur Rihal. Jaswinder Singh Rihal deponed in his affidavit dated the 23rd of November 2015, that the applicant lacks locus standi to file the current application on behalf of the estate of Harbans Kaur Rihal as they are yet by their own admission yet to get a re-sealed grant from this court. That the consent of 19th June 2012 settled the entire matter, that the consent was not only signed by the advocates who were on record but also himself and Surnder Singh Rihal who had a valid power of attorney from the Harbans Kaur Rihal. That the property known as L.R No. 209/136/245 Nairobi had not been sold as the lease has expired and he has applied for its extension and that upon the issuance of the extended Lease the property will be sold and proceeds paid out to the estate of the late Harbans Kaur Rihal as envisaged in the consent order. That there no assets of the estate that are un-administered as claimed that infact the entire estate has been administered save for the property in issue. That the property enumerated in the affidavit do not belong to the estate and that the application dated the 1st of November 2011 was settled pursuant to the consent order.

8. In a further affidavit dated the 1st December 2015 the applicant deposed that the court issued them with a resealed grant on the 27th of May 2015. That there was no consideration of the sum of shillings forty million paid to date and hence the consent order was fraudulent as the transfers of the suit property were executed without the said consideration to date, that even with the admission that the lease has not been renewed it's the more reason why the consent should be set aside and the transfer reversed. That it is painful and financially damaging for the beneficiaries of the estate that a fraudulent transfer of the L.R, No. 209/136/245 has caused and is still causing anxiety, massive loss and physiological and emotional loss to the beneficiaries of the estate.

9. The applicant submitted that subsequent to recording the consent order, the terms and conditions thereof were amended to the extent that the recording of the said consent order to the extent that the same promised payment of Kshs. 40 million to the widow or her representative in **L.R. 209/136/245**

That under Section 76 of the law of succession a grant can be recall or revoke a grant if the court is satisfied that a grant was obtained fraudulently

10. It was submitted that at the time the said consent was recorded there were lies peddled to the court that there was intention to sell the L.R. Number 209/136/245 and sale proceeds of 40,000,000 forwarded to Harbans Kaur Rihal through her son Surinder Singh Rihal. It was further submitted that the executor failed to proceed diligently with the administration of the estate and to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraph (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular. That the Grant has become useless and inoperative through subsequent circumstances. The effect of the consent order of 19th June 2012 was to create a grant. This is the consent order that the applicant seeks to recall and set aside and essentially revoke the grant and that prayer fall within the ambit of section 76 Law of succession Act, principles guiding the setting aside of consents and applicable legal provisions.

11. The respondent submitted that for consent orders to be set aside the applicant must show the court that there was an indication of fraud, collusion misapprehension which the applicant has failed to do adding that misapprehension and/or ignorance of the material facts at the time of recording the consent cannot be attributed to the respondent he relied in the case of **Brooke Bond Liebig (T) Limited vs Mallya [1975] E.A. 266**, “the circumstances in which a consent judgment may be interfered with were considered by this court in **Hirani vs Kassam (1952) 19 EACA 131**, “ 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 courtor if consent was given without sufficient material facts, or in general for a reason which would enable the court to set aside an agreement .”

12. He refuted the applicant’s allegation that a consent can be set aside if certain conditions remain to be fulfilled, he referred to the case of **Gichuki vs Minjua & 2 Others [2004] KLR 112** where it was held, “the only condition the non-performance which could give rise to the setting aside of a consent judgment would be conditions precedent to the coming into force of the consent and cannot refer to conditions or in other words the terms of the consent itself.”

13. It was submitted that the sale of the property was a term of the consent order and cannot be referred to as a condition that remains to be fulfilled. Further, that the delay in effecting the sale was communicated to them via letters explaining that the lease period had since expired and had to be renewed in order to sell the property. That the persons present were legally competent persons and entered into the agreement/consent with knowledge of the matter making the consent binding on all persons and those claiming under them. That the consent was signed by the advocate on record and Surinder Singh who had a valid power of attorney dated 15th September 2011 from Harbans Kaur Rihal and neither the passing of Harbans would render the consent invalid nor would it make it a ground for revocation of consent and that the beneficiaries of her estate would be a ground for revocation of consent order. That if there was any fraud at the time of signing the said consent only Surinder Singh can shed light on the same. That the properties listed do not form part of Ajit’s estate and that the most of the estate has been fully administered save for property known as L.R. No. 209/136/245. That the applicant took 3 years to set aside the said consent and if he had an issue with the same he should not have taken such great time to reveal the same. He relied on the case of **Sofia Mohamed vs. Rodah Sitiemi [1192] eKLR** “One would expect the appellant to react immediately she received information from her husband that a consent order had been entered into prejudicing her tenancy and immediately instructed the same counsel to have it rescinded.”

14. It was further submitted that the terms of the consent were never amended and that the applicant has failed to show the court whether upon entering into consent there was any indication of fraud, collusion, misapprehension or ignorance of the material facts. He urged the court to dismiss the application.

15. I have considered the affidavits and submissions filed by the parties. On the issue of preliminary objection I note that via an application dated September 2014 at the High Court Nairobi Probate and Administration division in cause no. 35 of 2015 the court issued a resealed grant of letters. Upon perusing the said document it indicates that the said grant was presented for resealing with date of resealing stated as 27th May 2015. From the foregoing it is clear that the said grant having been so presented for resealing the respondent’s preliminary objection dated 23rd November 2015 cannot stand and I dismiss the same.

16. The issue in contention is the consent order entered on 19th June 2012. A consent judgment is an agreement by parties in which they make reciprocal concessions in order to resolve their differences to avoid litigation or bring to an end litigation which have already commenced. Once adopted by the court a consent acquires the force and effect of a judgment. The circumstances under which a consent order may be set aside are grounds which would justify the setting aside of a contract in my view varies from one case to another . Grounds for setting aside contracts as held in the cases relied on are fraud, coercion, mistake or misrepresentation ,see **John Waruinge Kamau v Phoenix Aviation Limited [2015] eKLR**. Various requirements have to be met to vary of set aside the same. In the case of **Brooke Bond Liebig (T) Ltd. vs. Mallya Civil Appeal No. 18 of 1975 [1975] EA 266** as expressed in **Ongata Works Limited v Attorney General [2014] eKLR** the court expressed itself as follows:

“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 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, or in general for a reason which would enable the court to set aside an agreement... It is well settled that a consent judgment can be set aside only in certain circumstances, e.g. on the ground of fraud or collusion, that there was no consensus between the parties, public policy or for such reasons as would enable the court to set aside or rescind a contract.”

17. The principles of setting aside a consent judgment have been laid down however in my view the circumstances of each case especially in succession matters are unique in their own way and need to be examined in light of the said principles together with the subsequent actions of the parties in compliance with a consent order. In this matter the consent order was adopted in court on the 19th June 2012 subsequently the executor appears not to have taken any action to comply with the said consent of selling the property. The matter appears to have stalled until sometime in October 2015 as evidenced by the letter dated 14th October 2015 from the Director of City Planning referring to an application submitted on 28th September 2015 seeking permission for extension of lease on **L.R. 209/136/245**. What happened prior to the said date is not clear. The applicant having waited from 2012 thereafter moved the court with this application seeking to set aside the consent and reinstate the application dated 1/11/2011 on grounds that the consent has not been honored in that the conditions required to be fulfilled by the agreement have not been fulfilled and there was continued maladministration of the estate. Though the latter is yet to be established in my view allowing the consent to stand would be prejudicial to the estate of the deceased noting that the executor is deceased and currently there is no administrator to ensure proper administration of the deceased’s estate. In the case of **Broke bond Liebig Ltd –v- Mullya [1975] EA 266 to 269 Law Ag. P** stated that, “A court cannot interfere with a consent judgment except in such circumstances as would afford grounds for varying or rescinding a contract between parties.” Having noted the circumstances of this case I find that no party in this case will be prejudiced as none of the parties to the said consent has taken advance steps to comply with the said consent. I therefore set aside the consent recorder on the 19th June 2012. The applicant’s application dated 1st November 2011 is reinstated and the same proceed for hearing on merit.

Dated, signed and delivered this **15th** day of **September** 2016.

R. E. OUGO

JUDGE

In the presence of;

.....**For the Applicant**

.....**For the Respondent**

MS. Charity

Court Clerk