



REPUBLIC OF KENYA

HIGH COURT AT NAIROBI

MILIMANI LAW COURTS - FAMILY DIVISION

SUCCESSION CAUSE NO. 591 OF 2007

IN THE MATTER OF THE ESTATE OF MORGAN NJOROGE GAKUO (DECEASED)

JANE WAMBUI NJOROGE 1ST APPLICANT

EUNICE WANJIKU NJOROGE 2ND APPLICANT

RULING

INTRODUCTION

Jane Wambui Njoroge and Eunice Wanjiku Njoroge (the Applicants) filed the Summons for Confirmation of Grant dated 16th May, 2013 in which they sought the following orders:

- (1) That the Grant of Letters of Administration made to Jane Wambui Njoroge and Eunice Wanjiku Njoroge, in this matter on 29th July, 2011 be confirmed.**
- (2) That the cost of this Application be costs in the cause.**

THE APPLICANT'S CASE

In the Affidavit sworn by Jane Wambui Njoroge on 16th May, 2016, she deponed that the deceased was survived by the following beneficiaries:

- a. Jane Wambui Njoroge – widow
- b. Eunice Wanjiku Njoroge – widow
- c. Melissa Wanjiku Njoroge – daughter
- d. Sospeter Gakuo Njoroge – son
- e. Bobby Kamanu Njoroge – son
- f. Maureen Wanjiku – daughter
- g. Michele Stacey Wanjiru – daughter

She deponed that the deceased left the following assets:

- a) Proceeds in Equity Bank Account No. [...]
- b) Proceeds in National Bank Account No. [...]
- c) Proceeds of Kiambu Unity Finance Account No. [...]
- d) L.R No. Kabete/Karura/1755
- e) L.R No. Kabete/Gikuni/T.279
- f) Plot No. 43 Gikuni
- g) Kabete/Karura/516
- h) Kiambogo/Kiambogo Block 2/15966 (Mwariki)
- i) Kiambogo/Kiambogo Block 2/15936 (Mwariki)
- j) Kiambogo/Kiambogo Block 2/15937 (Mwariki)
- k) Kiambogo/Kiambogo Block 2/15935 (Mwariki)
- l) Kengen Shares
- m) Standard Chartered Bank shares
- n) National Bank of Kenya shares
- o) Kenya Airways shares.

The Applicants have attached a Schedule of the proposed mode of distribution and stated further that no Estate duty is payable to the deceased's Estate and no Application for provision for dependants is pending.

Subsequently, on 19th September, 2013, Eunice Wanjiku Njoroge (the Applicant) filed a Summons Application dated 18th September, 2013, in which she sought the following orders;

(1) That the consent order of 25th September, 2012 be reviewed.

(2) That on review, the same be set aside and/or vacated.

(3) That cost of this Application be provided for.

In her Affidavit, sworn on 18th September, 2013, in support of the Application, she deponed that the Respondent is the elder wife to the deceased and that she has the custody of all the documents relating to the deceased's assets. That in the month of July, 2012, a proposal was made as to how the Estate would be distributed and she was to get three assets, namely, Kabete/Gikuni/T164; Kabete/Karura/2076; and Maguga/Kahuho/1181, and the rest of the assets were to go to the Respondent and her children.

It was her deposition that at the time the consent was prepared, apart from the said three assets, the Respondent did not fully disclose the assets comprising the deceased's Estate and neither was an inventory of the deceased's assets disclosed to her. As a result, she honestly believed that the deceased's Estate was comprised of the assets shown to her during the entering of the consent. In that regard, she

argued that her advocates on record failed to advise her accordingly in regard to her rights under the Estate and they did not act in her best interest.

Furthermore, that the effect of the consent was that she is to get the assets listed therein and that the Respondent is to get the residue of the Estate. That she was also deprived of her right to appear and/or follow the current proceedings to their conclusion as a co-administrator, and that subsequent to the recording of the consent, the Respondent thereafter applied for the Confirmation of the Grant of letters of Administration. Additionally, that in the said Application, she has made a full disclosure of the entire Estate, where assets that she was not aware of have been disclosed and are all to be bequeathed to the Respondent.

It was therefore her argument that the consent herein was entered into through deception, fraud, material non-disclosure and was in bad faith and hence it ought to be set aside. Further, that in the three assets donated to her, only one is available for distribution, a fact she alleged the Respondent is aware of.

The Applicant contended that if the consent is allowed, she and her children will be deprived of their entitlements and for instance, L.R No. Kabete/Karura/2076 has already been distributed and registered to a new owner and L.R No. Kabete/Gikuni/T164 has a dispute and has a Caution placed on it and hence, the two are unavailable for distribution.

In her Written Submissions dated 4th March, 2014, the Applicant reiterated her depositions and contended that in the course of the proceedings herein, it was discovered that one of the properties had been transferred to a 3rd Party and the same was reported to the police. In that regard, the Respondent coerced her and subjected her to police harassment over the issue in order to force her to enter a consent over the present matter and that out of fear of prosecution, she conceded to the proposed consent.

She submitted that the couching of the consent order reads mischief since the content of the criminal proceedings were never disclosed to the Court nor were they elaborated to the Court during the recording of the consent. As a result, it was her argument that the consent is contrary to the policy of the Court and the Court cannot be used to sanction and illegal transaction.

She asserted that the consent was entered without full instructions and she never gave authority to her advocates to enter into the kind of consent they did on her behalf. Furthermore, that the consent order is prejudicial to her and her children.

It was her further submission that a consent order recorded by Counsel is binding on the Parties but in succession matters, there are instances where Counsel cannot record consent in the absence of the beneficiaries of the Estate. She relied on the decisions in **FLORA WASIKE VS DESTIMO WAMBOKO (1982-1988) IKAR 625** and **HIRANI VS KASSAM (1952) 19 EACA 131** in support of her argument that a consent order carries the same weight as a contract agreement and the same ought to be varied or set aside by the consent of the Parties that entered into the same.

For the above stated reasons, she urged the Court to allow the Application and grant the orders sought.

THE RESPONSE

The Respondent opposed the present Application through her Affidavit sworn on 3rd February, 2014. She stated that on 17th August, 2011, the Applicant fraudulently transferred L.R Kabete/Karura/2076 to herself and that on 28th September, 2011, she subsequently transferred the aforementioned plot to one, Obadiah Samngen Ole Mutez, and upon discovery of the fraudulent transfers, she instructed her Advocates to file an Application seeking to restrain the Applicant from further intermeddling with the Estate.

That the said Application was heard ex parte on 22nd December, 2011 and restraining orders were issued. As a result, the Applicant's advocates on record resolved to settle the matter out of Court and on 14th

May, 2012, the Parties herein entered into a consent in respect to the distribution of the Estate and the same was duly executed by the Parties respective advocates, on their behalf.

It was the Respondent's other contention that on 25th September, 2013, the matter was mentioned in Court and the consent was adopted as a Court order, and on 20th May, 2013, she instructed her advocates to file an Application for Confirmation of the Grant of Letters of Administration in accordance with the terms of the consent. That the Application was duly served but when it came up for hearing on 2nd July, 2013, the same was not confirmed as the Parties were not in Court. The matter was thereafter fixed for hearing on 14th October, 2013 but the hearing did not take place.

According to the Respondent, the present Application is malicious, an afterthought and meant to further delay the distribution of the Estate as the same was brought to Court over a year since the consent was recorded. Additionally, that the Applicant is responsible for fraudulently disposing of L.R No. Kabete/Karura/2070 and solely utilizing the benefits therein, to the exclusion of other beneficiaries, and that in any event, the existence of the caveat on L.R No. Kabete/Gikuni/T164 was well known to the Applicant at the point of executing the consent and the said caveat does not in any event imply that the said parcel does not constitute the Estate.

It was the Respondent's other argument that the present Application does not meet the threshold of setting aside a consent order, the Applicant has all along been well vested with the affairs of the Estate and it is hypocritical for her to feign ignorance of the existence of some of the assets and that the Applicant's advocates formerly dealing with the matter were fully involved in the recording of the consent and they had full instructions in accepting the terms of the consent.

In addition, it was her averment that the assets comprising the Estate were clearly stated in her Petition for Grant of Letters of Administration to which the Applicant filed an objection and she therefore cannot allege that she did not know of the existence of some properties. Further, that the proposed mode of distribution is fair, given the fact that the Applicant has already unfairly benefited from the Estate and that in any event, nothing has changed to warrant the varying of the terms of the consent and as such, the present Application remains an abuse of the Court process and is merely aimed at delaying the distribution of the Estate.

In her Written Submissions dated 2nd April, 2014, she reiterated her position that all along the Applicant was aware of what constituted the deceased's Estate and as such, the arguments of non-disclosure of facts do not hold any water as none of the assets listed in the Summons for Confirmation was omitted in the Petition for Grant of Letters of Administration. Additionally, that ground of non-disclosure has not been proved and the Applicant has not specified what was allegedly not disclosed.

It was her submission further that the present Application does not meet the requirements under **Order 45** of the **Civil Procedure Rules** for the setting aside of consent orders. In that regard, she relied on the holdings in **IN THE MATTER OF THE ESTATE OF STEPHENSON JOB CHEGE KIMOTHO, SUCCESSION CAUSE NO. 1146 OF 1997** in support of her argument that the present Application has been filed after considerable delay and the same ought to be dismissed. She relied further on **IN THE MATTER OF THE ESTATE OF NYAU WANJE WALUNGO, SUCCESSION CAUSE NO. 21 OF 2011**, for the proposition that the Court cannot go behind the advocate to investigate the scope of his authority or instructions and submitted that the Applicant has failed to demonstrate that the advocates were not properly instructed at the time of the execution of the consent.

According to the Respondent, the Applicant has not demonstrated that she will be prejudiced in any way in the event that the order herein is not varied and in any event, the Applicant has demonstrated bad faith in the matter and that the fact that criminal proceedings were not instituted against her is irrelevant and she ought not to assert that she was coerced into signing the consent on that basis.

For the foregoing reasons therefore, the Respondent urged the Court to dismiss the present Application with costs.

DETERMINATION

Based on the Parties' respective pleadings, as I have reproduced above, and a careful consideration of the same, the key issue that emerge for consideration is whether this Court should allow the present Application and grant the orders sought therein. In that regard, the Applicant's case is primarily that the consent order recorded in the present matter on the distribution of the Estate ought to be reviewed and aside for it is against the law and public policy.

The general principles to guide the Court in applications for setting aside consent judgments have been outlined by Courts in various instances. For example, the case of **BROOKE BOND LIEBIG LTD VS MALLYA [1975] EA 266** at 269 in which Law JA. opined that:

"The circumstances in which a consent judgment may be interfered with were considered by this court in Hirani vs Kassam (1952), 19EACA 131, where the following passage from Seton on Judgments and Orders, 7th edition, Vol.1 p.124 was approved: '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.'"

Additionally, in **EDWARD ACHOLLA VS SOGEA SATOM KENYA BRANCH & 2 OTHERS [2014] eKLR** where the court held that:

"Consent becomes a judgment or order of the court once adopted as such. Once consent is adopted by the court, it automatically changes character and becomes a consent judgment or order with contractual effect and can only be set aside on grounds which would justify setting aside, or if certain conditions remain unfulfilled, which are not carried out."

It is apparent therefore that the Court is vested with powers to set aside or vary consent orders in various instances, and relevant to the present matter, is the ground that such a consent is contrary to public policy. It is also to be noted that once a consent is adopted, it becomes a consent Judgment with contractual effect and as such, the same can only be set aside on the grounds for setting aside such contracts.

The impugned consent in the present matter is to the effect that:

(1)The Estate of the deceased be distributed as follows:

(a) That Eunice Wanjiku Njoroge together with her children do take the following properties:

- Kabete/Karura/2076***
- Kabete/Gikuni/T. 164***
- Muguga/Kahuho/1181***

(b) That Jane Wambui Njoroge and her children do take the balance of the deceased's estate.

(2) That the objector Eunice Wanjiku Njoroge's disposal of Kabete/Karura/2076 be and is hereby approved and the Petitioner, Jane Wambui Njoroge, will not pursue criminal or any legal action against Eunice Wanjiku Njoroge in respect to the said Kabete/Karura/2076.

(3) That Jane Wambui Njoroge be allowed to sell land parcel Kabete/Muthumu/T. 102 pending confirmation of the Grant of Letters of Administration to enable her meet her urgent family needs.

(4) That the Deputy Registrar be empowered to execute documents relating to the transfer of the

property Kabete/Muthumu/T. 102 for and on behalf of the Joint Administratrix Eunice Wanjiku Njoroge should it become necessary to do so.

(5) That each Party to bear its own costs for the entire suit.

The grounds advanced by the applicant in this case seeking to set aside the consent judgment are:

- (a) That at the time the same was entered, the Respondent did not fully disclose the assets comprising the deceased's Estate;
- (b) That the said consent was entered without full instructions and that she never gave authority to her advocate to enter the kind of consent that he did on her behalf;
- (c) That she was coerced into entering the consent; and
- (d) That the consent order is contrary to public policy.

On the first ground, the Court notes that the assets comprising the deceased's Estate had all along been disclosed to the Parties herein through the various pleadings filed in the present matter. For instance, in the Petition for Letters of Administration that had been filed on 14th February, 2007 in this Court, the Applicants therein, Jane Wambui Njoroge and Ernest Kamau Gakuo, provided a list of assets comprising the deceased's Estate. The Court notes that the Applicant herein successfully challenged the Grant of Administration that had been issued to the aforesaid and she was subsequently she was made an Administrator to the deceased's Estate. In the Court's view, by virtue of being an Administrator and having taken part in the present proceedings, as stated, the Applicant was aware of the assets of the deceased and in the circumstances therefore, the assertions by her that at the time of entering the impugned consent herein, she was not aware of the said assets.

On the second ground, I can do no better than adopt the holding by the Court in **KENYA COMMERCIAL BANK LTD VS SPECIALISED ENGINEERING CO. LTD [1982] KLR 485**, Harris J stated inter alia, that:

“(1) 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 collusion 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.

(2) A duly instructed advocate has an implied general authority to compromise and settle the action and the client cannot avail himself of any limitation by him of the implied authority to his advocate unless such limitation was brought to the notice of the other side.”

In the present case, it is undisputed that the Applicant had not withdrawn her instructions from the advocate who retained full control over the conduct of the case and had apparent authority to compromise all matters connected with the action and as such, the advocate had the necessary authority to act on behalf of the Applicant in entering the said consent. On that basis, this Court is unable to hold that the Advocate was not instructed to enter consent on behalf of the Applicant as he, was still acting on behalf of the Applicant. The Court therefore finds the assertions that the Applicant never instructed her advocate unmerited. Furthermore, this Court cannot fault the actions of the Applicant's advocate who was acting on behalf of the Applicant at the time the consent was entered and he had been retained by the Applicant to represent her.

The third ground adduced by the Applicant is that she was coerced into entering the consent. In that regard, as can be deduced from the impugned consent, paragraph 2 is to the effect that Respondent would not pursue any criminal or legal action against the Applicant in regard to the property known as Kabete/Karura/2076. It is apparent, from the face of the record, that a compromise was entered and that is

why the Respondent intimated that she would not pursue criminal or civil proceedings pertaining to the actions of the Applicant in relation to the said property. Based on that, the Court cannot escape the conclusion that the compromise entered also played a factor in influencing the Applicant to agree to the consent. Based on that, the Court is satisfied that the Applicant has made out a case to warrant the setting aside of the said consent.

For purposes of confirmation of grant proceedings under **Section 71 of Law of Succession Act Cap 160**, it is mandatory and a matter of legal practice that there is full disclosure of the beneficiaries of the estate, the assets that comprise of the estate of the deceased and the proposed mode of distribution. The beneficiaries must append written consents and appear in Court and if they do not consent they file protests. As such the said consent will not meet the legal requirements of summons of confirmation to be granted.

The above findings notwithstanding, the last ground adduced was that the consent order is contrary to public policy and prejudicial to the Applicant and her children. In that regard, it will be noted that the effect of the consent are that the Applicant, together with her children, are to have the following properties:

- a. Kabete/Karura/2076
- b. Kabete/Gikuni/T.164
- c. Muguga/Kahuho/1181

While the Respondent and her children are to take the remainder of the deceased's Estate. On that basis, if the consent is allowed to stand, it results to an unfair distribution of the deceased's Estate among the lawfully entitled beneficiaries. Whereas the Respondent asserts that the proposed distribution in the impugned consent is fair and equitable, the Applicant maintains that the same is prejudicial and she and her children are not adequately provided for. In the circumstances, and on a prima facie basis, the consent in question, if allowed to stand would be prejudicial to the Applicant and her children. Based on the circumstances, the Court is satisfied that the Applicant has made out a case to warrant the setting aside of the consent order for purpose of confirmation of grant

Based on the above analysis, allowing the consent to remain in force would be tantamount to this Court sanctioning an illegality and that ought not be allowed and as was correctly pointed out in **MAKULA INTERNATIONAL LTD VS HIS EMINENCE CARDINAL NSUBUGA AND ANOTHER [1982] HCB II**, by the Court of Appeal of Uganda that:

“...a court of law cannot sanction what is illegal and illegality once brought to the attention of the Court, overrides all questions of pleadings including admissions made thereon.”

The next issue that therefore follows for determination is how the deceased's Estate ought to be distributed in the circumstances. In that regard, **Section 40** of the **Law of Succession Act** is to the effect that:

(1) Where an intestate has married more than once under a system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.

(2) The distribution of the personal and household effects and the residue of the net intestate within each house shall then be in accordance with the rules set out in sections 35 to 38.

In the present case, the deceased had two wives, the Applicant and the Respondent herein, and their children. Based on the materials before the Court, it will be noted that the deceased was survived by the following persons:

House 1

- (1) Jane Wambui Njoroge - wife
- (2) Mellisa Wanjiku Njoroge - daughter
- (3) Sospeter Gakuo Njoroge – son
- (4) Bobby Kamanu Njoroge - son

House 2

- (1) Eunice Wanjiku Njoroge - wife
- (2) Maureen Wanjiku Njoroge - daughter
- (3) Mitchelle Stacey Wanjiru - daughter

As per **Section 40** of the **Law of Succession Act**, the Court considers each of the children as single units and the wives to as single units for the purposes of the distribution of the Estate. On that basis the 1st House shall comprise of four units and the 2nd shall comprise of three units. It is undisputed that the properties Kabete/Karura/2076 and Kabete/Muthumu/T/102 are not available as they have been disposed of already. It follows therefore that the following assets are available for distribution:

- (1) Kabete/Gikuni/T.164
- (2) Muguga/Kahuho/1181
- (3) Kabete/Gikuni/T.279
- (4) Kabete/Karura/516 – matrimonial home for Jane
- (5) Plot No. 43 Gikuni – (Jane has been paying land rates for the same)
- (6) Kiambogo/Kiambogo Block 2/15966 (Mwariki)
- (7) Kiambogo/Kiambogo Block 2/15937 (Mwariki)
- (8) Kiambogo/Kiambogo Block 2/15936 (Mwariki)
- (9) Kiambogo/Kiambogo Block 2/15935 (Mwariki)
- (10) Ndetika Sacco shares
- (11) Kengen shares – 4, 383
- (12) Standard Chartered Bank shares – 350
- (13) National Bank of Kenya shares – 1000
- (14) Kenya Airways shares – 1000
- (15) Proceeds in Equity Bank Account No. 0010290355934
- (16) Proceeds in National Bank Account No. 0124512520100

(17) Proceeds of Kiambu Unity Finance Account No. 092900002712.

DISPOSITION

As a result of the above analysis, the Court holds as follows:

(a) The consent order dated 27th September, 2012 is hereby vacated and set aside as confirmation of grant requires that all beneficiaries agree to the proposed mode of distribution under Section 71 of the Law of Succession Act Cap 160.

(b) The deceased Estate shall be distributed in terms agreeable and consented to by all beneficiaries in light of the disclosed properties of the estate of the deceased.

(c) In default of agreement, the properties shall be valued and estimated value filed in Court for Court to determine distribution of the estate.

DELIVERED, SIGNED AND DATED AT NAIROBI THIS 10TH DAY OF NOVEMBER, 2016

M. W. MUIGAI

JUDGE

In presence of:-

Mr. Rekedi for the Administrator.