



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
PROBATE AND ADMINISTRATION DIVISION
SUCCESSION CAUSE NO. 2692 OF 2008

IN THE MATTER OF THE ESTATE OF KANYONI KAMUNGE (DECEASED)

ISAAC NJENGA KAMUNGE.....1ST APPLICANT

JAMES NJOROGE KAMUNGE.....2ND APPLICANT

GEORGE KANYONI KAMUNGE.....3RD APPLICANT

- Versus -

HARRISON MUHIA KANYONI.....RESPONDENT

RULING

1. On 12th June 2012 the Applicants Isaac Njenga Kamunge, James Njoroge Kamunge and George Kanyoni Njoroge filed a summons of even date, under certificate of urgency, under **Rule 49 and 73** of the **Probate and Administration rules** seeking orders that the consent recorded by the court on 20th February 2012 be reviewed and set aside and that the cause do proceed to full hearing as directed by Maraga J (as he then was) on 16th May 2011.

2. They also prayed that pending such hearing and determination, a prohibitory order be made prohibiting the subdivision, partition transfer, sale, or any dealings or interference with the physical occupation of land No. Lari/Bathi/108. The court was asked to order the Officer in-Charge of Station at Lari Police Division and the District Commissioner Lari to ensure that the status quo was maintained. They prayed that the cost of this application be borne by Harrison Muhia Kanyoni and Meshack Ng'ang'a Kanyoni.

3. In support of the application, Isaac Njenga Kamunge swore an affidavit on his own behalf and on behalf of James Njoroge Kamunge and George Kanyoni Njoroge, in which he deposed that an asset of the Estate of the deceased being L.R. No. Lari/Bathi/108 was distributed at Kiambu court on 3rd November 2006; that the Respondent filed summons for Revocation of Grant which has not been determined and that he has been harassing the occupants of the suit land on the basis of a fake order allegedly issued by this court.

4. The Applicants stated that when they came to court to peruse the file to find out what was on record, the said file could not be traced until 5th June 2012 when their Advocate had sight of it. That upon

perusal of the file the Advocate found that proceedings had been taken on 20th February 2012 in which a consent was recorded completely concluding the matter. It is their assertion that the said consent was fraudulent since directions under **Rule 44(3) of Probate and Administration rules** have not been given and if they have, they were not served on all parties with beneficial interest in the Estate of the deceased.

5. The Applicants state that the directions given by Maraga J on 16th May 2011 were that the summons for revocation of grant would proceed by way of viva voce evidence and the said “consent” on record was not by all the parties in these proceedings. The Applicants averred that the court had been misled in the proceedings of 20th February 2012, into believing that all beneficiaries had agreed to the mode of distribution. They state that Meshack Kanyoni who agreed to the consent did so as the mode of distribution therein catered for his interests and his actions cannot bind the other administrators. Being apprehensive that the Estate of the deceased may be distributed pursuant to an unlawfully obtained consent order, denying the rightful beneficiaries their share in breach of the laws of natural justice, they have come to court to seek the orders set out above.

6. The Respondent Harrison Muhia Kanyoni opposed the application in his replying affidavit sworn on 10th July 2012 stating that the Applicants are not entitled to share in the eight acres of land that comprise Lari/Bathi/108, since the deceased had catered for all his adult sons before he died. That it was the sons in his mother’s house that were too young to have land registered in their names who were to inherit the suit land. The replying affidavit dwells at length on the entitlement of the children of the deceased and that the Applicants were not required to sign the consent since they have no interest in the suit land.

7. Learned counsel Mr. Macharia appearing for the Applicants filed written submissions in which he stated that the order of 20th February 2012 was made on the basis of a consent by only two parties being Harrison Muhia Kanyoni and Meshack Ng’ang’a Kanyoni, while the grant issued in Kiambu and which is sought to be revoked named five beneficiaries. That in fact Harrison himself named 15 beneficiaries in the supporting affidavit to the summons for revocation. Mr. Macharia urged that the said consent is therefore irregular and ought to be set aside.

8. Mr. Gachoka learned counsel for the Respondent filed a reply to the stated submission stating that the Applicant Isaac Kamunge, is not party the proceedings and is therefore improperly before the court. He contends that all parties to the proceedings were served and have not denied service. That it was not necessary to bring all the beneficiaries in the case in Kiambu to the High Court because they had no interest in the suit property. That this application is an attempt to reopen the summons for revocation and that it has not been stated who is entitled to a share in Lari/Bathi/108.

9. The issue for determination in the application dated 12th June 2012 is not the mode of distribution of the Estate of the deceased, but rather, whether the consent recorded before Mugo J on 20th February 2012 should be set aside. In **Flora Wasike v Destimo Wamboko [1982 – 1988] KAR pg 625**, the court of Appeal held that a consent judgment or order has contractual effect and can only be set aside on those grounds which would justify the setting aside of a contract. Those grounds are such as fraud, mistake and misrepresentation.

10. Clearly from the proceedings on 20th February 2012 before Mugo J, there was misrepresentation or misapprehension of the facts so that the court was made to believe that all three Administrators were agreeable to the mode of distribution of the Estate in the proposal filed on 29th October 2010. One Respondent George Kanyoni was absent and counsel informed the court that he too was agreeable according to what he had been told. Counsel told the court that the absent Respondent had been served and therefore the consent should be adopted as the order of court.

11. The court issued the orders adopting the consent accordingly and in effect comprised the Summons for Revocation dated 19th November 2008 completely. The court also confirmed the Grant to Meshack Ng’ang’a Kanyoni and Harrison Muhia Kanyoni.

12. Mr. Gachoka submitted that he had told the court that the other Respondents had been served and

were not in court and that that may be because they had no objection. He stated that he did not tell the court that they too had consented. There is therefore no doubt that the Applicants before me did not enter into the consent that was adopted by the court on 20th February 2012 and which binds them.

13. The Applicants are the administrators and are among the beneficiaries of the Estate of the deceased. The Summons for Revocation was going to affect all of them. It was only proper that they be consulted on a consent which purported to distribute the Estate and which was meant to compromise the application. It is immaterial that if the matter goes to full hearing the court will arrive at the same conclusion.

Reasons wherefore this court finds that the application dated 20th September 2012 has merit and is allowed.

The court finds that the consent recorded on 20th December 2012 is irregular and is hereby set aside ex debito justitiae.

SIGNED DATED and DELIVERED in open court this **4th day** of **March 2015**.

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L. A. ACHODE

JUDGE