



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
SUCCESSION CAUSE NO 591 OF 2007
IN THE MATTER OF THE ESTATE OF MORGAN NJOROGE GAKUO (DECEASED)
EUNICE WANJIKU NJOROGE.....APPLICANT
VERSUS
JANE WAMBUI NJOROGE.....RESPONDENT
RULING

INTRODUCTION

The deceased Morgan Njoroge Gakuo died on 14th January, 2007 as shown in the death certificate No. 57233.

The Respondent widow of the deceased filed a petition for grant of letters of administration on 14th February, 2007 and the grant was issued on 20th December, 2007 to Jane Wambui Njoroge and Ernest Kamau Gakuo. On 28th February, 2008 the Applicant filed summons for revocation or annulment of grant brought under **Section 76 Law of Succession Act Cap 160**. The matter was heard interpartes and culminated with the Ruling of Kimaru J of 29th July, 2011. In the ruling; the Court revoked and set aside the grant and issued a new grant in the names of the Applicant and Respondent jointly to administer the estate of the deceased on 20th July, 2011.

The Court record confirms that at some point and stage the parties reached an amicable settlement and agreed to the consent filed and signed in Court by the parties and their respective advocates before N. Njagi on 25th September, 2012 and the Deputy Registrar produced the same as adopted by Court on 27th September, 2012.

The Consent was as follows;

‘IT IS HEREBY ORDERED BY CONSENT

1. That the estate of the deceased be distributed as follows;

a. That Eunice Wanjiku Njoroge together with her children do take the following properties

i. Kabete/Karura/2076

ii. Kabete/Gikuni/T.164

iii. 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 cost for the entire suit.”

PLEADINGS

Pursuant to the Consent filed on 25th September, 2012, on 16th May, 2013, the Respondent Jane Wambui filed an application for summons for confirmation of grant with the names of the beneficiaries and the assets confirming the estate of the deceased and the proposed mode of distribution. The Co-administrator Eunice Wanjiku Njoroge filed the application of 28th September, 2013 under **Order 45 Civil Procedure Rules, Rule 49 and Rule 73 of the Probate and Administration Rules of the Law of Succession Act Cap 180 Laws of Kenya** and she sought the following orders;

a. The Consent Order of 25th September, 2012 be reviewed

b. In the review the said consent be set aside and/or vacated.

The Applicant alleged;

a. The Consent was fraudulently obtained by non disclosure of material facts by Respondent to the Applicant.

b. The Consent Order will have serious consequences if allowed to remain in force as the Applicant and her dependents stand to lose from benefiting from the estate of the deceased since no adequate provision has been made from them.

c. The consent as recorded is against the law and Public Policy.

d. The Consent Order be set aside to save the Applicant from severe hardship.

In the Applicant's supporting affidavit, she claimed that the estate would be distributed and she was to be allocated the 3 assets;

e. Kabati/Karura/T 164

f. Kabati/Karura/2076

The rest of the assets would be for the Respondent. The Applicant stated that at the time the consent was prepared, apart from the 3 assets, the Respondent did not disclose fully the assets that comprise of the deceased's estate. It is after the consent, that the Respondent filed summons for confirmation of grant and disclosed the assets of the deceased's estate.

The Applicant claimed that her advocates did not advise her accordingly and did not act in her best interests. She was deprived of her right to attend and follow the proceedings to their conclusion as Co-administrator. She also stated that the three (3) assets allocated to her only one (1) is available because; L.R Kabathi/Karura/2076 has already been disposed of and registered to the new owner and L.R. Kabathi/Karura/T. 164 has a dispute and there is a caution placed on it.

The Respondent filed a Replying Affidavit on 4th February, 2014. She deponed that on 14th January, 2007, the grant of letters of administration was issued to her and the Applicant jointly as administrators of the deceased's estate on 29th July, 2011. Thereafter, the Applicant fraudulently transferred one of the estate properties Kabati/Karura/2076 to herself and disposed of it. The proceeds were paid to her. The Applicant transferred the property one Obediah Samngen Ole Mutez. Upon this realization, Respondent filed an application to restrain the

Applicant from intermeddling with the estate and the Court gave restraining orders on 22nd December, 2011 as per the 'Exhibit 3' attached to the affidavit. The applicant, the purchaser or any other persons for interfering with the property of the deceased.

It is from these circumstances that the parties through their respective advocate reached the Consent of 25th September, 2012. The Respondent objects to the review, varying and vacating the consent of 25th September, 2012 as it was reached in consultation with the Co-administrator applicant's advocate. There is no fraud or false misrepresentation as the listed assets of the deceased's estate were enumerated in a schedule in the petition for grant of letters of administration filed on 14th February, 2007 which the Applicant objected to.

The Respondent filed for confirmation of grant and the Applicant did not come to Court, or give reasons for objection to the confirmed grant instead she filed the instant application.

SUBMISSIONS:

The Applicant through Counsel filed within submissions on 24th March, 2014. Counsel raised the following follows;

1. The Applicant agreed to the consent due to coercion and harassment that she would be subjected to criminal proceedings for interfering and intermeddling with the deceased's estate particularly the sale of L.R. Kabathi/Karura/2070.
2. Out of fear of Police prosecution the Applicant conceded to the proposal and the Respondent initiated the consent.
3. The mode of distribution is dishonest as the Applicant is entitled to three (3) properties of which only one (1) property is available the other one is sold and the other has a dispute with a Caution filed; which the Respondent will have the remainder thereof. It is incumbent upon the Respondent to disclose the extent of the deceased's estate to the co-administrator.
4. The Applicant did not obtain proper legal advice from the Counsel. The Applicant did not give full instructions to Counsel to enter the consent.
5. The consent was filed without full disclosure of the assets of the deceased.

6. The Court should not be used to sanction an illegal transaction. The Court cannot be used by the Applicant to perpetrate a fraud against the Objector. Had the Applicant had full appreciation of what she was consenting to she would not have consented.

The Applicant through Counsel relied on the following authorities with regard to setting aside and /or varying of Consent orders;

1. **FLORA WASIKE Vs DESTIMO WAMBUKO 1982-1988 IKLR 625**

2. **PURCELL Vs FC. TRUGELL LTD (1970) 3 ALL E. R. 671 at 676**

3. **HIRANI Vs KASSAM (1952) 19EACA at Page 134**

The gist of the three (3) authorities quoted is that setting aside consent orders must be on grounds that justify the setting aside of a contract entered into with the knowledge of material matters by a legally competent person (advocate).

The Court will not interfere with a consent judgment unless there are good grounds. Ideally an order made in the presence and with the consent of Counsel is binding on all parties to the proceedings or action. If the consent was given without sufficient material facts, misapprehension or ignorance of material facts or in general for a reason which would enable the Court to set aside the consent judgment. The Court will do so.

The Respondent through Counsel filed written submissions on 4th April, 2014 and raised the following issues;

1. The Respondent disclosed material facts to the Applicant at the time of execution of the Consent
2. All the assets and liabilities were disclosed in the Petition for grant of letters of administration of 14th February, 2007 which the Applicant opposed.
3. The Applicant was represented by Counsel in the proceedings culminating to the summons of the confirmed grant.
4. There is no sufficient ground to vary, review or set aside the consent therein as **Rule 63 of the Probate and Administration Rules** provides that **Order XLV of Civil Procedure Rules 2010** ought to apply which states;

The Court can review the Court judgment;

- a. On discovery of an error apparent on the face of the record.
- b. On discovery of material facts not known to the Applicant at the time the order was issued.
- c. The Application be made without unreasonable delay.

The authorities relied on are;

1. **FLORA WASIKE Vs DESTIMO WAMBUKA (1982 – 1988) KLR 625**

The consent judgment can only be set aside on the same grounds that jointly the setting aside of a contract for example fraud, mistake or misrepresentation.

2. **IN THE MATTER OF THE ESTATE OF STEPHENSON JOB CHEGE KIMOTHO NAIROBI HIGH COURT 1146 OF 1997.**

The Court dismissed the application for review as it was lodged 2 years after the Consent was made.

3. IN THE MATTER OF THE ESTATE OF LATE NYAU WANJE WALUNGO

MALINDI HIGH COURT SUCCESSION CAUSE 21 OF 2011

When the Applicant alleged that the advocate had no instructions to record consent and the Court stated, "The Law is clear. The Court cannot go behind the advocate to investigate the scope of his authority or instructions".

Counsel for the Respondent further submitted that the Applicant will not be prejudiced by the consent order not being varied reviewed or set aside. The Applicant has not come to equity with clean hands and therefore by her conduct and intermeddling with the estate of the deceased she cannot claim protection of the law.

ISSUES

The issue for determination and legal analysis are found as follows;

1. Should the consent of 25th September, 2011 be reviewed varied and /or set aside?
2. Is the mode of distribution of the deceased's estate just, fair and equitable distribution to the beneficiaries of the estate?

ANALYSIS

The Court has considered the oral pleadings and submissions of both parties and found the following emerging facts/circumstances;

- a. The list of assets and liabilities of the deceased's estate are enumerated in the attached documents to the Petition of grant of letters of administration filed in Court of 14th February, 2007 by the Respondent.

The schedule of assets filed on 14th February, 2007 includes shares, bank account proceeds, vehicles and immovable property land.

This application for letters of administration culminated with grant of letters of administration issued to the Respondent Jane Wambui Njoroge and Ernest Kamau Gakuo. The Applicant objected to the grant and it was

revoked and a new grant was issued in both Applicant and Respondents' name as administrators of deceased's estate.

Therefore the applicant must have seen and even been aware of the assets that comprise of the deceased's estate. Consequently there was no fraud misrepresentation or non disclosure of material facts at all by the Respondent.

- b. In the schedule of assets filed on 14th February, 2007 is the list of liabilities of the deceased's estate; outstanding bank loans and legal costs for existing cases in Court.

Therefore the list of assets /estate of the deceased is not to be seen in isolation but with regard to the liabilities being offset from the estate of the deceased as required under **Section 83 of the Law of Succession Act Cap 160.**

c. The review of the consent can only to be pursued in light of any misrepresentation, fraud, mistake, coercion, undue influence or illegality. The same grounds that vitiate the legality of the contract.

Order 45 of the Civil Procedure Rule 2010 lays the foundation of when a review of a Consent Order may be conducted; the Consent of 25th September, 2012 was adopted as Court Order and therefore to review the same, the basis would be on grounds listed in **Civil Procedure Rules**.

In the instant case, the Court finds that the review is not merited because;

- i. There is no error on the face of the Court record. The consent was by the advocates of the parties and with the same acknowledged by the Court on the 25th September, 2012.
- ii) There are no discovery of new facts as the list of assets and property of deceased's estate was and is in the Court file with all assets and liabilities listed in the attached schedule of the petition of grant of letters of administration.
- ii. The application for review was lodged one (1) year after the consent was duly filed in Court.
- iii. The issue regarding the quality of legal services and advice rendered by Applicant's Counsel on record is a matter that cannot be addressed by the Court as it is a matter between Counsel and client.
- iv. The issue of lack of proper legal advice and services cannot be visited on the Respondent.

From the above reasons the Court finds no basis to review the consent judgment as filed in Court.

The next issue is with regard to the summons of confirmation of grant filed on 20th May, 2013. The following issues are germane;

LAW

The duties of legal representatives/administrators of the estate are;

Section 83 of the Law of Succession Act Cap 160 provides;

Personal representatives shall have the following duties;

- “(a) to provide and pay, out of the estate of the deceased, the expenses of a reasonable funeral for him;*
- a. to get in all free property of the deceased, including debts owing to him and moneys payable to his personal representatives by reason of his death;*
- b. to pay, out of the estate of the deceased, all expenses of obtaining their grant of representation, and all other reasonable expenses of administration (including estate duty, if any);*
- c. to ascertain and pay, out of the estate of the deceased, all his debts;*
- d. within six months from the date of the grant, to produce to the Court a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account.*
- e. subject to section 55, to distribute or to retain on trust (as the case may require) all assets*

remaining after payment of expenses and debts as provided by the preceding paragraphs of this section and the income therefrom, according to the respective beneficial interests therein under the will or on intestacy, as the case may be;

f. within six months from the date of confirmation of the grant, or such longer period as the Court may allow, to complete the administration of the estate in respect of all matters other than continuing trusts, and to produce to the Court a full and accurate account of the completed administration.

g. to provide to the Court, if required by the Court, either of its own motion or on the application of any interested party in the estate, a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;

h. to complete the administration of the estate in respect of all matters other than continuing trusts and if required by the Court, either of its own motion or on the application of any interested party in the estate, to produce to the Court a full and accurate account of the completed administration”.

The Applicant sold L.R. Kabathi /Karura/2076 as Co – administrator of the deceased’s estate contrary to **Section 83 and 95 of the Law of Succession Act Cap 160**. As a Co-administrator she is in a fiduciary position which consists of honesty, diligence and trust. She received the proceeds of the sale of land and did not disclose or share with other beneficiaries. The said land is part of her allocation and will be taken into account in the distribution of the property.

The consent absolved her of the liability and in return; the Respondent was also allowed to sell Kibathi/Muthuruwa T.102. Therefore in the list of assets listed order the confirmation of grant; before the net estate is available for distribution; the parties ought to include the properties sold; the monies spent from 2007 to date 8 years and the liabilities settled.

The balance ought to be distributed equitably as provided in **Section 40 of the Law of Succession Act Cap 160** taking into account each widow and each child of the deceased as a unit. The same be distributed into 4 units for the Respondent and 3 units for the Applicant. The distribution is not equal between the widows as expressed by the Applicant but is equitably between the two (2) houses.

Finally the mode of distribution of the net estate shall be by consent of each of the adult beneficiary of the estate provided for in **Part VII Rule 40(8) of the Probate and Administration Rules**.

In the case of **GRACE KANYI NGANGA Vs NICHOLAS NJONJO NGANGA (2012) EKLR GBM KARIUKI S.C J** (as he then was) held;

“the provisions of the law required that all beneficiaries of grant consent to distribution of the estate.”

Therefore in spite of the valid consent filed in Court remaining in force there is also the requirement of all beneficiaries consenting to the proposed mode of distribution and when there is a protest or objection the rival party files the protest/objection in Court for hearing interpartes.

FINAL ORDERS

1. The Consent Judgment of 27th September, 2012 remains intact as review cannot be conducted under the grounds outlined in **Order 45 of Civil Procedure Rules 2010**.
2. The Summons for confirmation shall contain existing assets of the deceased’s estate taking into account;

- a. Properties have been sold Kabathi/Karura/2076 by the Applicant and Kabathi/Muthimu/T.102 by the Respondent as allocated in the proposed distribution to the respective parties.
- b. The liabilities outlined in the Petition offset and the remainder of the estate for distribution.
- c. Following the consent of September, 2012 and the fact that the estate has remained undistributed for 8 years the estate has wasted/depleted. So it is the balance of the estate; the net estate is the one that should be distributed to the parties.
- d. Any Objector/Protestor to file proposal for the Court to consider.
- e. What is confirmed as the existing assets of the deceased is what is available for distribution and confirmation of grant to be approved by Court under **Section 71 of the Law of Succession Act Cap 160.**
- f. No order as to costs.

READ AND SIGNED IN OPEN COURT ON THIS 8TH DAY OF May, 2015

M. MUIGAI

JUDGE

In the presence of;

Counsel for.....Applicant

Counsel forRespondent