

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 2274 OF 2012

IN THE ESTATE OF PATROBA NDURI MBAI (DECEASED)

RULING

1. The Motion dated 26th September 2014 seeks the setting aside of orders made on 15th July 2014 by consent.
2. The grounds upon which the application is premised are set out on the face of it, as well as on the affidavit of the applicant sworn on 26th September 2014. He argues that the orders of 15th July 2014 were not by consent as there was no consent of the administrators on the mode of distribution. He states that his grounds of opposition to the application dated 5th June 2014 were not considered. He avers that the second house would be prejudiced by the said orders.
3. Two affidavits have been filed in reply to the application. One is by one of the administrators, Martin Okoth Nduri, while the other is by the protestor, Samuel Okech Omer, sworn on 11th November 2014 and 24th November 2014, respectively.
4. Martin Okoth Nduru avers that it is the applicant who has been uncooperative. He did not attend meetings where the mode of distribution was discussed and agreed upon. He was said to have been present in court on 15th July 2014 when the consent orders were made. The applicant is accused of selling family property to the protestor without colour of right.
5. The protestor avers that the applicant sold a portion of the estate property to him. He affirms that the applicant was in court on 15th July 2014 when the court orders were recorded. He states that the applicant has not indicated in what respect the second house would suffer prejudice.
6. The application was argued orally before me on 26th November 2014. Mr. Olonde for the applicant argued that there was no consent on equal distribution, and that the applicant's objections were not taken into account. He submitted that the consent orders ought to be set aside to pave way for the parties to agree on distribution or for oral evidence to be taken on distribution of the estate.
7. Miss Musyoka for the respondent argued that the applicant was present in court on 15th July 2014. He was given opportunity to address the court, which he did, before the court made the orders that it did make. She submitted that the distribution ordered by the court was fair.
8. Mr. Goa for the protestor argued that the applicant sold the property to him and the court was therefore justified to protect his interests. He submitted that the applicant has not demonstrated how the second house would be prejudiced by the orders of the court.
9. The order of 15th July 2014 was apparently made in the presence of all the parties, after the court had heard all the parties. It was a valid order of the court. A party dissatisfied with such order should either appeal the order or seek its review.
10. The matter before me is neither an appeal nor an application for review. This court no doubt cannot stand on appeal against its own order. I am not being invited to review the said order in accordance with the provisions of the Civil Procedure Rules which govern review, and which have been imported into probate practice, I am being invited to set aside the said order.

11.The Motion dated 26th September 2014 is premised on provisions of the Civil Procedure Act and the Civil Procedure Rules. I have carefully gone through the provisions of the Law of Succession Act and the Probate and Administration Rules and noted that none of them import the provisions of the Civil Procedure Act and the Civil Procedure Rules that the application is premised on. There is clearly no basis upon I can set aside the orders made on 15th July 2014.

12.In view of the above, I hereby dismiss the application dated 15th July 2014, with costs to the respondent.

DATED, SIGNED and DELIVERED at NAIROBI this 10TH DAY OF JULY, 2015.

W. MUSYOKA

JUDGE

In the presence of Mr. Olonde advocate for the applicant.

In the presence of Miss Musyoka advocate for the respondents.

Mr. Goa for protestor.