



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 435 OF 1999

**IN THE MATTER OF THE ESTATE OF THE LATE NYACHANA MWAI alias NYACHANA
W/O MWAI-DECEASED**

**MEHU MWAI1ST
PETITIONER/RESPONDENT**

**JEREMIAH MACHARIA MWAI2ND
PETITIONERS/RESPONDENTS**

VERSUS

**JOHN NDEGWA WACHIRA.....
APPLICANT**

RULING

By way of a summons dated 27th November 2014, **John Ndegwa Wachira** (hereinafter referred to as the applicant) moved this court under certificate of urgency seeking orders inter that:-

- i. *That the application be certified urgent and heard ex-parte in the first instance.*
- ii. *That the applicant be made a necessary and interested party to these proceedings and such orders needful to preserve his position be issued.*
- iii. *That the court be pleased to order the registration of an order inhibition against title No. **Tetu/Unjiru/588** pending the hearing and determination of this application.*
- iv. *That the court be pleased to set aside the order made on 26.7.2013 in regard to title No. **Tetu/Unjiru/588** and all other subsequent orders affecting the same and make such necessary orders upon hearing the interested party affected by the said order.*
- v. *Costs of this application be provided for.*

The applicant did not specify the provisions of the law under which the application is expressed or premised, an issue that was pointed out by the Respondents in their submissions. However, I am of the view that such an omission is not fatal to the application. Also Rule 73 of the Probate and administration Rules clearly stipulates that nothing in the Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of court process.

The applicant avers in his supporting affidavit that:-

- a. That he is the registered proprietor of all that parcel of land known as **Tetu/Unjiru/2030** and annexed a copy the official search, and that he bought the same from a one **Joseph Githinji Kimaru** and immediately took possession and commenced developing it and had assembled materials at the site.
- b. That the said land was curved out of **Tetu/ Unjiru/1542** belonging to the said vendor, and that the mother title for the said land was **Tetu/Unjiru/588** which property was part of the deceased estate in this cause.
- c. That initially title number **Tetu/Unjiru/1542** was purchased from the father of the second Respondent a one **Jeremiah Macharia Mwai**.
- d. That sometimes in October 2014 he was warned by the second Respondent against trespassing on the said land as it was no longer his and upon visiting the lands office he confirmed that the title was no longer in existence and had been cancelled.
- e. That he further confirmed that the subdivisions pertaining to **Tetu/Unjiru/588** were all cancelled pursuant to a court order issued on 26.7.13.
- f. That none of the owners were heard before the said order was issued, hence the order was intended to secure their eviction without being heard.
- g. That the Respondent's knew of the existence of their titles before obtaining the said order & that the applicant now is threatened with eviction and seeks to be heard.

The second Respondent filed a replying affidavit on 30.7.2015 and swore that the estate in question relates to his grandmother who was survived by the first Respondent in this application and his father and that he learnt of the existence of succession proceedings after his father's death, and also the first Respondent said he had been defrauded of his share of the estate by his father and he was served with some court documents after being made to appear before the local administration.

The second Respondent denied that he was aware of any land dealings between his late father and the applicant relating to Title Number **Tetu/Unjiru/588** and they learnt in court that the succession had not been concluded and they agreed that the first Respondent was entitled to his share of land. Further the Respondents were appointed joint administrators and no dispute was raised at the time of sharing the said estate and that he has no idea what his father could have sold during the pendency of the succession proceedings.

The consent order issued on 26th July 2013 that triggered the activities complained of decreed as follows:-

- i. That the estate (sic) **L.R. Tetu/Unjiru/588** and any subsequent subdivision do revert to the deceased **Nyachania W/O Mwai alias Nyachania Mwai**.
- ii. That **Ceaser Mehu Mwai** and **James Maina Macharia** be and are hereby appointed as joint administrators.
- iii. That the administrators or either of them be at liberty to apply for confirmation of grant notwithstanding six (6) months will not have lapsed.

Both parties filed written submissions. In his submissions, counsel for the applicant summarized the history of the dispute and how the Respondents to this application obtained the consent order and failed to disclose that there were several innocent purchasers on the said land. Counsel further submitted that it was upon the Respondents to bring the said details to the courts attention and also notify all the interested parties, and stated that the said omission was an act of dishonesty, and that the said consent was motivated by *mala fides*.

Counsel submitted that it was necessary for all interested parties to be afforded an opportunity to be heard, and that the said consent order was vitiated and should not be allowed to remain. Alternatively, counsel submitted that his client had a case against the estate which claim ought not to be compromised by allowing *the said consent to remain*.

Counsel for the Respondents submitted that this cause was filed in 1985 in the lower court and was transferred to the High Court in 1999 and that between 1985 up to the June 2014 when the estate was distributed no grant had been confirmed to enable any person including the applicant to dispose the estate which comprised of **Tetu/Unjiru/588** and that any dealings that may have taken place were fraudulent.

In counsel's view, since no grant had been issued, the applicant cannot be protected under the provisions of Section 92 of the Law of Succession Act. He further submitted that the first Respondent went back to court after discovering that his deceased brother had intermeddled with the estate without his knowledge and without any grant of representation; hence all what happened was an illegality. He insisted that the consent order was legal and submitted that if the applicant has ant claim, then the same lies else-where and not in this case.

I have carefully considered the arguments advanced by both parties in this case and the relevant law and authorities as enumerated later in this ruling.

It is not disputed that the title in question had been subdivided and titles issued in the names of other persons among them the applicant herein. It is not disputed that the said titles among them the applicants were cancelled pursuant to a consent order. The applicant and indeed the other persons whose titles were cancelled were not parties to the said consent. The question that follows is whether the applicant and indeed any other person whose title or interest was to be affected by the said consent was entitled to be heard whether he/she was a party in the said case or as an interested party. Can a court order/judgement be enforced against a person who is not a party to the proceedings?

Black's Law Dictionary defines a consent judgement in the following terms:-

"A judgement, the provisions and terms of which are settled and agreed by the parties to the action"

"Agreed judgement" which is analogous to "consent judgement" is also defined in the same dictionary as:-

"A judgement entered on agreement of the parties, which receives the sanction of the court; and it constitutes a contract between the parties to the agreement, operates as an adjudication between them and when the court gives the agreement its sanction, becomes a judgement of the court"

In *Republic vs County Council of Narok & 2 others ex-parte Wildlife Lodges Limited* the court held that a consent order may be upset where the same has been obtained without involving all the parties including any person who is likely to be affected by the order. A similar position was held by Korir J in *Republic vs The Registrar General & Other*. Similarly Waithaka J in *Lilian Waithira Muiruri vs Zacharia Mugenyio Kaburu* held a similar position and stated as follows:-

'I am guided by the finding in the case of Barclays Bank of Kenya Ltd vs Martha Anthony, which relied on the decided case of Agricultural Finance Corporation vs Lengetia Limited. The Judge held thus; 'Further, the plaintiff has relied on a consent entered into between the defendant and the registered proprietor in Nairobi HCCC No. 1114 of 2006, regarding the transfer of the suit property to the defendant and the registration of the lease in favour of the plaintiff. The plaintiff is however, not a party in HCCC No. 1114 of 2006, nor was he a party to that consent. The authority which was cited by Mr. Machira, Agricultural Finance Corporation (supra), neatly deals with such a situation, and I can do no more than repeat the holding in that case that 'as a general rule, a contract affects only the parties to it, and cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit or purports to give him the

right to sue or to make him liable upon it.’ Needless to state, that the consent’(Emphasis added).

I find myself in agreement with the views expressed above that parties cannot be bound by a consent they are not a party to.

Further the fact that the consent order nullified existing titles registered in the names of persons not parties to the suit thereby adversely affecting their rights without affording them an opportunity to be heard is a serious breach of the well-known principles of natural justice and raises the possibility of bad faith.

As observed above, the Applicant was not given the opportunity to be heard. The courts have been consistent on the importance of observing the rules of natural justice and the need to grant each party the opportunity to canvass his day in court. In *Onyango vs Attorney General Nyarangi J* asserted that:-

“A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right. If the principle of natural justice is violated, it matters not that the same decision would have been arrived at”

It matters not that the Respondents believed no sale could legally take place without the grant being confirmed. That was the more reason why they ought to have notified the Applicant to come forward and establish their claims instead of acting secretly. In *Crescent Construction Co Ltd vs Delphis Bank Ltd* the court observed that:-

“.....the rules of natural justice require that the court must not drive away any litigant however weak his case may be from the seat of justice. This is a time honoured principle.....”

Procedural fairness is an implied common law duty to act fairly in decision making by the exercise of statutory and judicial powers which may affect an individual’s rights, interests and legitimate expectations. The law has now developed to a point where it must be accepted that there is a common law duty to act fairly, in the sense of according procedural fairness, in making administrative and judicial decisions which affect rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary statutory intention. There are three recognized rules of procedural fairness:-

- i. The Hearing Rule- that is the right to a fair hearing.
- ii. The Bias Rule- a requirement that the decision-maker is impartial.
- iii. The No evidence rule-the requirement for decisions to be based on logically probative evidence, not on mere speculation or suspicion.

No matter how weak applicant’s case is, he had a right to have his day in court. Thus, by recording the consent in question, it cannot be said that the issue relating to how the title was obtained was conclusively determined. The applicant was perfectly entitled to be heard and explain why his title should not be cancelled and only then could the court determine the legality or otherwise of the manner and process through which he acquired the title. Breach of the hearing rule will usually, amount to jurisdictional error and void the decision.

Had the Respondents disclosed to the court that the affected persons were not parties to the consent; the court could not have sanctioned the consent. Failure to disclose such crucial information to the court is an act of bad faith and an abuse of the court process. It is settled law that a person who approaches the court for grant of relief, is under a solemn obligation to candidly disclose all the material/important facts which have a bearing on the adjudication of the issues raised in the case. In other words, he/she owes a duty to the court to bring out all the facts and refrain from concealing/suppressing any material fact within his knowledge or which he could have known by exercising diligence expected of ordinary prudence. If he/she is found guilty of concealment of material facts or making an attempt to pollute the pure stream of justice, the court not only has the right but a duty to deny relief to such a person.

In one of the earliest decisions on the subject i.e *R vs Kensington Income Tax Commissioner Viscount Reading CJ* observed:-

“ ...if the court comes to the conclusion that the affidavit in support of the applicant was not candid and did not fairly state the facts, the court ought, for its own protection and to prevent an abuse of its process, to refuse to proceed any further examination of the merits. This is a power inherent in the court, but one which should only be used in cases which bring conviction to the mind of the court that it has been deceived. Before coming to this conclusion a careful examination will be made of the facts as they are and as they have been stated in the applicant's affidavit and everything will be heard that can be urged to influence the view of the court when it reads the affidavit and knows the true facts. But if the result of the examination and hearing is to leave no doubt that this court has been deceived, then it will refuse to hear anything further from the applicant in a proceeding which has only been set in motion by a misleading affidavit.”

In other words, it is the duty of a party to a proceeding to bring under the notice of the court all facts material to the determination of his right and it is no excuse for him/her to say that he/she was not aware of the importance of any facts which he omitted to bring forward. A litigant must act with *uberrima fides* in the conduct of his/her court proceedings and disclose all the material facts to the court.

Guided by the authorities cited above and having carefully considered the relevant law and authorities and after evaluating the facts of this case and the submissions made by both parties, I find that a consent order being an agreement or a contract cannot bind persons who are not parties to it, hence the consent recorded by the Respondents is not binding on the Applicant nor can it be used to affect the Applicants rights. Further, I also find that the said consent was obtained through concealment of material facts and information which if it had been brought to the courts attention, the court could not have allowed the consent. That there was bad faith on the part of the Respondents in entering into the said consent with the sole motive of using the court order to repossess the parcels of land in question without affording the interested parties an opportunity to be heard which in my view was an abuse of court process.

I also find that the applicant has established good grounds to be enjoined in these proceedings. Consequently, I allow the application dated 27th November 2014 and make the following orders:-

- i. *That the applicant be and is hereby enjoined as an interested party to these proceedings.*
- vi. *That an order of inhibition be and is hereby issued prohibiting and or restraining the respondents herein namely **John Ndegwa Wachira** and **Mehu Mwai**, their servant and or agents or any persons acting for and on their behalf from selling, leasing, charging, transferring, disposing or in any manner dealing with all that title or land known as No. **Tetu/Unjiru/588** pending the hearing and determination of the applicants' interests/rights to the said title/land or until such other or further orders of this court.*
- vii. *That the consent made on 26.7.2013 regarding title No. **Tetu/Unjiru/588** be and is hereby stayed in so far as it affects the rights of the applicant to the said land/title.*
- viii. *That the applicant is hereby ordered to institute such court proceedings as may be appropriate to establish his interests, rights and title the said land **within 45 days** from the date of this order in default of which the orders granted herein shall lapse.*
- ix. *Each party shall bear its costs for this application.*

Right of appeal 28 days

Dated at Nyeri this 9th day of November 2015

JOHN M. MATIVO

JUDGE
