



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT MALINDI

SUCCESSION CAUSE NO. 11 OF 2009

(IN THE MATTER OF THE ESTATE OF SIMON NDIBO MUSYOKI- DECEASED)

MARY MWIKALI NDIBO.....APPLICANT

VERSUS

MICHAEL KATUA NDIBO.....RESPONDENT

R U L I N G

1. This matter was referred to this Court by Meoli J on 28th March, 2014 after the Judge on her own motion disqualified herself. What was coming up for hearing before Meoli J is an Application dated 29th November, 2012. The Applicant is seeking for the revocation of Grant on the following grounds;
 - a. **The grant was obtained by means of untrue allegation of an essential fact that the deceased was only married to one wife.**
 - b. **That the grant was obtained fraudulently by deliberately concealing from the court the fact that the Applicant was and is at all material times a wife of the deceased and for the purposes of succession a deponent of the deceased.**
 - c. **That the grant was obtained without the knowledge and or consent of the Applicant herein who was entitled to be enjoined as a co-administrator of the estate of the deceased due to the fact that she was a wife of the deceased together with whom they bore four children and now of whom is enjoined.**
 - d. **That there is need to have the interests of both families equally protected through the succession process.**
1. The Application is supported by the Affidavit of the Applicant, Mercy Mwikali Ndibo, in which she has repeated what I have summarized above.
2. In his Replying Affidavit, the Respondent, Micheal Katua Ndivo has deponed that he is the personal representative of the Estate of Simon Ndibo Musyoki who died on 8th October, 2005.
3. The Respondent has further deponed that the Applicant has not stated what is untrue in the Petition; that the grant was obtained by consent of the parties on 25th June, 2012 and that the Applicant's advocate has not sworn an affidavit how he was misled before signing the consent.
4. It is the Respondent's position that the grant having been obtained by consent, the Applicant needs to satisfy the conditions for setting aside consent order; that the Respondent's Application is causing delay especially knowing that she continues to enrich herself unjustly from Kakungu Bar

- and Restaurant.
5. The parties agreed to dispose of the Application by way of written submissions.
 6. The Applicant's Counsel submitted at length on how the Applicant was married to the deceased. Counsel submitted that after the marriage, the deceased and the Applicant were blessed with four children and that this fact was concealed by the Respondent.
 7. The Respondent's counsel reiterated in his submissions what his client had deponed in the Replying Affidavit.
 8. The record shows that the Respondent filed the Petition herein on 10th March 2009 for letters of administration.
 9. On 9th June 2009, the Respondent's advocate filed an application seeking for an order that the Applicant be summoned to appear before the court and be fined or sentenced for intermeddling with the property of the deceased, namely, Kakungu Bar; that the said Mary Ndivo do give accounts for all the proceeds earned since the death of the deceased and that the Kakungu bar, being part of the Estate of the deceased be put under a temporary Management pending the hearing of the Succession case.
 10. When the Application came up for hearing on 25th June 2012, the Petitioner's advocate, in the presence of the Applicant's advocate, informed the court that the parties had agreed that the Letters of Administration be issued to the Petitioner in respect to the Estate and in the meantime, the Applicant/objector to continue operating Kakungu bar. The court proceeded to record the consent as follows:-

“Letters of administration be issued excluding the property known as Kakungu bar and restaurant. The objection regarding the same be heard on 27th September 2012 by *viva voce* evidence”

11. The grant was therefore issued by the consent of the parties. However, the Applicant/objector now says that the said Grant was issued to the Petitioner fraudulently and without the petitioner disclosing material facts.
12. The Petitioner cannot be faulted for the consent that was entered into by the parties on 25th June 2012. In fact, the issues raised in the current Applicant are the same issues that the Applicant/objector had raised while opposing the Petitioner's Application dated 8th June, 2009 and filed on 9th June 2009 before the Petition was compromised.
13. A consent has the same effect as a contract and the same cannot be set aside unless one proves that it was entered into by collusion, mistake, duress or misrepresentation.
14. The Applicant has not alluded to the said consent at all in her Application. In fact, there is no deposition that the said consent was entered into by way of fraud, collusion, mistake or misrepresentation or that the same should be set aside.
15. In the circumstances, I find and hold that the Applicant's Application dated 29th November, 2012 is unmeritorious and I dismiss it with costs.

Dated and Delivered in Malindi this 6th day of June, 2014.

O. A. Angote

Judge