



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCC. CAUSE NO.1430 OF 1997

IN THE MATTER OF THE ESTATE OF SAMUEL MWAURA KING'ANG'I - (DECEASED)

LUCY WANJIKU MWAURA.....APPLICANT

VERSUS

JAMES KUNG'U KIBUE.....1ST RESPONDENT

JOHN MUNGAI MWAURA.....2ND RESPONDENT

RULING

On 25th September 2009, the following consent was recorded between the Respondents:

“By Consent, it is hereby agreed between the Applicant and the Respondents that the land subject matter in this suit be shared equally between John Mungai Mwaura, the Applicant and James Kungu Kung’u Kibue, the Respondent and that if there were any properties of any party on the other party’s portion of land such party be free to remove them. It is further agreed between the Applicant and the Respondent that all cases pending in court in respect of Land Title Number Kabete/Lower Kabete 303 be discontinued.”

The consent of the parties was adopted as the order of the court. On 29th October 2013, the Applicant filed an application seeking to have the said consent order set aside, varied or vacated on the grounds that:

(a) The consent was obtained fraudulently by John Mungai Mwaura and James Kungu Kibue without the knowledge, authority and/or consent of the applicant and all other beneficiaries to the estate of Samuel Mwaura Kingangi.

(b) The consent was entered to by mistake and/or misrepresentation of facts since the wife of the deceased one Judith Nduta Mwaura one of the registered owners and/or co-owner of the Land Title No. Kabete/Lower Kabete/303 had already died in 2007 and no succession and/or substitution process had been carried out as to who was to inherit her share in respect of the Land Title No. Kabete/Lower Kabete/303.

(c) The consent drawn and filed in court on 28th September 2009 was done without following the right procedure laid down under the Laws of Succession Act Cap.160 of the Laws of

Kenya.”

The application is supported by the annexed affidavit of the Applicant. The application is opposed. James Kungu Kibue filed a replying affidavit in opposition to the application. In essence, he states that the application had no merit because the distribution of the properties that comprised the estate of the deceased was done fairly. On his part, John Mungai Mwaura also swore a replying affidavit in opposition to the application. He deponed that the Applicant was his sister. He stated that the estate of the deceased was distributed in accordance with the agreement of the members of the family. He annexed a copy of the agreement signed by all beneficiaries. The agreement is dated 16th January 2010. In the agreement, the family agreed that all the daughters of the deceased (born of Judith Nduta Mwaura) shall inherit 0.25 of an acre out of the share due to the family. The daughters were identified as: Lucy Wanjiku Mwaura (Applicant), Jane Njoki Mwaura and Wambui Mwaura (deceased) her portion to be taken by her son, Mwaura. He deponed that, in the circumstances, there was no dispute between the members of the family. It was the Respondents' case that the Applicant's assertion that she was not considered in the distribution was therefore false and had no legal foundation.

During the hearing of the application, this court heard oral rival submission made by Mr. Waithaka for the Respondents, Mr. Oyugi for the administrators and Mr. Omondi for the Applicants. The parties essentially reiterated that the contents of the pleadings and affidavits that they had filed in court. This court agrees with the Respondents that for this court to set aside an order that was entered by consent of the parties, the Applicant must establish grounds which would justify this court to set aside a contract. In **Bhupinder Singh Dogra –vs- Coast Development Authority [2003] eKLR**, Kasango J held at paragraph 5 of her Ruling as follows:

“The Courts have had occasion to consider when a consent order can be set aside. I can do no better than refer to the case of Flora N. Wasike –vs- Destimo Wamboko 91982) – 88) KAR. The Court of Appeal in considering whether a consent order can be set aside had this to say:-

“It is settled law that a consent judgment can only be set aside on the same grounds as would justify the setting aside of a contract, for example fraud, mistake or misrepresentation.”

That Defendant's application clearly shows that there was a mistake in entering the consent by his advocate. Such a mistake would be essentially vitiate the consent recorded before Court. The learned author of the book “Chitty on Contracts” had this to say in respect of mistake in a contract; he stated:-

“Mistake in the Law of Contract may have several different effects. At common law, it is usually said to operate so as to negative, or in some cases to nullify, consent. The contract will then be void ab initio. In equity it may be a defence in an action for specific performance.....”

In the present application, it is the Applicant's case that the Respondents entered into the consent with a view to achieving the objective of excluding her from benefiting from the estate of her late father. The Respondents countered this argument by annexing an agreement in the affidavit sworn in opposition to the application that clearly shows the fact that the Applicant is a beneficiary of part of the estate of the deceased. The Applicant appended her signature on the agreement. The Respondents therefore succeeded in their quest to dispel the Applicant's assertion that she had been excluded as a beneficiary of the estate of her deceased father.

In the premises therefore, this court holds that the Applicant failed to establish sufficient grounds for this court to set aside the consent. However, this court noted that after the consent was signed, John Mungai Mwaura agreed with his siblings to have three of their sisters, namely Lucy Wanjiku Mwaura, Jane Njoki Mwaura and Wambui Mwaura (deceased – her children to benefit). It was indicated that the said sisters would benefit from a share of land measuring .25 of an acre. The Applicant was party to this agreement.

The said consent order shall therefore be modified to the extent that the share inherited by John Mungai Mwaura shall be reduced by .25 of an acre which shall be inherited by the three (3) sisters. Otherwise, the Applicant failed to prove the adverse allegations made against the Respondents. The application is dismissed but with no orders as to costs. It is so ordered.

DATED AT NAIROBI THIS 2ND DAY OF OCTOBER, 2014.

L. KIMARU

JUDGE