



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 292 OF 2002

IN THE MATTER OF THE ESTATE OF BENJAMIN KISINA NGATI (DECEASED)

1. JOSHUA MAKAU KISINA
2. JONA MUSAU KISINA
3. MOSE MULEI KISINA
4. PAUL NDIING'A KISINA
5. SIMON MUNYAO KISINA OBJETORS/APPLICANTS

VERSUS

1. SERA KOKI KISINA
2. JULIUS KISINA KYENGO PETITIONERS/RESPONDENTS

RULING

The summons dated 8/12/10 is brought under **rule 49 Probate and Administration Rules Cap 160 Laws of Kenya.**

The application seeks the following orders:-

1. **“THAT this court be pleased to set aside the consent order made on 18/05/2009 referring this matter for distribution by clan elders.**
2. **THAT this honourable court be pleased to review and/or set aside the elders’ report on asset distribution filed on 28th July 2009.**
3. **THAT costs of this application be in the cause.”**

The application is supported by the affidavit of the Applicant **Paul Nding’a Kisina** sworn on 9/12/2010. The five Applicants are:-

1. **Joshua Makau Kisina**
2. **Jona Musau Kisina**
3. **Mose Mulei Kisina**
4. **Paul Nding’a Kisina**
5. **Simon Munyao Kisina**

The Applicants are opposed to the distribution of the estate of the deceased as carried out by the elders pursuant to the orders made herein on 18/5/09.

The Applicants have criticized the distribution of the estate by the elders. The Applicants’ complaint is that the 1st Respondent was unfairly given half of the estate by the elders while all the six sons of the first

house shared the other half. The Applicants' contention is that the 1st Respondent was not a wife of the deceased according to **Kamba Customary Law**.

According to the Applicants, issues like who the actual beneficiaries are and the legality of the Letters of Administration ought to have been settled first. The 1st, 2nd, 4th and 5th Applicants averred that the consent recorded by the court on 18/5/09 referring the matter to the elders did not bind them as **P.T.M. Kisongoa Advocate** was not their advocate.

It is further contended that the elders did not distribute some of the assets and that the origin of the amended report filed by the 1st Respondent is unknown. A further affidavit sworn by **Moses Mulei Kisina** the 3rd Applicant reiterates the same issues as stated in the supporting affidavit and denies that some of the properties in question are the property of the 1st Respondent.

In opposition in the application, **Serah Koki Kisina** the 1st Respondent swore a replying affidavit on 8/6/2012. The 1st Respondent has described herself as a wife to the deceased and a co-wife to the mother of the Applicants. The 1st Respondent stated that together with the 2nd Respondent who was since passed away they applied for the grant of Letters of Administration in the year 2003. That the Objectors' application to have the same revoked was struck out.

Thereafter a protest to the confirmation of the grant was filed and the matter subsequently referred to the clan by consent of all the parties.

The Respondent averred that plot **No. 1417 Nguu Settlement Scheme** was erroneously included in the original schedule of the assets of the deceased. According to the 1st Respondent, Plot **No. 1417 Nguu Settlement Scheme** was her property. That plot **No. 1012 Masue** was claimed by one of the Objectors as his and was therefore not subdivided.

According to the 1st Respondent, plot **No. 1012 Masue** belonged to the deceased. That the clan elders proceeded to distribute the three parcels of land which had no dispute and marked the boundaries but the Applicants have denied the 1st Respondent from taking possession of her share. The 1st Respondent saw the applications by the Applicants as made with the objective of causing delay to defeat the ends of justice.

The summons dated 4/5/005 to withdraw from acting for the beneficiaries which was allowed by the court on 1/11/2010 reflects the five Applicants as represented by **Paul Kisongoa & Company Advocates**.

However, on 18/5/2009 when the consent order in question was recorded, the court record reflects on the coram for that day that **Mr Kisongoa Advocate** was present for the 1st Objector. Matters are not made any better by the Notice of Appointment filed by **Paul Kisongoa & Company Advocates** dated 29/3/2004 which merely states "**the above has appointed us M/s Paul Kisongoa Advocates ...**" It is not clear who the "**above**" refers to since there are five Applicants and two Respondents reflected on the said Notice of Appointment.

On 20/7/2004, **Paul Kisongoa & Co. Advocates** filed a "**Notice of Change of Advocate**" dated 11/6/2004, stating that the Objectors had appointed **Mr Paul Kisongoa & Company Advocates** to act for them in place of **Mwongela Advocate**. It is noted from the record that the firm of **Muema Kitulu & Company Advocates** had on 26/2/2004 filed a Notice of Change of Advocates in place of **Ms N. Mwongela & Company Advocates**.

Without delving into technicalities of procedure, what comes out is that one cannot state with certainty whether **Paul Kisongoa Advocate** was on record for all the Objectors when the consent order was recorded by the court. Consequently, one cannot say that all the beneficiaries to the estate of the deceased had reached a consensus to have the distribution of the estate undertaken by the elders.

The issue of the 2nd Administrator having passed away remains unaddressed.

Although the consent order stated that the properties of the deceased were to be ascertained by the parties, it seems that was not done as there seems to be squabbles regarding the ownership of two of the properties and the elders ended up not distributing all the properties.

The mode of distribution by the elders is purported to be in line with **Kamba Customary Law and Practice** and the elders proceeded to distribute the three parcels of land equally between the two houses of the deceased. The deceased passed away on 21/3/1993 when the **Law of Succession Act Cap 160 Laws of Kenya** was in operation. The mode of distribution adopted by the elders flew in the face of the provisions of **section 40** of the said **Act**.

The dispute as to who the beneficiaries are and which properties are available for distribution still rages on.

The grounds to review a consent order are such grounds as would justify the setting aside of a contract.

**“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.”
(See Flora Wasike –vs- Destimo Wamboko 1982 – 88) 1KAR)**

In the case at hand, the above analysis of the facts herein shows the existence of a mistake on whether all the Objectors were represented by **Paul Kisongoa Advocate**. It seems that there was also a misapprehension of the court order on the issue of the ascertainment of the properties that comprised the estate of the deceased.

With the foregoing, the consent dated 18/5/2009 and the elders’ report on distribution filed in court on 20/7/2009 are hereby set aside. Costs in cause.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 4th day of July 2013.

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B. THURANIRA JADEN

JUDGE