



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU**

Succession Cause 64 of 1999

ITHARA IBUTU.....DECEASED

V E R S U S

HENRY M'MWARANIA M'RITHARA PETITIONER

Law of Succession

- ü Distribution by consent
- ü Grant confirmed by judge in presence of both parties
- ü Application by objector on ground that she had not consented to it
- ü In absence of fraud consent order binding and can only set aside with like consent.

R U L I N G

This Ruling relates to the objector/Applicant application dated 15th May 2008 in which the Applicant seeks three orders:-

1. **That the court do set aside the consent orders made on 30.5.2001.**
2. **That the court do issue any other orders it may deem just and equitable in the circumstances.**
3. **Costs be provided for.**

The application is supported by the Applicant's Affidavit sworn on 15.05.2005 and the following grounds:-

- (a) **That the consent was done in the absence of the applicant and without consultation with her and**
- (b) **That the consent was entered into fraudulently.**

In a Replying Affidavit by the Petitioner sworn on 18th September 2008, the Petitioner denies the Objector's averments and avers that the application is an afterthought, vexatious, frivolous, and an abuse of the court process and lacks merit (para 3), that the objector had filed a similar application and seeking the same orders, way back in 2001, which application was withdrawn on 4.03.2008 (paragraphs 4 & 5), that there was no agreement to give the applicant 0.52 acres and that no family meeting was held on the distribution of the deceased's estate, that the alleged "**minutes**" of a family meeting (**MMM "1"** to the Objector's Affidavit), are not authentic, the minutes are neither dated, nor do they set out the attendance of the meeting, that the Objector was present in court when the consent order was recorded and adopted (paragraph 6-10 inclusive).

There is no response by the Objector to the averments by the Petitioner. The Petitioner's averments are therefore unchallenged. To assist the court to determine the application counsel for the respective parties filed and exchanged written submissions supporting the respective parties', positions.

The application invokes the court's inherent jurisdiction under Rule 73 of the Probate and Administration Rules which reads-

73. Nothing in these 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 the process of the court."

The issue in this Application is whether there is any ground for the exercise by the court of its wide and unfettered discretion to make orders either to meet the ends of justice or to prevent abuse of the process of the court.

From the Objector's perspective, her ground for seeking the orders herein is merely because she received the least allocation in the distribution of the estate, 0.12 acres when all other beneficiaries received over 2.0. acres, other than the purchaser who received 0.25 acres. The Objector certainly received the least allocation but that is no ground for setting aside the order. It was an order made by consent.

It is now settled law that an order made with the consent of parties can only be set aside by another consent of all the parties. In this case the consent of all the beneficiaries would be necessary and not merely that of the Petitioner or the Objector. It cannot be done unilaterally at the wish or behest of the applicant. A consent order is like a contract, it is binding upon the parties to it or interested in it, such as beneficiaries in a succession cause. It can only be set aside on the same grounds upon which an ordinary contract would be set aside-

- Fraud
- Misrepresentation
- Mistake
- Illegality
- Lack of capacity to contract
- Collusion or
- Misapprehension or ignorance of material facts.

See for instance (the case of **FLORA N. WASIKE OF DESIMO WAMBORO 1982 – 88**) **KLR 625**.

The Applicant never pleaded any of the said grounds. The Applicants sole ground for seeking to set aside the Orders of 30.05.2001 is merely because she got less than the other beneficiaries. In answer to her identical application dated and filed on 19.07.2001 the Petitioner averred in paragraphs 5 – 7 of his

Replying Affidavit that the Applicant is married and her late father had decided not to give a share of the family land but that she would instead be given a goat in accord with the clan custom; but the family had decided to give her 0.12 acres which she had always occupied although she does not even farm on it.

In the absence of any of those classical grounds for setting aside a consent order the court has no material upon which to exercise its discretion.

On the contrary it is the applicant who is guilty of abusing the process of court. Firstly she files and withdraws her application of 19.07.2001 and some seven (7) years later on 6.06.2008 files an identical application. The applicant is not only guilty of inordinate delay for which there is absolutely no explanation but it is also an abuse of the court process to load the court with frivolous applications.

Setting aside 7 or more years old orders is not merely inequitable but works injustice to those other beneficiaries who have taken over and developed their portions of the inheritance. Whose portion does the court take away and give the applicant? Would an applicant compensate the beneficiaries to be disturbed and displaced? They would already have suffered costs by virtue of responding to ceaseless and baseless applications. This is one such application.

This is an unworthy application for further consideration. It is unmeritorious and is an example of the abuse of the court process. The process of court must be protected from such abusers and predators.

The Application dated 15.05.2008 and filed on 6.06.2008 is therefore dismissed with costs to the Petitioner.

Dated Delivered and Signed at Meru this 3rd day of July 2009

M. J. ANYARA EMUKULE

JUDGE.