



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Succession Cause 2254 of 1998

IN THE MATTER OF THE ESTATE OF WILSON MWANGI KAROGO - DECEASED

RULING

This is a probate case. The deceased, Wilson Mwangi Karogo died on the 1 st of August 1998 due to illness. He died testate and made his 1st wife and brothers as executor of his will. Letters of administration was duly obtained on the 7.12.98.

The deceased's' second wife was provided for in the said will. On the 15.12.98 she filed a summons for revocation or amendment of the grant issued on the grounds that the said grant had been obtained fraudulently. That application is still pending.

The advocate for the executors filed an application under Certificate of Urgency praying in principles that the respondent, 2nd wife (herein referred to as the respondent) was inter meddling with the estate. She wanted that this court to issue restraining orders against the respondent 2nd wife from intermeddling. This application is dated the 11.1.99.

When the parties came for inter parties hearing on the 14.1.99 before me, it transpired that apart from this current case that there exists another Probate file which is Succession case No.2487/98. There has been gazettelement and an objection to it duly filed. I recommended that the two files could possibly be consolidated.

Nonetheless I gave directions herein that the application for the revocation of the grant dated the 15.12.98 be heard first. As the issue of preservation of the estate was paramount, the parties were given an opportunities to how best to preserve the assets pending the hearing of the revocation application.

The parties came up with a consent agreement dated the 14.1.99. Both advocates duly signed my file to indicate the agreement which they dictated to the court to record.

This consent said in brief, that the respondent was to release a motor vehicle KAC 989 B which she would transmit to M/s Nyakio General Contractors -I believe a company owned by the deceased.

All the rents to the properties belonging to the deceased would be collected and placed in a joint account. The said interest bearing account to be signed for by the two advocates.

Thereafter, the application of 11.1.99 by way of Certificate of Urgency was to be stayed pending the hearing of the revocation application that had been earlier filed. The objection raised in the previous succession cause was also to be heard.

Any further properties not disclosed can be also included on application. The parties then appointed M/s Nduta Wamae & Co. Advocates to collect the rents. Three months later the respondent filed this current application which is the subject matter of this ruling whereby the 2nd wife respondent and now applicant prayed: "That this Honourable court do review the orders made on 14th January, 1999"

The reasons being is that the consent order had not taken into account the 2nd wife and her children depended on the rents collected from the estate. That she no longer has custody of the vehicle required to be surrendered and further that the deceased properties did not in fact belong to him. This application was opposed. The advocate had known and taken instructions on the matters. The consent was in order. The authority that was quoted of Kenya Commercial Bank Ltd.v Benior Amalgamated Ltd. Muiru Coffee Estate Ltd HCCC276of1997 was relied on by both parties.

The 2nd wife's advocate who actually presented the authority stated that he had entered into the consent without in fact consulting his client. It has now come to light that there were new and important facts which was not been within his knowledge as such he prayed for a review.

The advocate for the executors, stated that the said authority supported her case.

Once a consent has been recorded it cannot be set aside.

Indeed in the said authority, a consent had been entered into between parties. The file went missing for five years. In the meantime the defendant/applicant filed several suit to try to stop the execution of the said consent.

They finally entered to the original file and made application to have the consent reviewed or set aside. The Hon. Judge set the consent aside.

On appeal it was held, inter alia

"..... that a consent judgement or order has contractive effect and can only be set aside on grounds which would justify setting a contract aside..... "

The consent judgement in the above case was reinstated.

In this particular case the advocate for the 2nd wife and applicant in this current application had authority as an advocate to compromise on behalf of his client, his clients suit. This is if he acted bona fide and not contrary to express negative direction.

See Re: Newen M9031 1 CH pp 817, 818 2) Little V Spreadbury (1910)2 KB 658.

•I believe that the advocate was within the general authority when he so acted.

The other aspect is that once a deceased dies all his assets are frozen until there is an administrator or executor appointed. It is the task of such a person to gather his estate and ensure that the estate is preserved, debits noted and the beneficiaries provided for.

The parties were thus correct to ensure that the estate is preserved. The applicant/2nd wife has no direct right to any assets as it does not belong to her, nor the 1st wife/executor/respondent until the estate is distributed.

There is a possibility that, the day to day affairs of the beneficiaries needing funds could be provided through a partial confirmed grant.

I believe many people are not able to understand that an administrator or executor are not necessarily the

ones who would inherit the property of the deceased. They are mere managers who in turn distribute the estate to the best of their ability for the benefit of the estate. If parties understood this the amount of objections raised to grants and application for revocation would be few.

I find that the consent was freely recorded. It was so entered without duress. The sole purpose was to maintain the Status Quo and preserve the estate pending the hearing of the revocation - this being after the advocate had complied with rule 44(3) of the Probate Rules on directions.

I find that there are no new matters that have come to the knowledge of the applicant and indeed to her advocate.

The pending application could have easily been heard before the Hon. Judge in charge of probate within the months of February or March 1999.

It seems there is some considerable delay in having this been heard.

I find that the application must fail the same is dismissed with costs to the respondent/executor.

Dated this 22nd day of April, 1999 at Nairobi.

M.A. ANG'AWA

JUDGE