



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO 2100 OF 1987

JEREMIAH KAMAU GITAU & 2 OTHERS.....PLAINTIFF

VERSUS

WANDAI & 5 OTHERS.....DEFENDANT

JUDGMENT

1989, **Tanui J** delivered the following Judgment.

All the three plaintiffs in this case (hereinafter referred to as the second suit) are the administrators of the estate of one Daniel Gitau Mute, who died intestate on 15th January 1979. The first defendant in the second suit, was plaintiff in Nairobi HCCC No 1777 of 1982 (hereinafter referred to as the first suit) while the second, third, fourth, fifth and sixth defendants were also defendants in the first suit. In the second suit, brought by an originating summons, the plaintiffs are seeking the following orders:-

- (a) a declaration that proceedings in the first suit were null and void;
- (b) directions as to the ascertainment of the shares of Daniel Gitau Mute (deceased) in the property L.R. No 4953/88/iv – Thika; and
- (c) costs of this second suit to be paid by the defendants.

From the record of this second suit, it appears that, during 1973, four partners namely, Lukas Njararui Kamau, Joseph Muturi Kurutu (the second and third defendants herein), Daniel Gitau Mute and Andrew Mungai Njui jointly bought a property known as L.R. No 4953/88/iv, situated within Thika Municipality, which they held as tenants in common with equal shares. On 15th January 1979 Daniel Gitau Mute died intestate as stated above. Before a grant of letters of administration of the estate of the said Daniel Gitau Mute was sought, the three remaining partners with one Jeremiah Kamau Gitau entered into a sale agreement to sell the said property to the first defendant for Shs 450,000/- of which they were paid a deposit of Shs 45,000/-, on execution of the contract. It was a term of the said agreement, which was reduced into writing, that the sale was to be completed within six months from the date of the sale agreement, when the first defendant was to pay the balance of the purchase price. The six months' period expired before the first defendant paid the balance of the purchase price and hence the sale remained uncompleted. On 19th May 1982 Andrew Mungai Njui who was another partner in the said property and who was a party to the sale agreement also died, intestate. However, on 2nd June, 1982, the first defendant filed the first suit in this court, naming the two surviving partners namely, Lukas Njararui

Kamau, Joseph Muturi Kurutu as the first and second defendants. He also found Jeremiah Kamau Gitau, Mary Wanjiku Mungai and Philisila Njeri Mungai as the third, fourth and fifth defendants respectively. Although both Mary Wanjiku Mungai and Philisila Njeri Mungai were named as defendants in that case, unlike Jeremiah Kamau Gitau they were not a party to the sale agreement of 2nd June, 1981. On 26th July, 1982, a consent judgment, drawn and signed by M/S Karugu Wandai & co Advocates for the first defendant and Mr P.S. Punja, Advocates for all the defendants was filed in court and recorded. Subsequently a decree was drawn up and issued.

Following a petition in the Probate and Administration Cause No 579 of 1980, the plaintiffs were granted letters of administration of the estate of the Daniel Gitau Mute, on 16th September, 1982. Later on the first defendant was also appointed an administrator of the estate of Andrew Mungai Njui in the Succession Cause No 34 of 1983. On behalf of the owners of L.R. No 4953/88/iv, Thika, Mr Punja, Advocate, gave a notice to the first defendant, on 12th January, 1984, the sale agreement would be rescinded. The first defendant failed to pay the said balance of the purchase price.

The case came up before me for hearing on 28th June, 1989 and on perusing the record I noticed that there was not much dispute on the facts of the case and accordingly with consent of the advocates for the parties I ordered that written submissions be filed beginning with that of the advocates for the plaintiffs. By 21st September, 1989 the last submissions had been filed and served.

The issue that can be conveniently disposed of first in this judgment, is the alleged intermeddling with the estate of Daniel Gitau Mute. It is submitted on behalf of the first defendant, that the acts of Jeremiah Kamau Gitau which consisted of entering into the consent judgment with others were done in course of professed administration of the estate and they, are, therefore, binding on the estate and that the only remedy for the plaintiffs was to sue the Executor *de son fort* who acted in the character of executor.

According to section 45 of the Law of Succession Act, Cap 160 intermeddling with the property of a dead man consists of "taking possession, disposing or otherwise intermeddling with any free property". In the instant case the act of Jeremiah Kamau Gitau that might be considered to have amounted to intermeddling with the estate of Daniel Gitau Mute is the fact that he was one of the signatories of the sale agreement of 2nd June, 1981. As shown above this agreement eventually became void and the shares of the estate of Daniel Gitau Mute in the suit premises remain intact up to this day. I therefore find that this contention does not have any merits.

Before examining the main issue in this case there is one more huddle, I consider necessary to consider first. The plaintiffs have elected to institute this second suit to challenge the consent judgment entered and recorded in the first suit instead of making the necessary and requisite applications in the suit in which the consent judgment was recorded. The question is; were the plaintiffs entitled in law to bring this second suit? There is no guidance on this matter from the Civil Procedure Act and the Rules. There is a helpful passage cited to me in civil Appeal No 81 of 1984 *Flora N Wasike vs Destino Wamboko*) where at page 87, Hancox, J.A. (as he then was) said:

"The question is, then, how is the party objecting to it to go about setting aside the consent judgment or order, assuming he cannot appeal? There are passages in the *Annual Practice* which indicate that a separate action has to be brought to do so; See the 1979 Edition Volume 2 at paragraph 2010. In *Brooke Bond* case, Law Ag. P. with whom the rest of the court agreed said that the consent judgment could be challenged in the suit itself and as I understand him, by an application for review under the order relating to that procedure. But he did not rule out the bringing of a separate suit for this purpose and the burden in either case would be on the party seeking to set the judgment aside. In my view either method is possible and which is adopted must depend very much on the circumstances of the case, as to what witnesses have to be called the nature of the grounds relied on for setting aside and so on".

In *Mulla, on the Indian Code of Civil Procedure*, 12th Edition, Volume 2 page 987, paragraph (b) under the heading "compromise of suits" the following passage is found:-

“It would seem that the proper procedure in cases where forfeiture clause is in the form ... is to enforce the forfeiture not by an application to execute the consent decree but by a regular suit. The clause does no more than declare the right of forfeiture and to that extent the decree is declaratory and it is an elementary principle that a declaratory decree can only be enforced by a suit”.

In the instant case the plaintiffs’ main relief is for a declaration that the first suit is null and void. Such a declaration can only be sought by a fresh suit and not an application in the suit itself by the plaintiffs who were not a party to it. From the above authorities I find that the plaintiffs’ election to institute a fresh suit to challenge a consent judgment in the first suit is proper and regular in the circumstances.

I now turn to examine the consent judgment complained of. I note that the plaintiffs who are the legal representatives of Daniel Gitau Mute were not a party to the first suit in which this consent judgment was entered and consequently they are not bound by a compromise made between Mr Punja, Advocate who acted in the case for the second, third, fourth, fifth and sixth, defendants on one part and M/S Karuga Wandai & Co., Advocates for the first defendant on the other part. Even if they had been a party to the first suit, their being sued before they were appointed administrators of the estate of the deceased could not be validated by doctrine of relation back, on their obtaining grant of letters of administration: (see *Ingall v Moran* [1944] 1 KB 160; *Hilton Steam Laundry* [1946] KB 65; *Pinnegan v Cementation Ltd* [1953] 1 QB 688).

As to the question of Jeremiah Kamau Gitau who appears to have been sued, presumably as a legal representative of Daniel Gitau Mute and/or as being a signatory to a sale agreement of 2nd June, 1981, it is now plain that he had never been appointed an administrator of the said estate. It follows therefore, his acts being those of a stranger, have no effect at all in respect to the said estate especially as he was a mere defendant. Likewise the consent judgment filed on 26th July, 1982 in which he was made a party and in which the shares of the estate of Daniel Gitau Mute in the suit property were to be transferred are for the same reason invalid.

It was also submitted for the plaintiffs that the first suit was a nullity on the ground that Jeremiah Kamau Gitau, Mary Wanjiku Mungai and Philisila Njeri Mungai were sued as legal representatives of Daniel Gitau Mute and Andrew Mungai Njui before they obtained letters of administration.

The law on this issue is very clear. An Administrator of an estate derives his title from the grant of letters of administration and the deceased’s property vests on him only as from the date of grant. Such title of an administrator unlike that of an executor does not relate back to the death of the testator for all purposes. It does not relate back so as to cure an invalidity of a suit purported to have been filed by an administrator in a representative capacity before a grant is made to him. Lord Denning in the English Case of *Bowler vs John Mowlem & Co* [1954]. Succinctly enunciated such law as follows:-

“The law on this subject as laid down by several decisions of this court is this: if a plaintiff brings an action in a representative capacity as administratrix, then, that action is a nullity, if she was not at that date by law administratrix with a proper grant. Even if she obtains a grant within a week, a month or a year afterwards it does not relate back. The writ is a nullity from the beginning.”

In the first suit, Jeremiah Kamau Gitau, Mary Wanjiku Mungai and Philisila Njeri Mungai did not bring the action themselves in which the consent judgment was recorded. They were sued by the first defendant when they were not in law legal representatives of Daniel Gitau Mute (deceased) and Andrew Mungai Njui (deceased). In my view, the fact that they did not bring the suit themselves but were improperly made defendants in the said suit in which they were three out of five defendants, cannot make the said suit a nullity, as was submitted on behalf of the plaintiffs.

I have perused the record of the first suit and I note that paragraph 2 thereof which describes the defendants reads:-

“The defendants 1, 2 and 3 are male adults while defendants 4 and 5 are female adults of sound mind and their address for service for purpose of this suit is care of P.S. Punja, Advocate, Uhuru Street, P.O. Box 339, Thika (service through the plaintiff’s advocate’s office).”

It is clear from this paragraph and from the plaint as a whole that the third, fourth and fifth defendants in the first suit were not sued in their representative capacities. Of course, reading the letter of 15th May 1982 from the first defendant addressed to Mr Punja, Advocate, it appears that some of the defendants in that suit, presumably the said defendants, were to be sued as legal representatives of the deceased partners of the suit property.

This is further supported by the mandatory provision of Order VII rule 4(1) of the Civil Procedure Rules Cap 21 which stipulates that where a defendant is sued in a representative capacity the plaint shall state the capacity in which he is sued and how that capacity arises. The plaint of the first suit as indicated above did not state that the three defendants were sued in representative capacities and how such capacities arose. For these reasons it appears that each of these defendants was not sued in any representative capacity.

Having noted that the first suit was not instituted by Jeremiah Kamau Gitau, Mary Wanjiku Mungai and Philisila Njeri Mungai and having found that they were not sued in representative capacities as envisaged in the Civil Procedure Rules, I find that the first suit is not a nullity as was submitted. However, I further find that they were improperly made parties in that suit as they had no property to transfer to the first defendant.

As was held by the former Court of Appeal for Eastern Africa in the case of *Brooke Bond Liebig Ltd vs Mullya* [1975] EA 266 some of the circumstances in which a consent judgment can be interfered with is “if consent was given without sufficient material facts or in misapprehension or in ignorance of material facts ...” The advocates who represented the parties in the first suit appear to have acted either in misapprehension or in ignorance of material facts relating to the capacities of the said Jeremiah Kamau Gitau, Mary Wanjiku Mungai and Philisila Njeri Mungai to enter into consent judgment concerning transfer of the suit property. I therefore find that the consent judgment filed on 26th July, 1982 ought to be interfered with.

The plaintiffs have sought a declaration that the first suit is null and void. But as I have stated the suit itself was not a nullity but the consent judgment made in the suit relating to transfer of the shares of Daniel Gitau Mute and Andrew Mungai Njui in the property L.R. No 4953/88/IV, Thika is unenforceable.

I therefore declare that in as much as the said consent judgment dated 26th July 1982 was entered into in misapprehension of the capacity of the three defendants who purported to transfer the shares of the two deceased partners in the suit property the same is void. The plaintiffs will have the costs of this suit.

Dated and Delivered at Nairobi on 1989.

B.K TANUI

JUDGE