IN THE COURT OF APPEAL

AT NYERI

(CORAM: WAKI, SICHALE & KANTAI, JJ.A)

CIVIL APPEAL NO. 30 OF 2017

BETWEEN

REHAB NYAMBURA NDEGWA...........................APPELLANT

AND

JOHN NGUGI NDEGWA....................................RESPONDENT

(Being an appeal from the Ruling of the High Court of Kenya

at Nyeri (Wakiaga, J.) dated 31st October, 2013

in

H.C. Succession Case No. 701 of 2008)

****

JUDGMENT OF THE COURT

This is an appeal from the ruling of **Wakiaga, J.** delivered on 31st October 2013.

A brief background to this appeal is that **REHAB NYAMBURA NDEGWA**, the appellant herein, vide a petition filed on 24th November 2008 applied for grant of letters of administration of her late husband, **NDEGWA NGARI SAMUEL** (the deceased). On 14th April 2009 a joint grant of letters of administration was issued to her and her son **PETERSON MAINA.** On 3rd December 2009 the appellant applied for confirmation of the grant. However, **JOHN NGUGI NDEGWA**, (Ndegwa**)** another of the appellant's sons filed a protest on 27th January 2010. On 16th September, 2010 the parties consented to a mode of distribution. This consent was later amended by a further consent dated 24th September 2010 and the latter consent was adopted by the Court, consequent upon which a Certificate of Confirmation of Grant was issued on 29th November 2010.

The matter did not rest there as on 27th March 2012, Ndegwa filed an application seeking the following orders:-

> ***"a) That status quo be maintained with respect of parcel of land known as Nyeri/Mweiga/102 pending the determination of this application.***

b) That the District Land Registrar and or Surveyor do resurvey and redraft the sketch plan to allocate the applicant a share of three (3) acres of the arable land."

The application was heard by **Wakiaga, J.** In a ruling rendered on 31st October 2013 the learned judge determined it as follows:-

"From the affidavit and the submissions herein I find that the applicant was and is entitled to three (3) acres of arable land which has not been given to the same and since the parties had agreed that the said formula be used in distribution of the estate I allow the application herein and order the District Land Registrar and or Surveyor do resurvey and redraft the sketch plan taking into account the proposal made by Willy Kiama Muchemi filed in this court on 14th February 2013 which in my considered opinion reflect the intention of the deceased.

This being a family dispute each party shall bear his/her own cost of the suit but shall share the cost of resurvey and redrafting of the sketch plan and mutation thereof."

The appellant was dissatisfied with the said outcome and hence this appeal. In a memorandum of appeal dated 21st March 2017 the appellant listed 6 grounds which can be summarized as follows:-

i. The learned judge erred in setting aside a consent order without the consent of the parties.

ii. The learned judge erred in issuing orders as he had no jurisdiction the deceased's estate having been distributed.

iii. The learned trial judge erred in introducing 'the wishes' of deceased and yet the deceased's estate was distributed on the basis of intestacy.

On 23rd April 2018 the appeal came before us for plenary hearing. Learned counsel **Mr. Waweru**, appeared for the appellant and learned counsel, **Mr**. **G.M. Gori** appeared for the respondent.

On behalf of the appellant, **Mr. Waweru** contended that the dispute between the parties had been settled by a consent dated on 24th September 2010 and adopted as the judgment of the court. In the consent, the respondent got 14.3 acres, the appellant and Ndegwa each got 10 acres and further that the consent did not address itself on arable and non-arable land. Secondly, it was counsel's contention that after the confirmation of the grant and distribution of the estate, the High Court became *functus officio* as the deceased's property had been distributed. Thirdly, that the deceased died intestate and he had no "*wishes*" to be given effect to. Counsel also relied on their submissions and list of authorities filed on 16th April 2018.

On behalf of the respondent, Mr. Gori relied on the submissions filed on 20th April 2018 and reiterated that the consent dated 24th September 2010 did not address itself on arable and non-arable land; that the wishes of the deceased were that the respondent was to get 3 acres of arable land out of LR No. Nyeri/Mweiga/102. According to counsel, "***what the judge said is that the land be re-surveyed to be in conformity with the wishes of the deceased person which issue (sic) were dealt with and parties agreed that the respondent was given 3 acres of arable land".*** Counsel contended that what was in dispute is the location of the 3 acres on the ground as ***"… the drawing….."*** was not ***"….in conformity with the wishes of the deceased"*** hence the order for re-surveying. It was counsel's assertion that ***"it was in public domain that what is being claimed by the respondent was the wish of his late father".***

We have considered the record, the rival oral and written submissions, the authorities cited and the law. This being a first appeal, it is our duty to re-analyze and re-assess the evidence and the record and reach our own findings and conclusions on the same. In so doing however, we remind ourselves that unlike the trial Judge, we did not have the benefit of seeing and/or hearing the witnesses and we should respect the findings of fact by the trial Judge unless those findings are not backed by the evidence or the findings are perverse – (see **SELLE VS. ASSOCIATED MOTOR BOAT COMPANY [1968] E.A 123)**.

It is not in dispute that the parties herein recorded two consents. The first consent was recorded on 16th September 2010 and the second one was recorded on 24th September 2010 and adopted as an order of the court.

The position of consents entered freely by parties to civil and commercial transactions in law is well settled. In ***BROOKE BOND LIEBIG (T) LIMITED VS. MALLYA [1975] EA 266*** and ***HIRANI VS. KASSAM [1952] 19 EACA 131***, the court cited with approval a passage from ***SETTON ON JUDGMENTS AND ORDERS, 7TH EDITION, VOL.1.P.124*** which states:-

> "***Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them… and cannot be varied, or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court…or if consent was given without sufficient material facts, or misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement***."

Similarly in the ***BOARD OF TRUSTEES NATIONAL SOCIAL SECURITY FUND VS MICHAEL MWALO [2015] eKLR*** this Court ordered:-

> "***The law pertaining to setting aside of consent judgments or consent orders has been clearly stated. A court of law will not interfere with a consent judgment except in circumstances such as would provide a good ground for varying or rescinding a contract between parties. To impeach a consent order or a consent judgment, it must be shown that it was obtained by fraud, or collusion or by an agreement contrary to the policy of the court***."

There was no evidence that the two consents and more so the consent of 24th September 2010 was obtained fraudulently or obtained in any other unlawful manner. In the absence of any such allegations, the consent of 24th September 2010 bound all those who were parties and it cannot be set aside whimsically.

The other issue that arises in this appeal is whether the deceased had "*wishes*" as regards his estate. Again, it is not disputed that the deceased died intestate. **S. 34** of the Law of Succession Act, Cap 160 of the Laws of Kenya provides:

> "***A person is deemed to die intestate in respect of all his free property of which he has not made a will which is capable of taking effect."***

In our view the learned judge erred in coming to the conclusion that there was need to re-survey the land so as to give effect to the "***wishes***" of the deceased. The deceased having died intestate, there were no '***wishes***' to be considered in the distribution of the deceased's estate.

Having come to the above conclusion, we do not deem it necessary to address the issue of whether the court has jurisdiction or not. We find that the appeal is meritorious and accordingly allow it and set aside the orders of Wakiaga, J. delivered on 31st October, 2013. As the parties herein are family members, the order that commends itself to us is that each party shall bear his/her own costs.

Dated and delivered at Nyeri this 11th day of October, 2018.

P. N. WAKI

....

JUDGE OF APPEAL

F. SICHALE

....

JUDGE OF APPEAL

S. ole KANTAI

....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR