



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 1298 OF 2011

IN THE MATTER OF THE ESTATE OF GERISHON KAMAU KIRIMA (DECEASED)

STEPHEN KAMAU KIRIMA.....1ST APPLICANT

IRENE NJERI KIRIMA.....2ND APPLICANT

GRACE WARWATHA KIRIMA.....3RD APPLICANT

VERSUS

WANJAU KIRIMA.....1ST RESPONDENT

MARGARET KIRIMA.....2ND RESPONDENT

ANNE KIRIMA.....3RD RESPONDENT

MARIA NJERI KIRIMA.....4TH RESPONDENT

RUTH WANJA KIRIMA.....5TH RESPONDENT

RULING

1. The deceased Gerishon Kamau Kirima died on 21st December 2010. He was survived by members of three households, and left a substantial estate.

2. When this court took over this cause on 9th February 2021 the matter had been partly heard by Justice William Musyoka before he was transferred to Kakamega station. Following the application for the confirmation of the grant filed on 23rd May 2017, the parties were to give oral evidence. A joint administratrix Anne Wangari Kirima gave evidence on several occasions over a period of about two years. She had yet to conclude when the judge was transferred. The rest of the witnesses were yet to testify. This was the case when the parties and their counsel appeared before me on 9th February 2021. On this day, Mr. Ojiambo (SC) and Miss Mbuthia appeared for Anne Kirima, Mr. Munge for Maria Kirima, Mr. Nyamu for Alice Kirima and Teresiah Kirima, Mr. Marati and Mr. Ndoho for Rachael Ndeii, M/s. Achola was holding brief for Mr. Kithii for Wanjiru Kirima, Mr. Karomo was for Jane Kirima, Mr.

Anindo was holding brief for Mr Onduso for Teresia Kirima and Ms. Ndoho was holding brief for Mr. Kyalo Mbobu for Stephen Kirima and Irene Kirima. Following discussions among themselves, they entered into the following consent:-

- a. that by close of business on the following day Mr. Munge files and serves proposed issues for discussion;
- b. by end of 7 days parties to exchange and file a list of issues;
- c. parties to file a list of schedule of documents filed;
- d. parties to have leave of 14 days to file and serve any affidavit or further affidavit;
- e. parties to exchange written submissions on the issues filed;
- f. on the previous consents regarding fees, etc, parties to discuss and agree on the mode of payment depending on the monies available; and
- g. mention on 16th March 2021 to confirm compliance.

3. The understanding was that upon the parties complying, the court would, subject to any oral submissions, prepare and deliver a judgment to determine the application for the confirmation of the grant.

4. The parties were in the middle of compliance when the applicants Stephen Kamau Kirima, Irene Njeri Kirima and Grace Warwatha Kirima filed the instant application dated 11th June 2021 under **sections 1, 1A, 1B and 3A** of the **Civil Procedure Act** and **rule 49** of the **Probate and Administration Rules** seeking to review and set aside the consent recorded on 9th February 2021. The grounds were that:-

- a. the said consent was entered into in the belief that the hearing of the evidence of all witnesses had closed which was not the case as not all witnesses had testified;
- b. to write final submissions without having all the parties will not serve their constitutional right to a fair hearing under Article 50 thus rendering the final judgment legally challengeable on appeal;
- c. it is only fair and just for the propriety of these proceedings to give the applicants an opportunity to testify in order to have their day in court; and that
- d. it was a mistake to enter into the consent which mistake should be corrected by reversing and setting aside the consent order.

5. In the supporting affidavit sworn by Stephen Kamau Kirima, he stated that the parties and counsel who were present committed a mistake of monumental proportions when they decided to proceed the way they did without considering that not all parties had testified; that each party had a legitimate expectation to testify. He swore the affidavit on his behalf and on his behalf and on behalf of his sister Irene Njeri Kirima and his mother Grace Warwathia Kirima. They are all from the second house of Grace Warwathia Kirima.

6. This application was opposed by the rest of parties, except for Catherine Njeri Macharia who is a beneficiary and administratrix of the estate of the deceased. Catherine's case was that she and her advocate Mr. Mwangi Kigotho were not present and therefore were not bound by a consent they did not participate in recording. The parties opposing the application basically stated, and it is not denied, that the applicants were present with their advocates and participated in the making of the consent and cannot therefore be allowed to resile from it.

7. I have considered the application, the grounds of opposition, replying affidavits and the written submissions for and against. Ideally, there was no basis laid by the applicants to warrant the review and/or setting aside of the consent entered on 9th February

2021. This was because the applicants and their advocate were present and participated in the making of the consent. They became bound by it. The terms of the consent were clear on how they wanted the succession cause to be heard and determined, despite the earlier agreement that the same be heard through oral testimonies of the parties. However, the parties and counsel present knew, and ought to have informed the court that, Mr. Mwangi Kigotho and his client Catherine Njeri Macharia were not present. Counsel and his client were entitled to be heard, and their views sought before the consent was recorded. A consent cannot bind a party who did not participate in its entry. Because of this, I will allow the application and set aside the consent recorded on 9th February 2021.

8. Because of the facts of the application, the usual principle that costs follow the event shall not apply. The applicants will not get costs of the application.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF APRIL, 2022

A.O. MUCHELULE

JUDGE



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