



REPUBLIC OF KENYA



In re Estate of Samuel Maregwa Kahugu (Deceased) (Succession Cause 301 of 1997) [2023] KEHC 22965 (KLR) (29 September 2023) (Ruling)

Neutral citation: [2023] KEHC 22965 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
SUCCESSION CAUSE 301 OF 1997
SM MOHOCHI, J
SEPTEMBER 29, 2023**

BETWEEN

BEATRICE WANJIKU MAREGWA ADMINISTRATRIX

AND

MARTIN KAHUGU MAREGWA 1ST ADMINISTRATOR

WALTER MATHENGE MAREGWA 2ND ADMINISTRATOR

RULING

1. Before this Court is a Chamber Summons Application dated 19th January 2023 brought under Section 47 of the [Law of Succession Act](#) and Rule 73 of the *Probate and Administration Rules*. The Applicant seeks the following orders:
 - i. Spent.
 - ii. That the consent orders numbered (2) and (6) comprised in the consent order dated 7th December, 2021 and confirmed by the Honourable Mumbua T, Matheka on 31st March 2022 be set aside.
 - iii. That the consolidation of parcels of land known as L.R NO. 1376/1, 1376/2 and 421/2/3 Naivasha and subdivision of amalgamated parcels as proposed by P.R.J Wanyama, Regional Surveyor, Rift Valley and presented vide report dated 7th June, 2022 with accompanying sketch plan be adopted by the Honourable Court.
 - iv. That costs and incidental to the Application herein be awarded to the Administratrix.



2. The grounds upon which the Application was predicated were set out in its body and the Supporting Affidavit of Beatrice Wanjiku Maregwa sworn on 19th January, 2023.
3. A consent dated 6th December 2021 was entered where the parties involved agreed on the mode of distribution of the estate of the Late Samuel Maregwa Kahugu who died intestate. The deceased had two wives the 1st Administratrix and the house of the 2nd Administrator.
4. The Applicant contends that in the consent order numbers 2 and 6 in the subject consent has a mistake and the same cannot be implemented by the appointed surveyor without placing permanent structures belonging to the Applicant's houses within the portion belonging to the 1st Respondent's house.
5. The Applicant further states that it is due to the said challenge in implementing and that it ought to be rectified. The Applicant bases her contention on a surveyor's report dated 7th June, 2022 which was prepared by the surveyor and filed in Court.
6. The Application was opposed *vide* a Replying Affidavit dated 16th May, 2023 sworn by Martin Kahugu Maregwa the 1st Respondent herein. It was contended that the Applicant without informing the other administrators caused the surveyor to visit the parcel of land and prepare a second report without the knowledge and consent of the other administrators.
7. That the surveyor's visit was aimed at changing the boundaries without their knowledge. That the only permanent structure on the parcels belongs to the 1st Administrator's house and that the Applicant does not have a house there nor does she live there.
8. Pursuant to the directions of 13th June 2023 parties were directed to file written submissions. None filed.
9. Therefore, the sole question for determination before this Court is;
 - a. whether a case has been made for the setting aside of the consent entered on 31st March 2022 and adopting the report dated 7th June, 2022.
10. On 3rd August, 2020 an order was issued by Judge T. Matheka to the Regional Surveyor Rift Valley to survey consolidate and subdivide parcel L.R No. 1376/1, 1376/2 and 421/2/3 Naivasha. A report dated 17th August 2021 was thereafter done which was the basis of the consent dated 6th December 2021 that was filed and adopted in Court.
11. On 6th December, 2021 an advocate and a representative of the 1st Administrator were present and signed the consent order. Consequently, an advocate and the 2nd Administrator were equally present and signed the consent as well.
12. It is a fact that the initial survey was done with the full knowledge of all the parties and with the knowledge of the administrators. It is also a fact that the consent adopted on 31st March, 2022 was with the concurrence of all the parties as represented by their respective counsel and family. It amazes this Court as to why the Respondents were not informed prior to the second survey that there was a challenge in implementing the initial report's suggestion.
13. The surveyor expressed his concerns about the implementation of the initial report to the exclusion of the other administrators. The Applicant's advocate only communicated this information to the advocates of the Respondent upon being prompted in a letter dated 14th April, 2022. The surveyor went ahead and prepared the report without the Respondent's being informed or roped in the process and then proceeded to file the same in Court.



14. The grounds for setting aside a consent order are well established in the following authorities;
15. [*Flora Wasike -v- Destimo Wamboko*](#) [1988]1 eKLR where A.R.W Hancox JA (as he then was) had this to say;

It is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out: see the decision of this Court in *J M Mwakio v Kenya Commercial Bank Ltd* Civil Appeals 28 of 1982 and 69 of 1983. In *Purcell v F C Trigell Ltd* [1970] 2 All ER 671, Winn LJ said at 676;

“It seems to me that, if a consent order is to be set aside, it can really only be set aside on grounds which would justify the setting aside of a contract entered into with knowledge of the material matters by legally competent persons, and I see no suggestion here that any matter that occurred would justify the setting aside or rectification of this order looked at as a contract.”

16. In [*Kenya Commercial Bank Ltd vs Specialised Engineering Co. Ltd*](#) [1982] KLR 485, Harris, J correctly held, inter alia, that: -

“1. A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or collusion or by an agreement contrary to the policy of the Court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the Court to set aside an agreement.”

17. In [*Board of Trustees National Social Security Fund v Micheal Mwalo*](#) [2015] eKLR, the Court of Appeal stated as follows:

“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 Court.”

18. If there was an implementation challenge why were the parties that were likely to be affected by the said implementation challenge as to the positions of their house not consulted prior to undertaking the survey and making the report? Why did the surveyor visit the property without the knowledge of the other administrators? The process towards preparing the second report was exclusive.

19. The parties hereto are bound by the order dated 6th December, 2021. It was further stated in [*Kenya Commercial Bank Ltd vs Specialised Engineering Co. Ltd*](#) (supra) that:

“the making by the Court of a consent order is not an exercise to be done otherwise than on the basis that the parties fully understand the meaning of the order either personally or through their advocates and when made, such as order is not lightly to be set aside or varied save by consent or on one or either of the recognized grounds.”

20. The Applicant has not proved the existence of any of the ingredients which would persuade the Court to set aside the consent orders that were arrived at with her full participation. It is my considered view that the Applicant is attempting to have a second go at the subdivision.



21. The Court is therefore not convinced that the Application has merit and the Application is thus dismissed with no orders as to costs.

DATED, DELIVERED AND SIGNED AT NAKURU ON THIS 29TH DAY OF SEPTEMBER, 2023.

MOHOCHI S. M.

JUDGE OF THE HIGH COURT

