



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Simiyu Wasike Walubengo (Deceased) (Probate & Administration
17 of 2018) [2023] KEHC 23117 (KLR) (29 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 23117 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
PROBATE & ADMINISTRATION 17 OF 2018
SC CHIRCHIR, J
SEPTEMBER 29, 2023**

**IN THE MATTER OF THE ESTATE OF SIMIYU WASIKE WALUBENGO
(DECEASED)**

BETWEEN

TIMOTHY NGURETE SIMIYU 1ST PETITIONER

ISAAC MANDILA SIMIYU 2ND PETITIONER

AND

NASAKA TEMTURIA SIMIYU APPLICANT

RULING

1. By way of chamber summons dated March 14, 2023 the 3rd petitioner, Tamtiria Nasakho Simiyu (applicant) seeks to set aside the consent order dated September 15, 2021 and filed in court on September 16, 2021.
2. The application is supported by the grounds appearing in the face of the application and the affidavit of the applicant sworn on March 14, 2021, and a supplementary affidavit sworn on July 3, 2023.

The Applicant's Case:

3. It is the applicant's case that during the main hearing of this cause, she was represented by her advocate, one Mr Kayunza of Mukabane & Kagunza Advocate. Upon conclusion of the hearing, the court delivered judgement on February 19, 2023.
4. Later, she came to know that a consent order had been entered into setting aside the said judgement. The consent was recorded between the firm of Samba & Co Advocates and Momanyi & Manyoni Advocates.



5. She argues that the consent order was entered without her knowledge or consent as none of the firms were representing her at the time.
6. She further states that neither herself nor her advocate was notified of the court- attendance date, when the said consent came up for recording. The applicant further states that, contrary to the assertion by the firm of Momanyi & Manyoni Co Advocates, she filed and served a notice of change of advocates on them. Consequently, she argues, the said firm did not have the authority to represent her on September 11, 2021 when the consent was entered into.
7. The applicant has further deponed that she has since lodged a complaint at the local branch of the Law Society of Kenya at Kakamega (LSK) but her letter has not elicited any response.
8. The applicant states that the consent was an act of collusion between the two aforesaid firms.
9. In her submission, the applicant has relied on several authorities which sum up the argument that a consent may be set aside where it was based on fraud, non- disclosure of material facts or collusion.

Respondent's Case.

10. It is the respondent's case that if the applicant had indeed changed advocates as alleged, then the notice was neither served on the counsel for the respondent nor the firm of Momanyi ,Manyoni & Co Advocates.
11. That in any event, the applicant has failed to prove that the firm of Momanyi, & Co Munyano acted without instructions.
12. It is further contended that the firm of Momanyi ,Manyoni & Co Advocates were properly on record since the firm of Mukabane & Kagunza Advocates had not taken over the matter at the time of recording of the consent.
13. In their submissions, the respondent asserts that a consent order entered into by an advocate, who has proper instructions from their client, is binding on the instructing party
14. In the present case, it is argued, the applicant has failed to prove that there was fraud committed.

Background.

15. A brief summary of the circumstances and the facts leading to the present application is necessary.
16. The applicant and respondents are all administrators of the Estate of Simiyu Wasike Walubengo. (deceased). The applicant and the respondents each filed separate applications for confirmation of grant. The court gave directions for the applications for confirmations to proceed by way of viva voce.
17. During the hearing, the respondents were absent, but the applicant was present and proceeded to give evidence with the assistance of her counsel, Mr Kagunza. Prior to that, Mukabane & Kagunza Advocates had filed a notice of appointment. The notice is dated August 7, 2020 and was filed in court on August 11, 2023.
18. On March 19, 2021, the court (Musyoka J) delivered judgement, and on February 24, 2021, a certificate of confirmation of grant was issued in terms of the aforesaid judgement.
19. On April 20, 2020, by way of a notice of motion dated the same date, the respondents sought to set aside the judgement. On September 15, 2021, the motion was compromised by a consent signed by Samba & Co Advocates for the respondent and Momanyi Manyoni & Co Advocates for the applicant herein. The consent was adopted by the court on September 16, 2021.



20. This is the consent that forms the subject matter of the present application.

Determination:

21. The terms of the said consent were as follows:

- a. That the proceedings of December 1, 2020 and the resultant judgement delivered on March 19, 2021 with all the consequential orders be set aside.
- b. That the 2 parties' respective summons for confirmation of grant to the estate of the deceased be disposed off simultaneously by way of *viva voce* evidence as previously directed by this honourable court on October 7, 2020.
- c. That throw away costs of Kshs 5,000/= agreed by the parties have been paid to counsel for the respondents.

Determination

22. Two key issues arise for determination in this motion. These are:

- a). whether the firm of Momanyi , Manyoni & Co Advocates were on record for the applicant.
- b). whether the consent was procured through collusion.

Whether the firm of Momanyi Manyoni & Co were on record for the applicant .

23. In the case of *Kenya Commercial Bank v Specialized Engineering Ltd* (1982)KLR 485 it was held that "A consent ordered 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 the judgement".

24. The onus is therefore on the applicant to prove that she- was not bound by the consent for one reason or another.

25. It is the applicant's case that the consent was procured through an act of collusion between the law firms of Samba & Co Advocates and Momanyi and Manyoni Advocates; that by the time the consent was entered the firm of Momanyi and Manyoni Advocates was no longer represented her and was instead being represented by Mukabane & Kagunza Advocates. That the firm of Momanyi & Manyoni therefore had no authority to enter the consent on her behalf.

26. I have perused the record, a summary of which I have laid out herein before; The record shows that on August 11, 2020, the firm of Mukabane & Kagunza filed a notice of appointment of advocates to take up representation of the applicant. There is an endorsement on the said notice being an acknowledgment by "Silvester for Momanyi ", acknowledging that he received the notice on October 7, 2020.

27. The respondent contends that the notice was not served, but I agree with the applicant that the said Silvester has not sworn an affidavit denying that he received the notice. It is clearly evident therefore that as at the time of signing the consent on September 15, 2021, almost a year later, Momanyi & Manyoni were no longer the advocates on record for the applicant. It is also evident that Mr Momanyi appeared in court on September 16, 2021 to have the consent adopted when he had ceased to have authority to act for the applicant.



28. What about the advocate of the respondent, was he aware about the fact that Momanyi & Manyoni had ceased to represent the applicant? It has been argued that Samba and Co Advocates were not served. I have perused the record and indeed there was no evidence of service of the notice on the firm of Samba & Samba Advocates.
29. However, were they aware that the firm of Momanyi and Manyoni had ceased to represent the applicant's interest in any event? The answer is in the affirmative, and this is why: On October 7, 2020, when the matter was allocated a hearing date, Mr Tanui for samba & Co Advocates was present in court together with Mr Kagunza . Mr Kagunga introduced himself as representing the applicant as opposed to holding brief for Momanyi& Manyoni & Co or any other advocate. Mr Tanui for samba & Advocates therefore had implied notice to the effect that Mr. Kagunza was by then the advocate on record for the applicant and not Momanyi and Manyoni Advocates.
30. It is therefore my finding that as at the time the impugned consent was being entered into the firm of Momanyi & Manyoni advocates had no authority to represent the applicant.

Was the consent procured through an act of collusion?

31. To the extent that Momanyi & Manyoni Advocates had no authority to represent the applicant at the time of signing and adoption of the said consent, then I agree with the applicant that this was a case of collusion between the respondent and an advocate who had lost the mandate to represent her.
32. Something else corroborate this act of collusion: when the hearing took place on December 1, 2020, the applicant was represented by Mr Kagunza, It was not Mr Momanyi or his firm's representative who conducted the hearing. If indeed Momanyi & Manyoni were not aware of the change of advocates, then the pertinent question is, how did they later end up participating in setting aside a judgement, the proceedings of which they had not participated in? If they are genuine in their claims, wasn't this the time to ask the "how" and the "when" of the proceedings, the outcome of which they are now being asked to set aside by consent? It is also instructive that, once the judgement was set aside and re-hearing ordered, Momanyi through Mr Manyoni informed the court that he had not been able to get further instructions from his client. The said Momanyi was absent in court then.
33. It is trite law that a consent order is in the nature of a contract and can only be varied or set aside on the same conditions as one would set aside a contract. (See the case of *Hirani v Kassam* (1952) 19 EACA 131. Fraud or collusion is one such ground
34. The applicant has succeeded in establishing that the consent dated September 15, 2021 was obtained through collusion of the firm of Momanyi & Manyoni Advocates and Samba & Co Advocates as aforesaid
35. Momanyi & Manyoni Advocates not only misled the court but their actions are unethical and an act discrediting of an advocate.
36. In the circumstances, the application herein is merited, and I hereby proceed to make the following orders:
 - a. The consent orders dated September 15, 2021 and adopted in court on September 16, 2021 and all consequential proceedings, decree and/or orders are hereby set aside.
 - b. Costs of this application are awarded to the applicant.

Dated, signed and delivered in open court at Kakamega this 29th September 2023.



S. Chirchir

Judge

In the presence of:

E. Zalo – Court Assistant

Mr. Kagunza for the Applicant

No appearance by the Respondent.

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