



**Makabulu & another v Munyeti (Legal Representative of the Estate of the Late Simeon Munyeti Andashe) & 2 others (Succession Cause 105 of 2021) [2023] KEHC 24442 (KLR) (Family) (30 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24442 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
SUCCESSION CAUSE 105 OF 2021  
JN KAMAU, J  
OCTOBER 30, 2023**

**BETWEEN**

**DINAH MAKABULU ..... 1<sup>ST</sup> APPLICANT**

**ROBAI KHAVERE ANDASHE ..... 2<sup>ND</sup> APPLICANT**

**AND**

**JACKSON MUSUNGU MUNYETI (LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE SIMEON MUNYETI ANDASHE) ..... 1<sup>ST</sup> RESPONDENT**

**IDDI YAHUMA ANDASHE ..... 2<sup>ND</sup> RESPONDENT**

**FRANCIS JESJERY MAKAAANI (LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE JOEL KANGWANA ANDAHSE) ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

**Introduction**

1. In their Notice of Motion application dated and filed on 20<sup>th</sup> February 2023, the Applicants herein sought orders that the file herein be re-opened for hearing of their said application in which they had prayed that the firm of M/S Lagat Joshua & Co Advocates be granted leave to come on record for them after close of the proceedings.
2. They also sought that the consent of 30<sup>th</sup> September 2020 between the sons of the deceased be reviewed and/or set aside and that the Certificate of Confirmation of Grant be amended to reflect and confirm the orders of the Honorable Court dated 20<sup>th</sup> June 2018 which directed that L.R. No Tiriki/ Cheptulu/292 (hereinafter referred to as “the subject property”) be distributed equally among the beneficiaries of the deceased’s estate.



3. In addition, they sought that an order be issued directing the Registrar Vihiga County to delete, cancel and/or substitute entries that were made in the Register on 28<sup>th</sup> September 2022 with the orders of this court and further, that an order be issued to substitute the names of the deceased children and beneficiaries of the deceased.
4. The said application was supported by the Affidavit of the 1<sup>st</sup> Applicant herein on her own behalf and on behalf of the 2<sup>nd</sup> Applicant herein. The same was sworn on 20<sup>th</sup> February 2023.
5. The Applicants averred that the Grant was confirmed and the deceased's estate was distributed amongst his seven (7) children namely, the Applicants herein, the 2<sup>nd</sup> Respondent herein, Simeon, Sabeti, Joel and Grace but that on 30<sup>th</sup> September 2020, the brothers entered into a consent amending the Grant to the effect that they (brothers) would inherit one (1) acre each while they (Applicants) would share one (1) acre between them. They asserted that the said consent was entered without their knowledge and/or consent.
6. They added that the registration was also made without their knowledge. They pointed out that the same had challenges and would require substitution as their deceased siblings' names had been registered. It was their assertion that the Grant ought to be amended to reflect the orders of 20<sup>th</sup> June 2018, the substitution of their deceased siblings by other parties and the fact of each beneficiary being allocated 0.18 ha.
7. They averred that they had brought their application timely and with utmost good faith and that it was in the interest of justice that the orders they had sought herein be granted.
8. In opposition to the said application, on 21<sup>st</sup> April 2023, the 1<sup>st</sup> Respondent filed a Replying Affidavit. The same was filed on 22<sup>nd</sup> April 2023.
9. He confirmed that the Grant was amended after a consent was entered by Musyoka J who was seized of this matter at the time. He explained that that he was the only son in the deceased's first house while the 2<sup>nd</sup> Respondent and Joel Makani (deceased) were sons from the second house. He averred that Sabeti Munyeti Andashe who was the only daughter of the first house surrendered her share to his father who was the Petitioner herein.
10. He asserted the said consent was among all to the beneficiaries (sic). He pointed out that it was the 2<sup>nd</sup> Respondent herein and the Applicants herein who had always protested the mode of distribution.
11. He termed the Applicants' assertions as having been an afterthought considering the time that had elapsed since the Grant was confirmed. It was his further assertion that this Honourable Court had already rendered itself to the effect that it was functus officio and that the present application was tantamount to the court sitting on its own appeal.
12. The Applicants' Written Submissions were dated 2<sup>nd</sup> June 2023 and filed on 26<sup>th</sup> June 2023 while those of the 1<sup>st</sup> Respondent were dated 30<sup>th</sup> June 2023 and filed on 6<sup>th</sup> July 2023. The Ruling is therefore based on the said Written Submissions that both parties relied upon in their entirety.

### **Legal Analysis**

13. The Applicants submitted that the questions that were before this court for determination were:-
  - a. whether or not the consent dated 30<sup>th</sup> September 2023 could be set aside;
  - b. Whether this court was functus officio.



14. The 1<sup>st</sup> Respondent also adopted the said issues. This court found the issue of the Applicant's representation in the suit herein to have been another issue for determination.
15. This court therefore deemed it prudent to address the said issues under separate and distinct heads as shown hereinbelow.

### **I. Applicants' Representation by Advocates**

16. None of the parties submitted on the prayer that the firm of M/S Lagat Joshua & Co Advocates had sought to be granted leave to appear for the Applicants herein after close of the proceedings herein.
17. The Applicants were participating in the proceedings for the first time when they filed the present application. They had therefore not been represented by any counsel. The Certificate of Confirmation of Grant was issued on 30<sup>th</sup> September 2020. No judgment was rendered in this matter to warrant the said firm of advocates seeking leave to come on record for the Applicants herein (sic).
18. Order 9 Rule 9 of *Civil Procedure Rules*, 2010 stipulates as follows:-
  - a. upon an application with notice (sic) to all the parties; or
  - b. upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be."
19. Although the Respondents were not contesting the prayer for the said firm of M/S Lagat Joshua & Co Advocates coming on record for the Applicants herein, this court did not find it necessary to grant the same. Indeed, courts ought not to grant orders just because parties have asked for orders if there is a procedure that it to be followed.
20. Indeed, it was evident that there was no judgment in this Cause and the Applicants were not previously representing themselves in this Cause or being represented by any advocate as was contemplated in order 9 Rule 9 of the *Civil Procedure Rules*. It was not therefore necessary for the firm of M/S Lagat Joshua & Co Advocates to have sought leave to come on record for the Applicants herein.
21. Without belabouring this point, this court found and held that Prayer No (2) of the Applicants' present application was superfluous and was not merited.

### **II. Whether or not the Court was Function Officio**

22. The Applicants submitted that the 1<sup>st</sup> Respondent's contention that the court was functus officio was fallacious for the reason that having rendered its decision of 20<sup>th</sup> June 2018 directing that the deceased's property be distributed equally amongst the deceased's children, the court became functus officio but the deceased's sons re-opened the proceedings when they subsequently entered into a consent. They asserted that the present application had sought to review the said consent that was recorded in court without their participation.
23. They placed reliance on the case of *Mombasa Bricks & Tiles Limited & 5 Others vs Arwind Shah & 7 Others* [2018] eKLR where it was held that it did not mean that once a court rendered a judgment, it could not deal with subsequent proceedings because such an omission could leave the parties with impotent decisions that were incapable of realisation towards the closure of the file as was held in the



case of *Telkom Kenya Limited vs John Ochanda* [2013] eKLR. They pointed out that it was necessary that the deceased's children be substituted so that any confirmation of grant could become effective.

24. It was their submission that as the consent fell short of the standards of a consent, then the same ought to be varied and/or set aside.
25. On his part, the 1<sup>st</sup> Respondent did not specifically set out the case that he was relying upon under this head. Suffice it to state that he had set out a holding to the effect that a court became functus officio so far as confirmation of grant was concerned and could not revisit the matter unless under review.
26. He argued that having been dissatisfied with the distribution, the Applicants herein ought to have filed a review of the confirmed grant and not seek the setting aside of the consent. He further asserted that the court could not review a consent because it was not party to the said consent. He added that in any event, the Applicants had not met the threshold under Order 45 of the *Civil Procedure Rules* to be granted an order for review.
27. He further contended that there had been inordinate delay in bringing the present application and the current certificate had already been registered. He pointed out that re-opening the Certificate of Confirmation that was issued in 2018 would open a Pandora's box in terms of distribution to the surviving beneficiaries which had already been indicated in the certificate. He added that the brothers were from different houses and they were to represent daughters, including the Applicants herein, in the specific houses.
28. This court perused the 1<sup>st</sup> Respondent's Chamber Summons application dated and filed on 22<sup>nd</sup> October 2020 and noted that he had sought that the Deputy Registrar Kakamega High Court execute necessary transfer documents to effect the Grant and Certificate of Confirmation of Grant that was issued on 30<sup>th</sup> September 2020 on the ground that some of the beneficiaries had refused to sign the mutation forms. He had also sought several other orders against the Land Registrar, Vihiga County.
29. In his decision of 19<sup>th</sup> April 2021, Musyoka J who was seized of this matter at the material time rendered himself as follows:-

“Once the High Court issues a certificate of confirmation of grant the exercise that follows is transmission, which is not governed by the Law of Succession...but by land legislation which is not oversighted by the High Court but by the Environment and Land Court. Issues that arise from implementation of the certificate of confirmation of grant are not within the province of the High Court, and the High Court pretty much becomes functus officio, so far as implementation of the distribution orders are concerned (emphasis court). The only thing the High Court can do is to amend or review the certificate, but it cannot oversight how the exercise of distribution is carried out, for that oversight lies elsewhere...”
30. It was clear from the aforesaid decision that the learned judge did not find the court to have been functus officio on review of the Grant and Certificate of Confirmation. Indeed, courts have power to amend and/or rectify grants and certificates of confirmation of grants already issued and it does this all the time to give effect to any changes that may arise in a deceased's estate. Applications post issuance of grants and letters of administration are therefore not barred as was held in *Mombasa Bricks & Tiles Limited & 5 Others vs Arwind Shah & 7 Others* (*Supra*), a position that this court fully associated itself with.
31. Notably, on 11<sup>th</sup> April 2017, Njagi J issued an order directing the Deputy Registrar to execute the necessary documents for transfer and mutation forms effecting the decision of this court on 30<sup>th</sup> March



2016 confirming the grant of letters of administration. This was an application after confirmation of the grant which did not require orders for the re-opening of the file.

32. It was therefore the view of this court that it was not functus officio as regards pertinent matters relating to the deceased's estate and it could therefore entertain applications post the issuance of the Grant and Certificate of Confirmation of Grant that was issued on 30<sup>th</sup> September 2020. The file was still open and need not have been re-opened as the Applicant had sought.
33. A succession cause file can only be deemed to have been closed after the personal administrator of a deceased's estate has confirmed to the court that he or she had completed the administration of the deceased's estate as is envisaged in Section 83(g) of the [Law of Succession](#).

### III. Setting aside and/or varying the Consent

34. The Applicants relied on the case of *Brook Bond Liebig vs Mallya* (1975) EA 266 where it was held that a consent could be set aside where there was fraud or collusion or there was no consensus between the parties or on the ground that the consent was against public policy.
35. They also placed reliance on the case of [Intercounties Importers and Exporters Limited vs Teleposta Pension Scheme Registered trustees & 5 Others](#) [2019] eKLR and *Hirani vs Kasan* (1952) 19 EACA 131 where the common thread was that a consent could be set aside if it was demonstrated that the same was procured through fraud, non-disclosure of material facts or a mistake.
36. They further argued that there was misrepresentation as the Respondent (sic) made a false assertion leading the court to adopt an unlawful consent. It was their submissions that on 30<sup>th</sup> September 2020, the Respondents did not disclose to the court that there were other beneficiaries to the deceased's estate and hence it was evident that they had colluded with a sole aim of amending the orders of the court.
37. On his part, the 1<sup>st</sup> Respondent also placed reliance on the case of *Brook Bond Liebig vs Mallya (Supra)* and was in agreement with the Applicants on the circumstances under which a consent could be set aside.
38. He added that a certificate of confirmation of grant was not a judgment that could be set aside. In this regard, he referred this court to the case of In [Re Estate of Kiberenge Mukwa \(Deceased\)](#) [2021] eKLR where the court therein held that a certificate of confirmation of grant was not an order itself but was a confirmation that the grant of letters of administration had been confirmed and the shares of the beneficiaries ascertained.
39. He was emphatic that what the Applicants were seeking was a revocation of grant to revert to the earlier certificate of confirmation that was issued but that instead they had sought a review of the consent order which was not an order of the court. He added that setting aside the consent would not affect the confirmation of grant.
40. He further referred this court to the holding of the court In [Re Estate of Kiberenge Mukwa \(Deceased\)](#) (*Supra*) in which it was stated that there was no provision in the [Law of Succession Act](#) that provided for a remedy to a person who was aggrieved by confirmation orders. It was therefore his submission that the prayers the Applicants had sought herein were untenable.
41. Notably, Order 25 Rule 5 of the [Civil Procedure Rules](#) provides that:-

“Where it is proved to the satisfaction of the court, and the court after hearing the parties directs, that a suit has been adjusted wholly or in part by any lawful agreement or compromise (emphasis court), or where the defendant satisfies the plaintiff in respect of



the whole or any part of the subject-matter of the suit, the court shall, on the application of any party, order that such agreement, compromise or satisfaction be recorded and enter judgment in accordance therewith.”

42. It was clear that a consent was an agreement, compromise or satisfaction that was entered into by parties to a proceeding (emphasis court) and recorded by the court. No third party could purport to enter the fray and seek to set aside a consent which the parties who recorded the same were not aggrieved by.
43. A party to a consent which is ideally a contract can rely on the vitiating factors of fraud, collusion, misrepresentation, duress or undue influence to avoid such a consent and/or contract. Any person outside that consent and/or third party would be deemed to be a stranger to the proceedings relating to that consent and could not benefit from the vitiating factors to avoid a contract. A stranger had no priority of a consent and/or contract and could not be sued under it or enforce it on behalf of the contracting parties.
44. The Applicants herein were not parties to the said consent that was recorded on 30<sup>th</sup> September 2020. They could not therefore for all purposes and intent have purported to seek to have the consent set aside and/or vacated as they could not have possibly encountered the aforementioned vitiating factors so as to avoid the said consent.
45. Going further, this court looked at Order 45(1)(a) and (b) of the *Civil Procedure Rules* which states that:-
  1. Any person considering himself aggrieved—
    - a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
    - b. by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.
46. The Applicants’ application for a review of the consent was also not tenable as they were strangers to the said consent. Indeed, for a party to benefit from a review, he or she must be a party to the proceedings. Allowing any Tom, Dick and Harry to have a right to review court orders when they were not parties to proceeding would be a recipe for chaos and anarchy as any stranger would seek to set aside of orders that parties in a proceedings had consented to and had no problem with whatsoever.
47. In addition, the Certification of Confirmation of Grant that was issued on 30<sup>th</sup> September 2020 was not an order of the court. As the court held in In *Re Estate of Kiberenge Mukwa (Deceased)* (Supra), a certificate of confirmation of grant was an extract of an order and not the order itself. Not being an order therefore put a certificate of confirmation of grant outside the ambit of the review.
48. Having said so, where a party was aggrieved by such certificate of confirmation of grant, it was not to set it aside. The procedure to revert to an earlier position after issuance of a certificate of confirmation of grant could only be by way of application for revocation and/or annulment which the 1<sup>st</sup> Respondent asserted was what the Applicants herein were attempting to do.



49. Indeed, a party who was aggrieved by the contents of a grant or certification of grant would have to demonstrate any of the grounds that have been set out in Section 76 of the Law of Succession Act Cap 160 (Laws of Kenya) before a court can revoke and/or annul a grant or confirmed grant.

50. Section 76 of the Law of Succession provides as follows:-

“A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion-

- a. that the proceedings to obtain the grant were defective in substance;
- b. that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;
- c. that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;
- d. that the person to whom the grant was made has failed, after due notice and without reasonable cause either-
  - i. to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or
  - ii. to proceed diligently with the administration of the estate; or
  - iii. to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or
- e. that the grant has become useless and inoperative through subsequent circumstances.

51. Although the Applicants had premised their present application under the provisions of Article 159 (2)(d) of the Constitution of Kenya, 2010 which mandates courts to administer justice without having undue regard to procedural technicalities with a view to determining disputes before it on merit, their application was flawed and incompetent ab initio. This flaw was not a procedural technicality that could have been excused and/or cured by Article 159(2)(d) of the Constitution of Kenya. Rather, it went to the substance and/or root of the application as the procedure to set aside the consent was irregular.

### **Disposition**

52. For the foregoing reasons, the upshot of this court’s ruling is that the Applicants’ Notice of Motion application that was dated and filed on 20<sup>th</sup> February 2023 was not merited and the same be and is hereby dismissed. As this is a family matter involving siblings, this court will deviate from the general principal that costs follow the event and direct that each party bears its own costs.

53. It is so ordered.

**DATED AND DELIVERED AT VIHIGA THIS 30<sup>TH</sup> DAY OF OCTOBER, 2023.**

**J. KAMAU**  
**JUDGE**

