



REPUBLIC OF KENYA



KENYA LAW

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In re Estate of Lucy Lyoshi alias Lucia Lyoshi Sayisi (Deceased) (Succession Cause 25 of 2021) [2023] KEHC 26345 (KLR) (30 November 2023) (Ruling)

Neutral citation: [2023] KEHC 26345 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 25 OF 2021
SC CHIRCHIR, J
NOVEMBER 30, 2023**

**IN THE MATTER OF THE ESTATE OF LUCY
LYOSHI ALIAS LUCIA LYOSHI SAYISI-DECEASED**

BETWEEN

MAURICE OTUNGA LUGONZO PETITIONER

AND

LEONIDA LIBUTSULI LYOSHI OWEGI 1ST APPLICANT

HILLARY OPIYO OWEGI 2ND APPLICANT

RULING

1. Through the Application dated 28th April 2023 the objector herein seeks for a review of the court's directions given on 25th January 2022. The review sought is as follows:
 - 1). That the court does review its directions issued in this matter on 25th January 2022 revoking both the Grant of Probate issued in High court Succession cause No. 25 of 2021 (previously succession cause No. 1995 of 2012) and the Grant of letters of Administration issued in succession cause No. 613 of 2013, by reinstating the same and revoking the Grant issued in the joint names of Leonida Lyoshi Owegi and Maurice Otunga lugonzo.
 2. Secondly that the court does set down for hearing the objectors summons for Revocation of Grant dated 26th April, 2022.

The Applicant's case.

2. The grounds for review are highlighted on the grounds appearing on the face of the Application as well as the supporting Affidavit. The basis of review is that Elungata Advocate, who was holding brief for the Applicant's Advocate on that date, wrongly communicated the instructions that had been given



to him. Specifically, they submit, there was no instructions to allow for the parties herein to be made Co- Administrators of the Deceased's Estate.

3. The Applicant claims that it was only upon perusal of the proceedings of that day that her Advocate came to know that Mr. Elungata Advocate had wrongly communicated the instructions given to him on 25th January 2022.
4. She prayed that the court review its directions issued on 25th January 2022 revoking the grant issued in high court succession cause No.25 of 2021 (previously Nairobi High court Succession cause no 1995 of 2012) and reinstating the Grant issued in succession cause no.613 of 2013.
5. She further prays that upon reinstatement the court sets down for hearing the Applicant's Application for revocation and annulment of the grant dated 26th April 2022 for purposes of determining the legitimate Administrator of the estate of the deceased.
6. The Applicant further states that the instructions that had been given to Elungata Advocate was limited to having the two causes consolidated and requesting for copies of proceedings in succession cause No. 613 of 2013. Further that it never included instructions to have the Applicant and the respondent be appointed as joint Administrators of the Estate. The Applicant has annexed a letter dated 21st January 2022, addressed to the Respondent's Advocate and which, the Applicant alleges, was given to Elungata Advocate on the day he held brief for the Applicant's counsel.

The Respondent's case.

7. In opposition to the Application, the Petitioner /respondent filed grounds of opposition
8. The Respondent states that the application was scandalous, frivolous and vexatious; that it did not meet the known principles of setting aside the consent orders; and finally, that the Application does not meet the prerequisite conditions for review.

Applicant's submissions

9. The Applicant has cited a number of caselaw indicating circumstances under which a consent order may be set aside. She has relied on the following decided cases: Brooke Bond Liebig (T) Ltd vs. mallya (1975) 1 EA 266 (CAD); *Flora N. Wasike vs. Destimo Wamboko (1988)* eKLR ; *Intercountries Importers and Exporters Limited vs. Teleposta Pension scheme Registered trustees & 5 others (2019)* eKLR to buttress her submissions.
10. The Applicant reiterates that the instructions given to Elungata Advocate were only limited to seeking consolidation of the two causes and to the extent that what the Advocate conceded to by way of consent included other issues , then the consent was entered into without sufficient material facts.

Respondent's Submissions

11. On principles governing review of a consent, the respondent submits that a consent order like a contract are binding in nature unless it is demonstrated that it was improperly entered into.
12. The respondent further submits that there is no evidence that material facts were not disclosed as to warrant the setting aside of the consent.
13. In this regard the respondent has relied on several decisions including: *Paul Kiplangat Keter v. John Koech (2021)*eKLR, *Flora Wasike vs. Destimo Wamboko(1982-1988)* 1KAR 625, *Hirani vs. Kassam (1952)*19EACA 131 Paragraph 21 . *Kenya Commercial Bank Ltd Vs. Specialized Engineering*



Co.Ltd (1982) KLR P85; Protus Hamisis Wambanda &Anor pages 6 and 7 and [Kericho Guest House Enterprises LTD Vs. Kenya Breweries Ltd \(2018\)](#) eKLR at pages 4, 5 and 6.

14. The respondent further submits that there was no evidence that Elungata Advocate acted contrary to instructions and for failure to provide such evidence, the consent order remains binding on the parties.
15. The Respondent finally points out that the Applicant in any event does not have any complain in respect to the consolidation of the succession causes and in any case, she would still remain a Co-Administrator of the Estate. He has relied on the case of [Mary Mbone Mutoka vs. Jascintr Xavier Khatiakala \(2007\)](#) eKLR in this regard.

Determination.

16. The proceedings herein relate to the Estate of Lyoshi Sayisi Lucy alias Lucia Lyoshi Sayisi, who died on 14th may 2014. A brief background to this matter is necessary:
 - a). Upon the demise of the deceased, the 1st Applicant herein filed for Grant of probate with will annexed in Nairobi High court Succession Cause No. 1995 of 2012. She described herself as the Executor of, and beneficiary in, the will. A Grant of probate was made to her on 24th January 2013. The Grant was confirmed on 23rd September 2013
 - b). On the other hand, the Respondent through Kakamega High court succession cause No. 613 of 2013 petitioned for letters of Administration Intestate to the deceased's Estate. The grant was issued to him on 9th August 2013
 - c). On 18th November 2013, the respondent and his two sisters filed an Application in succession cause No. 1995 of 2012 seeking for revocation of grant . At the same time, they sought for the transfer of the said cause to Kakamega High court for disposal.
 - d). In a ruling delivered on 3rd November 2021 Justice Muchelule, (as he then was) transferred cause no. 1995 of 2012 to this court for disposal.
 - e). On the day that the matter came up before the Kakamega high court at the first instance, the cause was given the current cause number and was consolidated with succession cause No. 613 of 2013 and this succession cause made the lead file.
 - f). At the same time, by consent of the parties, the court also revoked the Grants issued in each of the two consolidated causes and appointed the Applicant and the Respondent as co-Administrators of the Estate. It is this consent that the Applicant herein now seeks to be set aside.
17. The following issues lend themselves for determination:
 - a). Whether the application meets the threshold for granting Review orders.
 - b). If the consent order should be set aside.

Whether the Application meets the threshold for granting review orders

18. The consent in question was recorded with ostensible authority of the advocate on record for the applicant, and the Advocate for the respondent. The Advocate for the Applicant was absent but Mr. Elungata was holding his brief.
19. According to the applicant's advocate, Mr. Elungata Advocate misrepresented him as what he communicated to the court went beyond the instructions that he had been given. The Applicant



- further states that the scope of instructions given to Elungata Advocate were set out in the letter that her Advocate had sent to the respondent’s advocate, dated 21st January 2022. The same letter was copied to the court, she submits.
20. The *Law of succession Act* makes no provisions for review. However, courts have traditionally borrowed from the provisions of the *civil procedure Act* to deal with issues review as and when they arise.
 21. Review is covered by section 80 of the *civil procedure Act* and Order 45(1) of the *civil procedure Rules* .
 22. Order 45 (1) of the *Civil procedure Rules* provide as follows:
 - (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 allowed and who on 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 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 the review of the Judgment to the court which passed the decree or made the order without unreasonable delay.”
 23. Thus Order 45 provides for three circumstances under which an order for review can be made: To be successful, the applicant must demonstrate to the court that there has been 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. secondly, he needs to demonstrate that there has been some mistake or error apparent on the face of the record. The third ground for review is worded broadly: an application for review can be made for any other sufficient reason.
 24. In the case of Tokesi Mambili and others vs Simion Litsanga the court held :
 - i. In order to obtain a review an applicant has to show to the satisfaction of the court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made . An Applicant may have to show that there was a mistake or error on the face of the record or for any other sufficient reason. (Emphasis added)
 - ii. Where the Application is based on sufficient reason it is for the court to exercise (Emphasis added)
 25. I understand the Applicant to be saying that part of what was communicated to the court was incorrect. This fact has not been disputed by the respondent; as the content of the letter as well as the fact that the same was the basis of what was communicated to the court on that day, has not been disputed .
 - (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 allowed and who on 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 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 the review of the Judgment to the court which passed the decree or made the order without unreasonable delay.”

26. In *Benjob Amalgamated Ltd & another v Kenya Commercial Bank Ltd [2014]* eKLR, the Court of Appeal stated: “The basic philosophy inherent in the concept of review is acceptance of human fallibility and acknowledgement of frailties of human nature and sometimes possibility of perversion that may lead to miscarriage of justice. In some jurisdictions, courts have felt the need to cull out such power in order to overcome abuse of process of court or miscarriage of justice”.
27. In the case of *The Registered Trustees of the Archdiocese of Dar es Salaam vs The Chairman Bunju Village Government & Others (Civil Appeal No. 147 of 2006)* the Court of Appeal of Tanzania had this to say about “ sufficient cause”-“It is difficult to attempt to define the meaning of the words ‘sufficient cause’. It is generally accepted however, that the words should receive a liberal construction in order to advance substantial justice, when no negligence, or inaction or want of bona fides, is imputed to the appellant” (Emphasis added)
28. Am duly guided by the above two decisions of the higher courts. Am satisfied that the circumstances upon which this review is sought falls under sufficient grounds to warrant a review Should the consent be set aside?
29. The Applicant contention is that what was communicated to the court did not emanate from them; that the counsel holding brief went beyond the scope of instructions that had been given to him; that the actual instructions were as per a letter dated 21.1.2022 addressed to the respondent’s Advocate; that the same letter was copied to court; and finally, that the Advocate holding brief was given this letter.
30. A consent is in the nature of a contract and there are a host of decisions to the effect that a consent order can only be set aside upon such grounds as a contract would. These include grounds such as misrepresentation, fraud or collusion; if entered into by an agreement contrary to public policy or if the consent was entered into without sufficient material facts . (See *Flora wasike vs Destimo Wamboko*, cited by the Applicant)
31. The Applicant’s case is that the consent was entered into without sufficient material facts; that Elungata Advocate conveyed to the court what was beyond the instructions given to him.
32. The counsel in court on that day however is presumed to have had instructions and hence had authority to bind the Applicant. In the case of *Hirani vs Kassam (1952) 19 EACA 131* the court of Appeal held:

“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 the consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement.”
33. I have looked at the facts in this case in the light of *Hirani* decision. (supra). This is not a case where the Applicant is saying her duly appointed Advocate was in the wrong, rather it is her Advocate telling the court that a fellow Advocate he had sent to the court went beyond the scope of instructions given.
34. The Advocate for the Applicant has insisted that the letter in question was given to Elungata Advocate for purposes of holding brief. The fact that misrepresentations can be made when a counsel other than the one who is acquainted with the matter must be admitted. We have had counsels tell court that “my instructions were limited” . Such statements speak to the reality that the ideal referred to in *Hiran*’s case



may be different when a counsel other than the one acquainted with the matter steps in to represent the one who was ordinarily in charge of a case.

35. I have perused the letter in question. It makes no reference to an intention to have the two contestants appointed as Co- Administrators of the deceased's Estate. The Applicant has stated that this was the letter given to counsel.
36. The respondent does not dispute the contents of the letter, as the basis of instructions given to Mr. Elungata as there was no replying Affidavit filed. An elaborate "response" has been made in the submissions. But submissions is not evidence. It simply amounts to a counsel trying to give evidence from the bar. The Respondent was at liberty to file a replying Affidavit but he did not. The fact that the letter was the basis of instructions is therefore uncontested.
37. I have also considered the circumstances of the two causes that were consolidated. The Appointment of the Applicant in Succession causes No. 25 of 2021 was on the basis of a written will. Thus, her appointment was on the based on a taste succession proceeding. On the other hand, the appointment of the Respondent was through an intestate succession.

The pertinent question is, were these material considerations in focus? Was the counsel holding brief aware that the basis of the appointment of the two administrators were different? I doubt. Am satisfied that the Applicant has satisfied this court that the consent was entered into on the basis of insufficient material facts.

38. A consent order can be set aside if the consent was entered into without sufficient material facts, or in misapprehension or in ignorance of material facts as was held in the case of Hiram's case (supra).
39. In conclusion, am convinced that the present Application is merited and I consequently make the following orders:
 - a). That the orders of this court made on 25th Januaury 2022 , limited to the appointment of Leonida Libutsuli Lyoshi Owegi and Maurice Otunga Lugonzo as joint Administrators of the deceased's Esate is hereby set aside.
 - b). For avoidance of doubt the order of consolidation remains undisturbed.
 - c). This matter to be listed for directions upon the delivery of this ruling for further directions on the hearing.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 30TH DAY OF NOVEMBER, 2023.

S. CHIRCHIR

JUDGE.

In the presence of :

E.Zalo- court Assistant.

