



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**SUCCESSION CAUSE NO 109 OF 2014**

**IN THE MATTER OF THE ESTATE OF DANIEL KIRIMI M'MUNA (DECEASED)**

MERCY MAKENA KIRIMI.....APPLICANT

**VERSUS**

JOSEPH KIPSIGEI BII.....1<sup>ST</sup> RESPONDENT

JACOB MUTHAURA MATHIU.....2<sup>ND</sup> RESPONDENT

JANE KENDI IKUNYUA.....3<sup>RD</sup> RESPONDENT

**AND**

FAITH NAITORE KIRIMI.....1<sup>ST</sup> INTERESTED PARTY

MARTIN MWIRIGI KIRIMI.....2<sup>ND</sup> INTERESTED PARTY

LYDIA GATWIRI KIRIMI.....3<sup>RD</sup> INTERESTED PARTY

PHINEAS MWONGEU KIRIMI.....4<sup>TH</sup> INTERESTED PARTY

NICHOLAS KIMATHI KIRIMI.....5<sup>TH</sup> INTERESTED PARTY

MWENDA KIRIMI.....6<sup>TH</sup> INTERESTED PARTY

**RULING**

1. The Applicant, Mercy Makena Kirimi, a beneficiary of the estate of Daniel Kirimi M'Muna, deceased, has filed her Summons dated 13.5.21 before this Court seeking orders that:

- a. *Spent*
- b. *The Consent order dated 20th August 2014 and filed herein be set aside;*
- c. *Spent*
- d. *This Honourable Court do issue a declaration Order that the parcel of land known as L.R No. 330/507 Nairobi belongs to the 1<sup>st</sup> - 6<sup>th</sup> Interested Party (sic) as joint proprietors;*
- e. *This Honourable Court do issue leave for the Chief Land Registrar (Nairobi) to be enjoined as an Interested Party;*
- f. *This Honourable Court do issue an Order directing the Chief Land Registrar to remove the 1<sup>st</sup> Respondent from the Title of the parcel of land known as L.R NO. 330/507 Nairobi;*

**g. The costs of this Application be provided for.**

2. The brief background of this case as can be gleaned from the record is that the deceased died intestate on the 28.12.12. He was survived by his widow Faith Naitore Kirimi and 6 children, Martin Mwirigi Kirimi Lydia Gatwiri Kirimi, Phineas Mwongera Kirimi, Nicholas Kimathi Kirimi, Mercy Makena Kirimi and Mwenda Kirimi.
3. Joseph Kisigei Bii, a creditor of the estate filed a petition for a grant of the estate of the deceased on 22.1.14, after citing Faith who failed to apply for a grant. Faith filed a caveat in the matter, dated 17.2.14. Thereafter, together with her children Mercy and Nicholas, Faith, filed an objection to the making of the grant to Joseph dated 13.6.14. They then filed an answer to petition dated 30.6.14 and petition by way of cross application on 1.7.14.
4. A consent dated 20.8.14 and signed by the parties' advocates was filed in Court on 27.8.14. The terms of the consent were that the caveat, answer to petition and petition by way of cross application were to be forthwith marked as withdrawn; Faith, Phineas and Joseph were to forthwith be appointed joint administrators of the estate of the deceased; L. R. No. 330/507 was to be sold and the sale proceeds to be distributed in the ratio of 48% to the beneficiaries of the estate and 52% to Joseph, one Jacob Muthaura Mathiu and Jane Kendi Ikunyua, the Respondents herein; Before distribution of the said proceeds, the estate of the deceased was to get Kshs. 5,000,000/= being a refund of the deceased's initial payment for the property, legal fees for the 3 firms of advocates and other incidental expenses and costs were to be deducted; the grant to be confirmed before expiry of 6 months to facilitate the sale of the property.
5. Pursuant to the said consent, a grant of letters of administration was on 16.9.14 issued to Faith and Phineas and Joseph and confirmed on the same date. The certificate of confirmation of grant of even date indicated that the beneficiaries were to get 48% of L. R. No. 330/507 while Joseph, Jacob and Jane were to get 52% jointly.
6. In her supporting affidavit sworn on 13.5.21 in support of the present Application, the Applicant averred that the Respondents purport to have entered into a joint venture agreement (JVA) with the deceased dated 27.1.05 to purchase the suit property. The Respondents agreed that the suit property be registered in the name of the deceased in consideration of his substantial contribution. In its report dated 27.2.19 of a forensic investigation into the authenticity of the JVA, the Directorate of Criminal Investigations (DCI) indicated that the signature of the deceased in the JVA was made by a different author. The Respondents have since been charged in Criminal Case No. 846 of 2019, with conspiracy to defraud the estate of the deceased, contrary to Section 317 of the Penal Code. The Applicant further stated that the Respondents intended to use fraudulent means to acquire and deprive the lawful beneficiaries of part of the estate of the deceased. According to the Applicant, there is sufficient reason warranting the setting aside of the consent including the ongoing criminal matter and the forensic report incriminating the Respondents and the forged signature.
7. The Respondents opposed the application *vide* a replying affidavit sworn on 23.6.21 by Jacob Muthaura Mathiu. He maintained that the Respondents and the deceased did indeed enter into the JVA for the purchase of the suit property and agreed to have the same registered in the name of the deceased since he contributed the most towards the purchase price. The Respondents contended that the JVA which was entered into on 27.1.05 was never challenged when the deceased passed away in December, 2012, until February, 2019 when the investigation was lodged. According to the Respondents, the challenge to the JVA 7 years later is an afterthought and the Applicant should justify the lethargy. That the Respondents confirm having been charged in Court and the proceedings are ongoing. The report from the D.C.I is yet to be tested on cross examination before it is confirmed to be factually or conclusively correct.
8. The Respondents further averred that the deceased was their business partner and was an interesting person who had several signatures which he would execute according to his mood. They stated that Jacob had actually advised the deceased that this would cause him problems if a third party were to challenge his various signatures. The Respondents further stated that the consent of 20.8.14 was above board and that the Applicant and Interested Parties were represented by a reputable firm of advocates who actively participated in the discussions that led to the consent. They further stated that in fact Faith and the deceased's advocate David Njeru Nyaga did record statements before the DCI and stated that the suit was jointly owned by the deceased and the Respondents.
9. The Respondents denied the accusation that they intend to fraudulently acquire the suit property and accused the Applicant's action of being greed driven and a scheme to deprive the Respondents of their entitlement to the suit property. This is further demonstrated by the Succession Cause 556 of 2018 filed by the Applicant and interested parties in which the suit property was distributed to the beneficiaries of the estate. They concealed from the Court that the suit property was jointly owned with the Respondents. The Respondents further stated that this Court is *functus officio* having determined the proceedings herein and cannot reopen the proceedings. That in any event, the correct forum in respect of land matters is the Environment and Land Court.
10. In a further affidavit sworn on 21.7.21, the Applicant averred that there is no time limitation imposed by law for one to challenge the authenticity of any document by subjecting it to a forensic investigation. Further the forensic report has not been challenged and the allegation that the deceased had multiple signatures is not an issue as the challenged signature in the JVA has been determined to not belong to the deceased. A consent order is binding unless it is proved to have been obtained by fraud or collusion or without sufficient material facts or in misapprehension of ignorance of facts or a reason that would enable the Court set aside an agreement. The Applicant stated that she and the Interested parties had been led to believe that the deceased and the Respondents were business partners until the forensic investigation revealed that the signature of the deceased in the JVA was a forgery. The Applicant further stated that this Court is the correct forum as the subject of her Application is the consent entered into by the parties herein.
11. Directions were given for the filing of submissions. The Respondents and Interested Parties did not file submissions. The Court did not also see the replying affidavit of the 6<sup>th</sup> Interested Party and a hard copy thereof was not supplied as directed. I have considered the Application, the rival affidavits and the Applicant's submissions. The issues that fall for determination are:

- i) Whether the threshold for setting aside a consent order has been met.
- ii) Whether the Court should make a declaration that the suit property belongs to the Interested Parties and an order should be

made that the 1<sup>st</sup> Respondent be removed from the title of L. R. 330/507.

Whether the Applicant has met the threshold for setting aside a consent order

12. The circumstances under which a consent order may be set aside are well settled. In the case of Samson Munikah practicing as Munikah & Company Advocates v Wedube Estates Limited [2007] eKLR, the Court of Appeal stated:

***This appeal raises the vexed question: (of) What are the circumstances in which a consent judgment may be set aside? In BROOKE BOND LIEBIG (T) Ltd V. MALLYA [1975] E.A. 266, the then Court of Appeal for East Africa set out the circumstances in which a consent judgment freely entered into by the parties to a dispute in court, would be set aside by the courts. Delivering the leading judgment of the Court Law Ag. P. expressed himself thus: -***

***“The circumstances in which a consent judgment may be interfered with were considered by this Court in Hirani v. Kassam [1952] 19 EACA 131 where the following passage from Seton on Judgments and Orders, 7<sup>th</sup> Edn., Vol 1, P. 124 was approved:***

***(1) Prima facie, any order made in the presence and with the consent of the 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 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.***

13. Generally, parties are bound by a consent order entered into in the presence and with the consent of their advocates. Such consent may only be varied, discharged or set aside if it is demonstrated that the same was obtained by fraud or collusion. Obtain such order by an agreement contrary to the policy of the court or without sufficient material facts could render the same liable to variation or setting aside. Further a consent order obtained in misapprehension or in ignorance of material facts may be set aside. The Court may also set aside such order for any reason that would enable a Court set aside a contract or agreement.

14. In the present Application, the grounds put forth by the Applicant for setting aside the consent orders are that the DCI’s report dated 27.2.19 of the forensic investigations of the JVA indicated that the signature of the deceased therein was made by another person. Put differently, the signature of the deceased in the JVA was a forgery. Based on the DCI’s findings therefore, the Applicant submits that the consent order was obtained fraudulently by misleading the parties. The Applicant contended that the Respondents took advantage of the beneficiaries of the estate of the deceased who did not have knowledge of the material facts at the time of execution of the consent. She further submitted that the consent was a collusion between the Respondents to defeat the beneficiaries’ interest and deprive them of the suit property and that the fact of the forgery of the deceased’s signature in the JVA was only discovered and brought to the attention of the beneficiaries after the investigations. The Applicant urged the Court to set aside the consent order.

15. The Court notes that there is indeed a report by the DCI. In that report dated 27.2.19 and signed by Bernard Cheruiyot, a forensic document examiner, for the Director of DCI, it is indicated that the signature in question and the known signatures of the deceased were made by different authors. This report led to the Respondents being charged in Criminal Case No. No. 846 of 2019 with conspiracy to defraud the estate of the deceased.

16. A forensic document examiner is an expert in his field and his report is an expert opinion. Section 48 of the Evidence Act provides:

***(1) When the court has to form an opinion upon a point of foreign law, or of science or art, or as to identity or genuineness of handwriting or finger or other impressions, opinions upon that point are admissible if made by persons specially skilled in such foreign law, science or art, or in questions as to identity, or genuineness of handwriting or fingerprint or other impressions.***

***(2) Such persons are called experts.***

17. Although a report by a forensic document examiner on the genuineness of a handwriting is expert opinion, it remains just that, an opinion. Such expert opinion though admissible, is not binding and must be evaluated just like any other property. In the case of In re Estate of Gitau Njoroge ‘B’ (Deceased) [2018] eKLR, Musyoka, J stated, and I concur:

***The findings of an expert witness are not binding on a court. Such findings amount to no more than mere opinion. Although the same are admissible as evidence, they are not conclusive, the court has to evaluate them alongside any other available evidence.***

18. And in the case of Elizabeth Kamene Ndolo v George Matata Ndolo [1996] eKLR, the Court of Appeal opined:

***“The evidence of P.W. 1 and the report of Munga were, we agree, entitled to proper and careful consideration, the evidence being that of experts but as has been repeatedly held the evidence of experts must be considered along with all other available evidence and it is still the duty of the trial court to decide whether or not it believes the expert and give reasons for its decision. A court cannot simply say”-***

***“Because this is the evidence of an expert, I believe it.”***

19. It is well settled that expert opinion should not be taken at face value just because it is expert opinion. It must be evaluated and considered alongside all other available evidence. In the present case, all the Applicant placed before this Court is the document examiner’s

report and no other evidence. The Applicant did not also find it necessary to call the document examiner as a witness so that his report could be subjected to cross examination. The Court cannot therefore rely on the said report to make a finding on the consent order. In any event, the criminal case is still pending in the trial Court which is yet to decide whether or not it believes the expert and give reasons for its decision. This being the case, it would be premature for the Court to make a determination on the consent order based on the forensic document examiner's report which is yet to be evaluated. In the premises, I find and hold that the Applicant has not demonstrated to the satisfaction of the Court that the consent order was obtained by fraud or collusion as alleged. The set parameters for setting aside a consent order have therefore not been met.

Whether the Court should make a declaration that the suit property belongs to the Interested Parties and an order should be made that the 1<sup>st</sup> Respondent be removed from the title of the suit property

20. The matter before me is a succession matter and the applicable law is the Law of Succession Act (LSA). The scope of the LSA as set out in its long title as follows:

***An Act of Parliament to amend, define and consolidate the law relating to intestate and testamentary succession and the administration of estates of deceased persons; and for purposes connected therewith and incidental thereto***

21. The Applicant seeks a declaration that the suit property belongs to the Interested Parties. She also prays that the 1<sup>st</sup> Respondent be removed from the title of the suit property. This is a succession Court. The jurisdiction of the succession Court is to deal with and make determination on matters relating to intestate and testamentary succession and the administration of estates of deceased persons, and not to determine ownership of property. Any dispute relating to ownership of a property is the preserve of the Environment and Land Court, by dint of Article 162(2) of the Constitution of Kenya, 2010 which provides;

***Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—***

***(a) ...***

***(b) the environment and the use and occupation of, and title to, land.***

22. The jurisdiction of a Court is not inferred but conferred by the Constitution, statute or both. In the case of Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR the Supreme Court succinctly stated:

***A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.***

23. Article 165(5) of the Constitution of Kenya, 2010 has stripped this Court of jurisdiction in respect of matters relating to the use and occupation of, and title to, land. The prayer that the Court makes a declaration that suit property belongs to the Interested Parties and to remove the 1<sup>st</sup> Respondent from the title thereto, goes to title and ownership. The Court is called upon to pronounce itself on the ownership of the suit property which is clearly out of its jurisdiction by dint of Article 165(5) of the Constitution. This Court cannot arrogate to itself jurisdiction exceeding that which is conferred upon it, or for that matter stripped of, by the Constitution.

24. In the end, I find that the Application lacks merit and the same is hereby dismissed with costs to the Respondents.

**DATED, SIGNED AND DELIVERED IN NAIROBI THIS 25TH DAY OF FEBRUARY, 2022**

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**M. THANDE**

**JUDGE**

**In the presence of: -**

.....**for the Applicant**

.....**for the Respondents**

.....**for the Interested Parties**

.....**Court Assistant**