



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**FAMILY DIVISION**

**SUCCESSION CAUSE NO. 2814 OF 2013**

**IN THE MATTER OF THE ESTATE OF LEONARD JAMES NGUGI (DECEASED)**

**JAMES NGOCHI NGUGI.....APPLICANT**

**VERSUS**

**MICHAEL KIRUMBA NGUGI.....1<sup>ST</sup> RESPONDENT**

**JAMES NGUGI .....2<sup>ND</sup> RESPONDENT**

**DAVID KURIA NGUGI .....3<sup>RD</sup> RESPONDENT**

**RULING**

1. Before this Court for determination is the summons dated 22<sup>nd</sup> October 2019 by which the Applicant **JAMES NGOCHI NGUGI** seeks the following orders:-

**“1. Spent.**

**2. THAT the Respondent be compelled to pay the Applicants**

**Kshs 357,000 the balance of the proceeds of rent.**

**3. THAT in default the Respondent be held in contempt of**

**court with the resultant court discretion on punishment.**

**4. Costs of the Application be provided for.”**

2. The Application which was premised upon **Section 47** of the **Law of Succession Act Cap 160, Laws of Kenya** and **Rule 73** of the **Probate and Administration Rules** was supported by the Affidavit of even date sworn by the Applicant.

3. The Respondent opposed the Affidavit and in doing so relied upon the Replying Affidavit dated 21<sup>st</sup> February 2020 sworn by **MICHAEL KIRUMBA NGUGI** the 3<sup>rd</sup> Respondent.

4. The Application was canvassed by way of written submissions. The Applicant filed the written submissions dated 6<sup>th</sup> October 2021 whilst the Respondents relied upon the written submissions dated 22<sup>nd</sup> October 2021. The Applicant filed a response to the Replying Affidavit which response was dated 22<sup>nd</sup> October 2019.

**BACKGROUND**

5. The Succession Cause relates to the estate of **LEONARD JAMES NGUGI** (hereinafter ‘the **Deceased**’) who died intestate on 9<sup>th</sup> July

2019. A copy of the Death Certificate serial Number 175132 is annexed to the Petition seeking letters of Administration.

6. Following the demise of the Deceased letters of Administration Intestate were issued to **JAMES NGUGI, MICHAEL KIRUMBA NGUGI** and **JAMES NGOCHI NGUGI** on **2<sup>nd</sup> April 2014**.

7. On **23<sup>rd</sup> March 2018** **Ms JANE WAHU NGUGI** who claimed to be a former spouse of the Deceased filed the summons for Revocation of Grant dated **20<sup>th</sup> March 2018**.

8. Following family meetings the Succession Cause was settled vide a Deed of Settlement dated **16<sup>th</sup> April 2018** after which the parties reached a consent by which they agreed to share the properties left by the Deceased in a manner so as to separate the interest of the Applicant from the interest of the **three** Respondents. That consent adopted by the court on **16<sup>th</sup> April 2018**.

9. The Applicant then filed this application alleging that the Respondents had unfairly distributed rental remittance from the properties situate in **Nairobi West** and in **Kileleshwa**. He claimed that the Respondents have unfairly held on to the sum of **Kshs 357,000/-** being an amount which was in fact due to the Applicant. The Applicant therefore seeks to be refunded this amount of **Kshs 357,000/-**, which he claims is due to him from the estate.

10. The Respondents deny that this amount of **Kshs 375,000/-** is due to the Applicant from the estate of the Deceased. They assert that all the rental income has all along been shared amongst the **five** beneficiaries of the estate including **Jane Wahu Ngugi** the Applicants mother. The Respondents own mother **Prof ELIZABETH NJERI NGUGI** passed away in the **year 2015**.

11. The Respondents state that one of the properties situate in Nairobi West was sold in line with the confirmed Grant and the Applicant was paid his share of the proceeds of sale being **Kshs 2,800,000/-**.

12. The Respondents assert that the consent entered into by the parties and adopted by the court on **16<sup>th</sup> April 2018** settled with finality all claims differences and disputes in this Succession Cause.

#### **ANALYSIS AND DETERMINATION**

13. I have carefully considered the application before this court, the Affidavit in Reply as well as the written submissions filed by both parties. It is not in dispute that the Deceased passed away on **9<sup>th</sup> July 2009**. It is also not in dispute that the Applicant as well as the **three** respondents were all beneficiaries of the estate of the Deceased.

14. The parties are all the sons of the Deceased albeit from different mothers. The mother of the Respondent **Prof Elizabeth Ngugi** is Deceased. The mother of the Applicant is one **Ms Jane Wahu Ngugi**.

15. The Applicant submitted that sometime in the year **2010** the parties agreed to exclude their respective mothers in the distribution of the estate. The Applicant therefore contends that any rental income collected should have been distributed **only** between the **four (4)** sons of the Deceased and **not** to the two widows.

16. According to the Applicant the **1<sup>st</sup>** Respondent who had taken over management of the estate instead proceeded to distribute rental income amongst the **four (4)** sons and also distributed a portion of said rental income to his late mother.

17. Firstly the Applicant claims that this amount of **Kshs 375,000/-** is due to his mother. The Applicants mother is an adult and is still alive. She is perfectly capable of filing suit on her own behalf to recover any monies due to her from the estate. Secondly, the Applicant has not exhibited any authority signed by his mother authorizing him to claim the money on her behalf.

18. As stated earlier the parties did engage in meetings in order to resolve the differences between them. As a result of these discussions the parties entered into a **Deed of Settlement** dated **16<sup>th</sup> April 2010**. The said Deed of Settlement which appears as Annexure 'MN-3' to the Replying Affidavit dated **21<sup>st</sup> February 2020**, set out the manner in which the estate of the Deceased was to be distributed. The same is signed by the Applicant, the **three** Respondents and more pertinently the same is also signed by **Francis Jane Ngugi** who is the mother of the Applicant.

19. If the Applicant or his mother had issues to raise or felt that some amount of money realized by the estate was due to them, she would not and ought not to have signed the Deed of Settlement.

20. **Paragraph 5** of the **Deed of Settlement** reads as follows:-

**“That each of the parties herein confirms that they have sought and received independent legal advice regarding the entire contents of this Deed of Settlement and executes this Deed in acknowledgment and in acceptance of all the terms herein contained and agree that the same is valid and binding against them.” (own emphasis)**

21. Having conceded that they received legal advice and have signed the Deed of Settlement it is too late in the day for the Applicant to be raising issues regarding the distribution of the estate. These are issues which ought to have been raised before the Deed was signed and if necessary ought to have been included in the Deed of Settlement. The fact that there is no mention of a debt of **Kshs 375,000** due to the Applicants mother convinces this court that this is a mere afterthought.

22. The record indicates that the parties filed a consent in this matter which consent was duly adopted by the court on **16<sup>th</sup> April 2018**. The consent letter dated **12<sup>th</sup> April 2018** appears as Annexure **MN-4(a)** to the Replying Affidavit. That consent was duly signed by **LESINKO NJOROGI & GATHOGO ADVOCATES** representing the Respondents and **KIMENYI & CO. ADVOCATES** who represented **James Ngochi Ngugi** the Applicant herein.

23. A consent is deemed to be a contract or agreement and has equal binding force on the parties to a dispute. Courts will not alter and/or vary a consent save in certain specified circumstances.

24. In **Board of Trustees National Social Security Fund Vs Michael Mwalo, Civil Appeal No. 293 of 2014**, the **Court of Appeal** held that:-

**“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”.**

25. In this case the applicant has not shown that the consent was obtained by fraud or by collusion or that the said consent was contrary to the policy of the court. The Applicant has not filed any application seeking to set aside the consent for fraud or misrepresentation.

26. Having instructed his advocate to enter into the consent dated **12<sup>th</sup> April 2018** and having himself signed the Deed of Settlement dated **16<sup>th</sup> April 2010** the Applicant cannot now renege on those consents. He cannot after the fact seek to claim this sum of **Kshs 375,000/-** especially given that he had ample opportunity to raise the issue before signing the consent.

27. Finally I find no merit in this application. The same is hereby dismissed in its entirety. This being a family matter, each side shall pay its own costs.

Dated in **Nairobi** this **18<sup>th</sup>** day of **February 2022**.

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**MAUREEN A. ODERO**

**JUDGE**