



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of FKM (Deceased) (Succession Cause 5 of 2017)
[2022] KEHC 11905 (KLR) (20 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 11905 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
SUCCESSION CAUSE 5 OF 2017
AN ONGERI, J
MAY 20, 2022**

IN THE MATTER OF THE ESTATE OF FREDRICK KIPROP MARITIM (DECEASED)

IN THE MATTER OF

**JOSEPH KIPLANGAT ROP 1ST ADMINISTRATOR
JANE JELANGAT 2ND ADMINISTRATOR
BEATRICE CHEPKURUI KOECH 3RD ADMINISTRATOR
MILKA CHEPNGENO 4TH ADMINISTRATOR**

RULING

1. The parties herein entered into a partial consent on 28/9/2020 in the following terms:-
By consent, the summons for confirmation of grant be allowed in the following terms:-
 - (a) Land Parcel Kericho/Kapsuser/XXX measuring 4.XXX Acres (1.9 HA) be shared equally amongst the 9 beneficiaries Excluding the homestead measuring 0.18 Acres and Eaton Towers measuring 0.02 Acres which shall be held jointly in the names of the administrators as trustees for rest.
 - (b) Land Parcel Kericho/Kapsuser/XXX measuring 2.XXX Acres (1.XX HA), Land Parcel Kericho/Kapsuser/XXXX measuring 2.XX HA and Land Parcel Kericho/Kapsuser/XXX measuring 2.XXX HA (5.XXXX Acres) to be consolidated and shared equally amongst all the beneficiaries less the portions sold to buyers and the church.
2. The consent was signed by the two Advocates on record and also the four administrators JKR, JC, BCK and Milka Chepngeno.



3. The 2nd and 4th administrators, JC, and MC filed an application dated 27/1/2022 seeking issuance of a certificate of confirmation pursuant to the consent order dated 28/9/2020 as follows:-

- i. Kericho/kapsuser/XXXX
 - a. Booster & Home XXXX
 - b. Beatrice Chepkurui XXXX
 - c. JR XXXX
 - d. PC XXXX
 - e. NC XXXX
 - f. JC XXXX
 - g. MC XXXX
 - h. MC XXXX
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- i. CCr XXXX
 - j. Milka Chepngeno XXXX Acres (To hold in trust for minors (A K, I C, Emmanuel K and V K) Children of the deceased L C)
 - k. Access Road 0.095 Ha.(0.235 Acres)
 - ii. Kericho/kapsuser/XXXX
 - a. BC XXXX
 - b. PC XXXX
 - c. NC XXXX
 - d. JC XXXX
 - e. MC XXXX
 - f. Access Road XXXX
 - iii. Kericho/kapsuser/XXXX
 - a. JR XXXX
 - b. MC XXXX(To hold in trust for minors (AK, IC, EK and VK) children of the deceased LC).
 - c. Access Road XXXX
 - Iv. Kericho/kepsuser/XXXX
 - A. MC XXXX
 - B. CC XXXX
 - C. MC XXXX



- D. SR XXXX
- E. Deliverance Church XXXX
- F. GR XXXX
- G. Access Road XXXX

4. The 1st and 3rd administrators filed a replying affidavit dated 25/2/2022 and a supplementary affidavit dated 16/3/2022 opposed the application dated 27/1/2022.
5. The parties filed written submissions in the application dated 27/1/2022 which I have duly considered.
6. The applicants submitted that the grant of letters of administration of the estate of the late Fredrick Kiprop Maritim was issued to Sarah Chemutai Maritim on 1/1/2004 who later on died. Subsequently, letters of administration were issued to four administrators namely JKR, JC, BCK and M C on 18/1/2010.
7. The administrators through summons for confirmation of grant dated 19/6/2020 sought to have the grant of letters of administration intestate made to the applicants on 18/1/2010 to be confirmed. However, the grant of letters of administration intestate dated 18/1/2010 was not confirmed because the beneficiaries had not agreed on the mode of distribution.
8. The beneficiaries *vide* consent dated 28/9/2020 agreed on the preferred mode of distribution which was adopted as an order of the court.
9. Subsequently the applicants filed the instant application dated 27/1/2022 for the confirmation of grant in accordance with the consent order recorded and adopted by the court. The 1st and 3rd administrator filed their joint replying affidavit dated 25/2/2022 in which the sought to have the court to vary and/or set aside the consent order.
10. The applicants submitted that the consent dated 28/9/2020 was in tandem and consistent with provisions of the law regarding the equal distribution of the estate of a deceased person. The applicants cited article 27 of the *Constitution* of Kenya, section 35 (5) and 38 of the *Law of Succession Act* and the Court of Appeal case of *Stephen Gitonga M'Murithi v Faith Ngiramurithi* [2015] eKLR.
11. The applicants further submitted the law on setting aside consent orders was clear and that a consent order can only be set aside on grounds that can justify setting aside a contract. The applicants cited the following cases *Brooke Bond Liebig v Mallya* [1975] EA 266, *Flora N Wasike v Destimo Wamboko* [1988] eKLR, *Kuwinda Rurinja Co Ltd v Andbukuwinda Holdings Limited & 13 Ors* [2019] eKLR, *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & Anor* [2001] eKLR.
12. The applicants sought to have the certificate of grant confirmed as per the terms of the consent recorded on 28/9/2020 which was adopted as an order of the court.
13. The respondents submitted that contrary to the assertion of the 2nd and 4th administrators, the 1st and 3rd administrators were not seeking to vary and/or set aside consent order dated 28/9/2020 rather there were seeking to amend the said consent order.
14. The main issues of contention being allocation for the booster and homestead, manner of allocation of various portions of land to beneficiaries within parcels LR Kericho/Kapsuser XXXX acreage each beneficiary was entitled to get and identification of parcels of land for the beneficiaries within the four parcels of land.



15. The respondents submitted that the identification of parcels ought to be done in a manner that is objective, fair and devoid of bias. Failure to parties failing to reach consensus that the court should consider a supervised balloting.
16. The respondents sought that the court do issue sufficient instructions on the issues they had raised before granting a certificate of confirmation of grant.
17. The sole issue for determination is how the estate should be distributed.
18. The consent order is clear that the estate should be shared equally to all the beneficiaries save for the portions sold to third parties (buyers) and donated to the church this is in tandem with the legal provisions on the equal distribution of a deceased estate. I therefore find no reason to interfere with the mode of distribution set out in the consent order.
19. With regard to varying and/or setting aside the consent order, the Court of Appeal in *Brooke Bond Liebig (t) Ltd v Mallya* Civil Appeal No 18 Of 1975 [1975] EA 266 expressed itself as regards to consent orders and judgments as follows; “*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 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. It is well settled that a consent judgement can be set aside only in certain circumstances, e.g. on the ground of fraud or collusion, that there was no consensus between the parties, public policy or for such reasons as would enable the court to set aside or rescind a contract.”
20. I find that this is not a case that warrants the court to vary and/or set aside the consent order dated 28/9/2020 as fraud, coercion and undue influence have not been established.
21. The proposed mode by the 2nd and 4th administrators seemed to be in line with the consent order signed by the parties on 28/9/2020.
22. Each beneficiary will get 0.175 HA. in Kericho/Kapsuser/3XX after removing 0.162 HA. for the home and booster.
23. From Kericho/Kapsuser/3XX, 3XX and 23XX each beneficiary will also get 0.445 HA after removing access roads and the liabilities.
24. If the beneficiaries are not able to agree on who takes what parcel, those who had constructed homes to retain their respective parcels and the rest who had not yet taken occupation to ballot.
25. Milka Chepngeno to hold the portions of Lorna Chepkemoi (deceased) in trust for her children.

DELIVERED, DATED AND SIGNED AT KERICHO THIS 20TH DAY OF MAY, 2022

A. N. ONGERI

JUDGE

