**In re Estate of Mbau Kinyuru Alias Mbau Kinyuru Njuguna –(Deceased) (Succession Cause 144 of 2017) [2022] KEHC 12642 (KLR) (28 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 12642 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NYAHURURU**

**SUCCESSION CAUSE 144 OF 2017**

**CM KARIUKI, J**

**JULY 28, 2022**

**(FORMERLY NYERI SUCCESSION CAUSE NO. 507 OF 13)**

**IN THE MATTER OF THE ESTATE OF MBAU KINYURU ALIAS MBAU KINYURU NJUGUNA –(DECEASED)**

**BETWEEN**

**JONATHAN NJUGUNA MBUA ..... APPLICANT**

**AND**

**RACHEAL NJOKI MBAU ..... RESPONDENT**

## JUDGMENT

1. The Application before Court is for determination is dated 6/12/2021 seeking orders:

   I. Spent

   II. Spent

   III. Spent

   IV. That Honourable Court be pleased to set aside the Consent recorded on the 24/9/2019 and the objection filed by the objector be fixed for hearing.

   V. That if prayer no. 3 does not succeed, the proceedings of 8/12/2021 be set aside and the Applicant and the beneficiaries of the estate of Mbau Kinyuru be granted unconditional leave to file an affidavit of protest to the summons for confirmation of grant dated 27/8/2020

   VI. That the costs of this application be borne by the respondent.

2. It is supported by affidavit of Jonathan Njuguna Mbau sworn on 6th December, 2021. Same is opposed by via affidavit of Rachael Njoki Mbau sworn on 11th March, 2022.

3. The parties opted to canvas same application via submission which they filed and exchanged.

**4. Applicant Case and Submissions**

5. The Respondent Rachael Njoki Mbau claims to be the deceased 1st wife which position was denied by the applicant and his deceased mother. The grant issued and confirmed in the Principal Magistrate's Court Nyahururu *vide* Succession Cause No. 151 of 1994 which had directed for the estate to be shared equally between Tabitha Nyambura and Rachael Njoki was revoked on the 3/2/2021 by the High Court sitting at Nyeri and the matter was transferred to this Court for hearing and determination.

6. Vide an order dated 5/12/2018 it was ordered that the summons for revocation of grant dated 2/11/2012 be heard by way of *viva voce* evidence.

7. When the matter came up for hearing on the 24/9/2019, the applicant was ready to proceed with his 2 witnesses who have recorded statements denying knowledge of the respondent and that she was the deceased's wife. Surprisingly instead of proceeding with the hearing, a consent was recorded by the advocates for the parties without consulting the Applicant and his witnesses, appointing Rachael Njoki Mbau as an administrator of the estate of the deceased.

8. If such an appointment recognized Rachael Njoki as a wife of the deceased and a heir of his estate, the applicant is opposed to the consent and he has in prayer No 4. of the summons dated 6/12/2021, sought for the consent order of 24/9/2019 to be set aside and for the Summons for revocation of grant to be set down for hearing through *viva-voce* evidence to determine whether the respondent was the deceased's wife and entitled to his estate.

9. The consent order was entered into through fraud and collusion of counsels appearing for the parties as the Applicant was not consulted despite him being present in Court with his witnesses ready to proceed.

10. In the Court of appeal case of *Brooke Bond Liebig v Mallya* 1975 E.A 266, it was held that:

> " A consent judgment may only be set aside for fraud collusion or for any reason which would enable the Court be set aside an agreement".

11. The applicant contends that, his advocate on record then, must have been compromised on the 24/9/2019, this is so contended because, after the respondent filed a summons for confirmation of grant dated 27/8/2020, the counsel refused to inform the applicant of its existence and of the confirmation date of 8/2/2021 and the summons was allowed unopposed.

12. The applicant submits that,he has in his supporting affidavit demonstrated that he has a good defence to the summons for confirmation of grant as the respondent was given a lion share of the estate by taking half of the estate comprised of 3.2 acres leaving the applicant and his siblings listed as 1st -8th beneficiaries in the application to share the remaining 3.2 acres equally. This translates to a portion of 0.35 Acres per person as against 3.2 acres awarded to the respondent.

13. The 1st -8th beneficiaries who are children of the deceased were not served with the summons for confirmation of grant and a hearing notice. They were not being represented by the firm of Wanjiru Waweru & co. Advocates and it was imperative that they be served before the grant could be confirmed. The 1st -8th beneficiaries and the applicant did not sign a consent as required of them under Rule 40 (8) of the *Probate and Administration Rules*.

14. The Court has wide discretion to set aside *exparte* orders granted for non-attendance of a party and it is only fair and just that the *exparte* orders of 8/2/2021 be set aside and for the applicant and the 1st - 8th beneficiaries to be allowed to participate in the confirmation process.

15. The delay occasioned in filing the application has been explained and has been blamed on the Applicant's previous advocates on record and thus prayed for the delay to be excused and for the errors of the advocate not to be visited on the applicant.

16. The delay in finalizing the matter cannot at all be attributed to the applicant who has always been prepared to proceed with the case. Reliance is made on the case of *in re-estate of M'Imwitha M'Ithanga (Deceased)* (2021) eKLR , *Attorney General v Small Wonder Ltd* [2015] .

**17. Respondent Case and Submissions.**

18. On 12th May 2002, the lower Court (in Nyahururu PMCC Succ No. 151 of 1994) delivered its judgment on the mode of distribution. (Refer respondent's annexure RNM/"6"). The court distributed the deceased's estate into two equal shares. The Applicant's mother moved to the High Court in Nyeri and applied to revoke the grant of letters of administration and certificate of confirmation in Nyahururu PMCC Succ No. 151 of 1994.

19. On 11th April 2012 the parties recorded consent in Nyeri HC Succ No. 125 of 2003 whereby the grant of letters of administration and certificate of confirmation in Nyahururu PMCC Succ No. 151 of 1994 were revoked. The consent also sought for the transfer of Nyahururu PMCC Succ No. 151 of 1994 to Nyeri High Court for hearing.

20. The net effect of the aforesaid revocation was that the estate was left without an administrator. The parties were thus to embark on the appointment of administrator(s) of the estate. Before the matter was heard, it was transferred to this court for hearing and determination. On 5th December 2018, this court directed the parties to file their respective statements for hearing on the appointment of administrators. Subsequent thereto, the matter was fixed for hearing on 24th September 2019.

21. It is not in dispute that on 24th September, 2019 the parties and their respective Advocates wee present in court. The matter was mentioned in open court and as such it was open for anyone to follow the proceedings. We invite the court to take judicial notice of the fact that the court assistant normally calls out (loudly) the case number of a file, and proceeds to call out the name of the deceased's estate and the parties. It is through such exercise by the court assistant that parties are able to follow the proceedings.

22. The court proceedings of 24th September 2019 were not an exception to the aforesaid exercise. It is evident that after the matter was called out, the parties' respective Advocate addressed the court of concern, the advocate informed the court that they had consent. The consent was read out to the court in open court by the Advocates and the terms were recorded. The advocates who were both present in court confirmed the terms of the consent, and the court proceeded to adopt it as the orders of the court.

23. The parties have confirmed in their respective affidavits that they were present in court on 24th September 2019. The parties have further confirmed that their advocates were also present in court. It is quite obvious that the advocates got instructions on the terms of the consent from their respective clients. The terms of the consent were read out in open court, and no one objected to the adoption of the consent as the orders of the court. It is thus in bad taste for the Applicant to allege that there was collusion between the advocates. By extension, the applicant is also implicating the court for not making him aware of the proceedings that were taking place. The applicant is thus alluding to the fact that there was collusion perpetrated by the Advocates and the court.

24. It is also misleading for the Applicant to depone that the matter was not mentioned. Whereas the court records indicate that it was mentioned in open court and in the presence of the parties' Advocates. In September 2019, court proceedings were taking place in open court, and the matter having been scheduled for hearing, it had to be handled in open court. The Applicant has not demonstrated the efforts he made to know what transpired on 24th September 2019 before he left the court premises. Since the proceedings were in open court, it was open for the Applicant to enquire for the court or the court assistant.

25. Thus the Respondent submits that, the Applicant was aware of the terms of the consent that were adopted as the orders of the court on 24th September 2019. The applicant gave his advocate authority to record the consent, and as such he should not be allowed to walk away from what he bargained for. The Applicant has not demonstrated that the consent was obtained by fraud or collusion or misrepresentation of facts. None of the factors that vitiate a contract have been proved by the Applicant.

26. Reliance is made on the case *Kenya Commercial Bank Ltd v specialized Engineering Co. Ltd* (1982) KLR 485.

27. It is submitted that, the court ought to find that the consent adopted on 24th September, 2019 was valid and binding on all the parties, thus court urged to dismiss the application.

28. It is submitted that, that the Applicant has not faulted the service of s summons for confirmation, and the hearing notice served upon his ten advocates. In the circumstances, there is no justifiable reason as to why the Applicant did not file a protest to the proposed mode of distribution. There is also no justifiable reason given for his nonattendance and that of his advocate during the hearing of the summons for confirmation.

29. Respondent relies on the cases of *In Re Estate of John Kiptele Bii (deceased)* (2021) eKLR,and submits that the court procedurally and legally confirmed the said grant as there was no protest filed objecting to the Respondent's proposed mode of distribution. In making the proposal for the mode of distribution, the Respondent was guided by the principle of equitable distribution as held by the lower court in its judgment of 12th May, 2002.

30. The applicant cannot be heard to fault his advocate at the expense of the proceedings in this cause. The applicant was aware that on 24th September 2019, the court gave the parties an opportunity to file summons for confirmation without the necessity of waiting for the statutory period of 6 months. It is evident that the Applicant woke from deep slumbers on 17th November 2021 when he received a call from his Advocates. The Applicant has not demonstrated the follow up efforts that he made to be UpToDate with the proceeding in the cause.

31. On 5th December, 2018, an order was given for the substitution of the Applicant in place of his late mother (Tabitha Mbao). The Applicant was thus made a party in December, 2018. The Applicant has not shown the steps he has ever taken as a party in this suit to ensuring the conclusion of this cause, bearing in mind that it has been in court from the year 1994.

32. This cause has been in court from 1994, and it is time that litigation comes to an end. This Court distributed the estate equitably and there is no justifiable reason for disturbing the said distribution. The current application is purely an afterthought, and it is an attempt to keep this matter longer in the court system. The Applicant should be contended with the current orders on the distribution of the estate, and should not be allowed to lay blame on his previous Advocates.

33. Respondent cites the cases of *multiple Hauliers v Enok Bilindi Musundi & 2 others* (2021) eKLR, *savings and loans limited v Susan Wanjiru Muritu Nairobi* (milimani) HCCS No. 397 OF 2002, *Michael Kanyi Mwarano v Festus Murimi Mwarano* [2021) eKLR, , *Rukenya Buuri v M'arimi Minyora & 2 others* [2018] e KLR,*Joseph Lekodi Teleu v Jonathan Paapai & another* (2022) e KLR, *Duale Mary Ann Gurre v Amina Mohamed Mahamood & another* (2014) eKLR.

**34. Issues, Analysis and Determination**

35. After going through the record, pleadings and submissions, I find the issues are; whether the application has met threshold of setting aside a consent order? if the above is in affirmative, what is the orders recommending themselves? What are the orders as to costs?

36. The applicant sought orders that,Court be pleased to set aside the Consent recorded on the 24/9/2019 and the objection filed by the objector be fixed for hearing and that alternatively, the proceedings of 8/12/2021 be set aside and the Applicant and the beneficiaries of the estate of Mbau Kinyuru be granted unconditional leave to file an affidavit of protest to the summons for confirmation of grant dated 27/8/2020.

37. This is a matter where the advocate recorded a consent to compromise matter on behave of the client. According to the applicant,the consent order was entered into through fraud and collusion of counsels appearing for the parties as the Applicant was not consulted despite him being present in Court with his witnesses ready to proceed.

38. According to the respondent, on the proceedings of 24th September 2019 indicate that, after the matter was called out, the parties' respective Advocate addressed the court of concern, the advocate informed the court that they had consent. The consent was read out to the court in open court by the Advocates and the terms were recorded. The advocates who were both present in court confirmed the terms of the consent, and the court proceeded to adopt it as the orders of the court.

39. The parties have confirmed in their respective affidavits that they were present in court on 24th September 2019. The parties have further confirmed that their advocates were also present in court. The terms of the consent were read out in open court, and no one objected to the adoption of the consent as the orders of the court.

40. It is thus rational to infer that, the advocates got instructions on the terms of the consent from their respective clients.In the Court of appeal case of *Brooke Bond Liebig v Mallya* 1975 E.A 266, it was held that:

> " A consent judgment may only be set aside for fraud, collusion or for any reason which would enable the Court be set aside an agreement".

41. In the case of *Kenya Commercial Bank Ltd v specialized Engineering Co. Ltd* (1982) KLR 485 Harris Judge correctly held inter alia that¨

> " A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or collusion or by an agreement contrary to the policy of the court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement. A duly instructed advocate has an implied general authority to compromise and settle the action and the client cannot

avail himself of any limitation by him of the implied authority to his advocate unless such limitation was brought to the notice of the other side."

42. Likewise, in *Duale Mary Ann Gurre v Amina Mohamed Mahamood & another* (2014) eKLR, Hon Justice Mutungi held as follows:

> " An advocate is the agent of the party who instructs him and such instructing client as the principal continues to have the obligation and the duty to ensure that the agent is executing the instructions given. If the case of litigation, the suit belongs to the client and the client has an obligation to do follow up with his advocate to ensure the advocate is carrying out the instruction as given. The litigation does not belong to the Advocate but to the client. If the Advocate commits a negligent act the client has an independent cause of action against the Advocate".

43. Further in the case of *Rukenya Buuri v M'arimi Minyora & 2 others* [2018] e KLR, the Honorable court held that.

> " Blaming his former advocate Is not enough. A litigant must be diligent enough to follow up how his case is being handled by his advocate". from the above authorities it is evident that the since a case belongs to a litigant, it is not sufficient for the litigant to blame his former advocates for failure to prosecute a matter without showing the tangible steps taken to prosecute the matter. I find that the applicant has not demonstrated the steps taken to follow up the matter with his former advocates on record".

44. The court agrees with respondent contention as the records indicate that the matter was mentioned in open court and in the presence of the parties' Advocates. In September 2019, court proceedings were taking place in open court, and the matter having been scheduled for hearing, it had to be handled in open court. The Applicant has not demonstrated the efforts he made to know what transpired on 24th September 2019 before he left the court premises. Since the proceedings were in open court, it was open for the Applicant to enquire from the court or the court assistant what transpired if she was not aware.

45. The foregoing demonstrate that the Applicant was aware of the terms of the consent that were adopted as the orders of the court on 24th September 2019. The applicant gave his advocate authority to record the consent, and as such he should not be allowed to walk away from what he bargained for. The Applicant has not demonstrated that the consent was obtained by fraud or collusion or misrepresentation of facts. None of the factors that vitiate a contract have been proved by the Applicant.

46. Thus, the court finds no merit in the application and makes the following orders;

    i. The application is thus dismissed.

    ii. Parties to bear their own costs.

**DATED, SIGNED, AND DELIVERED AT NYAHURURU THIS 28TH DAY OF JULY 2022.**

**.....**

**CHARLES KARIUKI**

**JUDGE**