



**In re Estate of Silas Gituma Musa M’Twaruchiu alias Silas Gituma Musa M’Twaruchiu-Deceased  
(Succession Cause 786 of 2015) [2022] KEHC 13400 (KLR) (29 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13400 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
SUCCESSION CAUSE 786 OF 2015**

**EM MURIITHI, J**

**SEPTEMBER 29, 2022**

**IN THE MATTER OF THE ESTATE OF SILAS GITUMA MUSA  
M’TWARUCHIU ALIAS SILAS GITUMA MUSA M’TWARUCHIU-DECEASED**

**MARGARET KANYUA GITUMA.....1ST PETITIONER**

**JOHN WYCLIFFE MUREITHI GITUMA .....2ND PETITIONER**

**VERSUS**

**JOAN KANANA GITUMA..... PROTESTOR**

**RULING**

1. This is a ruling on a Protest by a beneficiary of the Deceased against distribution of the estate in accordance with a consent which was allegedly concluded without her involvement. The Protestor filed her affidavit on 21/12/2021, opposing the consent letter dated 4/10/2021 and filed on 13/10/2021.
2. She averred that in following up on the confirmation of grant, she discovered that the petitioner had filed a consent later on 4/10/2021 which had been done and filed without her involvement and that her advocate was not issued with a copy which was intended to be adopted behind her back.
3. She further protested that hat the petitioners have never been ready to implement the distribution as ordered by the court and are enjoying the benefits of the estate. She said that her sisters have been coerced to surrender their entitlement over L.R Ruiriri/Rwarera/547 (hereinafter the suit land) to the 2<sup>nd</sup> Petitioner as the consent intends to have 10 acres from the suit land.
4. She also averred that she is entitled to 3 acres to be exercised out of the suit land as per the court judgement before her sisters and mother in accordance with their consent, surrender their shares to the 2<sup>nd</sup> petitioner and before any further action was to be taken in the matter. She contends that if the petitioner is to get 10 acres out of the suit land, then she would not get her 3 acres. Further, that efforts to reconcile and deal with the matter harmoniously bore no fruits. She thus opposed the adoption of the consent as it shall prejudice her lawful entitlement.



## Order of 8/10/2020

5. Looking at the ruling of 8/10/2020, the orders were that the objector was to receive 3 acres of the suit land which was distributed as follows;
  - a. “g). L.R Ruirir/Rwarera/547 (11.86 acres)
    - i. Joan Kanana Gituma - 3 acres
    - ii. Kellen Mwendwa Gituma - 3 acres
    - iii. Grace Karamuta Gituma - 2 acres
    - iv. Margaret Kanyua Gituma - 5 acres.”
6. The consent letter filed in court on 13/10/2021 indicates that beneficiaries, Kellen Mwendwa Gituma, Grace Karamuta Gituma, Margaret Kanyua Gituma and John Wycliffe Muretithi Gituma have agreed to have the grant rectified with the distribution of the suit land set as follows.
  - “ 1. That the distributed shares to Kellen Mwendwa Gituma (3 acres), Grace Karamuta Gituma (2 acres), and Margaret Kanyua Gituma (5 acres) as per the judgement of Justice A. Mabeya (J) over L.R No. Ruirir/rwarera/547, BE given to John Wycliffe Mureithi Gituma, such that he now owns 10 acres (Ten Acres) out of L.R No. Ruirir/rwarera/547.
  2. That the certificate of confirmation of grant be rectified accordingly over the distribution of L.R No. Ruirir/rwarera/547.”
7. The said consent is signed by all the four other beneficiaries of the estate being; Kellen Mwendwa Gituma, Grace Karamuta Gituma, Margaret Kanyua Gituma and John Wycliffe Muretithi Gituma.
8. At the time of this ruling, the partitioners had not filed any responses to the affidavit in protest. However, the matter was mentioned in Court on 16/3/2022.

## Determination

9. Having analyzed the Protestor’s case, the consent letter and the said ruling by Mabeya, J. and the sole issue commending itself for this Court’s determination is whether the consent letter should be adopted as an order of this Court as filed.
10. From the ruling of Mabeya J., it is evident that the Protestor is entitled to 3 acres of the suit land. The petitioners together with other beneficiaries seem to have colluded to disinherit the Protestor her lawful entitlement without her knowledge.
11. Article 159 of *the Constitution* is the foundation of the exercise of judicial authority as donated by the people. This Article outlines principles that guide any person/body who or which exercises that delegated sovereign judicial authority. Alternative Dispute Resolution is one such principle as provided by Article 159(2)(c). The High Court, Mativo J. (as he then was) in *Council of County Governors v.*



*Lake Basin Development Authority & 6 others* Petition No. 280 of 2017; [2017] eKLR stated as follows, and we agree, regarding Alternative Dispute Resolution:

“44. I have no doubt that alternative dispute resolution processes are complementary to the judicial process and by virtue of Article 159(2)(c) of *the Constitution*, the Court is obligated to promote these modes of alternative dispute resolution...”

12. The Court of Appeal in *Isaac Kinyanjui Njoroge vs National Industrial Credit Bank Limited* [2018] eKLR reiterated the principles for setting aside a consent order as set out in *Flora N Wasike vs Destimo Wamboko* [1982-88] 1 KAR 625 when it held that:

“The principles upon which an application for review is considered are well settled. As the Judge correctly stated, this Court held in *Flora N Wasike vs Destimo Wamboko* [1982-88] 1 KAR 625 that a consent judgment can only be set aside on the same grounds as would justify the setting aside of a contract, for example fraud, mistake or misrepresentation. In that case, the Court affirmed the principle in *Hirani vs Kassam* (1952) 19 EACA 131 that:

“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.”

13. It is trite law that a consent is a contract between parties which may be vitiated by the same principles of vitiating a contract apply in vitiating a consent. From, Article 159 as cited above, *the Constitution* acknowledges that parties are at liberty to settle matters out of court through Alternative Dispute Resolution and the courts are obligated to promote Alternative Dispute Resolution in accordance with *the Constitution*. That notwithstanding, the parties are expected to follow the law on contracts in arriving at consent agreements which are then capable of being adopted as orders of court.
14. In this case, it is evident that the consent was made without agreement of all parties concerned. The Protestor alleged that the other beneficiaries were also coerced and or intimidated by the 2<sup>nd</sup> Petitioner into making the consent agreement. Having looked at the consent as filed, the Protestor, despite being a rightful beneficiary of the estate, was not involved in its making thus material facts were concealed, thus the consent is void as against the non-executing party. If this court were to adopt the consent as filed, then it would mean that the court will be used to infringe on the rights of the Protestor, a legal and rightful beneficiary of the suit land.
15. In the circumstances and in the interest of justice the court is inclined to find that the protest is meritorious and that the Protestor has a right to her share of the suit land as distributed in the court ruling. It would be an injustice to rectify the certificate of confirmation of grant as proposed in the consent as that would disinherit the Protestor without her consent.

## Orders

16. Accordingly, for the reasons set out above, the Petitioner’s Protest is upheld and the application for rectification of the Confirmed Grant herein is declined.
17. Each party shall bear its own costs of the application.



Order accordingly.

**DATED AND DELIVERED THIS 29<sup>TH</sup> DAY OF SEPTEMBER, 2022.**

**EDWARD M. MURIITHI**

**JUDGE**

Appearances:

