



**In re Estate of Michael Kahihu Thiong'o alias Michael Kahihu Thiongo (Deceased) (Succession Cause 1212 of 2008) [2022] KEHC 14399 (KLR) (Family) (28 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14399 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**FAMILY**

**SUCCESSION CAUSE 1212 OF 2008**

**AO MUCHELULE, J**

**OCTOBER 28, 2022**

**IN THE MATTER OF THE ESTATE OF MICHAEL KAHIHU  
THIONG'O ALIAS MICHAEL KAHIHU THIONGOH (DECEASED)**

**BETWEEN**

**MARTIN KAHIHU MUTHIORA ..... APPLICANT**

**AND**

**ELIZABETH WAIRIMU KAHIHU ..... RESPONDENT**

**RULING**

1. The deceased Michael Kahihu Thiongo alias Michael Kahihu Thiong'o died intestate on January 25, 2007 at the PCEA Kikuyu Hospital at Thogoto. He was survived by his wife Elizabeth Wairimu Kahihu (the respondent) and several children who included Clement Muthiora, the father of the applicant Martin Kahihu Muthiora. He left several properties which included Dagoretti/Riruta/771. A joint grant of letters of administration was issued to the respondent and to the applicant's father on September 18, 2008. It was confirmed on July 28, 2010, by the consent of all the beneficiaries. Clement Muthiora died on January 4, 2012. On March 5, 2012 the respondent applied to have the grant and certificate of confirmation rectified so that she be left as the only administratrix. The application was consented to by the beneficiaries who included the applicant. It was allowed by the court.
2. In the certificate of confirmation all the property of the deceased was to be registered in the name of the respondent to hold in trust for all the beneficiaries. In respect of Clement Muthiora who had passed on, the applicant was indicated in the certificate as a beneficiary.
3. In the present application dated August 6, 2019, the applicant's complaint was that his father had been shown by the deceased where to build on parcel Dagoretti/Riruta/771. He built rental houses on the portion and his family has been collecting rental income from the property. However, beginning July



- 25, 2019 the respondent began coming on the property to claim it. She was saying that the applicant and his siblings should vacate as she was going to start collecting rent from the property. This is what forced him to come to court to apply for injunction to restrain the respondent and also for an order that she should be ordered to distribute the estate to the respective beneficiaries, or the court does the distribution. The application was brought under order 40 rules 1 and 2 of the Civil Procedure Rules and sections 3A and 63(e) of the Civil Procedure Act.
4. The respondent's response was contained in the grounds of opposition dated October 26, 2021. The grounds were that the application offended sections 35 and 37 of the Law of Succession Act (cap 160) and that the respondent was the living spouse of the deceased who had not remarried and had a life interest over the deceased's intestate estate.
  5. M/s Gulenywa for the applicant and Mr Washika for the respondent each filed written submissions on the application. I have considered what each had to say.
  6. One does not know whether the agreement of the beneficiaries to have the deceased's estate to be held by the respondent in trust for them was because of their recognition of the rights of the living and unmarried spouse of a deceased under section 35(1) of the Law of Succession Act. Whatever the case, they agreed on how the deceased's estate should devolve. The confirmation of the grant embodied that agreement. The order confirming the grant became the judgment of the court. It was a judgment that was entered by the consent of all the beneficiaries of the estate of the deceased, including the father of the applicant and later the applicant himself.
  7. The Court of Appeal in Flora N. Wasike v Destimo Wamboko [1988]eKLR states as follows:-

“It is now settled law that a consent judgment or order has a contractual effect and can only be set aside on grounds which would justify setting a contract aside, and if certain conditions remain to be fulfilled, which are carried out.”
  8. In Kenya Commercial Bank Ltd v Specialised Engineering Co Ltd [1982] KLR 485, Harris J held that:-

“A consent order entered into by counsel is binding on all the 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 material facts or in misapprehension or ignorance of such facts in general or for a reason which would enable the court to set aside an agreement.”
  9. The alternative is that all the beneficiaries who agreed to have the estate held by the respondent in trust for them should come to court with an agreement or consent to have the estate distributed so that each of them should have his or her separate portion.
  10. Given the foregoing, I find no merit in the application which I dismiss with costs.

**DATED and DELIVERED electronically at NAIROBI this 28<sup>TH</sup> day of OCTOBER 2022**

**A.O. MUCHELULE**

**JUDGE**

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