



In re Estate of M’Nthigai M’Rintira alias Nthigai Rintira (Deceased) (Miscellaneous Succession Cause 51 of 2021) [2022] KEHC 15697 (KLR) (24 November 2022) (Ruling)

Neutral citation: [2022] KEHC 15697 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
MISCELLANEOUS SUCCESSION CAUSE 51 OF 2021**

LW GITARI, J

NOVEMBER 24, 2022

**IN THE MATTER OF THE ESTATE OF M’NTHIGAI
M’RINTIRA ALIAS NTHIGAI RINTIRA (DECEASED)**

BETWEEN

JAMES MBAKA NKUNE APPLICANT

AND

DORIS KANINI NKUNE RESPONDENT

RULING

1. Before this court is the summons application dated 16th September 2022 seeking the following orders from this court:
 - i. Spent.
 - ii. Spent.
 - iii. That the consent order recorded on 8th March 2022 be hereby vacated.
 - iv. That this honourable court do now order the hearing of the Application dated 21/10/2021 in the nature of Summons for Revocation of Grant to proceed to its full hearing and determination.
 - v. That the costs of this application be provided for.
2. The application is based on the following grounds, inter alia:
 - i. That the Respondent herein lodged a succession cause (Succession Cause No. 98 of 2020) at Chuka Law Court in respect of the estate of M’Nthigai M’Rintira alias Nthigai Rintira (deceased) in secrecy, concealing material facts to the court which were defective in substance without informing all beneficiaries of the estate of the deceased.



- ii. That a Grant of Letters of Administration (P&A 41) was issued on 2nd November 2020 to the Respondent and subsequently confirmed on 29th September 2021 where a Certificate of Confirmation of Grant (P&A 54) was issued.
 - iii. That the Applicant came to learn of the succession cause after a Certificate of Confirmation of Grant was issued and he filed an application for Revocation of Grant in this honourable court dated 21/10/2021 vide Misc. Succession No. 51 of 2021.
 - iv. That when the application for Summons for Revocation of Grant came up for hearing, the parties were encouraged to try an out of court settlement and a consent was recorded on 8th March 2022.
 - v. The Applicant herein was then appointed as a co-administrator besides the Respondent.
 - vi. That since the recording of the consent, the respondent and some of the beneficiaries have fundamentally breached and/or reneged on the mutual agreement and/or undertakings forming the basis of the consent.
 - vii. That it is now necessary that the matter be allowed to proceed to full hearing and a determination be made on merit.
3. The Application is further supported by the affidavit sworn by the Applicant on 16th September 2022. He reiterates the grounds laid out on the face of the application.
 4. The Respondent opposed the application vide the Replying Affidavit sworn by herself on 26th September 2022. She deposed that the application is frivolous, vexatious and an abuse of the hallowed court process and that it should be dismissed with costs. According to the Respondent, this court is functus officio and cannot entertain the instant application. Further, she deposed that the Applicant has not satisfied the conditions of setting aside a consent order and or the decree of this Honourable court. It is the Respondent's argument that after the consent was entered by the parties, the Application for revocation of grant was fully spent and thus there is no application for revocation that is pending determination.
 5. The parties agreed to rely on their respective affidavits and left it for this court to determine the issue.
 6. I have considered the application dated 16th September 2022, the grounds set out therein, as well as the respective affidavits made by the parties in support and in opposition of the said application. The following issues arise for determination by this court:
 - i. Whether this court has powers to vacate the consent order; and if so
 - ii. Whether the Applicant has laid out a sufficient basis for the vacation of the impugned order.

Analysis

7. The application is expressed to have been brought pursuant to the provisions of Rules 49 and 73 of the Probate and Administration Rules (Chapter 160 of the Laws of Kenya).
8. Rule 49 of the Probate and Administration Rules states:

“A person desiring to make an application to the Court relating to the estate of a deceased person for which no provision is made



elsewhere in these rules shall file a summons supported if necessary by affidavit.”

9. On the other hand, Rule 73 of the Probate and Administration Rules states:

“Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

10. The above rules give a party leeway to file an application which is not otherwise provided for under the rules and affirms the inherent jurisdiction to Courts to make such orders as may be necessary to meet the ends of justice.
11. In this case, the Applicant is seeking the vacation of the consent order that the parties entered into on 8th March 2022, which consent order was adopted as an order of this court.
12. The said consent was reached in the following terms:
 - i. James Mbaka Nkune and Doris Kanini Nkune who are the applicants be appointed as the administrators of the estate.
 - ii. A grant be issued to the joint administrators.
 - iii. The two administrators to sign all the necessary documents and in the event one refuses to sign, the D.R. to sign the documents.
 - iv. The Land Registrar and the District Surveyor to conduct the subdivision and transfer as per the order issued by Hon. J. M. Njoroge on 6-10-21, that is, the confirmation of grant. The OCS Chuka Police Station to provide security.
 - v. The Summons for Revocation of Grant dated 21-10-21 be marked as settled.
13. A perusal of the application dated 21st October 2021 shows that the main order sought therein was the revocation, cancellation and/or annulment of the grant of letters of administration dated 10th November 2020 and the Certificate of Grant dated 6th October 2021. Notably, the said application was compromised by the recording of the consent order as evidenced by the last term of the said order.
14. The first issue herein therefore is whether this court has powers to vacate the impugned consent order.

Powers to vacate consent order

15. The Court of Appeal in *SMN v ZMS & 3 others* [2017] eKLR highlighted the following authorities as an illustration of the approach that should be taken by courts when attending to the issue of whether or not to vacate a consent order.
16. There is the case of *Flora N. Wasike vs Destimo Wamboko* [1988] eKLR where the Court of Appeal stated as follows:

“It is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out: see the decision of this Court in *JM Mwakio vs Kenya Commercial Bank Ltd* Civil Appeals 28 of 1982 and 69 of 1983.”



17. There is also the case of *Purcell vs F C Trigell Ltd* [1970] 2 All ER 671, Winn LJ said at 676 where the Court stated:

“It seems to me that, if a consent order is to be set aside, it can really only be set aside on grounds which would justify the setting aside of a contract entered into with knowledge of the material matters by legally competent persons.”

18. In *Kenya Commercial Bank Ltd vs Specialised Engineering Co. Ltd* [1982] KLR 485, Harris, J held, inter alia, that -

“1. 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.

2. 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.”

19. From the above authorities, it is clear that this court has powers to vacate or set aside a consent order. However, it is also clear from the above that a consent order can only be varied or set aside upon proof of certain specific grounds such as where the consent was obtained fraudulently, or in collusion between affected parties. Other grounds for vacation of a consent order include where the consent is contrary to the policy of the Court, or based on insufficient material facts, or based on misapprehension or ignorance of material facts.

20. Thus, the consequent issue for determination is whether the Applicant has laid a basis to warrant this court to vacate the impugned consent order.

Whether the Applicant has given a sufficient reason to warrant the vacation of the impugned order

21. In *Kenya Commercial Bank Limited vs Benjoh Amalgamated Limited & Another* [1998] eKLR the Court of Appeal cited a passage in *The Supreme Court Practice 1976* (Vol. 2) paragraph 2013 page 620 stating:-

“Authority of Solicitor - a solicitor has a general authority to compromise on behalf of his client, if he acts bona fide and not contrary to express negative direction; and it would seem that a solicitor acting as agent for the principal solicitor has the same power (*Re Newen*, [1903] 1 Ch pp 817,818; *Little vs Spreadbury*, [1910] 2 KB 658). No limitation of the implied authority avails the client as against the other side unless such limitation has been brought to their notice - see *Welsh vs Roe* [1918 - 9] All E.R Rep 620.”



22. The Court of Appeal in *Kenya Commercial Bank Limited vs Benjoh Amalgamated Limited & Another* (supra) cited the case of *Brooke Bond Liebig (T) Limited vs Mallya* [1975] E.A. 266 where the law in respect of this issues was stated in the following terms at p. 269:

“The circumstances in which a consent judgment may be interfered with were considered by this court in *Hirani vs Kassam* (1952), 19 EACA 131, where the following passage from Seton on Judgments and Orders, 7th edition, Vol.1 p.124 was approved:

'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 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.’

23. In this case, counsel for the Applicant and the Respondent, Mr. Kirimi and Mr. Kijaru respectively, appeared before this court on 8th March 2022 when they both confirmed that the parties had reached a consent and the consent was adopted as an order of this court. In the present application, it is contended by the Applicant that since the recording of the consent, the respondent and some beneficiaries have fundamentally breached and/or reneged on the mutual agreement and/or undertakings forming the basis of the consent.

24. The rule of evidence is clear that “He who alleged must prove”. That is the purport of Section 107 (1) of the *Evidence Act* (Chapter 80 of the Law of Kenya), which provides that:

“(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist”

25. The Applicant has not provided this court with any evidence to substantiate his claim. All material facts were known to the parties when they consented to compromise the application dated 21st October 2021. There is no suggestion of collusion or fraud. In addition, the terms of the consent were so unequivocal and clear and therefore left no room for a possibility of misapprehension or mistake. As such, it is my view that the Applicant failed to prove the existence of any of the circumstances identified in law that could warrant this court to vacate the said consent order. There should be an end to litigation.

Conclusion

26. The upshot of the above analysis, is that the application dated 16th September 2022 lacks merit. I dismiss the application with costs.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 24TH DAY OF NOVEMBER 2022.

L.W. GITARI

JUDGE

24/11/2022

Ruling has been read out in open court.

L.W. GITARI

JUDGE



24/11/2022

