REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

SUCCESSION CAUSE NO. 1057 OF 2009

IN THE MATTER OF THE ESTATE OF JOHN RENNIE

CARRIE GORDON ALIAS GORDON RENNIE (DECEASED)

JOHN PAUL KIMARU GORDON..APPLICANT

VERSUS

CHRIS GITHINJI RWENGO..1ST RESPONDENT

BENSON KINYUA MWANGI T/A OLE NASRA COMPANY LTD........2ND RESPONDENT

LUCY WERU...3RD RESPONDENT

FRANCIS KAMAU KIBERE...4TH RESPONDENT

PETER KARIUKI NDERITU...5TH RESPONDENT

SPERANZA NJOKI GITHINJI..6TH RESPONDENT

SUSAN WANGU NJOKI...7TH RESPONDENT

AGNES WARUGURU NJOKI...8TH RESPONDENT

JOHN KARANGA MUTHEE NJOKI..9TH RESPONDENT

PERIS NJOKI NYAGA..10TH RESPONDENT

MARY WANJIKU MUTHEE..11TH RESPONDENT

MARGARET WANJIKU KARWE...12TH RESPONDENT

BENSON KARIUKI MUTHONI...13TH RESPONDENT

ELIZABETH WARUGURU GORDON..14TH RESPONDENT

MOSES MUGAMBI GORDON..15TH RESPONDENT

RULING

1. The applicant has brought this application dated 7th July 2020, under **Rule 49, 63, 73 & 7(7) of the Probate and Administration Rules, Order 45 of the Civil Procedure Rules 2010, Section 35, 45, 55, 66 & 81 of the Succession Act, Section 16(1), 19 of the Adoption Act and 174 of the Children Act Cap 141 Laws of Kenya and Article 47(1), 50(1) & 159(2) of the Constitution of Kenya 2010**. The orders sought in the application are as follows:-

2. The applicant seeks for two main prayers:-

a. Review, vary and set aside the consent judgement dated 19th March, 2018 and entered on 20th September, 2019 which resulted to the confirmation of the grant.

b. Revocation or annulment of the grant of letters of administration issued on 1st April, 2019 and confirmed on 20th September 2019

The application is premised upon the affidavit of JOHN PAUL Kimaru Gordon sworn on 7th July 2020.

3. In opposition to the application, the 1st respondent filed his Replying Affidavit sworn on 22nd July 2020. The 6th – 12th respondents filed grounds of opposition dated 21st July 2020 and 2nd -13th respondents filed grounds of opposition dated 28th August 2020.

The Applicant's Case

4. The applicant states that one Moses Mugambi Gordon and himself are adopted sons of the deceased vide court adoption order issued in Meru CMCC Cause No. 29 of 2001 on 29th November 2001 and that the deceased was also survived by a wife, Elizabeth Waruguru Gordon and a son Moses Ian Gordon. The applicant adds that pursuant to the adoption order by the court, **section 16(1), 19 of the Adoption Act and 174 of the Children Act Cap 141 of the Laws of Kenya**, he and his brother Moses Mugambi Gordon, are sons of the deceased and entitled to be treated as such for purposes of the distribution of the estate just like biological sons to the deceased.

5. The applicant contends that the deceased had the following assets at the time of his demise, IR Nos. 6394 being L.R. No. 7387/15, 7387/16, 7387/20, 7387/21, 7387/22 L.R. IR No. 17155, LR No. 8343/4, IR No. 17156 L.R. No. 8343/5, IR No. 17158, L.R. No. 8343/6 and IR No. 17157 LR No. 8343/7. These properties were the suit properties in Succession Cause No. 396 of 2000, In the Matter of the Estate of Jane Waruguru Ndei alias Waruguru Gondoni & Waruguru Gordon who was the spouse of the deceased herein. She died on 24th May 2000 and the confirmed grant was issued on 19th April 2002 which vested the suit properties absolutely to the deceased herein.

6. The applicant further states that the 6th, 11th & 12th respondents participated in the Estate of Jane Waruguru's estate proceedings and they did not object to the suit properties being vested to the deceased absolutely. As such, the respondents were not ipso facto entitled to benefit from the estate of the deceased as the deceased had his surviving family, who are his legal beneficiaries and who rank higher in matters of distribution of the estate as per the law of succession act.

7. The certificate of confirmation of grant in this casewas issued on 20th September 2019 pursuant to a consent dated 19th March 2018 and grant of letters of administration issued on 1st April 2009. According to the applicant, the aforesaid consent was based on fraud, collusion, misinformation, ignorance of material facts and contrary to court policy. This is so because the 1st respondent is not entitled to any share out of the estate of the deceased, the alleged vendors had no legal entitlement or capacity to sell to the 2nd – 5th respondents who were purchasers, whereas the 6th – 13th respondents had no capacity to benefit from the estate of the deceased as per the provisions of **section 35 of the Law of the Succession Act.** Moreover, the 1st, 6th and 13th respondents have not disclosed their relationship with the deceased and further they have proceeded to allocate themselves shares to the detriment of the legal beneficiaries of the estate which in turn vide collusion were sold to the 2nd, 3rd and 5th respondents.

8. Furthermore, the applicant contends that he was accorded 19 acres of land which was vested to the 2nd respondent. Yet the 2nd respondent tricked him by promising him Kshs. 25,300,000/- vide a sale agreement dated 22nd December 2015. The 2nd respondent claims to have remitted Kshs. 11,700,000/- in regard to the agreement of 22nd December 2015. The applicant further adds that the 2nd respondent duped him into signing the acknowledgement dated 22nd December 2017 on the promise that the money shall be deposited but the amount of Kshs. 4,700,000/- was never deposited into his account.

9. The applicant further contends that the 1st respondent had no locus to take out a grant of representation in respect of the deceased's estate as he does not satisfy the provisions of **section 66 of the Law of Succession Act and Rule 7(7) of the Probate and Administration Rules and section 51 of the Law of Succession Act.**

10. The applicant states that he ranks higher in priority as a son of the deceased to be appointed as an administrator to the estate of the deceased in place of the 1st respondent.

The 1st Respondent's Case

11. The 1st respondent states that he is the executor of the will of the deceased and that he has no interest in the estate except that of an executor and trustee.

12. He further adds that during the long and checked history of the cause herein, the applicant was being represented by legal counsel all along.

13. Notably, the conception of the consent was through a process of consultation, compromise and negotiation. Further, the applicant's beneficial interest was compromised by himself by receiving substantial payments from the purchasers. Thus, the applicant is now using the court to run away from his bargains.

14. In conclusion, there are no grounds for the interference with what the parties mutually agreed upon.

The 2nd – 13th Respondent's Case

15. From their grounds of opposition, they contend that the application is not properly before this court, is bad in law, frivolous and a gross abuse of the court process.

The 6th – 12th Respondent's Case

16. From their grounds of opposition they contend that the application is not properly before this court, is bad in law, frivolous and a gross abuse of the court process.

17. Parties canvassed the application by way of written submissions. A summary of their rival submissions is as follows:-

Applicant's Submissions

18. It is the applicant's submission that the deceased was survived by the applicant, Moses Mugambi Gordon (the 15th respondent) and Elizabeth Waruguru Gordon (14th respondent) and her son, a minor, Moses Ian Gordon. As such and by virtue of the adoption orders issued in Meru Resident Magistrate Adoption Cause No. 28 of 2001 and 29 of 2001, section 16(1) of the Adoption Act and section 174 of the Children Act, the applicant and his adopted brother ought to be considered as having rights of inheritance over the deceased's estate, just as a biological son would. The applicant further contends that the deceased died intestate as no valid will was subsisting at the time of the deceased's demise.

19. The applicant contends that the 1st respondent is not a child of the deceased and as such there is no basis for his claim as an executor or trustee to the deceased estate because there is no valid will or trusteeship created. The applicant further adds that the 1st respondent has allocated himself 1/3 share of the 98.44 acres without any colour of right or basis in law.

20. The applicant further relied on the cases of **Samuel Mbugua Ikumbu vs Barclays Bank of Kenya (2015) eKLR** and **SMN vs ZMS & 3 Others (2017) eKLR** which sets out the grounds upon which a consent may be varied or set aside. It is the applicant's case that the consent dated 19th March 2018 which distributed the estate among the beneficiaries as purchasers as per the confirmed grant dated 20/9/2019 was based on fraud, collusion, misinformation, ignorance of material facts and contrary to court policy. It was argued that the 6th – 13th respondents being strangers to the estate of deceased have no legal right or capacity to sell the suit properties to the 2nd – 5th respondents and by doing so they contravened section 35, 55, 82 and 45 of the Law of Succession Act. The 1st – 13th respondents colluded by defrauding the assets of the estate of the deceased and vested in themselves at the expense of the legal beneficiaries. As such the conduct of the 6th – 13th respondents with the 2nd – 5th respondents jointly colluded and intermeddled with the deceased's estate before the confirmed grant was issued. The applicant further relies on section 55 of the Law of Succession Act which forbids the distribution of the estate before a grant of representation has been confirmed in accordance with section 71 of Act. In that regard, the respondents did not have any proprietary interest capable of being transferred to the alleged purchasers before the grant was confirmed. The 3rd – 5th respondents have not produced any sale agreements to the court to support their contention of being purchasers. The applicant relied on the cases of **Muriuki Hassan vs Rose Kanyua & 4 Others [2014]eKLR; Re Estate of John Gakunga Njoroge [2015]eKLR and Jane Kagige Geoffrey & Another Vs Wallace Ireri Njeru & 2 Others [2016] eKLR** in support of his contention.

21. It is the applicant's further submission that he was not aware and did not understand that it was contrary to the law of succession that the property of a deceased person can be dealt with before a confirmed grant is issued and that a legal beneficiary, an adopted son, can be excluded to inherit from his father's estate. He further adds that he was tricked by the 2nd respondent to enter into a sale agreement dated 22nd December 2015 before the confirmed grant was issued. Further that the 2nd respondent did not pay the full purchase price as agreed and that the alleged Kshs. 4,700,000/- that the 2nd respondent paid was never remitted to the applicant's account.

22. The applicant relies on the cases of **Re Estate of Kanyingi Gatwe (Deceased) [2018] eKLR, Rule 49, 63 and 73 of the Probate and Administration Rules** which allow the succession court to institute an application in this court on other provisions of the law other than the succession act. The applicant states that he has set out sufficient grounds to warrant review orders of the consent of 20th September 2019.

23. The applicant further relies on the case of **Re Estate of Festo Akwera Kusebe alias Akwela Kutsebe (Deceased) [2019]eKLR** which sets out who can apply for administration in intestate estates. The applicant states that the court ought to be guided by Part V of the Law of Succession Act which gives the priority in who can apply for the letters of administration intestate. Priority is given to the surviving spouse, then the children of the deceased then the parents of the deceased in the event the deceased is not survived by a spouse or children and other relatives follow thereafter. Thus following the aforesaid provision, the widow of the deceased ought to have been the admnistratrix of the deceased's estate.

24. The applicant also quoted Rule 7(7) of the Probate and Administration Rules and Rule 26 of the same rules in which rule 26 provides for letters of administration to be granted in a situation where other persons entitled in the same degree or in priority of the applicant. Following the above provisions, the applicant contends that the 1st respondent does not meet the threshold set out in section 66 of the Law of Succession Act, Rule 7(7) of the Probate & Administration Rules. The applicant contends that he, the 14th & 15th respondents rank higher in priority to be appointed as an administrator to the estate of the deceased as opposed to the 1st respondent.

25. The applicant submits that the 1st respondent ought not to hold the grant of representation because he participated in perpetuating illegal acts of intermeddling of the deceased's estate and allocated himself a share out of the estate excluding the 15th respondent. As such, the grant

issued on 1st April 2009 ought to be revoked and be issued to the applicant pursuant to section 66 and Rule 26.

26. The applicant submits that the applicable law is section 35 of the Law of Succession Act in distributing the deceased's estate. The applicant reiterates that he and the 15th respondent are regarded as natural children of the deceased. In saying so he relies on the case of **M.O. vs C.A.O & Another** (2017) **eKLR.**

27. The applicant also relies on section 174 of the Children Act and in the case of the **Estate of Simon Njehia Mundia HC Succession Cause No. 2079 of 2015.** He contends that an adoptive parent assumes parental responsibility to the adoptive child as would be the case if they were their natural or biological parents. He also relied on **section 16(1) and 19 of the Adoption Act** in support of his position.

28. The applicant further relied on **section 35 of the Law of Succession Act** and the case of **Re Estate of Nicholas Kaaka Kapore (Deceased) [2018]eKLR** and states that the court herein ought to distribute the assets of the estate equally in three units that is the applicant, his adopted brother-the 15th respondent and the 14th respondent and her son.

The 2nd – 13th Respondent's Submissions

29. The 2nd – 13th respondents submit that the applicant has relied **on Order 45 of the Civil Procedure Act and Rules 2010** and attempts to argue, by sneaking in new evidence into the proceedings, that the applicant was an adopted child and thus together with the 14 th & 15th respondents they are the only ones entitled to the estate of the deceased. This is contrary to what Order 45 provides because order 45 provides for review in an instance where; discovery of new and important matter, that the new matter was not within the applicant's knowledge, the new matter could not have been produced at the time the decree or order was passed exercising due diligence, there is an error apparent on the face of the record and there are sufficient reasons.

30. The consent dated 19th March 2018 was adopted in court on 12th April 2018 before the applicant's advocates Mr. Kiminda who confirmed to the court that the consent represented the true position of the beneficiaries on the distribution of the deceased's properties. The parties signed the consent and included their Identity card numbers including that of the applicant.

31. The respondents contend that the fact that the applicant was an adopted child is neither a new nor an important matter. All the beneficiaries knew that he was an adopted son of the deceased and it is on that premise he was included in the estate as a beneficiary. Further, at the time of the adoption, the applicant was seven (7) years old and therefore the applicant was aware of the adoption order all along. As such, he cannot say that this was a fact not within his knowledge. It is also apparent that the applicant was seized of the order all along. He thus cannot claim that he could not produce it in court at the time of the proceedings to show that he was the only adopted child of the deceased at the time of signing the consent.

32. The respondent further submit that the applicant has not shown any error apparent on the face of the record or any sufficient cause why the orders of the court should be reviewed. The judgement in the matter herein was entered in the terms that the summons for confirmation of grant be allowed in accordance with the distribution vide consent dated 9th March 2018. In this circumstances the application ought to be dismissed with costs.

33. The respondents contend that the present application is a gross abuse of the court process as the applicant seeks to have the confirmed grant revoked and/or annulled and that he be appointed as the new administrator. The applicant has however not cited **section 76 of the Law of Succession Act** which provides for the orders sought in the application. The respondents contend that matters under section 76 of the Law of Succession Act are dealt with upon full hearing of the parties and as such these orders cannot be granted at this interlocutory stage. The applicant ought to have taken out summons for revocation and/or annulment but instead he chose to rely entirely on Order 45 of the Civil Procedure Act and Rules. **Rule 44 of the Probate and Administration Rules** gives the procedure to be followed in this instance. Further, the respondents submit that the caveator ought to be a party in the present proceedings. The application therefore ought to be dismissed because it is incurably defective and a gross abuse of the court process.

34. The respondents further submit that assuming the applicant is properly before this court, which he is not, he has failed to prove fraud against the respondents and in particular the 2nd respondent. The 2nd respondent was not a signatory to the consent dated 18th March 2019 as the consent was only signed by beneficiaries of the estate. It is trite law that a judgment based on a consent between parties can be set aside on the same ground as a contract between parties would thus giving way to the applicability of the doctrine of privity of contract. In that regard, the applicant cannot seek to set aside the terms of the consent against a party that was not a signatory to the consent. He has not adduced any evidence to show how the 2nd respondent, not a signatory to the consent, influenced him to sign it. He has further failed to point out any vitiating factors in the agreement of sale between them. Further failure to pay under a sale agreement does not amount to fraud but breach of contract and breach of an agreement is not a ground for revoking or annulling a grant.

35. In any event, the consent dated 18th March 2019 settles the issues as beneficiaries and the court went ahead to hear the matter between the caveator and the beneficiaries. As such, the consent was not the basis of the judgment of the court dated 29th September 2019. The application is thus misguided and ought to be dismissed.

36. The respondents further submit that the consent and the judgment of the court has not breached any court policy. The court was not bound to go behind the consent signed by the beneficiaries to the estate. The policy of the court is to decide matters conclusively and expeditiously. The beneficiaries has agreed on the mode of distribution and signed the consent. The court further held that the caveator had no claim over the estate. Therefore there is no breach of any court policy. Moreover, a contract of sale before confirmation of grant may be void but not illegal and can be enforced against the party in breach.

37. Judgment was delivered on 23rd May 2019 and the consent was signed on 18th May 2018. The applicant has not provided an explanation

on why it has taken him over two years to have the consent set aside. Thus the applicant is being mischievous and should not be entertained by the court. The respondents relied on the cases of **Joshua Otieno Buyu vs Petro Ochieng Wasambwa, Kisumu Civil Appeal No. 347 of 2000 and Monica Murugi Nyongo vs Samuel Kagica Nyongo and Another, Nairobi Succession Cause No. 1047 of 1987** to support their submissions.

38. They pray that the application be dismissed with costs.

The 1st, 14th and 15th Respondent's Submissions

39. The 1st respondent herein, commenced this cause on 27th November 2009 by way of a Petition for Probate of a written will. He attached the will where he was appointed an executor and trustee. Despite objections to the 1st respondent's appointment on 1st April 2011, a grant of probate was issued in his favour. It is worth noting that the issuance of the said grant was made in consonance with the consent of the parties, which included the applicant herein.

40. When the executor applied to confirm the grant of probate issued to him, various protests were filed, including one filed by the applicant herein. It is also worth noting that the applicant has made various other applications which the court has made deliberations upon.

41. The protests were compromised by the parties except one who was heard and a judgment was entered dismissing the protest and adopting the parties consent. Notably, the consent orders were executed by the parties themselves (as opposed to the advocates on record) and the court adopted the consent.

42. According to the respondents, the application only raises the issue of whether there is sufficient material ground for setting aside the consent by the parties. The respondents further submit that the applicant is using the court to untangle him from the bargains he made and which he thinks are now not in his interest. He is admitting to the court that he is a dangerous intermeddler who dealt with the estate before the conclusion of the proceeding. He has approached the court with tainted hands and he entreats this court to entertain him and grant discretionary relief unclean hands notwithstanding.

43. The respondents further submit that the submissions of the applicant and the co-respondents on the law of setting aside of a consent order suffices save for the fact that no fraud or other ground to set aside has been substantiated to warrant the interference. Further there is no factual or legal basis upon which this court can interfere with the freedom of the contract of the parties.

Issues for determination

44. After careful analysis, we humbly submit that the main issues for determination are:

> a) Whether the consent order dated 19th March 2018 ought to be reviewed, varied and/or set aside;
>
> **b)** Whether the grant issued to the 1st respondent and confirmed on 20th September 2019 ought to be annulled and/or revoked.

The Law

45. There is currently a host of authorities on the law governing the setting aside of a consent judgment or order. The case of **S. M. N vs Z. M. S & 3 Others [2017] eKLR** summaries the case law and grounds upon which a consent may be varied or set aside as follows:

> a) Where the consent was obtained fraudulently;
>
> b) In case of collusion between affected parties;
>
> c) Where an agreement is contrary to the policy of the court;
>
> d) Where the consent is based on insufficient material facts;
>
> e) Where the consent is based on misapprehension or ignorance of material facts;
>
> f) Any other sufficient reason.

46. Generally, a court will not interfere with a consent judgment except in circumstance such as would provide a good ground for varying or rescinding a contract between parties.

47. **Flora N. Wasike vs Destimo Wamboko [1988] eKLR Hancox JA** held the view that:-

> **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, or if certain conditions remain to be fulfilled, which are not carried out.**

48. The Honourable Judge went further and cited **Setton on Judgments & Orders 7th Edition Vol. 1 page 124** and reiterated that:-

Any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and 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 general for a reason which would enable a court set aside an agreement.

49. In **Kenya Commercial Bank Ltd Vs Specialised Engineering Company Ltd [1982] KLR 485, Harris J:**

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.

50. Lastly in **Brooke Bond Liebig Vs Mallya (1975) EA 266** where **Mustafa Ag. VP** stated:-

51. The compromise agreement made an order of the court and was thus a consent judgment. It is well settled that a consent judgment can be set aside only in certain circumstance, e.g on grounds of fraud, collusion, that there was no consensus between the parties, public policy or for such reasons as would enable a court to set aside or rescind a contract. In this case the parties and their advocates consented to the compromise in very clear terms; they were certainly aware of all the material facts and there could not have been any mistake or misunderstanding. None of the factors which could give rise to the setting aside of a consent agreement existed.

52. Essentially, the above-cited authorities are clear that a consent order will only be set aside if it can be demonstrated that it was procured through fraud, non-disclosure of material facts or mistake or for a reason which would enable a court to set it aside. The factors presented by the applicant for impeaching the consent in this matter is fraud. Looking to the facts of the case the consent dated 19th March 2018 was adopted by the court. In the said consent, the parties herein agreed that that Chris Githinji Rwengo the 1st respondent be granted the letters of administration as an executor and trustee of the will of the deceased. Further, the consent outlined the mode of distribution among the parties herein. All the parties append their signatures against their names and put their identity card numbers. The applicant is listed as number 9 whose identity card number is 32646476 which means he was a party to the proceedings and agreed to the terms of the consent.

53. The applicant seeks to set aside the consent on the premise that it was obtained fraudulently and through collusion between the 1st to 13th respondents. He alleges that the grant was based on fraud, collusion, misinformation, ignorance of material facts. It was further alleges that the 1st respondent allocated himself 1/3 share out of 98.44 acres of the estate despite not having an identifiable legal basis. Further excludes the 15th respondent who is an adoptive son of the deceased and ought to benefit from his father's estate. Furthermore, the 6th – 13th respondents had no capacity to sell the suit properties to the 2nd – 5th respondents which amounted to intermeddling of the estate. That the 2nd respondent tricked him into entering a sale agreement before the grant was confirmed and that despite their agreement, the 2nd respondent never remitted Kshs. 4,700,000/- or Kshs. 11,700,000/- into his account. He further stated that he made a complaint to the DPP. Based on the allegations of fraud, collusion, misinformation and ignorance of material facts, the applicant has not produced any legal or factual evidence to support the same.

54. Moreover, as pointed out by counsel for the respondents, the 2nd respondent did not sign the consent. That consent was signed by the beneficiaries to the estate which consent amounts to a contract between parties. Therefore the applicant cannot claim to set aside the terms of the consent against a party who was not a signatory to the consent.

55. The applicant was present in the proceedings all along and signed a consent. As such he has not proved that there was any fraud or collusion among the respondents to warrant setting aside the consent.

56. The applicant was present in the proceedings all along and signed a consent. As such he has not proved that there was any fraud or collusion among the respondents to warrant setting aside the consent.

From the material presented by the applicant, he has failed to show what fraud, misrepresentation or collusion was committed by any of the 1st-13th respondents. He accused the 1st respondents. He accused the 1st respondent of concealment of material facts that induced him to sign the consent. Surprisingly none of the alleged facts have been given for the court to interrogate in this ruling. All the allegations made against the respondents remain a mere allegations.

57. The consent was filed in court and judgement as per the consent delivered by the court on 20th September 2019. This application was filed on 9th July 2020 which was about one(1) year after the judgement. Why did it take the applicant that long to realise that he had been duped to sign the consent? the applicant did not explain the cause of the delay in filing the application.

58. Following the judgment the applicant entered into an agreement to sell his inheritance to the 2nd respondent for Kshs.23,300,000/=. He says he was paid only Kshs.17,700,000 leaving the balance of 4,700,000 unpaid. He blames the 1st respondent for "tricking him to enter into the said agreement in which the deal went partly sour.

59. The applicant has already enjoyed the fruits of the consent for he has received proceeds of sale of his inheritance. There is a great probability that it is after the 2nd respondent failed to pay the balance of the purchase price that the applicant decided to apply to set aside the said consent and have the deceased's estate redistributed. This is breach of contract between the applicant and the 2nd respondent that has a

remedy in law. The applicant ought to initiate an action under the law of contract which is essentially a private matter between him and the 2nd respondent.

60. It is my considered opinion that the applicant has failed to demonstrate existence of any fraud, misrepresentation or collusion on part of the respondents and as such his informal prayer of setting aside the consent judgement must fail.

61. The applicant has also relied on order 45 of the Civil Procedure Code seeking review of the judgement of Ngaah J. He relies on **Order 45 of the Civil Procedure Act** which provides:

> **1. Any person considering himself aggrieved;**
>
> > **a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or**
> >
> > **b) By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree made the order without unreasonable delay.**

62. From the foregoing, it is clear that for review orders be granted the following has to be considered:-

a) There must be discovery of new and important matter

b) The new matter was not within the applicant's knowledge

c) The new matter could not have been produced at the time the decree or order was passed exercising due diligence

d) There is an error apparent on the face of the record

e) There are shown sufficient reasons.

63. The applicant claims he is an adopted son of the deceased having been adopted at the age of seven(7) years, other children of the deceased knew all along that his an adopted child. Further the applicant and the executor of the will named him in form P &A5 during the filing of this case and described him as an adopted son of the deceased.

Therefore, this cannot be said to be discovery of a new and important matter as the adoption order in court for the first time long before this application was in court while the 1st respondent filed it through his advocate on 10/3/2011

64. Order 45 of the Civil Procedure Rules also provides that an order for review ought to be made without unreasonable delay. The judgment herein was delivered on 23rd May 2019. As I have said herein, this application was filed one year after the judgement and the delay was not explained. The duration of one year in my view is inordinate an inexcusable. I rely on the case of **Anthony Kaburi Kario & 2 Others vs Ragati Tea Factory Company Ltd & 2 Others [2014] eKLR:-**

> **There is no precise measure of what amounts to inordinate delay, as to what amounts to inordinate delay will differ from case to case depending on the circumstances of each case. But care should be taken not to apply the word 'inordinate' in its dictionary meaning; but rather in the sense of excessive as compared to normality. Nevertheless, inordinate delay should not be difficult to ascertain once it occur, the litmus test being that it should be an amount of delay which leads to an inescapable conclusion that it is inordinate and therefore inexcusable.**

65. I hold the considered view that the applicant has not made a case for review under Order 45 of the Civil Procedure rules.

Whether the applicant is properly before the court and if yes, whether the grant confirmed on ought to be annulled and/or revoked;

66. The applicant sought to have the grant herein revoked, notably he did not cite section 76 of the Law of Succession Act which provides for the orders sought in the application. It is worth mentioning that section 76 of the Law of Succession Act provides for the grounds to be established in order to revoke or annul a grant. Rule 44 of the Probate & Administration Rules sets out the procedure to be followed in pursuing a remedy under Section 76. It provides that "where any person interested in the estate of the deceased seeks pursuant to the provisions of section 76 of the Act to have a grant revoked or annulled, he shall apply to the Court for such relief by summons in Form 107." It is thus clear that the applicant ought to have taken out summons for revocation of the grant and have included the caveator as a party to the proceedings because revocation requires a full hearing of the parties to determine from the evidence of everyone whether the grant ought to be revoked or not.

67. That notwithstanding the applicant has clearly argued his prayer for revocation of grant and the respondents have likewise responded to the said prayer. The court will then proceed to determine whether the application is competent. Article 159 of the constitution calls upon courts not to pay due regard to technicalities in determining a matter. The court will therefore disregard the form of the application and proceed to deal with the issues raised. I find that this application is therefore properly before the court as regards the prayer for revocation of grant.

68. Section 76 provides:-

***A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party of its own motion*.**

a) That the proceedings to obtain the grant were defective in substance;

b) That the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;

c) That the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;

d) That the person to whom the grant was made has failed, after due notice and without reasonable cause either:-

i. To apply for confirmation of the grant within one year from the date thereof, or such longer period as the court has ordered or allowed; or

ii. To proceed diligently with the administration of the estate; or

iii. To produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or

iv. The grant has become useless and inoperative through subsequent circumstances.

69. The grant herein was confirmed in the judgment of the court delivered on 20/09/2020 based on a consent dated 19th March 2018 which this court has referred to earlier in this ruling. The applicant alleges that the confirmed grant dated 20th September 2020 was obtained fraudulently and through collusion by the 1st to 13th respondents and therefore it ought to be revoked. Additionally the grant ought to be revoked because according to section 66 of the Law of Succession Act the applicant and his adopted brother Moses Mugambi the deceased's wife 14th respondent and her son rank higher in priority as compared to the 1st respondent in obtaining letters of administration. He alleges that the 1st respondent participated in perpetuating illegal acts of intermeddling in the estate by sanctioning the consent dated 19th March 2018 and by allocating himself shares out of the deceased estate and excluding the 15th respondent.

70. The court has already found that the consent that was signed by all the beneficiaries was in order and was not tainted by any illegality. In other words, there was no fraud, mistake, concealment or collusion between the parties or on the part of any of the parties. The issue to interrogate is how the 1st respondent came to be administrator of the estate. The record shows that this cause was filed as a testate or probate based on the written will of the deceased.

71. The deceased in the will made on 25th June, 2009 had named the 1st respondent as the executor of the will. In that capacity the 1st respondent was authorised to file the testamentary proceedings so as to have the deceased's will executed as provided by the law. Upon filing the will, some beneficiaries disputed the will through objections in court,

72. Later on, purchasers joined the cause to claim their interests having bought land from the children of the deceased. Upon the respondent filing the summons for confirmation of grant, protests were filed by some beneficiaries and other interested parties. Before the protest was heard by the court, all the beneficiaries entered into the consent dated 19th March, 2019 and filed it in court which spelt out the mode of distribution. In its judgement delivered on 20/9/2019, the court confirmed the grant on terms of the consent and also determined the protest of one of the purchasers one Evanson Githinji Kinyanjui.

73. This background explains clearly that the 1st respondent though not a child of the deceased had *locks standi* to file these proceedings in which all the beneficiaries joined in and got their shares in the estate identified and bequeathed upon them in the court's judgment aforementioned. The applicant's allegation that the 1st respondent unlawfully made himself the administrator is not true.

74. The argument of the applicant who is possessed of the facts of these proceedings is mischievous and lacks legal or factual basis. As for the land allocated to the 1st respondent in the consent, the applicant who was one of the makers of the said consent knows better than anyone else why the beneficiaries all agreed to bequeath him the land thought he was not a beneficiary of the estate.

75. There was a trend among the children of selling off their respective shares even before the grant was confirmed. There is a possibility that the 1st respondent may have bought land from one of the beneficiary during the pendency of determination of the case.

In my considered view, the 1st respondent initially filed this case in his capacity as the executor of the will and continued leading the beneficiaries some of whom did not accept the will or did an amicable solution to distribution. I have reason to believe that 1st respondent played a major role in putting the beneficiaries together which led to the determination of the cause. Precisely, the 1st respondent was not an impostor but an authorised person in the will. The applicant in signing the consent, and together with other beneficiaries agreed to have the

1st respondent gave authority to the 1st respondent to become the administrator and to distribute the estate as agreed by themselves.

76. The applicant raised the issue of his adopted brother one Moses Mugambi having been left out in the distribution of his late father's estate. From the adoption order presented by the applicant, the said Moses was adopted on 29/11/2001 having been born on 17/02/1993. By the time this application was filed Moses was an adult and ought to have filed his own papers to claim his right. The applicant has not told the court where Moses lives and whether he informed him of the proceedings in this cause from the time it was filed in 2009.

77. The applicant did not attach any authority from Moses to represent him in these proceedings. What if Moses decided to forego his right of inheritance in the estate of the deceased? How would this court know about it? The other beneficiaries were silent about Moses although he is named as a child of the deceased in these proceedings. The grant having been confirmed by another Judge, I wish to put the matter to rest for now.

78. However, in relation to the prayer for revocation of grant, the applicant, I find has no authority to represent Moses and he has failed to prove any fraud, misrepresentation or concealment of facts material to the cause on part of the 1st respondent or any other respondent.

79. Consequently I find that the applicant has not satisfied this court on any ground set out under Section 76 of the Act.

80. In conclusion, I find no merit in this application and hereby order it dismissed.

81. Being a succession cause, I hereby order that each party meets its own costs.

82. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 29TH DAY OF APRIL, 2021.

F. MUCHEMI

JUDGE

RULING DELIVERED THROUGH VIDEO LINK THIS 29TH DAY OF APRIL 2021