



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

SUCCESSION CAUSE NO. 237 OF 2008

IN THE MATTER OF THE ESTATE OF THE – LATE MARY CHEMARUS TELE (DECEASED)

RAPHAEL ARAP CHEPKWONY.....1ST APPLICANT

CHEPKEMOI ANGELINE.....2ND APPLICANT

VERSUS

LUCY CHEPNGETICH YEBEL.....1ST RESPONDENT

ROBERT TANUL.....2ND RESPONDENT

RULING

BACKGROUND

1. The applicants petitioned for letters of administration for the estate of **Mary Chemarus Tele** on 12th May 2008, in the capacity of son and daughter in law. A grant for confirmation was issued on 21st September 2010.
2. On 3rd January 2011 the 2nd respondent applied for the revocation of the Grant claiming that the 1st respondent is a purchaser of the suit property and averred that the property **Nakuru Municipality Block 13/312** does not form part of the estate of the deceased as the same had been distributed to the 1st respondent vide Nakuru High Court **Succession Cause No. 123 of 2009**.
3. The application for revocation was heard in the absence of the applicants; the Court allowed the application and ordered that the property be removed from the applicants' confirmed grant.
4. The applicants applied to set aside the orders issued on 25th November 2011, removing the property from their confirmed grant and by ruling delivered on 30th January 2019, **Justice A.K. Ndungu** vacated the orders restraining the administrators of the estate of **Mary Chemarus Tele** from distributing the suit property **Nakuru Municipality Block 13/312** and they were allowed to apply in furtherance of the administration of the estate.
5. The parties herein entered into a consent dated 11th June 2019 in the following terms:
 - i. *That the applicants have no further claim in respect to Nakuru Municipality Block 13/312.*
 - ii. *That accordingly the grant issued on 21st September 2010 shall be amended and or generated excluding land Parcel No. Nakuru Municipality Block 13/312.*
 - iii. *That accordingly the grant issued by the court devolving land parcel no Nakuru Municipality Block 13/312 to Lucy Chepnetich Yebei on 30th November 2010 in Nakuru High Court Succession Cause No. 13 of 2009 is hereby affirmed.*
 - iv. *That the said Lucy Chepnetich Yebei shall be at liberty to process title deeds for land parcel Nakuru Municipality Block 13/312 upon payment of the requisite fees.*
 - v. *That in turn the respondent shall secure a ¼ an acre within Kabarak Area which shall be jointly registered in the names of the applicant Raphael Chepkwony and Chepkemoi Angeline.*

vi. That the respondent shall bear all the transaction costs associated with the transfer of the said ¼ acre to be acquired within Kabarak Area.

vii. That the suit be marked as settled and each party to bear its costs.

viii. Dated at Nakuru this 11th June 2019.

PRESENT APPLICATION

6. The applicants later filed application dated 12th July 2019 seeking the following orders:-

a. spent

b. spent

c. That the honorable court be placed to review, vary and or set aside its consent order dated 11th June 2019.

d. Upon granting prayer 3 above the Honorable court be pleased to reinstate the suit herein and fix the suit for hearing.

e. The costs of this application be provided for.

7. Grounds in support of the application are that, the applicants consented to the terms of the consent dated 11th June 2019 without having clearly understood the same in that, the respondents' advocates failed to explain the terms of the consent to the applicants the implication and or consequences of signing the consent; that it was not the applicants' wish to give up rights over land parcel number **Municipal Block 13/312**.

8. Further, that the applicants understood the outcome of the consent at a later date and there was clear misrepresentation.

9. The reason advanced by the applicants for failure to understand the terms of consent are that their knowledge of English is limited and they were unrepresented; that they relied on advice of respondents' counsel whose advice was detrimental to them.

10. In the supporting affidavit sworn by **Raphael Arap Chepkwony** he restated grounds set out above.

11. In response, the respondent filed replying affidavit dated 23rd July 2019 and stated that parcel **No. Nakuru Municipality Block 13/312** does not form part of the estate of the deceased as the same had been confirmed vide **Succession No.123 of 2009** and devolved to **Lucy Chepngetich Yebei**.

12. The respondents further averred that the applicants have failed to prove ownership of the suit property in question; that he is bound by the consent and should ensure that the delivery of the promise of ¼ acre in Kabarak.

13. The respondent averred that if the application is allowed, **Lucy Chepngetich** will suffer prejudice as she has been collecting rent since the year 2010.

14. He further averred that the allegation that the applicants were intoxicated does not hold water as the same has not been proved. He stated that the applicants have come to court with unclean hands as they have had the consent since the execution of the same.

15. In a rejoinder, the applicants filed a supplementary affidavit on 15th July 2018 and emphasized that they were intoxicated at the time of signing the consent and stated that they signed the consent since the advocate of the respondents in the company of **John Towett** misrepresented to them that they were to get the suit property if they signed the consent; that they did not understand the terms of the consent and only signed in the belief that they will get the suit property.

16. The applicants failed to file written submissions and opted to rely on pleadings filed in court

1ST AND 2ND RESPONDENT SUBMISSIONS.

17. The respondents submitted that the applicants have not proved the facts alleged; that they have failed to adduce evidence of intoxication and or deceit and submitted that the Court can only set aside consent that was obtained through fraud and or misrepresentation as was in the case of **Board of trustees of N.S.S.F vs Michael Mwalo (2017) eKLR**.

18. The respondent urged this Court to shun the application and not be involved in rewriting the consent of the parties which they had executed and cited the case of **National Bank of Kenya Ltd vs Pipeplastic Samklit Ltd & Anor 2001 eKLR**.

ANALYSIS AND DETERMINATION

19. I have considered averments herein together with submissions filed by the respondents and find that the issue for determination is

whether sufficient grounds have been adduced to warrant setting aside the consent dated 11th June 2019.

20. The principles for setting aside consent orders are well set out in the case of *Brooke Bond Liebig vs Mallya (1975) EA 266* where Mustafa Ag. VP where the court stated as follows:-

“The compromise agreement was 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 circumstances, e.g on grounds of fraud or 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.”

21. And in *Flora N. Wasike vs Destimo Wamboko [1988] eKLR* the Court stated 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, or if certain conditions remain to be fulfilled, which are not carried out: see the decision of this Court in *J M Mwakio vs Kenya Commercial Bank Ltd Civil Appeals 28 of 1982 and 69 of 1983.*”*

22. Further, in *Board of Trustees National Social Security Fund v Michael Mwalo [2015] eKLR*, the Court of Appeal stated as follows:

“A Court of law will not interfere with a consent judgment except in circumstances such as would provide a good ground for varying or rescinding a contract between parties. To impeach a consent order or a consent judgment, it must be shown that it was obtained by fraud, or collusion or by an agreement contrary to the policy of Court.”

23. In deciding whether to set aside consent judgment the court is expected to consider whether it was obtained by fraud or collusion or by agreement contrary to public policy. The applicants allege intoxication and misrepresentation when they were signing the consent. They stated that before signing, they were called into a bar and bought beer and were given the consent to sign when intoxicated but later upon realizing the terms of the contract, they applied to have the same set aside.

24. It is clear from the record that the applicants and the respondents have been in a back-and-forth push over the suit property. From the pleadings and proceedings it appears neither party intends to give up their rights to plot **No. Nakuru Municipality block 13/312**; at some stage, the applicants sold the property to the 2nd respondent who is willing to settle the applicants into a ¼ acre in Kabarak, which the applicants no longer desire to have; it is not clear at what point the applicants changed their minds. They now allege the consent was signed while intoxicated and facts were misrepresented.

25. I note from the ruling delivered on 30th January 2019 that the court vacated the orders restraining administrators of the estate of **Mary Chemarus Tele** from distributing parcel number **Nakuru/Municipal Block 13/312**. This was followed by consent entered herein on 12th June 2019 in which the applicants denounced interest in the said parcel.

26. The applicants are not represented by an advocate and they have claimed that they were given alcoholic drinks which made them intoxicated and they were not in their senses when they signed the consent.

27. In view of the above allegation and moreso in a situation where parties are disadvantaged due to illiteracy and inability to engage a lawyer, it would be in the interest to allow the parties to be heard so as to enable the Court to determine the issues between.

28. From the foregoing, I find it fair and just to set aside consent entered herein on 11th June 2019.

29. **FINAL ORDERS**

1) **Consent entered on 11th June 2019 is hereby set aside.**

2) **This matter to be heard on priority basis.**

3) **Each party to bear own costs of the application.**

RULING dated, signed and delivered via zoom at **Nakuru**

THIS 30TH DAY OF SEPTEMBER, 2021

.....

RACHEL NGETICH

JUDGE

In the presence of:

MIRUKA - COURT ASSISTANT

APPLICANTS IN PERSON

KOOME FOR RESPONDENTS