



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

SUCCESSION CAUSE NO 495 OF 2015

IN THE MATTER OF THE ESTATE OF JOSEPH MENGE OTUNDO (DECEASED)

SERPINE NYASANI MENGE.....1ST APPLICANT

WILKINS RANGERIA.....2ND APPLICANT

VERSUS

AGNES KERUBO.....RESPONDENT

RULING

1. The applicants through summons filed before this court on 22nd April 2021 seeks to set aside and or vary the consent order of 2nd December 2019 by removing Barclays/Absa Account No 0081070687 from the free estate of the deceased. They further seek an order directing that the cheque that had been drawn from the account be returned to the account.
2. The application is filed on grounds that Barclays/Absa Account No 008xxxxxxx is being operated by the applicants and thus do not therefore form part of the deceased's estate and that it is illegal to introduce an account that is not in the name of the deceased as part of the deceased's estate.
3. In the supporting affidavit sworn by Wilkins Rangeria dated 19th April 2021, he claims that the ruling delivered by Majanja J did not have any specific account spelt out. He averred that the consent was entered into by mistake while believing that the account formed part of the deceased's estate.
4. He advanced that Barclays/Absa Account No 008xxxxxxx can only be part of the succession proceedings if the grant is rectified and it is introduced as part of the estate of the deceased. It was their case that it is in the interest of justice that the consent order be set aside on account of the mistake.
5. The applicants also filed a supplementary affidavit on 9th June 2021 where he deposed that there was no proof that the account held rent proceeds from the deceased's estate.
6. The applicants submitted that a consent order can be set aside on the same grounds that would warrant the setting aside of a contract and these grounds include mistake, misrepresentation, fraud and illegality. They cited the case of **Flora Wasike vs Destimo Wamboka [1988] eKLR** in support of their case. They claim that there was mistake on the part of the applicants who were mistaken that the account referred to on the consent belonged to the deceased.
7. They submitted that **section 3 of the Law of Succession Act** defines an estate as the property if a deceased's person and that Barclays/Absa Account No 0081070687 is not free property of the deceased. They also relied on the case of **Re Estate of Kioko Kituvya (deceased) [2019] eKLR**.
8. The respondents opposed the application by filing a replying affidavit dated 23rd April 2021.
9. In the Replying Affidavit dated 23rd April 2021 Christopher Nyachoti Menge deposed that upon the demise of the deceased, the family sat and agreed that notification be sent to Barclays bank to freeze Account No 008xxxxxxx in the name of the deceased and another account be opened for purpose of collecting rent from the building forming part of the estate. Two representatives were appointed to open a bank account for purposes of collecting rent and the 2nd appellant spearheaded the process of opening Barclays/Absa Account No 008xxxxxxx and also joined Ac No 008xxxxxxx as a signatory.

10. It was averred that other than the rental income none of the beneficiaries deposited funds into the account. He averred that as the administrator representing the interest of the 2nd house the court should order the 2nd applicant to release 50% of the funds to him. It was argued that the appellants objection in regard to the distribution of the deceased's estate was only on two properties being Kisumu house situate on **KISUMU/MUNICIPALITY/BLOCK 7/122** and the land parcel **No NAROK/TRANSMARA/136**.

11. In order to execute the orders of 27th May 2019 the applicants presented summons dated 26th October 2019 to enable transfer of funds in Barclays Bank Account Nos. No 0084024775 and 008xxxxxxx. That on 2nd December 2019 both advocates for the 2nd applicant together with members of the 1st house and the 2nd house entered into a consent authorizing the bank to deposit the said funds in court.

12. It was argued that all the administrators including all of the deceased's beneficiaries were thus aware that Barclays/Absa Account No 008xxxxxxx had rental income from the estate of the deceased. The averred that the 2nd applicant been previously accused of misusing funds from the estate in meeting held by the deceased's beneficiaries.

13. In his further affidavit Christopher Nyachoti Menge averred that after being appointed together with the 2nd appellant to Barclays/Absa Account No 008xxxxxxx and all rental income were deposited in the said account.

14. The respondents submitted that the applicants have not demonstrated any evidence of mistake or ignorance to warrant setting aside the consent order. The case of **Tasmac Limited vs Nassau Ltd & 4 Others** was cited in support of the case.

DETERMINATION

15. I have carefully considered the Affidavits on record, the submissions of parties and the authorities relied on. The sole issue before me is whether the applicants have satisfied the conditions for setting aside the consent order of 2nd December 2019. This is a case where the two account holders are contesting the purpose for which Barclays/Absa Account No 008xxxxxxx was opened. On the one hand the applicants contend that the account holds monies from its business while the respondent argued that the monies held in the account are rental income from the deceased's estate.

16. The main ground raised by the applicants on why the consent order should be set aside is that there were mistaken that the accounts in the consent order were the deceased's. In **S M N vs Z M S & 3 Others [2017] eKLR**, the Court of Appeal stated as follows:

“17. There is no dearth of authorities on the law governing the setting aside of consent judgments or orders, and we are grateful to counsel for citing some of them before us. Generally 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.”

17. 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.”

18. This application turns on whether there was a mistake in the inclusion of the subject account as part of the estate of the deceased to warrant the setting aside of the consent. As seen in the authorities cited, for this court to interfere or set aside the consent order it must be shown that the consent order was obtained by fraud; collusion; or it was obtained contrary to public policy; or given without sufficient material facts; or misapprehension or ignorance.

19. The applicant contends that there was a mistake in including Barclays/Absa Account No 008xxxxxxx in the consent. The other account holder, the respondent, contends the purpose of the account was to hold the deceased's rental income. The applicant was required to present evidence showing that the monies in the account were from his own business income. In my considered view, if the source of income was any other than rent from the estate, nothing would have been easier than for the applicant to demonstrate that fact by way of evidence. No such evidence was forthcoming.

20. On the contrary, evidence abounds to show that the account herein is related to the estate of the deceased. Firstly, the account is opened after the demise of the deceased. The account holders are administrators of the estate each representing a house of the deceased, the deceased having been polygamous. The respondent has deponed that the resolution to open the account was reached at a family meeting to facilitate the collection of rent. Though this meeting is denied by the applicant, on evaluation of the facts as stated by both parties, I find it more probable than not that the family indeed held a meeting and the resolution made. I cannot find any other plausible explanation why the account would be in the names of representatives of the 2 houses of the deceased. Am fortified in that finding by the failure of the applicant to present any evidence of an alternative source of monies in the account. I have no hesitation to conclude that the account holders herein were to hold in trust rental income from the deceased's estate held in the subject Account for the benefit of his beneficiaries.

21. I Am satisfied that the consent entered was regular. There is nothing in law that stops the inclusion of any asset as part of the estate of the deceased once so identified even where the said asset did not initially appear in the P & A 5 form. *(The inclusion of such an asset would happen any time even after many years so long as it is identified that an asset of the deceased had not been discovered or was in the wrong hands)*. In our case, the monies held in Barclays Bank Absa Account No. 008xxxxxxx is held in trust by the signatories to the account for the beneficiaries of the estate of the deceased herein.

22. Consequently I find no grounds upon which to set aside the consent herein. With the result that the application dated 22/4/21 is hereby dismissed.

23. Even though this is a family matter, the surrounding circumstances necessitate that I make an order for costs against the applicants.

DATED, SIGNED AND DELIVERED AT KISII THIS 27TH DAY OF OCTOBER, 2021.

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A.K. NDUNG’U

JUDGE