



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**SUCCESSION CAUSE NO. 2086 OF 2013**

**IN THE MATTER OF THE ESTATE OF MICHAEL WARUI GICHARU (DECEASED)**

**ROBERT GICHARU WARUI .....APPLICANT**

**VERSUS**

**MARGARET WANJIRU WARUI.....1<sup>ST</sup> RESPONDENT**

**JOHN NJIHIA WARUI.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. Before me is a Summons brought under *Rule 49 of the Probate and Administration Rules*. The applicant seeks an order for the review of this court's order granted on 15<sup>th</sup> February, 2016. The grounds upon which the Summons was predicated were set out in its body and the Supporting Affidavit of Robert Gicharu Warui sworn on 30<sup>th</sup> January, 2018. It is claimed that the applicant was aggrieved by the consent order issued on distribution of properties to the beneficiaries.

2. That upon perusal of the court orders, the applicant realized that the petitioner overstated the acreage of plot number Muguga/Muguga 1840 as 0.314Ha instead of 0.075 in her supporting affidavit to the summons for confirmation of grant dated 25<sup>th</sup> June, 2015. That as a result, the petitioner misdirected the court in giving information that led to unfair and unjust distribution of properties between the two houses being beneficiaries of the deceased. Further, that a copy of the title deed of the Property known as Laikipia/Kinamba 1/3131 allegedly also measuring 0.314 Ha according to the petitioner's affidavit was never produced in court. That as a result, of the material non-disclosure the applicant seeks a review of the order distributing Plots no. Muguga 2926, 2928, 2927, 2929, 2755 and 1840 to the House of Mary Njeri to mitigate the unjust distribution.

3. The applicant proposed that the petitioner/1<sup>st</sup> respondent's house should relinquish plots number Muguga/Muguga 2926 measuring 0.0963 Ha, Plot No. Muguga/Muguga 2928 measuring 0.0963 Ha and ½ of plot no Muguga/Muguga 2927 measuring 0.04815 all totaling to 0.24Ha, equal to the overstated acreage of Muguga 1840. Further, that the applicant be allowed to use borehole facilities constructed on Plot Number Muguga 2926 allocated to the 2<sup>nd</sup> respondent as it was meant for usage on irrigation of all the properties allocated to both houses.

4. The application was opposed vide a replying affidavit dated 26<sup>th</sup> March, 2018 sworn by John Njihia the 2<sup>nd</sup> respondent herein. It was contended that all the parties including the applicant herein were present during the protracted negotiations that lead to the consent order adopted by the court. That they were equally aware of the acreage of the various properties available for distribution which they all consented to. As such this application is an afterthought motivated by greed given that the applicant actively participated in negotiations as he represented himself in court leading to the various court orders.

5. On the issue of sharing of water resources from the borehole, the 2<sup>nd</sup> respondent asserted that the applicant and his family should buy water like any other resident and that they had their own functioning wells which can be used to access water. It was averred that the matter had already been closed and the applicant should not be allowed to open it or interfere with the plots distributed to the House of Margaret Wanjiru.

6. The 1<sup>st</sup> respondent also filed a replying affidavit dated 6<sup>th</sup> April, 2018. She associated herself with the 2<sup>nd</sup> respondent's affidavit. She added that at all times all parties had been aware of the physical locations of all the properties and neither the court nor the parties relied on the application for confirmation of grant to reach a determination. That there was always a need to let parties live on separate plots to avoid disputes and bitterness experienced throughout the process. It was her prayer for the application to be dismissed.

7. The application was canvassed by way of written submissions. The applicant and the 1<sup>st</sup> respondent filed their written submissions but the 2<sup>nd</sup> respondent filed none. It was submitted for the applicant that the petitioner/1<sup>st</sup> respondent overstated the acreage of plot Muguga 1840 leading to the house of Mary Njoroge Njeri being disadvantaged. This was done to fraudulently mislead members of his family in order to

concede ground during the negotiation process. That if the 1<sup>st</sup> respondent had indicated the actual acreage of the property, the applicant would not have conceded to the mode of distribution that is subject to the orders of 15<sup>th</sup> February, 2016.

8. It was submitted that due to the misapprehension of facts the 1<sup>st</sup> respondent's estate had benefited immensely more than the estate of Mary Njeri. There was unequal distribution of the deceased's property between the two houses due to the concealment of facts which the parties relied upon in reaching a consent. The applicant relied on the decision of **Hancox JA as he then was in the case of Flora Wasike v Destimo Wamboko (1982-1988), Brook Bond Liebig v Mallya 1975 E.A 266** and **Hirani Kassam (1952) 19EACA 131** to illustrate circumstances under which consent orders may be reviewed which was submitted to have been achieved.

9. On borehole resources, it was submitted for the applicant that the borehole was constructed by the deceased with the sole purpose of irrigation for all the plots. That tampering with the supply pipes by the 2<sup>nd</sup> respondent had immensely affected and caused him great loss and it was submitted that the amenity should be shared among the relevant beneficiaries.

10. The 1<sup>st</sup> respondent submitted that the consent order was binding on all parties to the proceedings and cannot be set aside or varied unless it is proved 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. It was submitted that the consent order was entered into voluntarily by all parties including the applicant and not through fraud or misrepresentation as alleged.

11. Further, that the consent order was never based on the acreage of the property and it was never indicated to be so, as such, it cannot be a consideration now in an attempt to achieve a 50:50 ratio which is almost an impossible task. The 1<sup>st</sup> respondent tasked the applicant to fulfil the conditions necessary to review a consent order; such as material non-disclosure, fraud/misrepresentation, mistake, undue influence or other supervening events all which are necessary to invalidate the order. It was submitted that there was no indication whatsoever from the proceedings or by the conduct of the parties that the aspects of setting aside of a consent order had been achieved.

12. The 1<sup>st</sup> respondent relied on the following cases:

- i. The Board of Trustees National Social Security Fund –vs- Michael Mwalo Civil Appeal No. 293 of 2014;
- ii. Kenya Commercial Bank Ltd -v- Benjoh Amalgamated Ltd, Hirani –Vs- Kassam [1952] 19 EACA 131 and
- iii. Kenya Commercial Bank Ltd -Vs- Specialised Engineering Co. Ltd [1982] 485 KLR in support of the submissions.

13. Having carefully considered the pleadings and the submissions of the parties to this matter, it is my view that the following two substantive issues are up for determination:

- a. Whether the application meets the threshold for granting Review orders.
- b. If the application meets the threshold, what orders should the Court issue

14. The guiding principles used by courts in setting aside consent judgments or orders are well established. In **Flora N. Wasike v Destimo Wamboko [1988] eKLR Hancox, JA**, as he then was, said:

***“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 certain conditions remained to be fulfilled which are not carried out”***

This position is clearly articulated in the English Case of **PURCEL V. F. C. TRIGELL LTD, (trading as SOUTHERN WINDOW AND GENERAL CLEANING CO. and Another), [1970] 3 ALL ER671**, where Winn, LJ, opined:

***“It seems to me that, if a consent order is to be set aside, it can 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, and I see no suggestion here that any matter that occurred would justify the setting aside or rectification of this order looked at as a contract.”***

15. In **Kenya Commercial Bank Ltd Versus Specialized Engineering Co. Ltd [1982] KIR 485**, it was held that 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 representation or ignorance of such facts in general for a reason which would enable the court to set aside an agreement. Justice Harris at page 493 opined:

***“The marking by a court of a consent order is not an exercise to be done otherwise than on the basis that the parties fully understand the meaning of the order either personally or through their advocates, and when made, such an order is not lightly to be set aside or varied save by consent or one or other of the recognized grounds.”***

16. The consent herein was entered into on 15<sup>th</sup> February, 2016 on the mode of distribution of various assets of the deceased to the beneficiaries. On this day, four advocates and the applicant who was acting in person recorded a consent that decided the mode of distribution. The advocates were representing various parties in the matter and the applicant signed on his own accord. There is nothing on record to show that there was any limitation on the authority of the four advocates, or that they had no authority to compromise the

application made on the mode of distribution, or that the applicant did not sign on his own accord. The order had the effect that Plots no. Muguga 2926, 2928, and half of 2927 was to go to the family of Margaret Wanjiru (applicant's family), while Plot no. 2929, 2755 and 1840 was to go to the family of Mary Njeri together with the other half of plot 2927.

17. One issue raised by the applicant is that the petitioner/1<sup>st</sup> respondent overstated the acreage of plot no. Muguga 1840 as 0.314 Ha instead of 0.075. It is the applicant's case that this was done intentionally in an effort to misrepresent and fraudulently disadvantage the house of Mary Njoroge Njeri. On his part the 2<sup>nd</sup> respondent asserted that in no way did the error in acreage affect the decision making of the parties as they had all been supplied with copies of the title deeds to the relevant properties. I note that a copy of the title deed in question has been supplied by the applicant in this summons for review.

18. I have perused the record and found that a copy of the title deed to Maguga 1840 was supplied during the application for letters of administration. The applicant has however failed to prove how the overstatement of acreage on land not distributed to himself or his house affected his decision making. The argument that he was influenced by the misrepresented acreage of the Maguga 1840 in reaching an agreement on distribution is feeble. He cannot claim ignorance of facts well within his realm of knowledge since all the parties knew the properties physically.

19. The applicant in challenging the consent order further submitted that he conceded to the mode of distribution of Plots No. 2926, 2927, 2928, 2929, and 1840 without appreciation of facts due to the concealment of facts by the petitioner. He insisted that he had no reason to doubt the information given in the affidavit of the petitioner during the application process for confirmation of grant. However the applicant has not shown that he could not have procured the information as to the acreage of the property with due diligence. Being one of the beneficiaries of the estate and was in active negotiations with other beneficiaries, it was his obligation to exercise due diligence.

20. The sharing of a borehole was never brought up for consideration during the distribution of properties to the beneficiaries. At this point, I am not seized of adequate information to determine such a prayer. The evidence provided on development and usage of the amenity is not sufficient to help the court make a determination.

21. As Justice Harris J (as he then was) said in **Kenya Commercial Bank Ltd V Specialized Engineering Co. Ltd (Supra)**, a consent order or judgment 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 or in general for a reason which would enable the court to set aside an agreement or consent judgment. The applicant has not proved the existence of any of the ingredients which would merit the review of the consent orders, arrived at with his full participation.

22. After careful consideration of the rival arguments in the application it is my view that this is but an attempt by the applicant to have a second bite at the cherry and the court is not convinced that this application has substance. Reasons wherefore the application is dismissed with no orders as to costs.

**SIGNED DATED AND DELIVERED IN OPEN COURT THIS 28<sup>TH</sup> DAY OF JANUARY 2019.**

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**L. A. ACHODE**

**HIGH COURT JUDGE**

**In the presence of.....Advocate for the Applicant**

**In the presence of.....Advocate for the 1<sup>st</sup> Respondent.**

**In the presence of.....Advocate for the 2<sup>nd</sup> Respondent.**