



**REPUBLIC OF KENYA**

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

**MISC. APPL. NO. 17 OF 2017**

**IN THE MATTER OF THE ADVOCATES RENUMERATION ORDER RULE X**

**IN THE MATTER OF THE ESTATE OF MICHAEL KIPRONO SANG alias MICHAEL A. SANG**

**JOHN KIPRORIR RONO.....ADMINISTRATOR/APPLICANT**

**VERSUS**

**W. K. NGENOH t/a W.K. NGENOH LESSAN AND**

**COMPANY ADVOCATES.....RESPONDENT**

**RULING**

1. This ruling relates to an Advocate/Client bill of costs for services rendered by the Advocate, W. K. Ngeno t/a Ngeno Lessan & Co. Advocates in relation to the estate of Michael Kiprono Sang *alias* Michael A. Sang. The applicant, John Kipkorir Rono, the administrator of the estate, filed an application dated 9<sup>th</sup> February 2018 in which he seeks the following orders:

***1) That this application herein be certified as urgent and be heard ex-parte in the first instance.***

***2) That pending the hearing and determination of this application, this court be pleased to issue a temporary order of stay of execution by the respondent as against the applicant.***

***3) That this court be pleased to issue an order and/or a directive that each beneficiary in the estate of the deceased herein to pay the advocates fee/charges individually and as agreed upon in accordance to their acreage (s) before the transfer documents/forms are executed by the administrator.***

***4) That this court be pleased to set aside the proceedings and or orders of the court issued on 5<sup>th</sup> July 2017 and all other consequential orders thereafter and that the advocates client bill of costs dated 8<sup>th</sup> June 2017 be taxed afresh and in accordance to the scale provided for in the advocate's remuneration order 2014.***

***5) That costs of this application be in the cause.***

2. The applicant avers in his affidavit in support of the application that the respondent caused him to sign a consent in court with respect to a bill of costs. He alleges that as a result, other beneficiaries of the estate have risen against him as the Advocates fees he consented to, being Kshs.10,771,720.00, is beyond their means. The respondent has since commenced execution proceedings against him for failure to meet the costs taxed. He alleges that the respondent is aware that each of the beneficiaries was supposed to pay him individually a specific amount equivalent to the acreage each of the beneficiaries is to receive before the transfer documents are executed.

3. The appellant contends that he has paid to the respondent a total of Kshs.1.6m for himself and his brother, Paul Kipyegon Rono. He contends that each of the beneficiaries should bear their part of the fees as agreed. The applicant annexes to his affidavit letters sent to each beneficiary by the respondent demanding payment of fees on their respective shares of the estate based on the acreage each has received. He also annexes documents relating to the taxation of the bill of costs before the Deputy Registrar, and a certificate of costs dated 19<sup>th</sup> July 2017 for Kshs.10,771,720 as fees due to the respondent.

4. In his affidavit in reply filed in court on 6<sup>th</sup> April 2018, the respondent avers that the application is an afterthought as they had entered into a consent in respect of the fees. He disputes the allegation by the applicant that he did not understand the effect of entering into a consent before the Deputy Registrar/Taxing Officer. The applicant was, in the respondent's view, attempting, in collusion with other beneficiaries, to deny him legal fees for services rendered over a 12-year period.

5. The respondent deposes further that the estate the administration of which gives rise to these proceedings is valued at Ksh.800,000,000/- and comprises over 500 acres of land and other properties. He further avers that he realized that he undercharged on some items and asks the court to tax the bill at Kshs. 16,000,000.

6. Further, it is his averment that the applicant, as administrator, has the mandate to give an account and inventory of the estate and should not hide in order to defeat justice. He maintains that his application for execution is proper and procedural and the applicant is seeking to escape responsibility.

7. In his submissions on his application, the applicant reiterates the averments in his affidavit that he did not know that he should not enter into a consent on the fees in Succession Cause No. 114 of 2014, especially in a matter that consists of more than 39 beneficiaries. He asks the court to grant prayers 2, 4 and 5 and require the beneficiaries to pay the respondents Kshs.20,000/- per acre.

8. The respondent further asks the court to set aside the orders of 5<sup>th</sup> July 2017 before the Taxing Master in which the respondent's bill was taxed by consent, and he further asks that the bill be taxed afresh. He sets out in his submissions the various arguments in respect of each item in the bill of costs which I believe should properly have been made before the Taxing Master.

9. In his submissions, the respondent observes that failure by the administrator to exert his authority over other beneficiaries is the gist of the applicant's application. He notes that the consent on the taxation of 5<sup>th</sup> July 2017 on his bill of costs dated 8<sup>th</sup> June 2017 was entered into after consultation between the parties. No party was coerced into the consent, and it was based on an understanding of the magnitude, complexity of the matter and the value of the property. He submits that the bill of costs was done to scale and was not excessive, and that he actually left out some items which would have pushed the bill to Kshs.16,000,000/-. The respondent therefore urges the court to dismiss the application.

10. The issue before me is whether I should set aside the consent order entered into between the parties to this application before the Deputy Registrar on 5<sup>th</sup> July 2017. I have considered the record of proceedings on 5<sup>th</sup> July 2017, in the presence of the applicant and the respondent. The record indicates that Mr. Ng'eno stated that:

***“What is before you is taxation (sic) dated 8/6/2017. Since there is no objection, I pray that it is allowed as drawn, or you may place it aside to see if we will agree.”***

11. The court then placed the file aside. At 10.15 a.m., the applicant and the respondent returned before the Taxing Master and the record indicates that the proceedings were as follows:

***‘Mr. Ngeno: “We have agreed to have the bill of costs dated 8/6/2017 allowed at Kshs. 10,771,720/-.***

***Respondent (John Kipurui Rono: “We have agreed. I confirm.”***

12. The applicant and the respondent signed the consent, which was then adopted as an order of the court.

13. Thus, the order for the applicant/administrator to pay to the respondent, the Advocate acting on the instructions of the administrator, was entered into by consent. That being the case, the court can only interfere with it on the grounds which have been reiterated in many previous decisions in our courts. These are only if the consent was obtained by fraud, collusion, or by an agreement contrary to the policy of the court.

14. These cases were considered in the decision of the Court of Appeal in **Board of Trustees National Social Security Fund vs Micheal Mwalo [2015] eKLR** where it stated:

***“The position is clearly set out in Setton on Judgments and Orders (7<sup>th</sup> Edn), Vol.1 pg 124 as follows-***

***“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...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 the court to set aside an agreement.”***

***33. This passage was followed by the court of appeal in Brooke Bond Liebig Ltd V Mallya [1975] EA 266 at 269 in which Law Ag P said:***

***“A court cannot interfere with a consent judgment except in such circumstances as would afford good ground for varying or rescinding a contract between the parties.”***

15. The Court of Appeal also considered the decision of Githinji J (as he then was) in **H.C.C.C. No. 1219 of 1992 Kenya Commercial Bank Ltd vs Benjoh Amalgamated Ltd** in which he dealt with the circumstances under which a consent judgment can be set aside. Githinji J. relied on the earlier decision in **Hirani vs Kassam [1952] 19 EACA 131** in which the passage from **Setton on Judgments and Orders** was cited and stated as follows:

***“It is now well 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 *J. M. Mwakio v Kenya Commercial Bank Limited Civ Apps 28 of 1982 and 69 of 1983*. In *Purcell vs F.C. Trigell Ltd [1970] 3 All ER 671*, Winn LJ said at 676:-

*“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 the 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.”*

16. Similarly Harris J in *Kenya Commercial Bank Ltd vs Specialised Engineering Co. Ltd [1982] KLR 485* 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 misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement.”...*

17. In the case before me, the applicant, as the administrator of the estate of Michael Sang, entered into the consent order he now impugns personally. The record does not indicate that he was under any disability with respect to the language used by the court, nor has he shown that there was any fraud by the respondent that led him to enter into the consent without understanding its import. In the absence of evidence of such fraud, there would be no basis for interfering with a consent order freely entered into by the applicant in his capacity as the administrator of the estate of Michael Kiprono Sang alias Michael A. Sang.

18. What the administrator seems to be suggesting, if I understand him correctly, is that he had no authority to enter into a consent with the Advocate representing him as administrator, in a matter involving an estate with more than 39 beneficiaries. I believe the implication of this argument would be that the respondent should deal with each beneficiary individually. Which begs the question: what is the role of an administrator appointed by the court with respect to liabilities incurred in the administration of the estate of a deceased person?

19. The powers and duties of an administrator are set out in section 79 to 83 of the Law of Succession Act. Section 79 which is titled **“Property of deceased to vest in personal representative”** provides as follows:

*The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and, subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative.*

20. Section 83 titled **“Duties of personal representatives”** provides as follows with respect to the duties of the administrator:

*Personal representatives shall have the following duties—*

*(a) to provide and pay out of the estate of the deceased, the expenses of a reasonable funeral for him;*

*(b) to get in all free property of the deceased, including debts owing to him and moneys payable to his personal representatives by reason of his death;*

*(c) to pay, out of the estate of the deceased, all expenses of obtaining their grant of representation, and all other reasonable expenses of administration including estate duty, if any);*

*(d) to ascertain and pay, out of the estate of the deceased, all his debts;*

*(e) within six months from the date of the grant, to produce to the court a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;*

*(f) subject to section 55, to distribute or to retain on trust (as the case may require) all assets remaining after payment of expenses and debts as provided by the preceding paragraphs of this section and the income therefrom, according to the respective beneficial interests therein under the will or on intestacy, as the case may be;... (Emphasis added)*

21. These provisions of the law, in my view, do not leave room for the administrator to say that the estate has 39 beneficiaries, and that he cannot therefore make a decision with respect to legal fees payable in respect of the administration of the estate. He has the legal duty to pay such fees. Upon freely entering into a consent on the fees in his capacity as administrator, he has a duty to meet the terms of the consent. He cannot argue that individual beneficiaries have a duty to pay the fees, for as administrator, the property of the deceased is vested in law on him, and he is required by law to pay the expenses related to the administration of the estate **out of the estate of the deceased** prior to distribution of the estate to the beneficiaries.

22. Accordingly, I find that no basis has been laid for interfering with the consent order entered into between the applicant as administrator and the respondent on 5<sup>th</sup> July 2017. The application dated 9<sup>th</sup> February 2018 is therefore dismissed with costs to the respondent.

**Dated Delivered and Signed at Kericho this 21<sup>st</sup> day of February 2019**

**MUMBI NGUGI**

JUDGE