



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 563 OF 2011**

**IN THE MATTER OF THE ESTATE OF REUBEN NJOROGE NJENGA**

**(DECEASED)**

**JOB MWANGI NJOROGE.....APPLICANT**

**VERSUS**

**ELIZABETH WANJA NJOROGE.....1<sup>ST</sup> RESPONDENT**

**ELIZPHAN KINYANJUI NJOROGE.... 2<sup>ND</sup> RESPONDENT**

**PHYLIS WAIRIMU NJOROGE.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. The ruling is in respect of the application by the Applicant dated 19<sup>th</sup> of March 2013 and which seeks orders:

- 1) **THAT this Honourable Court be pleased to adopt the consent dated 19<sup>th</sup> of October 2012.**
- 2) **THAT further and or in alternative to prayer 1 above, this Honourable Court be pleased to set aside, review and or vary the Consent Orders dated 28<sup>th</sup> of September 2012 and consequently revoke and or annul the letter of administration intestate issued herein and issue letters of administration *pendente lite* in its place.**
- 3) **THAT further and or in alternative to prayer 1 and/or prayer 2 above, this Honourable Court be pleased to issue any other orders and or directions as it may deem fit in the interest of justice, circumstance and nature of this case and more so in light of Court Orders of 26<sup>th</sup> April 2012.**
- 4) **THAT costs of this Application be in the cause.**

2. The application is premised on the following grounds:

- 1) **This Honourable Court issued orders on the 26<sup>th</sup> of April 2012 consolidated this matter with Nakuru Succession Cause number 551 of 2011 which was a testate succession cause in respect to the deceased herein to facilitate expeditious hearing and disposal.**
- 2) **After negotiations to expedite hearing and determination of these matter facilitated by Hon. Justice Ouko, the Advocates for the parties herein filed consent dated 28<sup>th</sup> of September 2012 whereby Phyliss and Job were appointed as joint administrators of the estate pending the hearing and determination of these proceedings.**
- 3) **That however, the Court issued a grant of letter or administration intestate despite the fact that it was not sought for and the parties intended a grant of letter of administration pending these proceedings.**
- 4) **That parties later on executed and filed consent dated 19<sup>th</sup> of October 2012 where they defined the purpose and nature of the said grant but the citors have now declined to have the same adopted.**
- 5) **That in the circumstances, it is in the interest of justice that this application be allowed.**

3. It is further supported by the affidavit of John Ndungu Njuguna sworn on the 19<sup>th</sup> of March 2013.

4. The substance of the application in a nutshell is that the Applicant and the 3<sup>rd</sup> Respondent had filed a written consent on the 28<sup>th</sup> of September 2012, that appointed the 3<sup>rd</sup> Respondent and the Applicant as administrators of the Estate. There was a subsequent consent dated 19<sup>th</sup> of October 2012 which was entered but when parties appeared before the Court it was noted that the parties seemed not to agree.

5. The Court then issued letters of administration intestate on the 28<sup>th</sup> of September 2012. The Applicant opposed the said letters and stated that the Consent entered into on the 28<sup>th</sup> of September 2012 was not clear and that the Consent dated 19<sup>th</sup> of October 2012 was clear since the letters of administration to be issued were *pendente lite*.

6. The Respondent states that there was no pending suit.

7. The application was canvassed by way of written submissions.

8. I have considered the application dated 13<sup>th</sup> of March 2013, the supporting affidavit and the reply thereto. I have had due regard to counsels' submissions on record.

9. The application was canvassed by way of written submissions. The issues for determination are:

1. **Whether the consent dated 28<sup>th</sup> of September 2012 should be set aside.**
2. **Whether the grant of letters of administration issued on 28<sup>th</sup> of September 2012 should be set aside.**
3. **Whether the court should adopt the consent dated 19<sup>th</sup> of October 2012.**
4. **What orders/directions are appropriate going forward.**

10. The consent of 28<sup>th</sup> of September 2012 was filed and adopted before Ouko J (as he then was). That consent entailed the appointment of Phyllis Wairimu Njoroge and Job Mwangi Njoroge as the administrators of the estate of Reuben Njoroge Njenga. The grant was duly issued on the same day.

11. The consent by the parties dated 28<sup>th</sup> of September 2012 was explicit and devoid of any ambiguity. Contrary to the applicant's held position in this application, there was no indication whatsoever that the parties intended a grant of administration pending these proceedings. The consent dated 28<sup>th</sup> of September 2012 was in writing and if the parties intended to have a grant of letters of administration pending these proceedings, nothing would have been easier than the parties stating so in the written consent. It is worthy of note that the consent filed is duly executed by advocates of the parties. There was therefore no shortage of legal advice on the part of any of the parties herein.

12. The Law on setting aside or variation of a consent is now well settled. In **Samuel Mbugua Ikumbu –vs- Barclays Bank of Kenya Ltd [2015]eKLR**, the Court of Appeal summed up the legal principles as follows;

*“The law on variation of a consent judgment is settled. The variation of a consent judgment can only be on grounds that would allow for a contract to be vitiated. These grounds include but are not limited to fraud, collusion, illegality, mistake, an agreement being contrary to the policy of the court, absence of sufficient material facts and ignorance of material facts.”*

13. Further exposition of the law is found in **Flora Wasike –vs- Destimo Wamboko [1982-1988]1 KAR 625**, where Hancox JA had this to say at page 626;

*“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 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 Ltd Civ. Apps 28 of 1982 and 69 of 1983.*

*This Court in the case of Brooke Bond Liebig Vs. Mallya 1975 E.A 266 held:-*

*“A consent judgment may only be set aside for fraud collusion, or for any reason which would enable the court to set aside an agreement.”*

*In Hirani vs. Kassam [1952], 19 EACA 131, this Court with approval quoted the following passage from Seton on Judgments and Orders, 7<sup>th</sup> Edition, Vol.1 p. 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 .... 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 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.”*

14. The onus is on the party challenging a consent to show fraud or collusion or the existence of an agreement contrary to the policy of the court.

15. I have endeavoured to find any of the elements above that would vitiate the consent of 28<sup>th</sup> of September 2012 and there is absolutely none.

16. There is the consent dated 19<sup>th</sup> of October 2012 and filed on the same day in court. I need not say much on this particular document save to state that though signed by the advocates for the respective parties and duly filed in court, this consent was not adopted as orders of court as one party declined to own the consent. The record of the court of 8<sup>th</sup> of November 2012 shows the Judge recording thus;

*“Court*

*i. Parties do not appear to have agreed.*

*ii. Taken out.*

In essence therefore there is no consent dated 19<sup>th</sup> of October 2012 and the court cannot adopt a consent that has not been wholly agreed upon by the parties.

17. The cumulative effect of the above is that the summons dated 19<sup>th</sup> of March 2013 is without merit. The same is dismissed and I make the following orders;

1. The summons dated 19<sup>th</sup> of March 2013 is dismissed.
2. Each party to bear its own costs.

**Dated and Signed at Kisii this 20<sup>th</sup> day of November 2019.**

**A.K NDUNG’U**

**JUDGE**

**Delivered this 27<sup>th</sup> day of November, 2019.**

**R. NGETICH**

**JUDGE**