



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**SUCCESSION CAUSE NO. 205 OF 2011**

**IN THE MATTER OF THE ESTATE OF GODFREY NJOROGE KAGECHU – (DECEASED)**

**JOYCE MUMBI MUNGA.....APPLICANT**

**VERSUS**

**KEZIAH NYAMBURA NJOROGE.....1ST RESPONDENT**

**SARAH WANGUI NJOROGE.....2ND RESPONDENT**

**PERIS WANJIRU NJOROGE.....3RD RESPONDENT**

**RULING**

**INTRODUCTION.**

1. The summons before court is dated 30th May, 2016. Prayers sought are:

1. Spent
2. THAT the court be pleased to set aside and or review the consent orders recorded in court on 9th February, 2016.
3. THAT in the alternative, the court be pleased to expunge the names of ESTHER WANJIRU MUNGA and MARY WANJIKU MUNGA from this petition.
4. THAT the costs of this application be provided for.

2. The application is supported by the supporting affidavit of Keziah Nyambura Njoroge and five grounds as listed on the face of the application viz:

- 1) That the Applicant's former advocates had no instructions to record the consent order on 9th February, 2016.
- 2) That the consent order should be set aside and or reviewed on the ground of mistake, error and/or misrepresentation
- 3) That the present petitioners are strangers to the Applicants herein and they have no claim over the estate as they are not beneficiaries of the deceased estate
- 4) That the petitioners intend to use fraudulent means to acquire part of the estate from the lawful beneficiaries
- 5) That the application should be allowed in the interest of justice

3. The application is opposed and Esther Wanjiru Munga, 1st petitioner (hereinafter Esther) has sworn a replying affidavit with authority of the 2nd and 3rd petitioners.

**THE APPLICANT'S CASE**

4. The gist of the supporting affidavit and grounds in support of the application is that Keziah is a daughter of the deceased with the late Florence Wangai Njoroge. Sarah Wangui Njoroge and Peris Wanjiru Njoroge are her siblings
5. The original petitioner Joyce Mumbi Munga was not married to the deceased and for that reason, Keziah and her siblings had objected to the petition filed by Joyce in court. The said Joyce died before the petition was concluded.
6. Upon her death an application for substitution was filed by Esther Wanjiru Munga and Mary Wanjiku Munga. The said application was allowed by consent and this was a surprise to the applicant as she had not given such instructions. She had opposed that application by filing a replying affidavit.
7. The present petitioners have no business with her father's estate and they are not beneficiaries.
8. It is urged that the consent entered before court allowing the application was entered by mistake, error and/or misrepresentation and the same should be set aside.

#### **THE RESPONDENT'S CASE**

9. The respondents' case is that an advocate is deemed to represent the client and acts according to instructions of the client and with the authority of the client.
10. On 21st May, 2015, counsel for the applicants sought leave of court to seek instructions of his clients in regard to the filing of a consent. Subsequently on 9th February, 2016, counsel on record for the applicants appeared before court confirming they had consented to the application for substitution and as such the application dated 22nd October, 2012 was allowed by consent. That consent is binding on the parties.
11. Such a consent judgment or order has a contractual effect and can only be set aside on grounds that would justify setting aside a contract or if certain conditions remain to be fulfilled and are not carried out

#### **AUTHORITIES**

12. The Respondent's counsel filed authorities in support of their position being:

- 1) **Samuel Mbugua Ikumbi V. Barclays Bank of Kenya Limited** [2015] eKLR
- 2) **Board of Trustees National Social Security Fund V. Michael Mwalo**, [2015] eKLR
- 3) **Kenya Commercial Bank Limited V. Benjoh Amalgamated Limited & Another**, [1998] eKLR.

The parties left the matter to the court to decide on the material on record.

13. It is trite law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting aside a contract or if certain conditions remain unfulfilled which are not carried out. (See **J. M. Mwakio V. KCB**, Civil Applications Nos. 28 of 1982 and 69 of 1983)
14. The Court of Appeal in the case of **Brooke Bond Liebig V. Mallya**, 1975 EA 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.”**

It is incumbent on the applicant to show existence of fraud or collusion or the reason which would enable the court set aside an agreement.

15. In our instant suit, the applicant merely states that counsel then appearing for her had no instructions to enter into a consent. Such assertion alone is not sufficient. The Court of Appeal in **Samwel Mbugua Ikumbu V. Barclays Bank of Kenya Limited** [2015] eKLR while quoting from **Hirani V. Kassam**, [1952] 19 EACA 131 stated:

**“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.”**

16. This issue is further illuminated by the decision in **Kenya Commercial Bank V. Specialized Engineering Company Limited** [1982] KLR 485 – where the court held:

**“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 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.”**

In the same case the Court further held that:

**“An Advocate has general authority to compromise on behalf of his client as long as he is acting bona fide and not contrary to express negative direction. In the absence of proof of any express negative direction, the order shall be binding.”**

17. The facts before me fall on all fours with the ones in the case of Samuel Mbugua Ikumbu (supra) where a counsel from a firm of Advocates entered into a consent on behalf of client only for the said firm to later turn around and state that that counsel had no instructions to enter into the consent.

18. In dismissing the application, the court rendered itself thus:

**“It has not been demonstrated that Mr. Ilako, the advocate employed by the law firm on record for the applicant had no authority to enter into the consent that was recorded. Instead Mr. Koceyo, advocate, who had sent Mr. Ilako to act for the applicant on that day readily admits not only that he sent the said advocate to deal with the matter but also that no complaint had been made against that advocate at all. The said law firm had authority to act for the applicant and had full mandate to compromise the application as it did. In any event, and as was properly submitted by learned counsel for the respondent the applicant was required to pay the sum of Kshs.7,500,000/= within 21 days of 28th April, 2015. The application before us was filed on 21st May, 2015, way outside the period agreed by consent, and it is mischievous for the applicant to ask us to review a consent order when he has not complied with what was agreed either within the compromised period or at all. The application has no merit and we dismiss it with costs to the respondent.”**

19. I am persuaded that it has not been demonstrated that the applicant's erstwhile Advocate had no authority to enter into a consent that was recorded in court on 9th February, 2016. There is no fraud or collusion or a reason that would warrant to set aside an agreement.

For the above stated reasons, I find the application without merit and dismiss it with costs to the respondents.

**Dated, Signed and Delivered at Nakuru this 25th day of January, 2017.**

**A.K. NDUNG'U**

**JUDGE**