REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Succession Cause 2357 of 1995

IN THE MATTER OF THE ESTATE OF WILSON GATHUNGURI MACHARIA (DECEASED)

1. TITUS WAITHAKA GATHUNGU

2. ISAAC MACHARIA GATHUNGU ……..… APPLICANTS

VERSUS

1. BETH MUGURE GATHUNGU

2. JACKSON MAINA GATHUNGU

3. JAMES MUCHIRI GATHUNGU …… RESPONDENTS

RULING

The parties in this Succession Cause are from two houses of the deceased herein.

There were initially two Succession Causes namely P&A 2357/95 and P&A 1064/97.

After several proceedings in these two causes, eventually joint grant was issued in the names of four sons of the deceased on 12th July, 2005 – They are:

Jackson Maina Gathungu, James Muchiri Gathungu, (from 1st House) and Titus Waithaka Gathungu and Isaac Macharia Gathungu (from the 2nd house).

It is also on record that the Notice of Appointment of 24th February 2000 by M/s C. N. Gathaara & Co. Advocates on behalf of the 1st house only mentioned Jackson and James, meaning that the said Advocate appeared on behalf of two Petitioners from the 1st House. Beth Mugure Gathungu (The present applicant) was not mentioned in the said Notice.

Beth (who is the widow from the 1st House) has filed, an affidavit sworn on 6th December 2004. The said affidavit really concerns the dispute as regards Bank Accounts which is still pending, and mainly stresses that she being a widow she also has a share in the Bank Account. The other affidavit was sworn and filed on 29th May, 2009 as one of the witnesses to give evidence in the hearing of the two applications for confirmation and issues on Bank accounts. This affidavit was drawn and filed by M/s A. O. Oyalo & Co. Advocates.

It is pertinent to note that since 1995 the two sons (aforesaid) from the 1st house were on the steering wheel. They filed the Petition for Limited grant for the estate. Beth seems to have been content with the handling of the affairs of the estate by her two sons.

On the other hand, the widow of the 2nd house till her death, was in forefront of the matter and she acted as a co-Petitioner on behalf of the 2nd House.

In short, I would like to stress that Beth till she filed her summons dated 9th July, 2009 was represented in all practical purposes by her two sons who are also the administrators representing 1st House in this matter.

That was so upto the filing of partial consent to the mode of distribution (real properties) which was filed in the court on 8th June 2009 signed by two Counsel and four administrators representing the 1st House and 2nd House. I may point out that when this consent was filed, Mr. Oyalo, the Learned Counsel for the 1st House, was also representing Beth, the widow of the 1st House.

It is also on record that this partial consent was filed during pendency of hearing of two applications dated 15th December, 2006 (summons for Confirmation) and application dated 18th June, 2008 raising issues on the Bank Accounts of the deceased. I further would like to place on record that PW 1, James Muchiri Gathungu, was on witness stand and during his evidence, Mr. Gathaara applied to withdraw from representing the 1st House and Mr. Oyalo came on the scene. I may not put here details of the behaviour of PW1 during hearing, but at least I can say is that it was not appropriate specially when he is well educated and is a Lecturer at the University of Nairobi.

However, during discussions at the end of session of the court hearing, he was the one who agreed to sit with all concerned and try to settle the matter amicably, which resulted in filing the partial consent now in question. I admire his efforts. But the truce did not last long and Beth filed the summons dated 9th July, 2009 and PW1, the 2nd Administrator/Respondent also chose to be represented by another counsel.

Be that as it may, I should mention that as some of the affidavits mention my name, I expressed my wishes that the summons be heard by another Judge and all the Counsels, but specifically Mr. Kamau and Mr. Waiyaki appearing for James Muchiri (PW 1 and 3rd Respondent and Beth respectively), urged me to hear this summons by stating that they had trust in this court. I had to give in and I note that none of the Counsel placed much stress to those paragraphs in their respective submissions.

Beth has prayed in her application that she be made a co-administrator along with others. I mention this prayer as by granting such order, I shall be going against the provisions of the Law of Succession Act which provide that maximum number of the Administrators shall be four. In any event that prayer was

withdrawn by Mr. Waiyaki.

Her main prayer is the review and/or setting aside of the partial consent order.

The application is supported by her supporting affidavit and the grounds set forth on the face thereof. But her three daughters have also sworn and filed affidavits.

In the grounds, she alleged that joint Administrators have intermeddled with estate by not providing Audited Accounts for the rental income. She did not mention which administrator out of four has done so. I may hasten to state that this ground cannot be allowed simply because, the partial consent has taken already care of that issue (See Clause 6 of the Partial Consent).

She further alleged that Ngong/Ngong/12484 has been left out and that income from Kiandemi/32/Othaya and Livestock farming is omitted. Once again the latter part of the said claim is subject to Paragraph 6 of the Partial consent.

In her supporting affidavit, she avers that as she has not signed the consent in question and she was a party to the proceedings. The consent ***ipso facto*** should be struck out. She further avers that she was not consulted prior to the signing or filing of the consent. She further states that shares of each beneficiary has not been spelt out and thus the consent is vague and that her life interest has not been specified, as well as that she has not been added as a unit for the first house as a surviving widow. I do fail to understand this ground because as per consent, the two Administrators are holding the share as trustee for the beneficiaries of the 1st house, which obviously include her. Her averments for negligence of her medical treatment once again is misplaced. She enclosed a medical report only from a radiologist which talks about Osteoporosis and I may take Judicial notice that she is an aged person and I note further that there is no report form any medical doctor specifying the needed treatment.

Furthermore, I do not understand how the distribution of the assets will have any effect on her medical treatment. The Administrators are trustees to look after her. In addition, I can state from the records that she had been living her life without complaint since the death of the deceased and thus her need or fulfillment of medical treatment are not new factors to be considered. She seemed to be in fairly good health for her age.

In any event, I will emphasize that it is not the sufficient ground in law for setting aside a consent order.

The only issue, which could be live, is her averments that her views should not have been ignored and to support that claim she avers, and I quote:

"**I have been advised by my Advocates, which belief (sic) to be true that as a party to the said cause, my views should not have been ignored in the first instance and that is sufficient ground to warrant review"**

She further averred that her constitutional right to be heard has been denied by the Court. In response to this, I simply note that before her evidence could be taken, the consent order was filed.

The purpose of recording a consent is simply to an end the dispute without the necessities of issues being heard and determined. All the litigants before the court should be encouraged to follow that route, if possible.

I also note that all her other averments are on advice from her counsel and thus are simply based on points of law.

Her three daughters have filed mirror affidavits which aver that specific shares of the beneficiaries are not mentioned and thus the consent is vague.

The 3rd Respondent James (PW1), in his replying affidavit sworn on 21st July 2009, supported the

application for review on the grounds inter alia that he signed the consent under duress and that the partial consent which was earlier agreed was changed while he went out for some time to attend to his duties at Nairobi University. The first draft is annexed as "Annexture "JMG1" to his affidavit I do note however that even if his averments are true, the annexed document does not apportion the shares as well as does not name the beneficiaries. These averments are contravented by affidavit of 1st Respondent and 2nd House as well from counsel representing him at that time. His averments that he suggested the consultations from all other beneficiaries including those staying abroad, are rebutted by the affidavit sworn by Mr. A. O. Oyalo the learned Counsel representing the 1st house and specifically by the three respondents. On the contrary, Mr. Oyalo has specifically averred that James told all present in the meeting on 8th June, 2009 that he has consulted his brothers and all other members of his family and that they were of the opinion that partial consent of 5th June, 2009 was unacceptable and must be renegotiated. On 8th June, 2009, according to Mr. Oyalo, the issue raised by him on L.R. No. Ngong/Ngong/12484 was explained to him. The title deed (copy thereof is annexed to affidavit of Administrators from 2nd House) clearly shows that that the said parcel of land is registered in the names of the deceased and their late mother Julia. As he was not yet quite agreeable, and insisted on its inclusion in the assets of the estate, Mr. Oyalo thereafter told him that if he is not satisfied, he could get another Advocate to represent him.

Thus on 8th June, 2009, they attended the court to seek for further directions but before that was done Mr. Oyalo was given a written note by James that he was ready to sign the consent as proposed. Mr. Oyalo also refutes, correctly as per my own knowledge, that this court ordered James to bring the consent. It was merely a suggestion from the court to the parties to reconcile, if possible. Jackson Maina also made similar averments in his further affidavit sworn on 23rd September 2009. It was stated by him that the negotiations were conducted by four Administrators and both counsel were present to guide them in law and that the issue of ambiguity was never raised by James.

Jackson has also stated that since 1967, he has supported their mother and he still continues to do so.

Both Administrators from the 2nd house swore their replying affidavit on 24th August 2009 and has succinctly described what transpired before the court on 8th June, 2009 when the matter was kept aside on information that the parties have reached 95% agreement. I also note from my record that on 8th June, 2009, Mr. Oyalo appeared late at 3.00 p.m. and then I gave warning that if he or his client came late the court would proceed with hearing of the matter. Thereafter both counsel urged the court to give them last chance to finalize a minor issue and the matter was adjourned to 2.30 p.m. for next day.

On 9th June, 2009 the partial consent in question was made an order of the court.

Even looking from the record of the case, I shall not accept any contrary averments made by James, the 3rd Respondent and I would also like to quote at this stage, the order made by the court after the close of hours on 4th June, 2009.

"**Court: At this juncture the parties and the Counsel do intend to try another attempt at reconciliation.**

I vacate to-morrow's date.

Hearing to continue if there is a total failure of any possibility of negotiation on 8th June, 2009."

The Affidavit of Administrators from the 2nd House has annexed all the title documents namely – Othaya/Kiandemi/261, Othaya/Kiandemi/32 which were gifted to the children of 2nd house and that of Ngong/Ngong/12484 which is jointly registered in the name of the deceased and widow of the 2nd House on 16th June, 1992 before the death of the deceased which occurred on 27th July, 1995. It has also annexed the partial consent reached on 5th June, 2009 which was signed by four Administrators and two

counsel which contain similar proposals.

Mr. Kimondo Mubea, the learned counsel of the 2nd House, in his affidavit sworn on 24th August 2004 has reiterated what transpired in the court on 4th June, 2009, during meetings and on 8th June, 2009.

In view of the aforesaid what is stated by James as regards the events in the court is, to say the least, very unfortunate and ***mala fide***.

Moreover, I do observe that the distribution of two Othaya Properties, mentioned hereinbefore, to the 2nd House is appropriate, as in my opinion, it was only the shares of the deceased in those two properties which were available for distribution, as assets of the estate.

I also state that the omission of Ngong property (afore mentioned) also is appropriate as the widow of the 2nd Home as a surviving joint proprietor became the owner thereof, and in absence of any further evidence before the court the issue cannot be revisited. I do note specifically that administrators of both Houses agreed to omit the property in the list of property and Mr. Oyalo's affidavit is very clear as to what transpired when the issue was raised by James who eventually agreed to his advice. Moreover, Beth in her affidavit, apart from complaining on its omission, has not made any other allegations as to its proprietorship.

With these facts, the only issue before the Court is, in my opinion, whether the absence of signature by Beth on the partial consent is the ground of review and that whether the partial consent offends section 72 and Sec. 40(1) of the Law of Succession Act.

Mr. Waiyaki, the Learned Counsel for Beth the Applicant, contended that there are new facts and error apparent on the face of the consent order entered. He submitted that the Administrators have no authority to divide the properties under Sec. 71(2) read with Rule 40 of the Probate and Administration Rules. He stressed that there were averments of intermeddling with affairs of the estate before consent was entered. It was also stated that Beth has referred to Ngong and Othaya properties, but I do note that these properties and documents of ownership thereof have been sufficiently observed by me hereinbefore.

I have also observed that there are issues and disputes on accounts and those are kept alive vide the consent. They do need the hearing and it is agreed to do so.

Section 71(2) gives the Court powers to confirm the grants and it is clear in this matter that the administrators of both houses have agreed on the undisputed issues and also on the disputed issues in this matter. I further note that all beneficiaries are included whose interests are held in trust by the two Administrators from each house.

Rule 40(8) of the Probate and Administration Rules, with due respect, cannot come to the aid of the Applicant. This is the consent recorded by the Administrators who had and have shown before the court that since 1995 they have authority to act from the beneficiaries.

Coming to section 40(1) of the Act, it is quite obvious that the partial consent has distributed the assets as per the two houses, and I must place on record as per the two houses. I must specify and place on the record that it was submitted that the consent is contrary to section 82 of the Act. In my considered view, that section firstly gives powers to the administrators to administer the estate on behalf of the beneficiaries and secondly, more pertinently, the partial consent has nowhere mentioned any sale of the properties. Thus I cannot be and am not persuaded to accept that contention.

Lastly, the consent specifically stipulates that the divided assets are to be held in trust by two administrators from each home, ***for the benefit of all the beneficiaries***. Thus in all practical purposes the distribution, by implication, is as per section 40 of the Act. It also has to be noted that the 2nd house is obligated to pay Shs. 7,585,000/- to the 1st House to balance the difference in valuation of the divided properties between the two houses.

Thus, in my humble view, there is no error apparent on the face of record or no new facts are brought forth before this court.

However, I do agree that the present application is a distinct application and with a history behind it which seeks review or setting aside of a consent order, and the law to set aside such consent order is tritely established.

I shall start with the famous case of **Flora N. Wasike Versus Destimo Wamboko (1982) – 88) KAR 625.**

The case has established two principles of Law, namely:-

It is settled law 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, and that an Advocate would have ostensible authority to compromise a suit or consent to Judgment so far as the opponent is concerned.

In the case of ***Kenya Commercial Bank Ltd V. Specialized Engineering Co. Ltd.*** **(1982) KLR 455**, The Court held that;

"**1. A duly instructed advocate has an implied general authority to compromise and settle the action and the client cannot avail himself of any limitation by him or the implied authority to his advocate unless such limitation was brought to the notice of other side and**

2. An advocate has general authority to compromise on

behalf of his client as long as he is acting *bonafide* and

not contrary to express negative directions. In the

absence of proof of any express negative direction, the

order shall be binding."

Apparently, I do not have any sufficient proof of alleged negative instructions and do find on the contrary that the facts of this case suggest otherwise.

In the case of ***Gachiru V. Republic*** (1987) KLR 1 Court of Appeal expounded further the above principle and held that:-

"**The consent of a client is not needed for a matter which is within ordinary authority of counsel."**

In the said case Counsel, without the consent of the client, withdrew a criminal Appeal and Court of Appeal upheld that action.

Mr. Waiyaki's contention that Beth's constitutional right of being heard was breached is also unsustainable. I may pause here and state that in all the matters which are compromised the parties do not reach the witness stand, and in this case, in my considered view Beth's right of inheritance has not been at all affected.

Mr. Kamau, the learned Counsel for the 3rd Respondent James stated that he supports the application because James overstepped his authority as an administrator. I have amply demonstrated earlier that the Partial consent, did not affect any one's right or prejudiced any one and the parties and counsel acted ***bona fide*** and within the law

Mr. Kamau relied on the case of **James Kingaru and 17 others Versus J. M. Kangari & Nuhu Holdings and 2 others. Misc. C.C. No. 693 of 2005) eKLR.**

This authority, in my opinion, helps the 2nd Respondent and the applicants as it specifically observes that in the matter of Review the Applicant must show that he could not have produced the evidence inspite of all diligence, that he had no knowledge of the evidence or that he had been deprived of the evidence at the time of trial.

Beth or 3rd Respondent has failed to fulfill the aforesaid requirement.

I do not understand the citation of **Misc. Application No. 230 of 1985 (Nairobi) (Seraphino Njoka V. Nanuruga Ngochi & another.** The facts and findings thereof are not relevant to the present case.

In short, I hold that the Partial consent in question does not contravene any provisions of Law of Succession Act under the circumstances of this case, and that the court is not shown any fraud, mistake or misrepresentation or any other sufficient cause so that it can be persuaded to grant the prayers sought for.

This is a very old case, and parties are advised to see its completion.

Finally, I may reiterate that the spirit of the parties to consent order was and is to allow the Administrators to hold the properties in trust for the benefit of all the beneficiaries of each house so that on final confirmation of grant, the same be divided amongst the beneficiaries as per law.

I thus dismiss the summons dated 9th July, 2009. In order to achieve the possible unity of purpose within the family, I shall not make any order on costs.

Orders Accordingly.

Dated, Signed and **Delivered** at Nairobi this **17th** day of **November 2009**.

K.H. RAWAL

JUDGE

17.11.2009