



**In re Estate of Esther Wanjiru Ng'ang'a (Deceased) (Family Appeal
23 of 2023) [2024] KEHC 1580 (KLR) (15 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1580 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
FAMILY APPEAL 23 OF 2023
FN MUCHEMI, J
FEBRUARY 15, 2024**

IN THE MATTER OF THE ESTATE OF ESTHER WANJIRU NG'ANG'A (DECEASED)

OWEN NG'ANG'A MUNGAI.....APPELLANT

VERSUS

JANE NJERI KINYANJUI.....1ST RESPONDENT

JANE WANJIKU EZEKIEL.....2ND RESPONDENT

*(Being an Appeal from the Ruling of Hon. M. W. Wanjala (SRM) delivered
on 15th November 2022 in Thika CM Succession Cause No. 155 of 1998)*

JUDGMENT

Brief facts

1. This appeal arises from the ruling of Thika Senior Resident Magistrate in CM Succession Cause No. 155 of 1998 where the court found that the Amended Summons for Revocation of grant dated 17th August 2021 lacked merit and dismissed it on the grounds that the appellant failed to establish the grounds in her application to the effect that the grant issued on 1st September 2000 in favour of George Kinyanjui Ng'ang'a was obtained fraudulently.
2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 20 grounds of appeal summarized as follows:-
 - a. The learned trial magistrate erred in law and in fact in ignoring the fact that Pius Mungai and Benedetta Wangui were beneficiaries although they did not take part in the succession proceedings before the lower court;
 - b. The learned trial magistrate erred in law and in fact in finding that the transfer form was executed despite that appellant raising concerns on the legality and authenticity of the said transfer form for it was not approved by the lands registrar as required by law;



- c. The learned trial magistrate erred in law and in fact by finding that there was an intention to transfer as sufficient proof against the law which requires that transfer of a gift must be complete for it to become valid;
 - d. The learned trial magistrate erred in law and in fact in finding that the consent dated 13th November 2017 was binding yet the said consent was recorded without the involvement of the administrator who was dead at the time;
 - e. The learned trial magistrate erred in law and in fact by finding that the evidence of the area chief did not bear any weight but instead the 2nd respondent's evidence was more binding than that of the chief's report;
 - f. The learned trial magistrate erred in law and in fact in finding that the appellant did not have capacity to set aside the consent.
3. Parties put in written submissions to dispose of the appeal.

Appellant's Submissions

4. The appellant relies on Section 76 of the *Law of Succession Act* and the case of *Jamleck Maina Njoroge vs Mary Wanjiru Mwangi* [2015] eKLR and submits that he is an interested party in regard to the deceased's estate and therefore he had capacity within the purview of the law to apply for revocation of the grant in the trial court.
5. The appellant submits that the grant issued to George Kinyanjui Ng'ang'a on 1st September 2000 was obtained fraudulently and by concealment of material facts. To support his contentions he relies on the cases of *Re Estate of Prisca Ong'ayo Nande (Deceased)* [2020] eKLR; *Re Estate of Moses Wachira Kimotho (Deceased)* [2009] eKLR and *Re Estate of Julius Ndubi* (no citation given).
6. The appellant further submits that the chief letter filed and relied on by the trial court in making the said grant deliberately omitted the names of Pius Mungai Ng'ang'a and Benedetta Wangui Ng'ang'a who are beneficiaries to the estate. Furthermore, the administrator failed to get consent from the said beneficiaries contrary to Rule 26(2) of the *Probate & Administration Rules*. Instead one James Ngaruiya identified himself with the identification number 3053078, which belongs to Pius Mungai.
7. The appellant contends that the beneficiaries to the estate were not informed of the confirmation of the grant and therefore they did not participate in the confirmation proceedings. The applicant further states that no affidavits of service were filed showing that all the beneficiaries were aware of the hearing of the confirmation.
8. The appellant submits that the deceased became senile as from 1994 and was being taken care of by his father up until the time of her death and thus the applicant contends that she had no mental capacity to gift any parcel of land despite the fact that the respondents never had the time to interact with her the whole of the year before she passed on.
9. The appellant further argues that the deceased passed away on 30th October 1995 yet LR No. LOC 16/Mwagu/724 was registered in the name of George Kinyanjui Ng'ang'a on 3rd January 1996 and LR No. LOC 16/Mwagu/721 was registered in the name of the 2nd respondent on 19th December 1995. Furthermore, the appellant argues that the 2nd respondent affirmed to the court that she never saw the title and she never authorised George Kinyanjui or signed any transfer documents for use on title issuance in respect of LR. No. LOC 16/Mwagu/721 meaning the transfers carried out by George Kinyanjui were fraudulent.



10. The applicant contends that the transfer document presented by the respondent in respect of LR. No. LOC 16/Mwagu/724 is not a legal document as it is not fully executed and it indicates a sale for value yet the 1st respondent claimed that the same was a gift inter vivos. Moreover, the appellant argues that for a gift inter vivos to be valid, it must be complete before the death of the owner. To support these contentions the appellant relies on the case of Succession Cause No. 153 of 2014 *In the Matter of the Estate of Chepkwony arap Rotich alias Chepkwony arap Moson* and *Re Estate of the late Gedion Manthi Nzioka (Deceased)* [2015] eKLR and submits that the onus was upon the respondents to prove on a balance of probabilities that the deceased intended to gift them with the said parcel of land by producing valid documents yet the respondents produced a transfer document which was not executed by the land's office and the parties therein.
11. The appellant argues that the estate of the deceased was intermeddled with as George Kinyanjui Ng'ang'a and Alice Wathanu Ng'ang'a sold the suit property to Iganjo primary school before the court confirmed the grant in 2000. Further, the appellant argues that the respondents testified that there was issues of land swapping by George Kinyanjui and Alice Wathanu Ng'ang'a prior to 2000. The 2nd respondent testified that she swapped land with George Kinyanjui and sold the other to Iganjo primary school even though the suit land was still under the name of the deceased. As such, the appellant contends that the transactions as conducted by George Kinyanjui and Alice Wathanu disqualifies the issue of the parcels of land being a gift.
12. Additionally, the appellant contends that the transfer of LR. No. LOC 16/Mwagu/724 was not done procedurally according to law as there was no consent obtained from the Land Control Board pursuant to Section 6(1)(a) of the Land Control Board Act and therefore the title obtained by George Kinyanjui was obtained by fraud or misrepresentation. Pursuant to Section 26 of the *Land Registration Act*, the appellant contends that a title can be challenged where it has been acquired illegally, unprocedurally or through a corrupt scheme and where it was obtained by fraud or misrepresentation. To support his contentions, the appellant relies on the cases of *Elijah Makeri Nyangwra vs Stephen Mungai Njuguna & Another* [2013] eKLR; *Alberta Mae Gacci vs Attorney General & 4 Others* (2006) eKLR and *Arthi Highway Developers Limited vs West End Butchery Limited & Others* Civil Appeal No. 246 of 2013. Upon finding that the registration was obtained through fraud, the appellant contends that pursuant to Section 80(1) of the *Land Registration Act*, the court ought to order for the rectification of the register by cancelling the registration or amending it accordingly. The appellant relies on the case of *Alice Chemutai Too vs Nickson Kipkurui Korir & 2 Others* [2015] eKLR and urges the court to find that the registration in respect of the suit property was a nullity.
13. The appellant submits that the consent dated 13th December 2017 is null and void ab initio because none of the parties to the consent had the legal capacity to amend the grants issued on 1st September 2000 as the grants are marred with irregularities and illegalities. Moreover, the appellant states that George Kinyanjui, a party to the consent was dead as he died in the year 2013 and the 1st respondent applied to be administratrix over his estate in the year 2018 vide Succession Cause No. 26 of 2018. The grant was issued to the 1st respondent on 29th June 2018 and therefore pursuant to Section 80 (2) of the *Law of Succession Act*, the 1st respondent had no capacity to enter into the consent on behalf of George Kinyanjui.

The Respondents' Submissions

14. The respondents submit that the deceased was a co-wife to Alice Wathanu Ng'ang'a as they were both married to the late Hezekiah Ng'ang'a and lived together in the same house. The respondents further submit that the deceased had no children of her own whereas Alice Wathanu had eight



children namely:-Ruth Mwhiki, David Ndung'u, George Kinyanjui Ng'ang'a, Pius Mungai Ng'ang'a, Benedetta Wangui, Philip Kihui, Jane Wanjiku Ezekiel and James Ngaruiya.

15. The respondents state that prior to his death, the late Ezekiah Ng'ang'a divided his two parcels of land between his two wives giving LR. No. LOC 16/Mwagu/276 measuring 6 acres to the deceased and LR. No. LOC 16/Mwagu/727 to Alice Wathanu. Prior to her death, Alice distributed her land to all her children whereas the deceased sub divided her parcel of land into four plots each measuring 1.5 acres and the resultant plots were parcel numbers 721, 722, 723 and 724. The deceased, in her lifetime disposed the said parcels of land as follows:- L.R. 721 was gifted to the 2nd respondent because she gave birth to a child and named her after the deceased, L.R. 722, was retained by the deceased for herself which she later sold to Iganjo Primary School, L.R. 723 was gifted to Pius Mungai Ng'ang'a, the father to the appellant herein and parcel 724 was gifted to George Kinyanjui Ng'ang'a the husband to the 1st respondent. After gifting parcel 724 to George Kinyanjui, the deceased commenced the transfer process and executed the transfer documents in favour of George Kinyanjui. However, the deceased died before George Kinyanjui obtained the title in 1996.
16. The respondents further submit that after the deceased died, the appellant's father Pius Mungai Ng'ang'a became uncooperative and refused to take part in the succession proceedings occasioning George Kinyanjui to take the initiative and institute the succession proceedings. Due to the appellant's father lack of cooperation, the land parcel 723 which was gifted to him was distributed to Alice Wathanu. The respondents contend that the appellant's father resurfaced in 2017 when he filed summons for revocation of grant and the parties entered into a consent dated 24th November 2017 which provided that the certificate of grant to be amended for plot no. 722 to devolve to Iganjo Primary School and plot no. 723 previously registered under Alice Wathanu to be registered in the name of Pius Mungai.
17. The respondents contend that they asked the court to note that even at the point of signing the consent, and throughout his lifetime, Pius Mungai never contested the ownership of land parcels 721, 722 and 724 as he was fully aware of their rightful ownership and how the deceased bequeathed the said land parcels.
18. The respondents argue that they are bound by the consent dated 24th November 2017 as it was signed by Pius Mungai through his advocates on record, the 2nd respondent and James Ngaruiya, which consent was recorded to compromise the summons dated 7th August 2017 filed by Pius Mungai. Relying on the cases of Samuel Mbugua Ikumbu vs Barclays Bank of Kenya Limited [2015] eKLR and Board of Trustees National Social Security Fund vs Michael Mwalo [2015] eKLR, the respondents argue that a consent can only be set aside on grounds of fraud, collusion, illegality, mistake, being contrary to the court policy, absence of sufficient material and ignorance of material facts, none of which the appellant has not proved that it occurred herein.
19. The respondents further contend that the appellant's father is a beneficiary of parcel number 723 under the consent to which he is disputing, in which case the court should then take it to mean that indeed the devolution of the said parcel to which the appellant has not laid claim should not be in the estate of his late father but ought to revert back to the estate of the deceased.
20. The respondents submit that the deceased and her co-wife lived in the same house and the deceased cared and loved her step children however she never adopted her co-wife's children. The respondents further submit that the appellant's father Pius Mungai even at filing the summons of revocation of grant dated 7th August 2017 never made any claim as to being adopted by the deceased. Therefore, the respondents argue that it is absurd for the appellant, who was only a child then and having no first-hand information apart from what he heard from other people with regard to the relationship between



the deceased and his father to make such claims of adoption whereas his father never made any such claims before the honourable court.

21. Furthermore, the respondents contend that if the appellant's assertions were true, the adopted children being Pius Mungai and Benedetta Wangui ought to have been the very first persons to be bequeathed the land parcels by the deceased. Moreover, it is worth noting that Benedetta Wangui, was not gifted any parcel of land despite the appellant alleging that she was an adopted child, yet the appellant has not addressed this anywhere before the trial court or the instant court. The appellant in his failure to bring the suits in the interests of the alleged bona fide beneficiaries, Pius Mungai and Benedetta Wangui has clearly demonstrated that all his efforts are driven by selfish interests only aimed at benefiting himself.
22. The respondents argue that the appellant is neither a beneficiary nor a dependent of the deceased and therefore has no right or capacity to seek orders for revocation of grant. Furthermore, the respondents submit that grandchildren do not have an automatic right to inherit from a grandparent but can only inherit from them indirectly through their parents. To support their contentions, the respondents rely on the case of *Cleopa Amutala Namayi vs Judith Were* [2015] eKLR.
23. The respondent submit that after the death of the deceased, Pius Mungai declined to participate in the succession proceedings and thus George Kinyanjui proceeded to petition for the grant of letters of administration intestate without any objection. The institution of the succession proceedings for the deceased was well within the knowledge of Alice Wathanu, Jane Wanjiku Ezekiel, Pius Mungai and James Ngaruiya, all who never objected to George making the application for grant of letters of administration. Furthermore, the respondents submit that Pius Mungai declined to participate in the succession proceedings and any meetings with regard to the estate of the deceased including signing the consent for confirmation of grant, attending meetings at the chief's office and attending court sessions during the succession proceedings. Failure to participate in the succession proceedings led to land parcel 723 being distributed to Alice Wathanu.
24. The respondents contend that the sole purpose of the application and petition for the grant of letters of administration was to perfect the deceased's gifts and ensure that all properties were bequeathed as she wished, which role the late George Kinyanjui carried out and performed to the letter before his death in 2013. Thus, the respondents argue that the letters of administration were not obtained fraudulently as the appellant's father wilfully refused to cooperate during the succession process.

Despite being fully aware of the proceedings, he did not object to George Kinyanjui's application. Relying on Section 76 of the *Law of Succession Act* and the cases of *Jamleck Maina Njoroge vs Mary Wanjiru Mwangi* (2015) eKLR and *Albert Imbuga Kisigwa vs Recho Kawai Kisigwa* Succession Cause No. 158 of 2000, the respondents argue that the appellant has not met satisfied the conditions to be met to revoke a grant.
25. The respondents further argue that it beats logic that the appellant's father never raised any issue or complaint with regard to the acquisition of the letters of administration by George Kinyanjui all through his life and that being the son, the appellant should bear the mantle.
26. The respondents rely on the cases of *Arthi Highway Developers Limited vs West End Butchery Limited & 6 Others* [2015] eKLR and *Koinange & 13 Others vs Koinange* [1968] KLR 23 and submit that the appellant has failed to specifically plead and strictly prove on a balance of probabilities any fraudulent acts in respect of the transfer of parcel number 724. The respondents further submit that the appellant has failed to raise any concern over the ownership of land parcels 721 and 723 which were given to his father and the 2nd respondent, which shows that the appellant is out to waste the court's precious judicial time and abuse the due process of this court for satisfaction of his selfish and inconsiderate interests.



Issues for determination

27. The main issue for determination is whether this appeal has merit.

The Law

28. Being a first Appeal, the court relies on a number of principles as set out in *Selle and Another vs Associated Motor Boat Company Ltd & Others* [1968] 1EA 123:

“.....this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence.”

29. In *Gitobu Imanyara & 2 Others vs Attorney General* [2016] eKLR the Court of Appeal stated that:-

An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.

30. From the above cases, the appropriate standard of review to be established can be stated in three complementary principles:-

- a. That on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
- b. That in reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it; and
- c. That it is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

31. Section 76 of the *Law of Succession Act* gives the court the powers to revoke a grant provided the conditions stipulated therein have been met. It states that:-

A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion:-

- a. That the proceedings to obtain the grant were defective in substance;
- b. That the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;
- c. That the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;
- d. That the person to whom the grant was made has failed, after due notice and without reasonable cause either:-



- i. To apply for confirmation of the grant within one year from the date thereof, or such longer period as the court has ordered or allowed; or
- ii. To proceed diligently with the administration of the estate; or
- iii. To produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or
- iv. The grant has become useless and inoperative through subsequent circumstances.

32. It is clear from the above provision that a grant may be revoked by court on its own motion or by application by any interested party. I have perused the court record and noted that the appellant is a step grandchild of the deceased. The appellant sought to revoke the grant on the basis that LR. No. LOC 16/Mwagu/724 was gifted to his father, Pius Mungai Ng'ang'a and later given to another beneficiary. The appellant's father was a beneficiary in the estate of the deceased, a fact which is not denied. He was therefore entitled to follow the interests of his father in this cause by filing the application for revocation. The Court of Appeal in the case of *Re Estate of Yusuf Kipkorir Chepkeitany (Deceased)* [2021] eKLR considered the meaning of the words 'any interested party' in Section 76 of the Law of Succession and held that:-

It is manifest therefore that the respondents' argument that an application for revocation can only be brought by a dependant of the deceased is unfounded. Indeed, it is now settled that the above provision is wide enough to include a purchaser. Thus in *Musa Nyaribari Gekone & 2 Others vs Peter Miyianda & Another* (2015) eKLR the Court of Appeal sitting in Kisumu held that:-

The expression 'any interested party' as used in that provision, in its plain and ordinary meaning, is in our view wide enough to accommodate any person with a right or expectancy in the estate. We are not persuaded, as Mr. Oguttu urged that the expression is limited by or should be construed against the provisions of Section 66 and 39 of the *Law of Succession Act*. Section 66 provides a general guide to the court of the order of preference of the person(s) to whom a grant of letters of administration should be made where the deceased has died intestate. Section 39 provides for the order of priority of the persons to whom the net intestate estate shall devolve where the deceased left no surviving spouse or children. Those provisions do not in our view have a bearing on the question of who may be an 'interested party' for purposes of an application for revocation or annulment of grant of letters of administration under Section 76 of the *Law of Succession Act*. There is therefore no merit in the complaint that the learned judge paid undue premium or undue regard to Section 76 of the *Law of Succession Act* when he held that the 1st respondent has the locus standi to present the application for revocation of grant. We agree with the learned Judge that the 1st respondent's interest as a purchaser of the property of the deceased qualifies him as an 'interested party' with standing to challenge the grant.

33. It is therefore evident that the appellant was an interested party in the deceased's estate through his father and as such falls within the category of 'interested party' pursuant to Section 76 of the *Law of Succession Act*.



Whether the grant issued and confirmed on 1st September 2000 ought to be revoked.

34. The deceased died on 30th October 1995. She was a co-wife to Alice Wathanu Ng'ang'a and they were both married to Hezekiah Ng'ang'a. The deceased did not have children of her own whilst Alice Wathanu had eight children namely; Ruth Mwihaki, David Ndung'u, George Kinyanjui Ng'ang'a, Pius Mungai Ng'ang'a, Benedetta Wangui, Philip Kihui, Jane Wanjiku Ezekiel and James Ngaruiya. All of the children are deceased save for Jane Wanjiku Ezekiel, the 2nd respondent herein.
35. Upon the deceased's demise, George Kinyanjui applied for letters of administration on 8th May 1998 listing the beneficiaries of the deceased as himself, Alice Wathanu Ng'ang'a, the 2nd respondent Jane Wanjiku Ezekiel and James Ngaruiya Ng'ang'a. The administrator provided the estate of the deceased as comprising of LR. No. LOC 16/Mwagu/722. Grant of letters of administration were issued on 9th September 1998. The said grant was confirmed on 1st September 2000 and the estate was distributed between Iganjo Primary School as the sole beneficiary of LR. No. LOC 16/Mwagu/722 and Alice Wathanu Ng'ang'a as the sole beneficiary of LOC 16/Mwagu/723.
36. The appellant's father, Pius Mungai Ng'ang'a thereafter filed summons for revocation of grant dated 7th August 2017. In his summons he stated that the deceased had no children and his mother and siblings filed the succession cause excluding him as a beneficiary. The summons was comprised by a consent dated 24th November 2017 which was adopted as an order of the court on the same day. The said consent listed Pius Mungai Ng'ang'a as the sole beneficiary of LR. No. LOC 16/Mwagu/723.
37. It is the appellant's case that the grant issued on 1st September 2000 ought to be revoked as the administrator obtained the same by fraudulent means and by concealing material facts. The appellant further argues that the consent dated 24th November 2017 be set aside since none of the parties had any legal capacity to amend the grant issued on 1st September 2000 and in any event the said grant was marred with illegalities.
38. It is noted from the record that the parcel of land in dispute herein is LR. No. LOC 16/Mwagu/724 which resulted from the sub division carried out by the deceased from her land LR. No. LOC 16/Mwagu/276 inherited from her deceased husband. The deceased sub divided the said land into four plots being Nos. 721, 722, 723 and 724. According to the evidence of all the parties, the deceased bequeathed land parcel 721 to the 2nd respondent for giving birth to a child and naming her after herself. The deceased retained plot No. 722 for herself and bequeathed plot no. 723 to Pius Mungai Ng'ang'a. The 2nd respondent testified that the said land parcel was not allocated to the said Pius Mungai during succession proceedings but to his mother Alice Wathanu because he refused to attend the succession proceedings and was uncooperative. Thereafter the appellant's father Pius Mungai through the consent dated 24th November 2017 was allocated plot no. 723.
39. Notably, the letters of administration were issued in the year 2000 when Pius Mungai was still alive and yet he did not dispute or challenge the said grant or the administrator, George Kinyanjui. He only argued that he was excluded from the succession proceedings. Furthermore, he made no mention about plot no. 724. Even after the consent comprising the summons for revocation he did not contest anything or state that plot no. 724 was left out of the estate of the deceased.
40. The appellant argues that plot no. 724 was gifted to his father who is now deceased because he was an adoptive son of the deceased. The appellant admitted that he was just told that the deceased had adopted his father but had no evidence to that effect. Furthermore, the 2nd respondent, a step daughter of the deceased testified that the deceased did not adopt any children during his lifetime. At the time that the appellant's father filed his Summons for Revocation, he failed to indicate that he was adopted



by the deceased. He stated that his mother and his siblings applied for letters of administration and just like them he was a beneficiary of the deceased's estate. It is evident that the appellant did not provide any evidence that the deceased gifted his father with plot no. 724. In fact the appellant did not produce any evidence to show that his father at any time made an application to include plot no. 724 as part of the deceased's estate.

41. On further perusal of the record, I have noted that the 1st respondent testified that the deceased gifted plot no. 724 to her late husband, George Kinyanjui prior to her death. The transfer documents were executed on 4th January 1994 and her husband began the process of pursuing the title but he got it in 1996 when the deceased had already died. The 1st respondent produced a mutation form dated 23rd August 1993 which showed that the deceased intended to sub divide LR. No. LOC 16/Mwagu/276 and the resultant plots were 721, 722, 723 and 724. The witness further produced a transfer of land document signed by the deceased on 4th January 1994 before her death, transferring L.R LOC.16/ Mwagu/724 to George Kinyanjui Ng'ang'a. The resultant certificate of title was issued on 3rd January 1996.
42. The appellant further contends that all the siblings of his father were not informed about the succession proceedings of the deceased and therefore they were excluded as beneficiaries. On perusal of the court record, there is evidence to the effect that the deceased did not have children of her own. Further evidence of the parties confirm that the deceased distributed her estate before her demise in a traditional Kikuyu ceremony. The only land parcel that the deceased retained was plot no 722 which was the subject of her succession cause. The record further shows that no objection was raised by any person against confirmation of the grant, not even by the 2nd respondent's siblings. It is therefore my considered view that the appellant has not shown that the grant was obtained fraudulently or through concealment of facts.

Whether the transfer of LR No. LOC 16/Mwagu/724 was fraudulent.

43. The appellant has further argued that the transfer of LR. No. LOC 16/Mwagu/724 was done procedurally and illegally.
44. Upon perusal of the court record it is noted that LR. No. LOC/16/Mwagu/724 was a resultant parcel of land from LR. No. LOC 16/MWAGU/276 which was given to the deceased by her late husband before his demise. The evidence on record shows that the deceased shared out her property before her demise and gifted land parcel number 724 to one George Kinyanjui. To this effect she executed a transfer form on 4th January 1994 in favour of George Kinyanjui. These facts were confirmed by the 2nd respondent in her evidence the actions of the appellant's father who was aware of what was happening Pius Mungai did not contest the gift to George Kinyanjui in respect of land parcel 724. The respondent's evidence on record support the fact that the deceased executed the transfer documents in 1994 and shortly passed away before the certificate of title was issued to George Kinyanjui. Although the appellant contends that the title was obtained through fraud, he has not shown any element of fraud that he alludes to. Furthermore, the fact that his father did not contest the gift of parcel number 724 to George Kinyanjui supports the contentions that the said land parcel was lawfully given to George Kinyanjui lawfully and that the appellant's father did not show any interest in the said land. There is no doubt in the evidence of the parties that the deceased executed transfer documents in respect of L.R. LOC16/Mwagu/724 in favour of George Kinyanjui. This act is sufficient to indicate the intention of the deceased to gift the said property to the said person.
40. On further perusal of the appellant's submissions, it is noted that he has brought in new issues on appeal namely that no consent was obtained from the relevant Land Control board to transfer the



land pursuant to section 6(1)(a) of the Land Control Board Act. Respectfully, these issues as raised are new on appeal and moreover, this court being a probate and administration court cannot determine the indefeasibility of title. This principle was enunciated in the case of Priscilla Ndubi and Zipporah Mutiga vs Gerishon Gatobu Mbui, Meru Succession Cause No. 720 of 2013, held:-

“The primary duty of the Probate Court is to distribute the estate of the deceased to the rightful beneficiaries. As of necessity, the estate property must be identified. Thus, where issues of ownership of the property of the estate are raised in a succession cause, they must be resolved before such property is distributed. And that is the very reason why rule 41(3) of the *Probate and Administration Rules* was enacted so that claims which are prima facie valid should be determined before confirmation.”

As such, the dispute as to ownership can only be determined by the Environment and Land Court. Therefore, this honourable has no jurisdiction and cannot determine anything as regards the suit property till the dispute over ownership of the parcel of land is determined by the Environment and Land court. Once the ownership of the suit property is ascertained through determination in the Environment and Land Court, the probate court shall proceed to distribute the said property to the rightful dependants.

It is evident that this court has no jurisdiction to decide on the validity of the title now held by George Kinyanjui in respect of L.R. Loc. 16/Mwagu/724. It is noted that the court below did not deal with the issue of validity of the title. As such, the said issue is misplaced in this appeal.

Whether the consent dated 24th November 2017 ought to be set aside.

41. The appellant argues that the consent dated 24th November 2017 ought to be set aside as it is null and void ab initio because none of the parties to the consent had legal capacity to amend the grant issued on 1st September 2000. There is currently a dearth of authorities on the law governing the setting aside of a consent judgment or order. The case of *S. M. N vs Z. M. S & 3 Others* [2017] eKLR summaries the case law and grounds upon which a consent may be varied or set aside as follows:

- a. Where the consent was obtained fraudulently;
- b. In collusion between affected parties;
- c. Where an agreement is contrary to the policy of the court;
- d. Where the consent is based on insufficient material facts;
- e. Where the consent is based on misapprehension or ignorance of material facts;
- f. Any other sufficient reason.

42. Generally, a court will not interfere with a consent judgment except in circumstance such as would provide a good ground for varying or rescinding a contract between parties.

43. In *Flora N. Wasike vs Destimo Wamboko* [1988] eKLR Hancox JA held the view that:-

“It is now settled law that a consent judgment or order has a 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.”



44. The Honourable Judge went further and cited Setton on Judgments & Orders 7th Edition Vol. 1 page 124 and reiterated that:-

“Any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and 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 the consent was given without sufficient material facts, or in general for a reason which would enable a court set aside an agreement.”

45. Similarly in *Kenya Commercial Bank Ltd vs Specialised Engineering Company Ltd* [1982] KLR 485, Harris J:

- a. 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.
- b. 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 of the implied authority to his advocate unless such limitation was brought to the notice of the other side.

52. I have perused the consent dated 24th November 2017 and noted that it is in respect of LR. No. LOC 16/Mwagu/723 and 722. The parties who signed the consent are the advocates on record for Pius Mungai, for the 2nd respondent and for James Ngaruiya Ng'ang'a. Although the appellant argues that the consent was perpetrated by fraud, he has not shown the elements of fraud. Furthermore, the appellant has not shown that the consent was obtained through collusion, an agreement contrary to the policy of the court or the consent was given without sufficient material facts. Furthermore, the law is clear that an advocate entering a consent on behalf of his client, as is the case here with the appellant's father, is binding. Moreover, the appellant was not a party to the consent. Therefore, the party better placed to challenge the consent would have been the appellant's father but he did not do so. It is interesting to note that the appellant's father is a beneficiary of LR. No. LOC 16/MWAGU/723 whose ownership the appellant is not disputing.

Conclusion

53. In conclusion, I find that the appellant has not established any of the grounds of appeal.

54. In my considered view, this appeal lacks merit and is hereby dismissed.

55. Being a family matter, I hereby order that each party meets their own costs.

56. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT THIKA THIS 15TH DAY OF FEBRUARY 2024

F. MUCHEMI

JUDGE

