



In re Estate of Mark Kiptarbei Too (Deceased) (Succession Cause 16 of 2018) [2024] KEHC 1024 (KLR) (9 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1024 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
SUCCESSION CAUSE 16 OF 2018
JRA WANANDA, J
FEBRUARY 9, 2024**

BETWEEN

**MARY JEPKEMBOI TOO 1ST ADMINISTRATOR
SOPHIA JELIMO CHEMENGEN 2ND ADMINISTRATOR**

AND

**MOSES KIROTICH TOO 1ST OBJECTOR
CEPKOECH TOO 2ND OBJECTOR
SAMMY WAKI MULILI AKA KIPLAGAT TOO 3RD OBJECTOR
ALI MARK KIPTARBEI TOO 4TH OBJECTOR
ARAFAT MOHAMMED BAKARI 5TH OBJECTOR**

AND

**ELIZABETH JEPKOECH TOO INTERESTED PARTY
JENNIFFER JEBET TOO INTERESTED PARTY
DANIEL KIPCHICHIR TOO INTERESTED PARTY
SANDRA JEROP TOO INTERESTED PARTY
KEVIN KIPKEMEI TOO INTERESTED PARTY
SHARON JEPCHUMBA TOO INTERESTED PARTY**

RULING

1. As I stated in my earlier Ruling herein delivered on 22/09/2023, this Succession Cause relates to the estate of the late Mark Kiptarbet Too who died on 30/12/2016. After disagreements and protracted



litigation between the two Administrators on who should be appointed such Administrator over the estate, the two whom each claimed to be the genuine wife of the deceased, finally entered into a consent agreeing to be appointed joint Administrators. Pursuant thereto, on 12/07/2021, this Court then issued a Grant of Letters of Administration Intestate to the two of them as such joint Administrators.

2. This Ruling is in respect of the 4th Objector's Application (Notice of Motion) dated 16/05/2022. The same is filed through Messrs Rioba Omboto & Co. Advocates and seeks the following orders:
 - i. [Spent]
 - ii. That the 1st Respondent be granted leave to withdraw a sum of Kshs 2,000,000/- from the deceased's known bank accounts particularly Equity Bank No. [.....] in favour of the 4th Objector/Applicant (Ali Mark Kiptarbei Too).
 - iii. That in the alternative, the properties forming part of the Estate be sold and more particularly a portion which has been allocated/given to the Applicant, namely L.R. No. Soy/Kipsombe/Block 12/30.
 - iv. That the aforesaid money be used to cater for his subsistence, stalled business venture and other overheads pending the final distribution of the estate of the deceased herein.
 - v. That costs be in the Cause.
3. The Application is expressed to be brought under Section 26, 29, 34, 47 of the Law of Succession Act, Rules 49 and 73 of the Probate and Administration Rules, Section 1A, 1B, 3A of the Civil Procedure Act, and "all other enabling legal provisions".
4. In the Affidavit, the 4th Objector deponed that he is one of the dependents or children of the deceased herein. He named 12 other dependents (including the 2 Administrators-widows). He then deponed that he was being maintained by the deceased since childhood till his death in the year 2016, that the deceased used to support him in his business venture which includes selling electronics and imported assorted goods from abroad and that the deceased was also supporting his livelihood/subsistence, and that prior to the Application for Confirmation of Grant dated 21/10/2021, through his Advocates, he entered into an agreement where some of the properties forming part of the Estate was distributed. He added that the distribution was to the effect that 50 acres was to be hived from L.R. No. Soy/Kiplombe/Block 12/30 and allocated to him, a sum of Kshs 10,000,000/- was also to be paid to him, and further, legal fees of Kshs 6,000,000/- was to be paid to his Counsel on record.
5. The 4th Objector deponed further that he has not been able to benefit in any way from the purposed distribution despite the vast and rich multibillion estate of the deceased, that his business was adversely affected by the challenges of the COVID-19 pandemic and non-cooperation from the Administrators, that he has no other source of income to enable him continue with his previous business venture which was being financed by his late father, that he has been left destitute hence his livelihood is jeopardized due to prolonged wrangles in this protracted Succession, that the deceased left behind a multimillion estate with several accounts and assets which can be disposed off to enable him get funds to refurbish or revamp his business venture and cater for his subsistence. He listed the properties as Equity Bank Account No [.....], Eldoret Municipality/Block 13/138, LR No. Kapkoi/Mabonde Block 1 (ex-prison), L.R. No. Soy/Kipsombe/Block 12/30. He urged the Court to grant leave to withdraw the sum of Kshs 2,000,000/- from the said Equity Bank Account or sale proceeds from those that parcels of land.



Responses

6. In opposition to the Application, I have only come across the Grounds of Opposition filed on 20/06/2022 by Messrs J.M. Waiganjo acting for both the 1st Administrator and the 1st Objector and represented herein by Mr. Mburu Advocate.
7. Ms. Ndirangu, Counsel for the 2nd Objector representing, I believe, Messrs Judy Thongori & Co. Advocates, informed the Court that they are not opposed to the Application.
8. The rest of the parties were absent on 31/10/2023 when the matter came up before me for directions and I have also not come across any Responses from any of them.
9. The other representation in this matter is Messrs Prof. Tom Ojienda Associates for the 2nd Administrator and also for the Interested parties. Although Messrs Prof. Tom Ojienda Associates did not file any Response specifically to the instant Application on behalf of their clients, I have come across the Replying Affidavit that they filed on 17/03/2023 which was in respect to a separate Application but in which the issue of enforcement of the said consent arose. In the Affidavit, sworn by the 2nd Administrator, enforcement of the consent was opposed on the ground that the same was never formally adopted by the Court.
10. From the record, there is also Messrs Ondieki & Ondieki Advocates acting for the 5th Objector. As regards the 3rd Objector, it is not clear from the record whether he is represented. As aforesaid, I have not seen any Response from either.

Grounds of Opposition filed by the 1st Administrator and 1st Objector

11. In the Grounds of Opposition, it is averred that the Application seeks premature distribution of the estate contrary to Rule 40(6) and (8) of the Probate and Administration Rules, that the 1st Administrator has already filed an Affidavit of Protest pursuant to the aforesaid Rule 40(6) and (8) and the matter should thus be set down for hearing, that in view of the foregoing, and noting that the paternity of the 4th Objector's is questioned as highlighted in the Affidavit of Protest, the present Application is premature and no partial distribution can be effected in favour of the 4th Objector, that the consent is not anticipated under Rule 40(8) aforesaid, is not signed by all the dependents as prescribed, and that notwithstanding above, the Applicant has not provided any evidence of the alleged "subsistence, stalled business venture and other overheads" in support of the figure sought.

Hearing of the Application

12. I then directed that the Application be disposed of by way of written submissions. Mr. Mburu, Counsel for both the 1st Administrator and the 1st Objector informed the Court that he will rely on his said Grounds of Opposition and would not therefore be filing any Submissions. Pursuant thereto, only the 4th Objector's Counsel, Mr. Omboto, filed Submissions which he did on 11/10/2022.

4th Objector's Submissions

13. Counsel for the 4th Objector-Applicant reiterated that the 4th Objector is a son and dependent of the deceased and therefore entitled to a share. He cited Section 29 of the [Law of Succession Act](#). He then submitted that the 4th Objector entered into the consent dated 7/10/2021 with the Administrators and reiterated that the 4th Objector claims for partial distribution of the estate as he cannot survive without support, that he was being maintained by the deceased since childhood and was left destitute and his livelihood paralyzed as a result of the demise of the deceased. He cited the case of In Re Estate of GKK



(Deceased) [2017] eKLR and submitted that the 4th Objector is in need of finances to also boost his business venture which stalled. Counsel submitted further that a consent recorded by Administrators may be used in effecting partial distribution of the estate. He cited the case of Rabai Syalo Lutilo & David Ngilandala v Josephine Lutilo [2017] eKLR and added that the consent herein has not been set aside or varied and should therefore be enforced. He also cited the case of Elizabeth Wairimu Thimba & 2 Others v Wilfred Njogu Mbutia 2 Others [2014] eKLR.

Analysis and Determination

14. I have carefully considered the Application, response thereto, Submissions by Counsel and the authorities cited. Upon considering the foregoing, I find that the issue that arises for determination herein to be “whether the consent dated 7/10/2021 should be adopted and enforced and therefore partially distributing the estate herein”
15. The said consent dated 7/10/2021 is drawn and executed by Messrs Prof. Ojienda & Associates Advocates then acting for both the two Administrators and also acting for all the Interested Parties. The two Administrators were deemed to be the widows and the Interested Parties are the deemed children of the deceased. The consent is also executed by Messrs Rioba Omboto & Co. Advocates acting for the said Ally Mark Kiptarbei Too described in the consent as 5th Objector but who is in fact the 4th Objector. The consent was never however formally adopted by the Court as an order.
16. The consent is premised as follows:
 - “The parties herein (The Administrators and Interested Parties and the 5th Objector (Ali Mark Kiptarbei Too) have agreed to have this matter be marked as fully settled between the estate and himself based on the following terms:
 - i. That the Objection by the 5th Objector dated 17th September 2018 herein be marked as withdrawn with no order on costs.
 - ii. That the 5th Objector be recognized as the son of the late Mark Kiptarbei Too and consequently as one of the dependents of the late Mark Kiptarbei Too under Section 29 of the *Law of Succession Act*.
 - iii. That the 5th Objector be awarded 50 acres to be hived from L.R. Soy/Kipsombe Block 12/30 as full and final settlement of his share of the estate of the late Mark Kiptarbei Too.
 - iv. That the 5th Objector be awarded a liquidated sum of Kshs 10,000,000 as full and final settlement of his share of the estate of the late Mark Kiptarbei Too.
 - v. That a further sum of Kshs 6,000,000/- be paid as legal fees to his Advocates on record M/S Rioba Omboto & Company Advocates.
 - vi. That this consent be deemed to have fully and finally settled any claim that the 5th Objector may have against the estate of the late Mark Kiptarbei Too.
 - vii. Each party to bear their own costs.”
17. I note that on 21/10/2021, Messrs Prof. Ojienda & Associates filed the Summons dated 21/10/2021 seeking confirmation of the Grant. The Summons was supported by the respective Affidavits sworn by the two Administrators and contains proposed modes of distribution and also consents thereto executed by both the Administrators and the Interested Parties and also some settlement Agreements



- between the parties. Attached to the Summons is the said consent dated 7/10/2021 in favour of the 4th Objector, executed by Messrs Prof. Ojienda & Associates and Messrs Rioba Omboto & Co. Advocates. Also attached are separate consents executed in favour of the 6th Objector by Messrs Prof. Ojienda & Associates and Messrs Ondieki & Ondieki & Co., Advocates for the 6th Objector.
18. I notice however that on 6/12/2021, the 1st Administrator - Mary Jepkemboi Too - turned against Messrs Prof. Ojienda & Associates and her co-Administrator and, through her separate new Advocates, Messrs J.M. Waiganjo & Co., filed an Affidavit withdrawing her consent to the Summons dated 21/10/2021. In the Affidavit, she deponed that noting that she is semi-illiterate, the 2nd Administrator together with the Advocate, duped her into signing the Affidavit in support of the Summons together with the consent on mode of distribution under misrepresentation that she was signing an Application for provision for her grandchildren's school fees, and that she only learnt about the true contents of the Summons after his Advocates were served with the documents and they explained to her the same.
 19. I also observe that on 7/03/2022, the 1st Administrator went further and filed an Affidavit of Protest in which she opposed the Summons on various grounds including that although she had conceded to the 2nd Administrator being appointed her co-Administrator, she only did so for purposes of expedient disposal of the Succession Cause and not as a concession of the 2nd Administrator's marital status to the deceased. She also deponed that some of the children of the 2nd Administrator were conceived before cohabitation between the 2nd Administrator and the deceased. She deponed further that some of the properties listed in the estate were owned by her mother but held by the deceased in trust for the 1st Administrator, that together with the deceased they acquired some of the properties prior to cohabitation between the deceased and the 2nd Administrator. My understanding of the 1st Administrator's argument is that the said properties devolved solely to the 1st Administrator upon the death of the deceased, that the properties do not comprise part of the estate and were therefore not available for distribution among the beneficiaries.
 20. I have set out all the above to demonstrate that the consent seeking to partially distribute the estate in favour of the 4th Objector is strongly opposed by the 1st Administrator. She has now disowned the consent claiming that being semi-illiterate she was misled into signing it. She even filed an Affidavit of Protest and is now represented by her own separate Advocate.
 21. In the circumstances, my view is that it will not be safe to adopt or enforce the consent since clear unanimity is lacking. Although generally, an Advocate has ostensible authority to enter into consents on behalf of his client, such consent may be set aside where serious doubts have been raised by the client on the manner in which it was procured.
 22. I also take into account the fact that while there are 4 other Objectors in this matter apart from the 4th Objector-Applicant, the consent is not signed by the rest of these other Objectors. Since Messrs J.M. Waiganjo & Co. also act for the 1st Objector, my presumption is that he, too, is opposed to the consent. Although the validity of the Objector's claims or lack thereof will only be ascertained after hearing of the Objections, they cannot be wished away at this stage. Although the 2nd, 3rd and 5th Objectors have not filed anything to support or challenge the Application, my view is that not being parties to the consent, the same cannot be imposed on them without their express authority clearly communicated to this Court.
 23. I have also taken into consideration the enormity of the amounts proposed in the consent to be paid to the 4th Objector and to his Advocates, Kshs 10,000,000/- and Kshs 6,000,000/-, respectively, and also 50 acres of a parcel of land to be hived off and transferred to the 4th Objector. While the 4th Objector appears to be arguing that the estate is a multi-billion one and that the said amounts and



acreage proposed to be paid to him amount to “a drop in the ocean”, I beg to disagree. At this stage, the identification and true values of the properties comprising the estate are yet to be judicially ascertained and confirmed. Similarly, the real number and/or identity of beneficiaries and dependents is also yet to be conclusively ascertained. There is no certainty that other alleged dependents or beneficiaries may not still emerge. All these matters shall only be ascertained at or during the stage of confirmation of the Grant and/or distribution of the estate. The amounts proposed to be awarded to the 4th Objector by dint of the consent therefore has the capacity to cause a substantial “dent” on the estate and lead to an undesirable scenario of unfair or inequitable distribution.

24. In the case of *George W. Songwa v Christopher Khaemba* [2013] eKLR, Ngenye-Macharia J (as she then was), faced with an almost similar scenario, held as follows:

“The subject consent order was only signed by one party purporting to represent a myriad of others. Parties who did not sign it, by themselves or their representatives cannot be bound by it.

Therefore, the order of the court adopting the consent as its judgment was an error on the face of the record.

In *Brooke Bond Liebig (T) Ltd -Vs- Malya* (1975) E.A. 266, Court of Appeal held that “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.”

A consent, as earlier noted is in the nature of an agreement. The one in question has failed to meet the threshold of a valid agreement and it is only fair that court does away with it.

In the High Court in *Ratilal Gora Sumaria -Vs- Fina Bank Limited & 2 Others*, the court noted that a consent acts as an estoppel. However, it can be set aside on any ground which would invalidate an agreement such as misrepresentation, fraud or mistake.

This applies in the instant case. I have no doubt in my mind that, notwithstanding the good intents for which the consent was recorded and adopted as a judgment of the court, it has failed to meet the threshold of a valid consent.

I disagree with counsel for the Respondent that all parties beneficially entitled to the estate of the deceased signed the consent and that therefore it should not be vacated. The fact is that the beneficiaries and the purchasers only signed against their names only to confirm that they agree to take their respective entitlements. But at the bottom the signature of the Administrator/Applicant is missing. He is one crucial person that the absence of his consent automatically invalids the consent order.”

25. Similarly, in the case of *In re Estate of the Late Ngaulo arap Tanui (Deceased)* [2021] eKLR, S.M. Githinji J held as follows:

“Therefore from the foregoing, it is my considered view that the mediation agreement dated 5/12/2019 is invalid to the extent that some of the parties to the suit and in particular the applicants herein who are the objectors in the main suit, never appended their signatures on the said agreement, a fact of which the respondent’s counsel has admitted in their submissions when she stated that the applicants were present during the mediation processes but refused to append their signatures on the agreement.



I also find that the applicants’ refusal to sign the mediation agreement is a clear indication that they were not in agreement with its terms and the Mediator should have indicated so. There was no settlement.”

26. There is also the case of *In re Estate of Njagi Maguta (Deceased)* [2017] eKLR where F. Muchemi J remarked as follows:

“The firm of Gachiengo Gitau & Co Advocates represents Jennifer Gichuku and Jane Kina. The above is representation of only four (4) beneficiaries as opposed to nine or more. The five or more absent beneficiaries did not sign the consent.

18. They are stakeholders in the deceased’s estate and the consent order affects their interests. Some of those absent in court were given shares in the grant by Runyenjes court. This means that no one can take away or alter their shares without their consent. The applicant was present in court as shown by the record but he had not signed the consent. He ought to have been involved together with the other beneficiaries.

19. The Probate and Administration Rules require that all beneficiaries and interested parties in the estate be served with any application or summons before it is heard. Similarly, no consent may be recorded in absence of some beneficiaries. In this case, six beneficiaries including the applicant were left out.

.....

22. I find that the consent recorded on 30/06/2015 is null and void for all purposes ..”

27. What the above authorities reiterate is that a consent order can be set aside or a Court can refuse to adopt a consent where there are good reasons to do so, such as where not all parties necessary to the resolution of the dispute participate in or append their signatures to the consent or where the consent is based on a misapprehension or ignorance of the underlying facts. I find that all the above factors are applicable in the present case.

28. I am therefore constrained to decline the Application.

Final Orders

29. In the circumstances, I order as follows:

- i. The 4th Objector’s Notice of Motion dated 16/05/2022 is dismissed.
- ii. Costs shall be in the Cause.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 9TH DAY OF FEBRUARY 2024

.....

WANANDA J. R. ANURO

JUDGE

