



**In re Estate of Eliashib Wilfred Ongadi Odero (Deceased) (Miscellaneous Succession Cause 16 of 2019) [2024] KEHC 17046 (KLR) (6 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 17046 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MIGORI  
MISCELLANEOUS SUCCESSION CAUSE 16 OF 2019  
RPV WENDOH, J  
MAY 6, 2024**

**IN THE MATTER OF THE ESTATE OF ELIASHIB WILFRED ONGADI ODERO (DECEASED)  
IN THE MATTER OF THE APPLICATION BY  
BEATRICE ATIENO ONGADI FOR REVOCATION  
AND/OR ANNULMENT OF GRANT ISSUED TO PETER ODHIAMBO ONGADI IN  
THE PRINCIPAL MAGISTRATE'S COURT AT  
MIGORI IN SUCCESSION CAUSE NO. 383 OF 2007**

**BETWEEN**

**BEATRICE ATIENO ONGADI ..... OBJECTOR**

**AND**

**PETER ODHIAMBO ONGADI ..... ADMINISTRATOR**

**AND**

**JOHN KENNEDY ONGANDI ..... INTERESTED PARTY**

**COGETRA COMPANY LIMITED ..... INTERESTED PARTY**

**RULING**

1. This ruling is in respect to the estate of Eliashib Wilfred Ongadi Odero (Deceased) who died intestate on 6/6/2004. The deceased was polygamous and had four wives. He had several pieces of land which he subdivided to the four houses. The issue before court relates to original title Kamagambo / Kabuoro / 3243 which was the subject of distribution in Migori PM Succession Cause 383 of 2007. Cogetra Company Limited (the 2<sup>nd</sup> interested party) filed an application dated 17/7/2023 on 18/7/2023 seeking the following orders: -

a. Spent;



- b. That the consent orders dated 4/7/2023 between the applicant and the petitioner/respondent be reviewed and stayed, set aside, and/or vacated forthwith, there being an error apparent on the face of the record;
  - c. Spent;
  - d. In the alternative to (3) above, the Land Registrar Migori County be ordered to restore and preserve Land Reference No. Kamagambo/Kabuoro/5959 and 5960 in the name of and for the benefit of Cogetra Company Limited as the registered proprietor pending the hearing and determination of the summons for revocation and annulment application dated 17/12/2019;
  - e. A conservatory order do issue directed against the applicant, the petitioner and the Land Registrar from dealing in any way with the Land Parcels No. Kamagambo/Kabuoro/5959 and 5960 and/or receiving any payments, or proceeds in respect of or out of the said Land Reference No. Kamagambo/Kabuoro/5959 and 5960 to the detriment or contrary to the interest of Cogetra Company Limited;
  - f. Costs be borne by the respondents.
2. The application is based on the grounds found on its face and the affidavit of Elizabeth Okello, the Director of the 2<sup>nd</sup> interested party. It was deposed that the 2<sup>nd</sup> interested party was the registered owner of Land Reference No. Kamagambo/Kabuoro/5959 and 5960 (suit properties) having bought it from John Kennedy Ongadi (1<sup>st</sup> interested party); that at the time of purchase, there was no prohibition or encumbrance noted against the suit properties; that the National Land Commission identified the suit properties for road expansion, duly gazetted the same and the 2<sup>nd</sup> interested party has been awaiting compensation; that it is the issue of compensation that has triggered filing of summons for revocation and nullification of grant; that the applicant, respondent and 1<sup>st</sup> interested party brought the application for revocation of grant targeting many land parcels for revocation and cancellation of title so that the compensation money payable would be paid to them as family members.
  3. It was further deposed that the purported consent sought to have the grant partially revoked to affect the 2<sup>nd</sup> interested party's ownership and entitlement to the suit properties as a means of accessing the compensation funds from the National Land Commission; that Counsel for the 2<sup>nd</sup> interested party did not accede to the consent and by a letter dated 2/6/2023, the 2<sup>nd</sup> interested party noted its objections; that the applicant and the petitioner filed the consent in court to have it adopted without notifying the 2<sup>nd</sup> interested party; that a mention was done in court on 4/7/2023 without notifying the 2<sup>nd</sup> interested party; that the deprivation of the suit property belonging to the 2<sup>nd</sup> interested party is unconstitutional and if the consent order/letter is to go by, the same was done without the consent of the 2<sup>nd</sup> interested party.
  4. The application was opposed by Beatrice Atieno Ongadi (the objector) by way of a replying affidavit dated 17/10/2023. She deposed that upon doing a search at the lands registry on the suit properties, she noted that the 2<sup>nd</sup> interested party appeared to have obtained ownership of the said suit properties from the deceased's parcel of land L.R. Number Kamagambo/Kabuoro/3243 well after his death which she did not consent to; that the objector got to know of the 2<sup>nd</sup> interested party after it filed ELC Appeal No. 30 of 2019 which is still pending; that she was not a party to Succession Cause No. 383 of 2007 prompting her to file this succession cause seeking to revoke and annul the grant given in the said succession cause; that the consent orders dated 5/6/2023 was filed in good faith and in the best interest of their family.



5. It was further deposed that the 2<sup>nd</sup> interested party was involved in the consent; that on 24/4/2023, in the presence of all Counsel, the court gave directions. That however the consent was not acceded to by the 2<sup>nd</sup> interested party; that the 2<sup>nd</sup> interested party is well placed to pursue its constitutional rights and land property interests in the ELC Appeal No. 30 of 2019; that the 2<sup>nd</sup> interested party's concerns fall on appeal not review; that the application is bad in law and tantamount to an abuse of the court's process and it should be struck out with costs in favour of the objector.
6. The replying affidavit by Peter Odhiambo Ongadi (the respondent) dated 30/9/2023 was in response to the affidavit sworn by the objector on 17/12/2019 in support of the summons for revocation of the grant. I do not think that it will serve any useful purpose in the present application. Instead, the respondent replied to the application through written submissions dated 30/10/2023 which I shall highlight later.
7. The application was canvassed by way of written submissions. The 2<sup>nd</sup> interested party filed its written submissions dated 23/10/2023 on even date. It was submitted that a consent can be set aside if it was obtained through fraud, collusion or any agreement contrary to the policy of the court, lack of sufficient material facts or any other reason as it was held in the case of Flora N Wasika vs Destino Wamboka (1988) eKLR.
8. The 2<sup>nd</sup> interested party urged that the consent order of 5/7/2023 sought to make the 2<sup>nd</sup> interested party's properties as forming part of the deceased's estate and subject it to fresh apportionment and distribution among only a few and select members of the deceased's beneficiaries; that without obtaining the 2<sup>nd</sup> interested party's consent the court must find that there was no valid consent, there was fraud and concealment of material facts which renders the order/judgement liable to be set aside; that there was no affidavit of service showing that all the parties were aware of the date to record the consent.
9. To further support its position, the 2<sup>nd</sup> interested party relied on the cases of Julius Kigen Kibiego vs Angeline Korir & Another (2012) eKLR and Brahat Ishwaral Maru vs Deepak Ashwin Kumar Maru & Another (2018) eKLR where the courts examined the import of a consent where a party who is to be affected by it is not joined in the consent. The 2<sup>nd</sup> interested party urged the court to allow the application.
10. The respondent filed his submissions dated 30/10/2023 in court on even date. It was submitted that the issue herein does not relate to the distribution of the entire original estate land number Kamagambo/Kabuoro/324 but rather it relates to how members of the house of Mama Elsheba should share their undisputed share which came to be known as Kamagambo/Kabuoro/5557. The respondent urged the court not to disturb the already distributed portion.
11. The respondent submitted that the consent does not prejudice the objector and the purchasers as it relooks into the distribution of the contested portion in an open forum where each of the affected parties shall have an opportunity to canvass and argue their respective cases; that the 2<sup>nd</sup> interested party purchased the suit properties from within the share of the house of Mama Elsheba who is still alive; that the application fails the test of conditions which must be established by a party seeking to set aside a consent order, to wit, fraud and illegality which has not been shown; that the application should be dismissed and place L.R. Kamagambo/Kabuoro/5557 whose inheritance is contested for redistribution and/or partial reconfirmation. The respondent asked this court to declare that the portions whose inheritance are unchallenged be declared as partially confirmed.



12. I have carefully considered the 2<sup>nd</sup> interested party's application, the response in opposition by the objector, the submissions by the 2<sup>nd</sup> interested party and the respondent. The sole issue for determination is whether the consent order dated 4/7/2023 ought to be set aside and/or vacated.
13. I have understood the 2<sup>nd</sup> interested party to say that it purchased the suit properties from the respondent who was the registered owner. This court has also understood that L.R. Kamagambo/Kabuoro/5557 and as it is conceded by the objector and the respondent, is a resultant subdivision of the original Kamagambo/Kabuoro/3243.
14. The said L.R. Kamagambo/Kabuoro/5557 was allocated to the house of Mama Elsheba where the objector hails from. It was again subsequently subdivided to other smaller portions being Land Parcel Nos. Kamagambo/Kabuoro 5953, 5954, 5955, 5956, 5957, 5958, 5959, 5960 and 5961. Some of the resultant subdivisions were sold to 3<sup>rd</sup> parties one of them being the 2<sup>nd</sup> interested party herein.
15. The objector states that she was not aware how the 2<sup>nd</sup> interested party acquired the suit properties and that the real issue in controversy is the sharing of the portion known as L.R. Kamagambo/Kabuoro/5557 which was allocated to the house of Mama Elsheba where the objector hails from.
16. On the issue of the consent, both the objector and the respondent agree that the consent was lawfully entered into and it is in the best interest of all the parties. The importance of the consent order as it was contended was to relook into the issue of the redistribution of Kamagambo/Kabuoro/5557.
17. The principles for setting aside a consent are now well settled. A consent can be set aside if it is obtained by fraud, collusion or by an agreement which is contrary to the policy of the court. The East African Court of Appeal in *Hirani vs Kassam* (1952) EACA 131 held: -
 

“Prima facie, any order made in the presence and with 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 the 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.”
18. Similarly, in *Purcell vs F C Trigell Ltd* [1970] 2 All ER 671 cited by the Court of Appeal in *S M N vs Z M S & 3 others* (2017) eKLR it was held;
 

“It seems to me that, if a consent order is to be set aside, it can really only be set aside on grounds which would justify the setting aside of a contract entered into with knowledge of the material matters by legally competent persons...”
19. The respondent and the objector are not denying that the 2<sup>nd</sup> interested party is the registered owner of the suit properties. From the evidence on record, the suit properties were transferred to the name of the 2<sup>nd</sup> interested party on 13/6/2016 and 18/6/2016 respectively. The objector caused a caution to be placed on the suit properties on 12/4/2018.
20. The impugned consent which the 2<sup>nd</sup> interested party seeks to set aside/vary is dated 4/7/2023. From the court proceedings, on 24/4/2023, Mr. Arika for the objector and Mr. Kisera for the respondent were present in court. Mr. Ochillo for the 1<sup>st</sup> interested party and Mr. Oduk for the 2<sup>nd</sup> interested appeal to have were absent. The court proceedings bear the record that this court directed Learned Counsel Mr. Arika and Kisera to share the proposed consent with the interested parties' Counsel for them to consult their respective clients.



21. On 4/7/2023, Ms. Kijana holding brief for Mr. Omonde Kisera for the respondent and Mr. Arika for the objector appeared in court to record the consent. Counsel informed the court that a consent had been filed. On the face of the consent, Counsel for the interested parties did not sign it. The consent was signed by Counsel for the objector and the respondent only. It therefore leaves doubt whether Counsel for the interested parties were consulted on the terms of the proposed consent before the same was filed in court for adoption. The terms of the consent were among others to cause the cancellation of the resultant subdivisions of L.R. Kamagambo/Kabuoro/5557 in which the suit properties are amongst those to be freshly distributed.
22. The 2<sup>nd</sup> interested party contended that the consent was entered into without its knowledge and approval. Indeed, the letter dated 2/6/2023 from the 2<sup>nd</sup> interested party's Counsel clearly indicates that he did not agree with the terms of the proposed consent. Infact, Counsel for the 2<sup>nd</sup> interested party was categorical that they strongly objected to the consent unless the suit properties would not form part of it. Therefore, it would be unjust to cause the cancellation of the titles of the suit properties without involving the 2<sup>nd</sup> interested party or other purchasers who claim to have purchased portions of the original properties.
23. A perusal of this court's proceeding shows that Counsel for the 2<sup>nd</sup> interested party was not aware of the mention date when the impugned consent was to be adopted. It would be unjust for the consent to remain as it were and seeing that the 2<sup>nd</sup> interested party has been in possession of the suit properties for 6 years now. It will be prejudicial to the 2<sup>nd</sup> interested party.
24. A further perusal of the court proceedings indicates that the consensus was that the objection proceedings would proceed via viva voce evidence. The objector sought to have the grant issued to the respondent be set aside on grounds of misrepresentation of facts. One of the aspects of the objection the proceedings was to challenge how some of the purchasers obtained the titles of the resultant subdivisions. In the event that there may have been bona fide purchasers for value for the resultant titles, the best way to resolve the objection proceedings was by way of viva voce evidence to allow all the affected parties to be heard.
25. Therefore, I am convinced that the circumstances present good grounds for varying and rescinding the consent order dated 4/7/2023 for the sole reason that the 2<sup>nd</sup> interested party was not represented when the consent was entered and through its Counsel made reservations about it.
26. In that regard, the following orders do hereby issue: -
  - a. The consent order dated 4/7/2023 between Beatrice Atieno Ongadi and Peter Odhiambo Ongadi is hereby set aside and/or vacated.
  - b. An order is hereby issued restraining Beatrice Atieno Ongadi, Peter Odhiambo Ongadi and the Land Registrar Migori County from dealing in any way with Land Parcel Numbers Kamagambo/Kabuoro/5959 and 5960 to the detriment or contrary interest of Cogerta Company Limited.
  - c. Costs awarded to the 2<sup>nd</sup> interested party.

**DATED, SIGNED AND DELIVERED AT MIGORI THIS 6<sup>TH</sup> DAY OF MAY 2024**

**R. WENDOHO**

**JUDGE**

Ruling delivered in the presence of;



Ms. Awinda holding brief for Mr. Arika for the Objector.

No appearance for the Respondent.

No appearance for the 1<sup>st</sup> Interested Party.

Ms. Theuri holding brief Mr. Oduk for the 2<sup>nd</sup> Interested Party.

Emma & Phelix - Court Assistants.

