



**In re Estate of Katana Ndarawe Omar (Deceased) (Succession Cause
172 of 1989) [2024] KEHC 4908 (KLR) (2 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 4908 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
SUCCESSION CAUSE 172 OF 1989**

G MUTAI, J

MAY 2, 2024

IN THE MATTER OF THE ESTATE OF KATANA NDARAWE OMAR (DECEASED)

BETWEEN

KAZUNGU KATANA NDARAWE PETITIONER

AND

KANZE KATANA NDARAWE 1ST INTERESTED PARTY

SODIA ENTERPRISES LTD 2ND INTERESTED PARTY

KAZUNGU KATANA NDARAWE 3RD INTERESTED PARTY

MARY MBODZE KATANA 4TH INTERESTED PARTY

SIDI KATANA NDARAWE 5TH INTERESTED PARTY

RULING

1. Before me are two Chamber Summons dated 16th August 2021 and 27th September 2021.
2. The Chamber Summons dated 16th August 2021 seeks the following orders:-
 - a. Spent;
 - b. Spent;
 - c. The Honourable Court be pleased to review the orders made on 25th November 2019 pursuant to the consent letter dated 13th November 2019;
 - d. The Honourable Court be pleased to order Sodias Enterprises Limited be heard in opposition to the Chamber Summons dated 17th June 2019 and that it be served with all the pleadings filed herein and be granted leave to file the necessary responses;



- e. In the alternative and without prejudice to the foregoing, the honourable court be pleased to set aside and or vary the orders made on 25th March 2019, *ex debito justitiae*, so as to give Sodía Enterprise Limited, a chance to be heard and participate in the Honourable Court's process;
 - f. Plot Nos. Kilifi/Mtwapa/457 and Kilifi/Mtwapa/1025 be reinstated to their status quo ante the court orders made on 25th November 2019 and the Land Registrar Kilifi Lands Registry, do re-open any closed registers or maintain Sodía Enterprises as registered proprietor of Plot Nos Kilifi/Mtwapa/457 and Kilifi/Mtwapa/1025;
 - g. The costs of this application be borne by the respondents in any event.
3. The application is premised on the grounds stated in the body of the summons and also on the Supporting Affidavit of Solomon M. Mutungi sworn on 16th August 2021.
 4. Mr. Mutungi deposed that the 2nd Interested Party is the registered owner of Plot Nos. Kilifi/Mtwapa/457 and Plot No. Kilifi/Mtwapa/1025, which plots are the subdivisions of Plot No. Kilifi / Mtwapa/217. The said plots are affected by orders issued on 25th November 2019 vide which the court adopted the consent of parties arising from consent letter recorded on 13th November 2019 and filed on 18th November 2019 between the Petitioner and the 1st Interested Party. The orders revoked the letters of administration issued and confirmed in favour of the Petitioner and cancelled and nullified all transfers made in respect of Plot No. Kilifi /Mtwapa/217 and reverted the same to the deceased's name. The effect of the said orders is to dispossess the 2nd Interested Party without according him a hearing.
 5. He further stated that at the time of making the said orders the 2nd Interested Party was not aware, neither was it notified, heard or made a party to the proceedings. That the 2nd Interested Party remains in full possession of the subject property, and carries out farming activities. That the 2nd Interested Party has developed the suit property by erecting a caretaker's house and a toilet, planting various food crops, mainly maize and by occupying and possessing the same. The 2nd Interested Party only learnt of the dispute in May 2021 when he was erecting the caretaker house when the children of the 1st Interested Party showed up to stop the construction. He reported the issue at Ndongya Police Post, Mtepeni Area, Mtwapa, on 13th May 2021. From the police station, he received a call from Mr Kutwa, claiming to be a relative of the 1st Interested Party, requesting a meeting. The meeting took place and was attended by Mr. Kutwa (Mzee wa Mtaa), his two sons, his contractor as well as his nephew. During the said meeting, he was told he had to enter into new negotiations on the purchase of the subject plots, which he declined.
 6. He averred that a search at the Lands Registry, Kilifi, showed that the 2nd Interested Party was still registered as the proprietor of Plot No. Kilif/Mtwapa/457. However, he couldn't trace the file for plot No. Kilifi/Mtwapa/1025, and hence no search was conducted.
 7. He stated that the 2nd Interested Party bought the subject property from Peter Mbui Mbogori in the year 2000 and that the 1st Interested Party is his neighbour, that notwithstanding, the 1st Interested Party had never informed him of any dispute. The said suit properties did not form part of the estate of the deceased herein. The 1st Interested Party joined the proceedings after the confirmation of the grant. She did not seek leave to be enjoined in the proceedings and thus was not a proper party. It was contended that the consent was entered into erroneously.
 8. In response, the 1st and 3rd Interested Parties filed a replying affidavit sworn on 4th October 2023. They stated that 2nd Interested Party is a stranger to their family and that none of their family members sold the said plots to it as claimed. They alleged that the 2nd Interested Party bought the plot from



intermeddlers, as it hadn't proven how it acquired the said property and thus cannot plead to be an innocent purchaser for value without notice.

9. Further, at the time of his demise, the deceased had three children who were underage. The interests of the minors were not taken into account, as a guardian was not appointed to protect their rights. Further, the letter of the chief was not annexed to the petition.
10. They further stated that when the present petition was filed, it was filed as the estate of Katana Ndarawe (deceased); the name Omar was added later without leave. Section 66 of the *Law of Succession Act* was not adhered to during the filing of this case. The grant issued does not state the suit plot, and thus, it's not clear how the same was subdivided. It was thus urged that the same needs to be revoked and the titles cancelled. They urged the court to dismiss the 2nd Interested Party's application.
11. The 2nd Interested Party filed a Further Replying affidavit sworn by Solomon M. Mutungi on 26th October 2023.
12. Mr Mutungi stated that it is un-procedural for the 1st Interested Party's to join the same proceedings where he is also the Petitioner and that the same amounts to an abuse of court process. The 4th and 5th Interested Parties are guilty for mispresenting themselves as beneficiaries who were surviving at the of the death of the deceased.
13. He stated that the 2nd Interested Party holds valid titles which cannot be annulled in the manner proposed by the Respondents but only by the Environment and Land Court. The consent judgment sought to be set aside would have led to the dispossession of the 2nd Interested Party without a hearing. He urged the court to allow the 2nd Interested Party's application.
14. The 2nd Interested Party, through its advocates Njoroge & Katisya Advocates, filed its written submissions dated 25th October 2021.
15. Counsel submitted that there were no signs or defects on the titles held by Peter Mbui Mbogori, and there is no dispute between the said individual and the estate of the deceased herein. Thus, he is a bona fide purchaser for value without notice.
16. Counsel further submitted that the Respondents had the duty to inform the court that the orders they were seeking were against parties not before the court, which they didn't. Thus, the 2nd Interested Party was condemned unheard. Counsel urged the court to allow the application.
17. The 2nd Interested Party, through its advocates, filed Supplementary Submissions dated 16th November 2023.
18. Counsel submitted that the order for joinder of the 2nd Interested Party was granted on 18th August 2021, and the same has not been appealed against. The 2nd Interested Party's titles were cancelled by the order of the court on 25th November 2019. The 2nd Interested Party was condemned unheard as no evidence has been led to show that it was involved in fraud. That being the case, it is entitled to the orders it seeks.
19. The second application seeks the following orders: -
 - a. Spent;
 - b. That leave be granted to enjoin the 4th and 5th Interested Parties/Applicants to these proceedings and the said applicants be represented by the firm of Ambwere T.S & Associates Advocates;



- c. That this Honourable Court be pleased to allow the Interested Parties/Applicants to execute their pending application for revocation of the grant pending in the suit herein; and
 - d. That the Interested Parties/Applicants be allowed to proceed forthwith to confirm the grant in High Court Succession Cause No. 64 of 2017; In the Matter of the estate of Katana Ndarawe Omar (deceased).
20. The said application is based on the grounds stated in the body of the application and also on the Supporting Affidavit of Kazungu Katana Ndarawe and Kanze Katana Ndarawe, sworn on 27th September 2021.
 21. They stated that all was well until the 2nd Interested Party got into their plot and started putting up illegal structures. They averred that the allegation that Kazungu Katana Ndarawe is the petitioner is fraud as he did not sign papers and or appoint an advocate to file the petition. The death certificate used to file the petition is different from what is in their possession. They did not instruct the said firm of advocates to file the current petition neither did they consent to the same. It was further averred that the certificate of confirmation of grant did not include the beneficiaries. The title was issued to the deceased on 2nd October 1991 two months before it was confirmed.
 22. They consented to the orders of 25th November 2019 being set aside as they were not aware of how the 1st Interested Party was joined in the suit neither did she instruct any advocate to do so. They urged the court to set aside the said orders and allow them to prosecute the application for revocation of the grant.
 23. In response the 2nd Interested Party filed a Replying Affidavit sworn on 18th July 2023 sworn by its director Solomon M. Mutungi.
 24. He stated that the wishes of the 1st Interested Party to have the process commence and for the grant obtained by the Petitioner set aside raises a conflict of interest and that in his knowledge the 3rd interested party and the petitioner are one and the same person thus the petitioner cannot act in two capacities as it amounts to an abuse of the court process. Allowing the 1st, 3rd, 4th and 5th Interested parties to represent the Petitioner would compromise the suit.
 25. He further stated that the Chamber Summons dated 17th June 2019 is yet to be heard and determined and that the procedure for revocation of grant would require that parties present evidence to challenge the same.
 26. He stated that the Petitioner, who is also the 3rd Interested Party, and the 1st Interested Party's intention is to dispossess the 2nd Interested Party. The 2nd Interested Party is an innocent purchaser. The family of the deceased has all along been aware of its ownership and occupation of the two titles it holds on the suit premises since the year 2000 when it took occupation. It has carried farming on the said suit properties with the full knowledge of the deceased's family since then. He urged the court to give directions on the hearing and determination of the application dated 17th June 2019.
 27. I have considered the applications and the responses thereto. In my view the issue that require my determination are: -
 - a. Whether the orders of 25th November 2019 should be reviewed and or set aside; and
 - b. Whether the 4th and 5th Interested Party should be enjoined in this suit.
 28. The consent dated 13th November 2019 was adopted by the court on 25th November 2019 in the following terms: -



- a. The grant of letters of administration issued and confirmed herein be and is hereby revoked accordingly;
 - b. The subsequent subdivisions and transfers made on Plot No. Mtwapa/Kilifi /217 made following the issue of the grant be nullified and the said plot do revert to the name of the deceased;
 - c. The Land Registrar, Kilifi District, do re-open the register for the aforesaid plot for purposes of effecting order (ii) above without gazettement;
 - d. There be no orders as to costs.
29. On whether the consent order should be set aside, I am guided by the court in the case of *Intercountries Importers and Exporters Limited v Teleposta Pension Scheme Registered Trustees & 5 others* [2019] eKLR where the court stated: -

“The principles that appertain to setting aside of a consent orders are well established in a line of cases including *Brooke Bond Liebig v Mallya* (1975) EA 266 where Mustafa Ag. VP stated thus: -

“The compromise agreement was made an order of the court and was thus a consent judgment. It is well settled that a consent judgment can be set aside only in certain circumstances, e.g on grounds of fraud or collusion, that there was no consensus between the parties, public policy or for such reasons as would enable a court to set aside or rescind a contract. In this case the parties and their advocates consented to the compromise in very clear terms; they were certainly aware of all the material facts and there could not have been any mistake or misunderstanding. None of the factors which could give rise to the setting aside of a consent agreement existed.”

And in the case of *Flora N. Wasike vs Destimo Wamboko* [1988] eKLR Hancox, JA cited Setton on Judgments and 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.”

Essentially, the above cited authorities are clear that a consent Order will only be set aside if it can be demonstrated that it was procured through fraud, non-disclosure of material facts or mistake or for a reason which would enable a court set it aside.”

30. The foregoing notwithstanding the parties herein have conceded to the setting aside of the impugned consent orders. That being the case I allow the same.
31. On whether the intended interested party should be joined into these proceedings, the court in the case of *Gladys Nduku Nthuki v Letshego Kenya Limited; Mueni Charles Mainigi (Intended Plaintiff)* [2022] eKLR stated: -

“The relevant tests for determination whether or not to join a party in proceedings were restated by Nambuye, J (as she then was) in the case of *Kingori v Chege & 3 Others* [2002]



2 KLR 243 where the learned Judge stated that the guiding principles when an intending party is to be joined are as follows:

1. He must be a necessary party.
2. He must be a proper party.
3. In the case of the defendant there must be a relief flowing from that defendant to the plaintiff.
4. The ultimate order or decree cannot be enforced without his presence in the matter.
5. His presence is necessary to enable the Court effectively and completely adjudicate upon and settle all questions involved in the suit.”

32. Upon consideration of all the issues raised in this matter it is my view that the 4th and 5th interested parties are necessary and proper parties in this case. In the circumstances, I grant them leave to join these proceedings.

33. Consequent to the foregoing I hereby direct that the Chamber Summons application dated 17th June 2019 shall be heard on merits on a date to be given by the Court.

34. This being a succession cause, I make no orders as to costs.

35. Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 2ND DAY OF MAY 2024.

GREGORY MUTAI

JUDGE

In the presence of:-

Mr Njoroge for the 2nd Interested Party;

Mr Lijoodi for the 1st, 3rd, 4th and 5th Respondent; and

Arthur – Court Assistant.

