



REPUBLIC OF KENYA



**In re Estate of Gerishon Kamau Kirima (Deceased) (Succession Cause
1298 of 2011) [2024] KEHC 12886 (KLR) (Family) (11 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12886 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

FAMILY

SUCCESSION CAUSE 1298 OF 2011

PM NYAUNDI, J

OCTOBER 11, 2024

IN THE MATTER OF THE ESTATE OF GERISHON KAMAU KIRIMA (DECEASED)

RULING

1. The Application for determination is dated 25th July 2024 filed by Bishop Jane Gathoni Kirima (the Applicant). It seeks the following orders;
 1. That the Partial Certificate of Confirmation of Grant issued by the Honourable Court in this matter on 13th December 2023 be varied to order the subdivision into equal parts of the property known as Land Reference 5908/8 and the property known as 6825/2, and the equal transfer of 50% of the resulting portions to the 15 beneficiaries.
 2. That the Partial Certificate of Confirmation of Grant issued by the Honourable Court in this matter on 13th December 2023 be varied to order the subdivision into equal parts of the property known as Land Reference 5908/8 and the property known as 6825/2, and the equal transfer of 50% of the resulting portions to the estate of Gerishon Kamau Kirima pending the determination of the claim by Wanjau Kirima and further orders of the court.
 3. That the order requiring that an escrow account be opened by the Administrators in favour of the estate pending the determination of the claim by Wanjau Kirima and further orders of the court be vacated.
 4. That the Partial Certificate of Confirmation of Grant issued by the Honourable Court in this matter on 13th December 2023 be varied to order the subdivision into equal parts of the property known as Land Reference 336/39 and the property known as Kajiado/Kisaju/103 and the equal distribution and transfer of titles the resulting portions to the 15 beneficiaries of the estate.
 5. THAT costs of this application be in the cause.



2. The Application is brought pursuant to Section 3A of the *Civil Procedure Act*, Order 45 Rule 1 (1) (b), Rule 49 and Rule 73 of the *Probate and Administration Rules* and was supported by a sworn affidavit by the Applicant of even date. She filed a supplementary affidavit sworn on 20th September 2024.
3. Anne Wangari Kirima opposed the application vide a Replying Affidavit dated 19th September 2024.

Applicant's Case.

4. The Applicant's case is that, the parties entered into a consent which was adopted as an order of the court on 30th October 2013. Properties known as LR No. 5908/8 (Njiru Property); LR No. 6825/2(Njiru Property) be distributed equally among all beneficiaries taking into consideration the claim by Wanja Kirima; LR No. 336/39 (Kariobangi Property) and Kajiado/Kisaju/103 be distributed equally among all beneficiaries.
5. On 13th December 2023, this court issued a Partial Certificate of Confirmation of Grant. It directed that the estate of the deceased be distributed in the following terms;
 - a. Property known as Land Reference No. 5908/8 and 6825/2 be subdivided and the resulting portions excised therefrom be sold and the proceeds therefrom be disbursed as follows;
 - i. 50% to be shared equally amongst all beneficiaries.
 - ii. 50% to be held in an Escrow Account in the names of the administrators to be in favor of the estate pending the determination of the claim by Wanjau Kirima and further orders of the court.
 - b. Property known as Land Reference No. 5908/8 and 6825/2 be subdivided and the resulting portions excised therefrom be sold and the proceeds therefrom be disbursed as follows;
 - i. A separate Escrow Account be opened by the administrators for the purposes of settling the expenses relating to the transaction and other liabilities at Equity Bank within 7 days.
 - c. The property known as Land Reference 336/39 and the property known as Kajiado/Kisaju/103 and the equal distribution and transfer of titles the resulting portions to the 15 beneficiaries of the estate.
 - d. All shares in Nairobi Stock Exchange together with all uncollected dividends be shared equally between the 15 beneficiaries named in the consent order of 30th October 2013 and in terms with the orders of 17th October 2015 and 5th October 2023.
 - e. An Escrow Account in the names of Teresia Wairimu Kirima and Anne Wangari Kirima be opened and Kenya Shillings Eight Million (Kshs.8,000,000) be opened to cater for Auditors Fees, Consultant Fees and other transactions in relation to Kenya Revenue Authority and other liabilities.
 - f. Dividends payable to the deceased by Wangu Investment to be shared equally amongst all 15 beneficiaries.
6. According to her, the administrators are not transparent and accountable in implementing the Partial Certificate of Confirmation of Grant. The family appointed two valuers to value the Njiru Property. She carried out an independent valuation. That they agreed on the sale prices of the properties. However, the administrators instructed the firm of Kaplan & Straton who issued letters of offers to different buyers quoting sale prices that differed from the agreed prices. That the administrators have



not explained why the prices vary. They have also not accounted for the plots sold and the amount collected from the sale.

Respondent's Case.

7. The Respondent's /Administrator's case is that, the consent was recorded in court where all the beneficiaries were present. That the Applicant has not met the threshold to set aside or vary a consent. That there was a review in the sale prices which the Applicant and other beneficiaries were aware of. There has been transparency on how many plots have been sold and the amount collected so far. That they have received Kshs. 17,000,000 from the proceeds of sale and 50% have been distributed to the beneficiaries in accordance with the partial confirmation of grant. They urged the court to dismiss the applicant's application with costs.

Analysis And Determination.

8. The applicant seeks a review of the consent orders adopted by the court on 13th December 2023 following mediation between the parties. It is trite law that a consent once adopted by the court becomes binding and enforceable in the same way as a contract entered into between the parties. Therefore, a consent judgement may only be set aside on the same ground upon which a contract may be vitiated e.g. fraud misrepresentation, coercion or mistake.

9. The locus classicus case on factors to be considered when setting aside of consent orders was discussed in the case of *Flora Wasike v Desterio Wamboko* [1982-1988] IKAR 625, at page 626 wherein it was held:

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

10. The power to set aside consents must be exercised within the framework of Section 80 of the [Civil Procedure Act](#) and Order 45 Rule 1. Section 80 of the [Civil Procedure Act](#) provides as follows:

80. Any person who considers himself aggrieved-

- (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
- (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgement to the court, which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

11. Order 45 Rule 1 of the Civil Procedure Rules, 2010 provides as follows;

45. Rule 1 (1) Any person considering himself aggrieved-

- a. By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- b. By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain



a review of the decree or order, may apply for review of judgement to the court which passed the decree or made the order without unreasonable delay.”

12. A clear reading of the above provisions shows that Section 80 gives the power of review while Order 45 sets out the rules. The rules restrict the grounds for review. They lay down the jurisdiction and scope of review. They limit review to the following grounds- (a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or; (b) on account of some mistake or error apparent on the face of the record, or (c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay.
13. In *Kenya Commercial Bank Ltd Versus Specialized Engineering Co. Ltd* [1982] KIR 485, it was held that an order entered into by consent 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 representation or ignorance of such facts in general for a reason which would enable the court to set aside an agreement. Justice Harris at page 493 opined:

“The marking by a court of a consent order is not an exercise to be done otherwise than on the basis that the parties fully understand the meaning of the order either personally or through their advocates, and when made, such an order is not lightly to be set aside or varied save by consent or one or other of the recognized grounds.”
14. The role of this court is to determine whether the consent orders adopted 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 or in general for a reason which would enable the court to set aside the orders.
15. The Applicant has not proved the existence of any of the ingredients which would merit the setting aside the partial confirmation of grant of 13th December 2023. Reasons wherefore it is my finding that the application dated 25th July 2024 is in want of merit and is consequently dismissed with costs to the 2nd Administrator who responded to the Application.

SIGNED DATED AND DELIVERED IN VIRTUAL COURT THIS 11TH DAY OF OCTBER, 2024.

P. NYAUNDI

JUDGE

