



REPUBLIC OF KENYA



KENYA LAW
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**Muchogu & another v Muchogu (Civil Appeal 84 of 2019)
[2023] KEHC 3892 (KLR) (2 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 3892 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL 84 OF 2019
MM KASANGO, J
MAY 2, 2023**

BETWEEN

JOEL KAGO MUCHOGU 1ST APPELLANT

SAMWEL GITHEGI MUCHOGU 2ND APPELLANT

AND

NATHANIEL KAMAU MUCHOGU RESPONDENT

(Being an application to set aside a consent in this partial appeal from a portion and/or part of the ruling made by (Hon. C. Kutwa, SPM) at the Senior Principal Magistrate Court Githunguri dated 16th May, 2019 in Succession No. 69 of 2017)

RULING

1. The appellants and the respondent are all beneficiaries of the estate of Charles Muchogu Kago deceased. I will steer away from discussing the details of the litigation before the trial court and even before this Court in this appeal except as the same impacts on the Notice of motion application dated December 15, 2021, the subject application.
2. The subject application is filed by four persons who approach this Court on the ground that they purchased plots of land within the parcel No 6845/111 Gitunguri Njiru Farm hereafter the Njiru Farm from the deceased in his lifetime. One of the beneficiaries and son of the deceased namely, Nathaniel Kamau Muchogu (now deceased) hereafter referred to as Nathaniel deceased petitioned before the Githunguri SPM in Succession No 69 of 2017 for grant of letters of administration intestate in the deceased's estate. In so doing, Nathaniel deceased listed the applicants, amongst others, as interested parties to the estate of the deceased. When Nathaniel deceased filed the summons of confirmation of grant, affidavits in protest to his proposed mode of distribution were filed by Samuel Githegi Muchogu, Tabitha Wambui Muchogu, Joel Kaago Muchogu and Peter Nduati Muchogu. The court in hearing the protests made a Ruling dated May 16, 2019.



3. The protests related to the manner of distribution of deceased's estate. The trial court by its Ruling determined distribution of the estate but I will zero in on the property that is the subject of the present application. To reiterate the applicants of the subject application alleged that they purchased the Njiru Farm from the deceased during the deceased's life time.
4. Following the trial court's Ruling of May 16, 2021 this appeal was filed by Joel Kago Muchogu and Samwel Githegi Muchogu. The final prayers in this appeal reads as follows:
 - a. The appeal be allowed.
 - b. That the ruling of the honourable Magistrate's court (Mr Kutwa) sitting at the Senior Principal Magistrate's Court, Githunguri delivered on the May 16, 2019 be set aside as regards the distribution of Githunguri/Kamith/T.70'A':
 - c. A declaration that plot H1 does not exist and lot V should be included in the confirmation of grant and be allotted to Monica Wambui Chuchu."
5. The parties to this appeal are Joel Kago Muchogu and Samwel Githegi Muchogu as the appellants and Nathaniel Kamau Muchogu (deceased) as the respondent. This Court by an order of December 15, 2021 directed this appeal to be heard by written submission. The appellants filed their submissions on February 5, 2021 supported by legal authorities while the respondent (Nathaniel deceased) filed his written submission on February 26, 2021. When the appeal was listed before me on November 17, 2021 the appellant's learned advocate Ms Njeri Gathua informed the court that the respondent (Nathaniel deceased) had passed away and needed to be substituted. The hearing of the appeal was adjourned for that reason.
6. Njeri Gathua advocate filed a limited grant issued before this Court in Succession Cause No 123 of 2021 in respect of the Estate of Nathaniel deceased. That Limited grant was issued to Lydia Wambui Mburu (Lydia) and Martha Njeri Kamau (Martha). On November 8, 2021 Njeri Gathua Advocate filed her notice of representation for Lydia and Martha. In other words that advocate by that notice of appointment was acting for both the appellants and both the respondents (Lydia and Martha) who substituted Nathaniel deceased. That advocate simultaneously filed a consent on distribution of the deceased's estate. That consent is signed by the appellants and Lydia and Martha. That distribution allocated part of the Njiru Farm, which the applicants alleged to have purchased from the deceased. That distribution was to persons other than applicants (purchaser).
7. The applicants have moved by the subject application for the setting aside of that consent on the ground that the trial court's Ruling of May 16, 2019 determined that they had purchased plots E, G, C, G, H, D1, E1, F1, G1 and H1 of the Njiru Farm from the deceased. Those are the plots that were distributed to other persons other than the purchasers by the consent dated November 8, 2021.
8. Generally, a consent order cannot be set aside unless it is impeached on fraud or any other ground which invalidates a contract/agreement. This indeed was what was stated in the case [*Kericho Guest House Enterprises Limited v Kenya Breweries Limited \(2018\) eKLR*](#) thus:-

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“23. In its decision in [*SMN v ZMS & 3 Others \[2017\] eKLR*](#), the Court of Appeal stated as follows:-

‘17. There is no dearth of authorities on the law governing the setting aside of consent judgments or orders, and we are grateful to counsel for citing some of them before us.



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

9. The effect of the consent dated November 8, 2021 is two folds: Firstly, the applicants (purchasers) will be denied a right to be heard since they were not parties of that consent nor of this appeal; and secondly, the consent has the effect of overturning the trial court’s Ruling with regard to the applicants/purchaser’s rights, yet the purchasers’ right is not the subject of challenge in this appeal.
10. The right to be heard is protected under the Constitution. This is what the court of Appeal held in the case of Richard Ncharpi Leiygu v Independent Electoral And Boundaries Commission And 20 Others (2013) eKLR as follows:

“The right to a hearing has always been a well-protected right in our Constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality.”
11. The consent of November 8, 2021 had the effect of revoking the applicants/purchasers’ right to title of the identified plots on Njiru Farm. This taking away of the applicants/purchasers’ right was done without giving them a hearing since they are not parties to this appeal. In view of the fact the applicants/purchasers were not made party to the consent, a consent which denied them their right recognized by the trial court, and this being done without involving them smacks of collusion and/or fraud against the applicants/purchasers. Their right was hijacked through what I term as an illegal consent. The consent therefore falls to be set aside on the grounds that it was made by means of misrepresentation and was also though unconscionable conduct. This is in view of the holding of the trial court, through its Ruling of May 16, 2019 which holding set out below, is not challenged in this appeal. Excerpts of the Ruling as follows:

“The protestors were not opposed to the people [the applicants in this appeal] who bought plots in Githunguri/Njiru Farm/6845/111 from getting their legally acquired shares upon proof of payment of the requisite consideration...

From the submissions and evidence of both parties, it is not in dispute that the following plots A, B, C, E, G, H, J, K, L, M, N, S, T, N, U, V, D1, E1, F1, G1 and H1 were sold or given out by the deceased. The other remaining plots are disputed by the protestors. I therefore direct that the undisputed plots be given to their owners by the administrators and the same is confirmed accordingly. For the disputed plots, the purchasers to present their papers to the administrators for vetting purposes and issuance of the necessary documents.”
12. As stated above, that holding by the trial court is not the subject of this appeal and this is clearly revealed in the heading of the memorandum of appeal and the prayers thereof reproduced hereabove. That holding indeed recognized the rights of those who purchased their plots from the deceased in his life time.
13. There is clearly justification to set aside the consent for the reasons set out above and also because the consent was entered with non-parties to this appeal, since there is no formal order of this court substituting Lydia and Martha for Nathaniel deceased in this appeal.

Disposition

14. The notice of motion dated December 15, 2021 is allowed in the following terms:



- a. The consent dated November 8, 2021 is hereby declared null and void and is expunged from the record of this appeal.
- b. The costs of the application dated December 15, 2021 shall be paid by Joel Kago Muchogu and Samwel Githegi Muchogu to Margaret Wambui Njoroge, David Muchoki Muriuki, Zipporah Nyasuguta Mogoi and Edward Mungai Ngugi.

Further, in exercise of this Court's inherent jurisdiction, I order that:

- c. Nathaniel Kamau Muchogu decreased be formally substituted in this appeal within 21 days from this date hereof. To that end, the notice of change of advocate filed by the law firm of Njeri Gathua dated November 8, 2021 is expunged from record of this appeal.
- d. In the event this appeal relates to the plots purchased by Margaret Wambui Njoroge, David Muchoki Muriuki, Zipporah Nyasuguta Mogoi and Edward Mungai Ngugi those persons shall be joined as respondents in this appeal within 21 days of this date hereof.
- e. Failure to make substitution as ordered in paragraph (c) above, or failure to join in this appeal the applicant as ordered in paragraph (d) above within the time stated in those orders (c) and (d) above this appeal shall stand as struck out and this file shall henceforth be closed.

15. Orders accordingly.

RULING DATED AND DELIVERED AT KIAMBU THIS 2ND DAY OF MAY, 2023.

MARY KASANGO

JUDGE

Coram:

Court Assistant: Mourice/Julie

For Kinyua Mwaniki & Winaina Advocates for applicants:- N/A

For Njeri Gathua Advocates for the Appellants:- Ms Gathua

Ruling delivered virtually.

