



REPUBLIC OF KENYA



KENYA LAW
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Ireri v Wambugu; Njagi & another (Interested Parties) (Miscellaneous Application 12 of 2002) [2023] KEHC 23945 (KLR) (17 October 2023) (Ruling)

Neutral citation: [2023] KEHC 23945 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
MISCELLANEOUS APPLICATION 12 OF 2002
LM NJUGUNA, J
OCTOBER 17, 2023**

BETWEEN

CHARLES NDWIGA IRERI APPLICANT

AND

DAVID MURIITHI WAMBUGU RESPONDENT

AND

HENRY IRERI NJAGI INTERESTED PARTY

DAVID MBUI MBOGO INTERESTED PARTY

RULING

1. The applicant filed summons dated January 14, 2021 premised on the grounds on its face and in the supporting affidavit thereof, seeking orders that:
 - a. The honorable court be pleased to review and/or set aside the consent order issued on March 31, 2003 and all consequential orders;
 - b. The costs of this application be borne by the respondent.
2. On March 31, 2003, this court, being differently constituted, issued a consent order that the grant of letters of administration made to Charles Ndwiga Ireri on October 9, 1998 in Succession Cause No. 79 of 1998 be revoked and annulled. The applicant herein avers that he did not consent to such revocation. He stated that even though the court record shows that he was present in court, he claims that he was not present in court when the alleged consent was recorded. That he only learnt of the revocation of the grant after he was served with application dated November 19, 2019. He added that the subject property in the suit has since been sold to the interested parties herein who are the current registered owners.



3. The respondent filed a replying affidavit stating that the applicant has delayed by 17 years in bringing the application and that the same should not be allowed. That he cannot claim that he was not in court when the consent order was given because the record of the court shows that indeed he was present. It was his case that the consent orders could only be challenged on the same grounds as those that would warrant a breach of agreement between the parties. That the applicant knowingly sold the parcels of land known as Ngandori/Kiriari/3941 and Ngandori/Kiriari/3942 and wants to defeat justice through this application.
4. The application was disposed of by way of written submissions. Only the respondent filed their written submissions.
5. The respondent submitted that the applicant has not demonstrated sufficient grounds for the consent order to be reviewed and set aside. He relied on order 45 rule 1 of the Civil Procedure Rules on the conditions under which the court may review its orders. It is his argument that consent orders can only be set aside where fraud is alleged as in the case of *Broke bond Liebig (T) Ltd v Maliya* [1975] EA 266. It was his case that the application served to hide the fact that the applicant was not entitled to the property in the first place and he wants to use this court to sanctify his actions. That it is still questionable as to how the applicant, who is the uncle of the deceased, was appointed administrator of the estate of the deceased who had parents and siblings. He urged the court to dismiss the application as it is prejudicial to the respondent.
6. The issue for determination herein is whether the consent order meets the threshold for review and setting aside.
7. The impugned order arises from this court and by consent of the parties. According to the court proceedings of March 31, 2003, the court was scheduled to hear the application dated March 11, 2002. On the day of the hearing, the court noted that both the applicant and the respondent were present and wished to record a consent. The court noted “order by consent application dated 11.03.02 granted as prayed”. The order was extracted on the same day.
8. It is obvious that no appeal is allowed against an order arising from the consent of the parties but the same may be reviewed by the issuing court. This is provided for under sections 67 and 80 of the Civil Procedure Act as follows:
Section 67. Appeal from original decree
 - (1) An appeal may lie from an original decree passed ex parte.
 - (2) No appeal shall lie from a decree passed by the court with the consent of parties.Section 80 Review
80. Review 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 judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.
9. A consent recorded between parties and adopted by the court have the effect of a legally binding contract and cannot be reviewed or set aside unless on the same grounds as would apply to setting aside



of a contract. The court made this observation in the case of *Hirani v Kassam* [1952] 19 EACA 131 where the Court of Appeal held;

“It is now well 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: see the decision of this court in *JM Mwakio v Kenya Commercial Bank Limited* Civ Apps 28 of 1982 and 69 of 1983. In *Purcell v F.C. Trigell Ltd* [1970] 3 All ER 671, Winn LJ said at 676:-

“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 the knowledge of the material matters by legally competent persons, and I see no suggestion here that any matter that occurred would justify the setting aside or rectification of this order looked at as a contract.”

10. Further, in the case of *KCB Limited v Specialized Engineering Co. Ltd* [1982] KLR the court held:

“A consent order entered into by counsel 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 in misapprehension or ignorance of suit facts in general for a reason which would enable the court to set aside an agreement.”

11. The applicant was noted as present in court when the consent was recorded. He has not demonstrated that the consent was recorded through fraud, undue influence or collusion. In fact, he has not pleaded these flaws in his application. The applicant only prays that the court reviews the consent order and sets it aside because he was allegedly absent in court when the said order was granted. In finding this as desperately insufficient, I do wonder if the applicant means that the person who was present in court on March 31, 2003 was not him; did someone else impersonate him? If this was the argument, then it ought to have been sworn in the supporting affidavit to this application and proof provided. All I have to refer to is the previous court record and the orders issued and extracted. Unfortunately for the applicant, based on this record, the applicant was in court and he cannot refute this, not without providing proof.

12. Ultimately, I find that the application lacks merit and is hereby dismissed, with no order as to costs.

13. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 17TH DAY OF OCTOBER, 2023.

L. NJUGUNA

JUDGE

.....for the Applicant

.....for the Respondent

.....for the 1st Interested Party

.....for the 2nd Interested Party

