



REPUBLIC OF KENYA



In re Estate of Hezekiah Ougo (Deceased) (Succession Cause E005 of 2021) [2024] KEHC 14187 (KLR) (15 November 2024) (Ruling)

Neutral citation: [2024] KEHC 14187 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
SUCCESSION CAUSE E005 OF 2021**

DK KEMEL, J

NOVEMBER 15, 2024

IN THE MATTER OF THE ESTATE OF HEZEKIAH OUGO (DECEASED)

BETWEEN

FRED OUGO 1ST APPLICANT

JACKSON OCHIENG 2ND APPLICANT

AND

LUCY ADHIAMBO OUGO 1ST RESPONDENT

OKATCH & PARTNERS ADVOCATES 2ND RESPONDENT

RULING

1. The Applicants herein filed an application dated 8/9/2023 pursuant to Sections 1A, 1B and 3, 63(e) and 80 of the Civil Procedure Act, Order 45 of the Civil Procedure Rules, section 74 of the Law of Succession Act seeking the following reliefs:
 - a. Spent.
 - b. This Honourable court be hereby pleased to review, vary and/or set aside the consent order recorded in court on 4th July 2023 on account of gross misrepresentation and withholding of information by the Respondents and order a current independent valuation of the property known as Nairobi Block 23/357 (formerly LR/ 209/6899) located in Kileleshwa Area of Nairobi County (hereinafter the “property”) to ascertain the fair market value in accordance with the terms of the certificate of confirmation of grant dated 14/12/2022 for purposes of determining an equal, fair and honest compensation to the Applicants in exchange for relinquishing their rights in the proposed joint venture project over the said property.
 - c. The Honourable court be pleased to order that the aforesaid joint independent valuation of the property be undertaken by the Applicants, Respondents and beneficiaries within fourteen



- (14) days from the date of such order failing which the Applicants be allowed unfettered access of the property to conduct the valuation of the said property to be used for purposes of determining the fair market value of the property.
- d. Upon valuation of the property as ordered, this Honourable court be pleased to review the financial terms of the consent in line with the resultant valuation report.
 - e. Costs of the application be borne by the Respondents.
2. The application is supported by the grounds set out on its face and by the supporting affidavit of Fred Ougo who is the 1st Applicant herein sworn on even date.
 3. The Applicants gravamen is inter alia; that the Applicants are beneficiaries and that the 1st Applicant is a co-administrator of the estate of the deceased; that the Respondents misrepresented and concealed pertinent information from the Applicants to induce them to enter into the consent recorded on 4/7/2023; that the Respondents concealed any information regarding the joint venture project from the Applicants such as the issue of valuation of the property namely Nairobi Block 23/357 (formerly LR 209/6899) in Kileleshwa area of Nairobi County; that the 1st Respondent purporting to be acting on behalf of the other beneficiaries has entered into a joint venture project with a developer and in which the Applicants view it to be shrouded in secrecy as it lacks transparency; that the developer later agreed to buy out the Applicants' shares in the property so as to allow the joint venture to proceed as regards the other beneficiaries; that the Applicants sought for an independent valuation of the property but were rebuffed by the Respondents; that the Respondents' conduct induced the Applicants to enter into the consent and agreed to do away with the need for an independent valuation of the property and accepted the valuation of Kshs130,000,000/= as presented by the Respondents and which had been conducted two years prior to the issuance of the grant; that upon the signing of the consent, the Applicants came across critical information that ought to have been shared with them prior to recording the consent; that the Applicants have now discovered that prior to the ruling of this court dated 5/4/2023, the 1st Respondent had presented herself as the sole nominee of the estate to the developer which was not correct as she was just one of the administrators of the estate; that the Applicants were coerced to accept that the pre-set valuation of Kshs130,000,000/= was the current one for purposes of the consent; that the Applicants have now discovered that prior to the entry of the consent, the 1st respondent executed a deed of vacation of the joint venture agreement wherein the developer undertook to compensate the 1st Respondent for loss of rent from the premises; that it is due to the said concealment and misrepresentation that has led the Applicants to approach this court for review of the terms of the said consent so as to ensure that they get a fair compensation of the market value of the property as they have always opted not to be part of the proposed joint venture project over the property but deserve to be fairly compensated; that there is a basis for setting aside and or varying the financial terms of the consent and that an independent valuation of the property be carried out; that the Applicants stand to suffer prejudice if the consent is not set aside.
 4. The application was opposed. The 1st respondent swore a replying affidavit on 29/11/2023 wherein she categorically denied the Applicants assertions and maintained that the Applicants were involved in all the consultations leading to the entry of the consent dated 4/7/2023.
 5. The Applicants filed a further affidavit through the 1st Applicant sworn on 9/2/2024 wherein he averred inter alia; that there were no consultations on the issue of the joint venture; that other beneficiaries are now up in arms against the 1st Respondent over her conduct in engaging in secrecy regarding the project and further purporting to act for all other beneficiaries without consultation; that his court must disregard the misleading statements by the Respondents and interrogate the real



issues ailing the full transmission of the estate of the deceased; that the consent should be set aside and the terms varied as there was material non-disclosure of facts and gross misrepresentation.

6. The application was canvassed by way of written submissions. Both parties duly filed and exchanged their submissions.
7. Learned counsel for the Applicants started off by indicating that the issue for determination is whether the Applicants have satisfied the conditions for setting aside a consent order as expounded in the case of Brooke Bond Liebig Vs Mallya [1975] EA 266 & Flora N. Wasike Vs. Destimo Wamboka [1988] eKLR. It was submitted that the consent dated 4/7/2023 was procured through fraud, non-disclosure of material facts or mistake or for any other reason which would enable a court properly exercising its jurisdiction, to set aside. It was further submitted that the Applicants were not aware that over and above the value of Kshs130, 000,000/= for which their rightful share was Kshs27, 857,126/=, there was an additional sum of Kshs 6,628,572/= paid to the 2nd Respondent and Kshs 7,200,000/= to the 1st Respondent which was available for distribution as part of estate. It was further submitted that this particular information was concealed by the respondents so as to steal a march against the Applicants and hence, the consent should be set aside *ex debito justitiae*.
8. Learned counsels for the Respondents raised one issue for determination namely whether this court should set aside the consent order recorded on 4/7/2023. It was submitted that the consent aforesaid was entered into after extensive consultations between, the Applicants and all beneficiaries and that they all settled on the sum of Kshs 130,000,000/= as the value to work with in respect of the property which was an average of two valuation reports. It was submitted that the Applicants have refused to do their part as agreed despite having been paid their dues but they now want more money, a classical act of greed. Learned counsel sought reliance on the case of Flora Wasike VS. Destimo Wamboko [1988] eKLR, and Board of Trustees National Social Security Fund VS. Michael Mwalo [2015] eKLR, Brooke Bond Liebig VS. Mallya [1973] EA 266.

It was further submitted that the Applicants are acting in bad faith as they have not even refunded the colossal sum paid out to them pursuant to the consent if indeed they do not want to be part of it. It was further submitted that the Applicants had filed a suit in a Nairobi High Court pursuing for their dues and that the same was later withdrawn after the payment was made. It was also submitted that the Applicants are not deserving of the order sought as they are acting in bad faith after participating in the consultations leading to the consent in question and that the application is meant to frustrate the distribution of the estate of the deceased in accordance with the certificate of confirmation of Grant. The Respondents sought for the dismissal of the application.

9. I have considered the rival affidavits and submissions filed herein. I find the only issue for determination is whether the Applicants have met the threshold for setting aside of the consent dated 4/7/2023.
10. Setting aside of consents entered into by parties is not a matter of course since certain conditions must be met. In the case of Flora Wasike Vs. Destimo Wamboka [1988] eKLR it was held as follows:

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

Again, in the case of Board of Trustees National Social Security Fund Vs. Michael Mwalo [2015] eKLR it was held:

“A court of law will not interfere with a consent judgement except in circumstances such as would provide a good ground for varying or rescinding a contract between parties. To



impeach a consent order or a consent judgment, it must be shown that it was obtained by fraud or collusion or by an agreement contrary to the policy of the court.”

Also in the case of Inter Countries Importers and Exporters Limited Vs Teleposta Pension Scheme, Registered Trustees and 5 Others [2019] eKLR the Court of Appeal held as follows:

“The principle that appertain to setting aside of a consent order are well established in a line of cases including Brook Bond Liebig Vs Mallya [1975] EA 266 where Mustafa Ag VP stated this and in the case of Flora N. Wasike Vs. Destimo Wamboka [1988] eKLR, Hancox J.A cited Seton on judgments and Orders (7th Edition) Vol. 1 Page 124 and reiterated thatessentially, 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 to set it aside.”

11. It was contended by the Applicants herein that the Respondents withheld crucial information regarding the property which turned out to be far in excess of the Kshs130,000,000/= that had been used as the basis of calculation of shares to them and that upon the discovery of the new evidence, they felt that they have been shortchanged. They have pointed out that the two Respondents herein later received some monies in the sum of Kshs 6,628,572/= and Kshs 7,200,000/= respectively. It was the view of the Applicants that some information was concealed by the Respondents so as to steal a march against them. The Applicants maintain that there was a variation of the joint venture agreement which has put them at a disadvantage as they have been denied an opportunity to receive a higher share as beneficiaries of the estate. They feel that they have been shortchanged.
12. I have perused the documents relied upon by both the Applicants and Respondents. It is noted that the joint venture agreement was entered into on 31/3/2023 and hence it is apparent that the Applicants had all along been aware of the same. It is instructive that the Applicants did express their intention to pull out of the said venture quite early. Thereafter, there were deliberations regarding the valuation of the property and that they used two valuations that had been conducted previously and that they later resolved to use the valuation of Kshs 130,000,000/= from where the Applicants shares were paid out. It is further noted that the consent entered on 4/7/2023 was done long after the issue of the joint venture had been discussed by the parties.
13. Even though the Applicants are claiming that the Respondents have gained a lot from the joint venture, it is my finding that even if the respondents managed to convince their partners in their joint venture for some extra monies regarding the property in question, then there is nothing wrong with the same. The Applicants having made known quite early that they would have nothing to do with the said joint venture project, should not turn around and seek to be paid more money. If the joint venture has somehow yielded some benefit, then the same should be for those supporting the joint venture project.
14. I have also noted that prior to the joint venture project, several consultations among the family members took place. It was out of these consultations that the Applicants opted not to be part of the said joint venture project. The issue of the joint venture had arisen much earlier as can be seen in the ruling of Aburili J dated 5/4/2023 wherein the 1st Applicant’s application dated 3/10/2022 was determined. Hence, I find the issue of the joint venture was well in the knowledge of the Applicants and the rest of the family members. I am not persuaded that the Applicants were kept in the dark regarding the issue of the joint venture and the valuation of the project prior to the entry of the consent. The Applicants were not duped regarding the said joint venture and that their expression not to board the joint venture was made by them of their own free will and volition. I also find that the Applicants had all the requisite information within their knowledge prior to the entry of the consent. Hence, their



reliance on the provisions of section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules is not helpful since there is nothing new that they have come to discover as all the issue regarding the project were well known to them. The alleged issues are not new matters which can be said to have been out of their reach and knowledge. Section 80 of the Civil Procedure Act provides as follows:

‘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 orders thereon as it thinks fit.

Similarly, Order 45 of the Civil Procedure Rules provides as follows:

1. Any person considering himself aggrieved-

(1)

- 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 a review of judgement to the court which passed the decree or made the order without unreasonable delay.

It is clear from the rival depositions and documents relied upon that the Applicants were well aware of the issue of the joint venture project way back in March, 2023 and that vide family consultations and meetings, they opted not to be part of the said project and were thus to be compensated for their shares in the estate while the rest of the family members continued with the joint venture project. The valuation report was agreed upon by the family members and it was agreed that the value of Kshs 130 million was agreed as the value of the property and which was used in the calculations of the shares due to the Applicants and which informed them prior to the entry of the consent. The Applicants had been involved in the consultations and all the issues were within their knowledge and thus



the same cannot now be ne matters. Upon the Applicants pulling out from the joint venture project, the rest of the beneficiaries went on with the project and engaged the developer and that if the said engagements brought some good tidings, then the same should go to the beneficiaries since the Applicants had made their choice to leave. I am not convinced that there were any new matters that were not within the knowledge of the Applicants at the time of the entry of the contract. Hence, the request for review or setting aside of the consent has not been properly established by the Applicants.

15. As regards the Applicants' claim vide their further affidavit sworn on 9/2/2024 that other family members have raised concerns over the secrecy in the joint venture project, it is noted that the said beneficiaries have neither sworn affidavits in support of the view held by the Applicants nor lodged objections to the mode of distribution of the estate of the deceased. It would appear that the rest of the family members except the Applicants are in favour of the joint venture project.
16. It is further noted that the Applicants have not expressly indicated that they are willing to return the monies already received in the event the consent is to be set aside. It is clear to me that the Applicants appear to suggest that they have made a bad bargain and now seek to scuffle the joint venture project. I find that they made their choices conscientiously and must now abide by them. If the joint venture has brought good tidings, then the same should be enjoyed by those in favour of the project.

The certificate of confirmation of Grant is clear that the joint venture project is owned by all the beneficiaries except the Applicants herein.
17. Looking at the rival affidavits by the parties, I have come to the finding that the Applicants have not convinced this court that there was fraud or concealment of material facts on the part of the Respondents leading to the consent dated 4/7/2023. I find that there were extensive consultations by the parties prior to the entry of the consent aforesaid. It is instructive that majority of the family members have thrown their weight behind the joint venture project. It is clear that the Applicants are out to scuttle or frustrate the joint venture project as they have deponed that they were not for it from the beginning and hence the present application is a form of protest to the same. This is despite the fact that the 1st Applicant herein is one of the administrators of the estate of the deceased and who is under obligation to discharge his duties as administrator by ensuring that the transmission processes are carried out so that the beneficiaries get their entitlements under the estate.
18. In view of the foregoing observations, it is my finding that the Applicants' application dated 8/9/2023 lacks merit. The same is dismissed. The Applicants are now directed to comply with the terms of the consent order dated 4/7/2023. This being a matter involving family members, there will be no order as to costs.

DATED AND DELIVERED AT SIAYA THIS 15TH DAY OF NOVEMBER, 2024.

D. KEMEI

JUDGE

In the presence of;

Kaula.....for Applicants



M/s Amutari for Okatch....for Respondents

Ogendo.....Court Assistant

