REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

SUCCESSION CAUSE NO. 141 OF 2010

IN THE MATTER OF THE ESTATE OF BENJAMIN MWANGI MBOGA (DECEASED

IN THE MATTER OF AN APPLICATION FOR SETTING ASIDE A CONSENT ORDER

BETWEEN

PETER MBUGUA MWANGI.....1ST APPLICANT

JOHN THUKU.....2ND APPLICANT

SAMUEL WANDAI.....3RD APPLICANT

AND

LEAH WANGARE.....1ST RESPONDENT

LABAN THEURI.....2ND RESPONDENT

RULING

[1] The application dated **23 May 2019** was filed herein by the three Applicants, **Peter Mbugua Mwangi, John Thuku** and **Samuel Wandai**, pursuant to **Section 47** of the **Law of Succession Act, Rule 63** of **the Probate and Administration Rules, Order 45** of the **Civil Procedure Rules, 2010,** and all other enabling provisions of the law. They seek the following orders:

> **[a]** Spent
>
> **[b]** That the Court be pleased to review and/or set aside the Consent Order entered on **4 March 2019** and adopted as an Order of the Court;
>
> **[c]** That the Court be pleased to give orders of injunction against **Leah Wangare** and **Laban Theuri,** barring them from intermeddling with the management of the parcel of land known as **Langas Block 1/197** pending the confirmation of grant in respect of the estate of the late **Benjamin Mwangi Mboga** (the Deceased);

[d] That costs of the application be provided for.

[2] The application was premised on the grounds that the Applicants are the biological children of the Deceased; and that a Consent Order was recorded on the **4 March 2019** which was adopted as an Order of the Court without their involvement. It was also their assertion that the said Consent was recorded without disclosing the existence of some of the beneficiaries. These grounds were expounded on in the three Supporting Affidavits annexed thereto, sworn by each of the Applicants on **23 May 2019.**

[3] The salient aspects of the three affidavits are the averments that the Applicants were neither consulted nor their input obtained before the impugned Consent Order was made. They were particularly averse to the stipulations in the consent that an agent be appointed to collect rent and that another bank account be opened for that purpose. Hence, they posited that the continued existence of the Consent Order amounts to an infringement of their constitutional rights as provided for in **Article 50** of the **Constitution;** hence their application for review.

[4] On behalf of the Respondents, a Replying Affidavit was filed herein on **20 July 2019**, sworn by the 1st Respondent, **Leah Wangare**. She deposed that, at the centre of the dispute is the income generated from the block of flats on land parcel **No. Langas Block 1/197**; and that whereas their mother, **Ruth Njeri Mwangi**, who was the 1st Administrator before her demise, would share out the income among all the beneficiaries of the Deceased, the Applicants stopped doing so in **November 2015** for no apparent reason; yet they (the Respondents) have not relinquished their rights as beneficiaries. That it was on account of this that the parties negotiated a consent that was acceptable to all pending the finalization of this Succession Cause. Thus, according to the Respondents, the application is based on falsehoods and should accordingly be dismissed with costs.

[5] Directions having been issued on **20 June 2019** that the application be disposed of by way of written submissions, Counsel for the Applicants filed written submissions on **16 July 2019** reiterating the Applicants' contention that they were not party to the Consent Order. They relied on **Flora N. Wasike vs. Destimon Wamboko** [1988] eKLR for the applicable principles to the setting aside of a consent order and urged the Court to note that the beneficiaries represented by the firm of **Ledishah J.K. Kitony and Company Advocates** were not opposed to the application. Counsel further submitted that the right to be heard is provided for under **Article 50** of the **Constitution** and cannot be limited by a consent order.

[6] Counsel for the Respondents, on the other hand, was of the view that, since none of the Applicants was acting in person at the material time, they were duly represented by the firm of **Ledisha J.K. Kittony & Company Advocates** for purposes of the Consent Orders dated **3 December 2018** and **4 March 2019**, save for the 3rd Applicant, who was then represented by **M/s Rioba Omboto & Company Advocates.** Accordingly, Counsel urged the Court to find and hold that the said Advocates had the full authority of the parties to negotiate and enter into the impugned consent. He relied on **Re Estate of Kamau Macharia (Deceased) [2018] eKLR** to support his proposition and urged the Court to reject the argument by the Applicants that rent proceeds from the controversial property can only be enjoyed by the sons of the Deceased, as that argument has no known place in law.

[7] Granted the rival positions taken by the parties, it is important to set out the full background of this matter so as to put the issues in perspective. The deceased, **Benjamin Mwangi Mboga,** died intestate on **12 November 2002** at Moi Teaching & Referral Hospital, leaving behind a widow, **Ruth Njeri Mwangi,** and 10 sons and daughters. In his lifetime, the deceased had acquired a number of assets, including **Parcel No. Langas Block 1/197 (the disputed property)**. The detailed particulars of the assets comprising the estate of the deceased were listed in the Affidavit in Support of Petition for Letters of Administration Intestate, Form P&A 5. The Petition for grant was made by the deceased's widow, **Ruth Njeri Mwangi** through the law firm of **Ledisha J.K. Kittony & Co. Advocates.**

[8] The court record shows that, although the Petition was processed and Grant of Letters of Administration Intestate prepared in **2011** for issuance in the name of the Petitioner, **Ruth Njeri Mwangi,** the same was not issued. It was not until **26 April 201,** when an application was made by the three Applicants through **M/s Rioba Omboto & Co. Advocates,** that it was made known to the court that the Petitioner had since died; and that the beneficiaries of the deceased were feuding over the Langas property. Thus, the Applicants sought to have the Respondents restrained from collecting rent from the property pending the hearing and determination of their application dated **26 April 2018.**

[9] The Applicants relied on the affidavit of **Laban Theuri**, sworn on **26 April 2018**, wherein it was averred that the two Respondents collect about **Kshs. 95,000/=** per month from the rental premises comprising the disputed property. It was further averred that the Respondents have failed to account for the rental income to the other beneficiaries; and therefore, that it is only fair and just that they should henceforth be restrained from collecting rent proceeds pending the finalization of these Succession Proceedings.

[10] In his response to the application, **Daniel Ndungu Mwangi**, the 2nd Respondent, filed an affidavit deposing that it has always been his desire to have this Succession Cause finalized at the earliest opportunity for the estate to be finally distributed. He acknowledged that there are creditors of the deceased who have been kept waiting for their respective pieces of land to be vested in them, and who ought to be provided for as a matter of urgency. The 2nd Respondent explained that he took over the rent collection function upon the death of their mother; and that he has always shared the proceeds equitably among his siblings, including the Applicants. He added that, though he occupies one of the premises, he is also paying rent like any other tenant; and that it has never been his intention to defraud his siblings. According to him, he has been diligent and transparent in managing the disputed property with the assistance of the 1st Respondent. He denied having intermeddled with the estate of the deceased and urged for an expedited and final resolution to this dispute.

[11] The 2nd Respondent annexed to the Replying Affidavit documents to show that, by a letter dated **6 November 2015**, he had notified their Advocates of the demise of the Petitioner; and proposed a substitution to bring on board **Peter Mbugua Mangi, Daniel Ndungu Mwangi, Leah Wangare Mathu** and **Simon Theuri Mwangi**. The annexed documents further show that, an application for substitution was filed by **Ledisha J.K. Kittony & Co. Advocates** to that effect dated **27 January 2017**.

[12] That is the background upon which the parties entered into a consent and an order was recorded on **3 December 2018** to the following effect:

> **"By consent the application dated 27 January 2017 be and is hereby allowed and that the Administrator herein, the late Ruth Njeri Mwangi, be and is hereby substituted by:**
>
> **Peter Mbugua Mwangi;**
>
> **Daniel Ndungu Mwangi**
>
> **Leah Wangari Mathu**
>
> **Laban Theuri Mwangi.**

That the costs of the application be in the cause."

[13] Another consent was recorded on **4 March 2019** in respect of the application dated **26 April 2018** with particular reference to the disputed property as follows:

> **"By consent the application dated 26 April 2018 be compromised in the following terms:**
>
> **[1] That all the Administrators herein together with the Dependants of the Deceased's Estate do appoint an agent who is agreeable to all of them to collect rent from the business premises the subject matter of these proceedings on Parcel No. Langas Block 1/197 (Kisumu Ndogo) for the benefit of the Administrators and the Dependants;**
>
> **[2] That the Administrators herein do open a joint Bank Account in their joint names at the Family Bank, Eldoret Branch for the Agent to deposit the proceeds of the rents;**
>
> **[3] The parties herein, the Administrators and the Dependants, do agree on the mode of distribution of the deposited rents among themselves and that the particulars of the agreement be filed in court;**
>
> **[4] The 1st and 2nd Administrators to avail to the 3rd and 4th Administrators a Statement of Account for the rent received by them for the period November 2015 to date;**
>
> **[5] The Agents so appointed to commence these duties from next month, that is April 2019."**

[14] Unfortunately, the foregoing consent did not resolve the dispute amongst the siblings; and so some of them, namely **Peter Mbugua Mwangi, John Thuku** and **Samuel Wandai** (the Applicants) proceeded to instruct the firm of **M/s Mathai & Co. Advocates** to file the instant application, namely, the Summons dated **23 May 2019.** The same was filed against **Leah Wangare** and **Laban Theuri**, seeking a review and/or setting aside of the Consent Order dated **4 March 2019;** and an order of injunction to restrain the Respondents from intermeddling with the management of the disputed property**.** Thus, the key issues for determination is the question whether sufficient cause has been shown for the setting aside of the Consent Order of **4 March 2019;** and whether injunction ought to issue as proposed.

On the setting aside of the Consent Order dated 4 March 2019:

[15] *To warrant the setting aside of the Consent Order of* ***4 March 2019****, the Applicants were under duty to prove* that the impugned Consent Order was obtained by mistake or fraud. This is because a consent order is a valid contract between the parties thereto, and can only be set aside or varied upon proof of certain prerequisites. Thus, in Flora **Wasike vs Destimo Wamboko [1988] 1 KAR 625, Hancox, JA**, reiterated this principle thus:

> **"It is now settled law 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."**

[16] The basic contention of the Applicants is that the impugned Consent Order was made and adopted by the Court without their involvement; and that the said Consent was recorded without disclosing the existence of the some of the beneficiaries. It was also asserted that it would not be prudent to appoint and pay an agent to collect rent and that another bank account be opened for that purpose, granted the meagre income from the disputed premises. Hence, the Applicants posited that the continued existence of the Consent Order amounts to an infringement of their constitutional rights as provided for in **Article 50** of the **Constitution;** hence their application for review.

[17] The Respondents on the other hand were categorical, in the Replying Affidavit sworn by **Leah Wangare**, the 1st Respondent, that at no single point have the Applicants appeared as acting in person; and that they were all represented by the firm of **M/s Ledisha J.K. Kittony & Co. Advocates**, not only for purposes of negotiating the consent but also at its adoption by the Court. She deprecated the averments of the 1st Applicant to the effect that the proceeds should only be shared among the deceased's sons to the exclusion of the daughters, adding that the daughters have not renounced their rights as beneficiaries of the deceased. Thus, according to the Respondents, the application is based on falsehoods and should accordingly be dismissed with costs.

[18] In my careful consideration, there is nothing in the Supporting Affidavits to demonstrate fraud or mistake in respect of the impugned Consent Order dated **4 March 2019**. To the contrary, the record shows that the parties were well represented by Counsel when the order of made. Indeed, in the case of **Brooke Bond Liebig (T) Ltd vs Mallya [1975] EA 266,** wherein a passage from **Seton on Judgments and Orders, 7th Edition, Vol. 1 p. 124** was quoted with approval, it was made clear that:

> **"Prima facie, 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 consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement."**

[19] Similarly, in **Kenya Commercial Bank Ltd vs. Specialized Engineering Co. Ltd, Civil Case No. 1728 of 1979 [1980] eKLR,** the point was made that:

> **"...the making by the 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 an order on one or either of the recognized grounds..."

[20] There is therefore no justifiable cause for setting aside the Consent Order dated **4 March 2019**, which was recorded much in the same way that the earlier Consent Order on representation dated **3 December 2019** was made. Moreover, it is now settled that allegations of fraud require a higher standard of proof than the normal standard applicable to ordinary civil cases; which burden was not discharged herein. Hence, in ***Central Bank of Kenya Ltd v Trust Bank Ltd & 4 Others*** **NAI Civil Appeal No. 215 of 1996,** the Court of Appeal held that:

> **"...Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the Appellant in this case than in an ordinary Civil Case..."**

On Temporary Injunction

[21] The second limb of the application dated **23 May 2019** is the prayer that the Court be pleased to give orders of injunction against **Leah Wangare** and **Laban Theuri** barring them from intermeddling with the management of the parcel of land known as **Langas Block 1/197** pending the confirmation of grant in respect of the estate of the late **Benjamin Mwangi Mboga** (the Deceased); In this regard, the Applicants were under duty to demonstrate a *prima facie* case against the Respondents in terms of the principles laid down in down in **Giella vs. Cassman Brown & Co. Ltd** , namely, that:

> **"First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."**

[22] As to what amount to a *prima facie* case, the Court of Appeal, in Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 123 held that:

> **"A prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."**

[23] As of **23 May 2019** when the instant application was filed, there were four Administrators, brought on board by dint of the Consent Order of **3 December 2019**. There is no clear explanation as to why only **Leah Wangare** and **Laban Theuri** were singled out as Respondents to the application. More importantly, there is absolutely nothing in the Supporting Affidavits to demonstrate that the two are intermeddling with proceeds of rent from the disputed property; or the manner of the alleged intermeddling. I therefore find no basis for holding that the Applicants have made out a *prima facie* case.

[24] It is now settled that where no *prima facie* case is made out the Court need not consider whether irreparable loss will ensue or the balance of convenience. In **Nguruman Limited vs. Jan Bonde Nielsen & 2 Others: Civil Appeal No. 77 of 2012,** the Court of Appeal held thus:

> **"In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;**
>
> **(a) establish his case only at a prima facie level,**
>
> **(b) demonstrate irreparable injury if a temporary injunction is not granted, and**
>
> **(c) allay any doubts as to (b) by showing that the balance of convenience is in his favour.**
>
> **These are the three pillars on which rest the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration..."**

[25] It is in the light of the foregoing that I find that the application dated **23 May 2019** is totally lacking in merit. The same is hereby dismissed. However, owing to the nature of the dispute, it is hereby ordered that the costs of the application shall be costs in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 4TH DAY OF DECEMBER 2019

OLGA SEWE

JUDGE