



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**SUCCESSION CAUSE NO. 96 OF 2000**

**IN THE MATTER OF THE ESTATE OF RAHAB WANJIRU EVANS (DECEASED)**

**BETWEEN**

**CHRISTINE WANGARI GACHEGE.....1<sup>ST</sup> ADMINISTRATOR**  
**ELIZABETH WANJIRA EVANS.....2<sup>ND</sup> ADMINISTRATOR**  
**PETER GACHEGE NJOGU.....3<sup>RD</sup> ADMINISTRATOR**  
**MARY WANJIKU GACHEGE.....4<sup>TH</sup> ADMINISTRATOR**

**AND**

**ELIZABETH WAMBUI.....1<sup>ST</sup> BENEFICIARY**  
**MARY NYAMBURA.....2<sup>ND</sup> BENEFICIARY**  
**MARGARET WANJIRU.....3<sup>RD</sup> BENEFICIARY**  
**SALOME NJOKI.....4<sup>TH</sup> BENEFICIARY**  
**ANTHONY GACHIGI.....5<sup>TH</sup> BENEFICIARY**  
**ZAINABU WANJIRU GACHIGI.....6<sup>TH</sup> BENEFICIARY**  
**JOSEPH GACHIGI ZAMBEKATIS.....7<sup>TH</sup> BENEFICIARY**  
**JENIFFER WANJIRU ZAMBETAKIS.....8<sup>TH</sup> BENEFICIARY**  
**JOHN IRUNGU ZAMBEKATIS.....9<sup>TH</sup> BENEFICIARY**  
**LUCY MUTHONI.....10<sup>th</sup> BENEFICIARY**  
**JANE NYAMBURA.....11<sup>TH</sup> BENEFICIARY**  
**AGNES WAITWIKI ZAMBETAKIS.....12<sup>TH</sup> BENEFICIARY**  
**MERCY WANJIRU MBURU.....13<sup>TH</sup> BENEFICIARY**

**AND**

**OIL LYBIA.....1<sup>ST</sup> INTERESTED PARTY**

**KIWAKA GENERAL MERCHANTS LIMITED.....2<sup>ND</sup> INTERESTED PARTY**

**JOHN MACHARIA MUTURI T/A JEDDY DISPLAYS...3<sup>RD</sup> INTERESTED PARTY**

**THOMAS KUNGU T/A ANKER INVESTMENTS.....4<sup>TH</sup> INTERESTED PARTY**

### **RULING**

1. A good place to begin unravelling the present knot in the complex controversy related to the estate herein is to recall the present procedural posture of the case. A dispute regarding the rightful beneficiaries and mode of distribution of the estate of the Deceased herein went all the way to the Court of Appeal. The Court of Appeal's final verdict was seemingly parsimonious: some of the identified properties in the vast estate of the Deceased to be disposed of separately with all the beneficiaries sharing equally in the proceeds. The High Court was directed to oversee the process.

2. The High Court, with the concurrence of the parties, elected to dispose of one property at a time. They were to be disposed of by way of a public auction through bids; with the auction advertised in the local dailies. The first four properties were advertised. It is not clear what the status of the Nairobi and Mavoko properties is after the auction. The auction of the two Nakuru properties has generated quite some controversy leading to the present Applications and this ruling. First there is Title Number Nakuru Municipality Block 4/258. There was some controversy about the propriety of one of the bidders to wit Oil Libya to change its bid after opening of the bids. Nonetheless, all the concerned parties seem to have entered into a consent permitting Oil Libya to do so. Oil Libya, therefore, ended up as the highest bidder. A transfer has already been effected to it. A preservative order by this Court directed that the registration in the name of Oil Libya remains as such for the time being. The beneficiaries have already shared the proceeds of the sale. However, one of the other bidders to wit John Macharia Muturi T/A Jeddy Displays still contests the process used to auction and identify Oil Libya as the highest bidder. In any event, that controversy is not presently implicated here except tangentially. This is in part because the proceeds of the sale to Oil Libya have already been distributed to the beneficiaries who have willingly accepted their shares.

3. The present controversy concerns the second piece: Title Number Nakuru Municipality Block 4/259 ("Subject Parcel"). Like for the first parcel, bids for this parcel were opened by the Deputy Registrar of the Court on 08/02/2016. The Deputy Registrar announced Anker Investments as the highest bidder for the Suit Parcel with a bid of Kshs. 157,000,000/-. The Deputy Registrar made the following consequential rules:

- a. That the successful bidder deposits 10% of the bid amount in the Court's bank account within the next 24 hours from the date of opening the bid.
- b. That the balance of the bid amount be paid by way of deposit in the Court's bank account within the next ninety (90) days from the day of opening the bid.
- c. That the transfer of the property to the successful bidder be done after payment of the entire purchase price.
- d. That in the event of default of any of the conditions by the highest bidder, the sale to stand cancelled in respect of the particular property in question and any deposited bid amount to be refunded to the affected highest bidder less ten percent of the deposited amount as a penalty for the breach.

4. It would appear from the proceedings that the highest bidder for the Suit Parcel was unable to comply with the above rules. The result was that Kiwaka General Merchants Ltd ("Kiwaka"), who were the second highest bidders filed an application before the Court, after paying its bid amount (Kshs. 126,500,000/-) into Court, praying for a vesting order in its favour in respect of the Suit Parcel. That order was granted on 17/05/2016.

5. That order became the subject of various applications to set it aside or vary it principally by John Macharia Muturi T/A Jeddy Displays (hereinafter "Jeddy") and Thomas Kungu T/A Anker Investments Ltd (hereinafter "Anker"). There was an interesting development on 05/10/2016. When the parties appeared for directions over the various applications still pending before the Court, Mr. Wahome, Counsel for Kiwaka, informed the Court that Kiwaka, Jeddy and Anker had a consent to record. The consent read as follows:

*By consent John Macharia Muturi Trading As Jeddy Displays and Thomas Kungu Trading As Anker Investments be and are hereby joined as the 3<sup>rd</sup> and 4<sup>th</sup> Interested Parties. Jeddy Displays to deposit in Court a sum of Kshs. 161,000,000/- within 30 days from the date hereof in respect of Nakuru Municipality Block 2/258 being the purchase price for that property. Anker Investments Ltd to deposit a sum of Kshs. 157,000,000/- in Court within thirty days being the purchase price for Nakuru Municipality Block 2/259. In default of such deposits property No. Nakuru Municipality Block 2/258 in the name of Oil Libya (sic) remains in the name of Oil Libya Kenya Ltd. The Property Nakuru Municipality Block 2/259 to vest and title to be issued in the name of Kiwaka General Merchants Ltd. For avoidance of doubt, the deposits shall be made by John Macharia Muturi for Property No. 258 and Thomas Kungu for Property No. 259. No applications for extension of time shall be entertained whatsoever.*

6. It is not clear whether the beneficiaries to and administrators of the estate supported the consent. The Court record does not bear them or their lawyers reacting to the consent. Curiously, the Court does not expressly adopt the consent as its order either. I am aware, though, that an order was extracted and duly signed by the Deputy Registrar.

7. What came up next was an application to extend time – which, incidentally, was expressly forbidden by the terms of the consent. Jeddy and Anker both wanted time extended to permit them to deposit the amounts agreed in the Consent of 05/10/2016. That Application was dated 04/11/2016. It came up for arguments on 14/02/2017. The Applicants (Jeddy and Anker) wanted to be granted thirty days to abide by

the consent of 05/10/2016. The Application was opposed by Kiwaka and some of the beneficiaries. Jeddy and Anker already enjoyed interim orders maintaining *status quo* which had been granted *ex parte*. One of the questions that arose at the hearing was whether the orders to preserve *status quo* would be maintained pending a formal ruling on the Application to extend time. Justice Ndung'u had, by the time the Application was being argued, entertaining another Application by some of the beneficiaries to recuse himself from the matter. He ruled that he was obliged to preserve the *status quo* pending his ruling on whether to recuse himself on the matter altogether. Justice Ndung'u eventually recused himself from the case.

8. Although Kiwaka was originally opposed to the Application for extension of time, at the conclusion of the arguments, after Justice Ndung'u gave his brief ruling preserving *status quo* by extending interim orders, in a change of tack, Mr. Wahome, Counsel for Kiwaka informed the Court that he was conceding to the Application dated 04/11/2016. Mr. Bosire, Counsel for Jeddy and Anker, indicated his agreement with the concession.

9. Following this exchange, the Learned Judge indicated that the Application dated 04/11/2016 was allowed "in its entirety."

10. One of the main issues in contention in the present Applications is the implications of that concession or "consent" as Kiwaka calls it. Technically, the immediate effect was to grant Jeddy and Anker a further 30 days within which to deposit the amounts indicated in the consent of 05/10/2016.

11. As fate would have it, neither Jeddy nor Anker complied with that order.

12. Kiwaka's Application dated 07/04/2017, therefore, principally seeks to confirm it as the purchaser of the Suit Parcel and certain consequential orders flowing therefrom. Its exact prayers are:

*1. THAT this Application be certified as urgent and heard ex parte in the first instance and service thereof be dispensed with.*

*2. THAT this Honourable Court be pleased to reinstate and declare absolute the sale of parcel of land known as **TITLE NUMBER NAKURU MUNICIPALITY BLOCK 4/259** to the Applicant – **KIWAKA GENERAL MERCHANTS LIMITED**.*

*3. THAT this Honourable Court be pleased to issue a vesting order forthwith in favour of **KIWAKA GENERAL MERCHANTS LIMITED** in respect of the property known as **TITLE NUMBER NAKURU MUNICIPALITY BLOCK 4/259** and consequently direct that the Title to the said property be issued forthwith in the name of **KIWAKA GENERAL MERCHANTS LIMITED**.*

*4. THAT this Honourable Court be pleased to order and/or direct that **KIWAKA GENERAL MERCHANTS LIMITED** be put in possession of the property **TITLE NUMBERS NAKURU MUNICIPALITY BLOCK 4/259**.*

*5. THAT this Honourable Court be pleased to order and/or direct the administrator to execute transfers and all other instruments as well as procure the necessary consents and/or clearances to ensure that the property **TITLE NUMBER NAKURU MUNICIPALITY BLOCK 4/259** is transferred in favour of the Applicant - **KIWAKA GENERAL MERCHANTS LIMITED** and in default the Deputy Registrar does execute the same.*

*6. Any other orders and/or directions as this Honourable Court deems fit and just to issue in the circumstances hereof.*

*7. THAT the costs of this Application be in the cause.*

13. On the other hand, the Application by the 12<sup>th</sup> Beneficiary (Agnes Waitwika Zambetakis) dated 23/10/2017, is the mirror image of Kiwaka's Application. Agnes' Application seeks the following:

*1. That this Application be certified as urgent and service be dispensed with.*

*2. That the Honourable Court be pleased to grant a stay of any further proceedings in relation to properties Nakuru Municipality Block 4/258 and 4/259 pending the hearing and determination of this Application.*

*3. That this Honourable Court be pleased to set aside the consent order made on the*

*4. That the Applicant's hearing be allowed to respond to the said Application dated 4<sup>th</sup> November, 2016.*

*5. That the costs be in the cause.*

14. Shorn of all technical complexities, the main question is whether either Application is merited in the circumstances of the case. The straightforward argument by Kiwaka is that it is entitled to the orders because it satisfied the terms of the auction and deposited the amount of its bid in Court. According to Kiwaka, Jeddy and Anker may have had a right to challenge their winning of the bid but they lost that right when they failed to comply with the consent order of 05/10/2016 and 14/02/2017.

15. Those in opposition to Kiwaka's Application make two principal arguments:

a. First, those who are beneficiaries and administrators of the estate argue that the consent orders were procedurally and substantively infirm as they were entered into by the interested parties only and in their absence. As such, the consent orders are not

valid.

b. Second, the beneficiaries and administrators argue that the interests of substantive justice militate in favour of denial of the prayers since it would lead to major losses for the estate since the bidding process and public auction was fatally flawed. They seek an opportunity to demonstrate to the Court the extent of the flaws.

16. On the other hand, some of the beneficiaries are in full support of Kiwaka's Application dated 07/04/2017. In particular, the 4<sup>th</sup> – 9<sup>th</sup> Beneficiaries represented by Githui & Co. Advocates favour the grant of the prayers in the Application dated 07/04/2017. They also oppose the Application dated 23/10/2017. They raise two main arguments for their position:

a. First, they fault the 12<sup>th</sup> Beneficiary (Agnes Waitwika Zambetakis) as lacking *locus standi* to bring her Application dated 23/10/2016. This is because, they argue, she is not an administrator to the estate of the Deceased yet she claims to bring the Application to protect the interests of the estate. Only administrators, they argue, can take out proceedings to protect the interests of the estate.

b. Second, they argue that Kiwaka's Application is merited on substance since the Application dated 04/11/2016 was compromised by the parties and a consent entered.

17. I have anxiously considered all the rival arguments raised in this case. The disagreements among the parties have been very costly to the estate. This is an unfortunate state of affairs. Unfortunately, the internecine fights have ensnared "innocent" parties whose only interest may have been to purchase property from the estate. Some ended up depositing their cash hence losing the value of the money over time. Yet, in the end, the question the Court must answer is a simple one: could the Interested Parties (Kiwaka; Jeddy and Anker) legitimately compromise the issues in the suit through their consents of 05/10/2016 and 14/02/2017?

18. To get to the substantive answer to this question, I have waved off three technical arguments raised by some of the parties. The first one complains that the body of the Application dated 07/04/2017 does not name all the parties in the litigation and that it is, therefore, fatally defective. The second one complains that the same Application was drawn by H. Kago & Co. Advocates, a firm which is a stranger to these proceedings.

19. I have summarily dismissed these objections as technical ones based merely on form and not related to the substance at all. Pursuant to Article 159 of the Constitution, Courts are no longer slaves or High Priests of technical form: failure to name all parties on the face of an application will not be dispositive of the substantive claim in the application unless it can be shown that the omission was done in bad faith. That was not the case here. I have also looked at the Application dated 07/04/2017. There is no doubt that the name "H. Kago & Company" which appears towards the bottom of the Application is a typographical error. It is immediately cured by the inscription: "Drawn & Filed by: L. Wahome & Company Advocates" – the true advocates for Kiwaka. In any event, the Court record indicates that Mr. H. Kago occasionally appeared with Mr. Wahome in this matter. I need not belabor these points.

20. The third technical objection is raised by Counsel for the 2<sup>nd</sup> and 4<sup>th</sup> Administrators. It claims that the Learned Justice Ndung'u made the orders of 14/02/2017 when he had no jurisdiction since the Learned Judge had already recused himself from the proceedings. This is a misapprehension of facts. In fact, the Learned Judge only recused himself from the case on 08/03/2017.

21. I will now turn to the substantive question: could the Interested Parties (Kiwaka; Jeddy and Anker) legitimately compromise the issues in the suit through their consents of 05/10/2016 and 14/02/2017? I have come to the considered conclusion that they could not. In doing so, I have, after perusing the record of the Court, confirmed, for example, that the 12<sup>th</sup> Beneficiary (Agnes Waitwika) was not involved in the consent and was not in Court at 2:30pm on 05/10/2016 when it was entered even though she was acting in person. In reaching this conclusion, I am also of the view that Kiwaka; Jeddy; and Anker did not possess sufficient legal capacity to enter into the two consents in the face of direct or oblique opposition to them by some of the beneficiaries and administrators to the estate. Some of these beneficiaries of and administrators had taken positions in opposition to the auction whose winners were announced on 08/02/2016 by the Deputy Registrar. It is important to recall that the difference in value between acquiescing to the outcome of the auction or challenging it is a substantial Kshs. 30 Million.

22. Given the concerns announced by some of the beneficiaries of and administrators to the estate to the sale and transfer of the Suit Parcel, and given the stake these groups have in the estate, the three parties which participated in the auction and, which were jockeying to be declared the "winners", did not have the ability to enter into a consent whose effect was to completely dissolve the concerns without the involvement of or consultations with the beneficiaries of and administrators to the estate. While Kiwaka; Jeddy and Anker were at liberty to settle any legal issues among themselves; they did not have a right to settle all legal questions among themselves and all the beneficiaries of and administrators to the estate as they purported to do in their two consents.

23. This last paragraph is the answer to the objection raised by the Counsel to the 4<sup>th</sup> – 9<sup>th</sup> Beneficiaries that the 12<sup>th</sup> Beneficiary lacks standing to bring her Application dated 23/10/2016. I believe any recognized beneficiary of or administrator to the estate has sufficient interest in the estate to challenge an impugned auction of the assets of the estate. It is true that in some cases the position taken by administrators qua administrators trumps those of individual beneficiaries. Yet, it is a step too far to claim that beneficiaries lack standing to challenge actions taken with respect to the estate even where they form the opinion that the estate's value is being actively or perniciously diminished.

24. Where does that leave things? In the immediate post-auction period where Kiwaka's bid is the winning one to purchase the Suit Parcel subject to any valid legal challenge by any party with sufficient stake in the estate. That could include any of the beneficiaries or the administrators. I would therefore give any party with such stake a limited period to raise anew any concerns they have. All these concerns will be addressed by the Court in the absence of the shadows of the impugned consent seeking to elide such concerns for the Court to make a determination whether the auction was procedurally and substantively infirm. The Court is unable to make that determination at this time

based on the material placed before it. Differently put, the concerns that all the parties have about the auction of the assets of the estate by auction must be fully ventilated and a determination made. This is yet to happen.

25. The upshot is the following:

**a. The Application dated 07/04/2017 is disallowed at this time as premature.**

**b. The consents entered into on 05/10/2016 and 14/02/2017 are not binding on the beneficiaries of and administrators to the estate of the Deceased herein. The consents are hereby set aside to the extent they purport to bind the beneficiaries of and administrators to the estate of the Deceased herein.**

**c. All the parties to these proceedings will be at liberty to challenge the auction of the Suit Parcel within fourteen days from the date hereof. They can do so by filing an appropriate motion before this Court and serving all the other parties.**

**d. All motions brought under (c) above will be heard together.**

**e. The costs of both Applications shall be in the Cause.**

26. Orders accordingly.

**Dated and delivered in Nakuru this 17<sup>th</sup> day of October, 2018**

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**JOEL NGUGI**

**JUDGE**