REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCC. CAUSE NO. 1380 OF 2011

IN THE MATTER OF THE ESTATE OF SIMON KARIUKI KURIA (DECEASED)

LIVINGSTONE KURIA KARIUKI…........................1ST APPLICANT

JECINTA WAIRIMU KARIUKI…...........................2ND APPLICANT

FRIDAH MUTHONI KARIUKI…............................3RD APPLICANT

ANTHONY NG'ANG'A KARIUKI…........................4TH APPLICANT

VERSUS

FRANCIS KURIA KARIUKI…………….……..…1ST RESPONDENT

JOHN KURIA KARIUKI……………..………..…2ND RESPONDENT

JAMES MAINA KARIUKI………………………3RD RESPONDENT

SAMUEL MWANGI KARIUKI………..…………4TH RESPONDENT

RULING

1. The deceased Simon Kariuki Kuria died intestate on 27th May 2010. He was survived by four widows as follows:-

1. Hannah Murigo Kariuki with whom he had six daughters and four sons;
2. Margaret Wangui Kariuki with whom he had two sons and two daughters;
3. Cecilia Mwihaki Kamotho which whom he had three sons and three daughters; and
4. Charity Wanjugu Kariuki with whom he had a daughter and four sons.

2. On 8th July 2011 the family allowed Francis Kuria Kariuki 1st respondent from the 2nd house), John Kuria Kariuki (2nd respondent from the 3rd house), James Maina Kariuki (3rd respondent from the 1st house), and Samuel Mwangi Kariuki (4th respondent from the 4th house) to petition for the grant of letters of administration intestate. The grant was issued to them on 2nd December 2011. The respondents then

applied for the confirmation of the grant. The application was allowed on 3rd July 2012 and a certificate of confirmation of grant issued on the same day. The application was supported by all the family members who also signed a consent on the mode of distribution of the estate.

3. On 1st July 2015 Livingstone Kuria Kariuki (1st applicant and from 4th house), Jecinta Wairimu Kariuki (2nd applicant and from the 1st house), Fridah Muthoni Kariuki (3rd applicant and from the 2nd house), and Antony Ng'ang'a Kariuki (4th applicant and from the 1st house) filed this application dated 26th June 2015 under **sections 76, 83, 94** and **95 of the Law of Succession Act (Cap. 160 of the Laws of Kenya).** The Application was over land parcel Ongata Rongai Township/59 which was given to the respondents during confirmation and which has since been transferred to them. The applicants challenged that allocation and transfer which they say was illegal and fraudulent because the understanding of the family was that the respondents would hold it in trust for the others and would collect rent from it and distribute to the family members. They asked that the certificate of confirmation of grant be amended so that the respondents are indicated to hold the property in trust for the rest of the family, and, in the meantime, the proceeds of the property be secured in a joint interest earning account with a reputable bank.

4. The response of the respondents was contained in the replying affidavit sworn on their behalf by the 1st respondent. He denied the allegations in the application. He denied that there was agreement that the property be held by them in trust for the rest of the members of the family. He stated that all the family members consented to the mode of distribution, and according to it they were given this parcel of land. He swore that they have acquired a proprietary interest in the property on the basis the certificate of confirmation of grant and therefore have a valid title that cannot be challenged.

5. The 1st applicant swore a further affidavit to state that:-

> **"5. ……that during the confirmation of grant all the beneficiaries were in agreement that the respondents would hold the subject property on their own behalf and that of all the beneficiaries."**

He annexed "LKK9" which he said were minutes of the family meeting held on 14th December 2011 and which had a mode of distribution that shared the rest of the estate of the deceased, and in respect of the property in question it was indicated:-

> **"shared in equal shares by; Francis Kuria Kairuki, James Maina Kariuki, John Kuria Kariuki and Samuel Mwangi Kariuki (in trust of the other beneficiaries)."**

6. The firm of Ndegwa Wahome & Company Advocates represented the applicants and the firm of Geoffrey Otieno & Co. Advocates represented the respondents. Counsel filed written submissions on the application, and cited various authorities. I have considered them.

7. The record shows that the estate had various properties. It is only parcel 59 that is now challenged. 10 parcels of land, shares in two companies and monies in Post Bank Account were distributed during confirmation and have no dispute. In support of the application of grant, two documents were filed. They were "consent to the mode of distribution of estate" and "mode of distribution." Both were dated 29th February 2012. All the beneficiaries signed each of the documents. The documents said that they were consenting to the confirmation of grant and to the distribution of the deceased's estate. In respect of "Ongata Rongai – No. 59 Kajiado North" it was agreed that it be:-

> **"shared in equal shares by; Francis Kuria Kariuki, James Maina Kariuki, John Kuria Kariuki and Samuel Mwangi Kariuki."**

It was on that basis that the grant was confirmed. It was on the basis of the two documents that the estate of the deceased was distributed.

8. In my considered view, whatever grievances the applicants now have, the consents that were signed by all the beneficiaries (with them included) bind the family. At the time the entire family was represented. The document the 1st applicant now produces has an additional provision in relation to the parcel in question that says the property was to be held in trust. That was not the position at the time of confirmation. It is not alleged that the respondents alone crafted the consents. The applicants could not have appended their signatures to the consents if it did not represent their interests. They are not saying that they signed documents they did not understand, or a document that was not read to them.

9. It is trite that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify the setting aside of a contract, or if certain conditions remain to be fulfilled, which are not carried out **(Flora Destimo Wamboko [1988] IKAR 625).** The grounds upon which a consent judgment or order may be set aside are fraud, mistake, collusion, or agreement being contrary to public policy, absence of sufficient material facts, ignorance of material facts or any general reason which may enable a court set aside an agreement. In **Kasmir Wesonga and another –v- Ismael Otoicho Wanga [1987] KLR 159** it was observed that the purpose of a consent judgment is for parties to inform the court that they have compromised all their differences in a manner suitable to themselves without asking the court to take any further decision. The principle is that the parties know best how to conduct their own affairs, and that by entering into a consent judgment they have entered into a contractual agreement to compromise their differences to their satisfaction.

10. I have said in the foregoing that the consent upon which the applicants seek to rely in relation to parcel 59 is materially different from what was filed in court at the time of the confirmation of the grant and which has all the signatures of all the beneficiaries, them included. They are the ones seeking to set aside the agreement and consequently owed the court an explanation regarding the difference. They ought to have materially explained why they consented to the mode of distribution at the time of confirmation and now seek to resile from that. That mode of distribution asked the respondents to equally share parcel 59 without any further conditions.

11. The result is that the application dated 26th June 2015 has no merits and is dismissed with costs.

DATED at NAIROBI this 29TH JANUARY 2016

A.O. MUCHELULE

JUDGE

DELIVERED at NAIROBI this 1ST FEBRUARY 2016

W. MUSYOKA

JUDGE