



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**FAMILY DIVISION**

**SUCCESSION CAUSE NO. 2171 OF 2001**

**IN THE MATTER OF THE ESTATE OF WATHUKO CHONGO ALIAS WATHUKO CHONGO  
WATHUKO (DECEASED)**

**BETWEEN**

**NDERI WATHUKO CHONGO.....1<sup>ST</sup> APPLICANT**

**PETER NDERI CHONGO.....2<sup>ND</sup> APPLICANT**

**AND**

**SAMUEL NJOROGE WATHUKO.....1<sup>ST</sup> RESPONDENT**

**SERAPHINE WANJIKU WATHUKO.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The deceased died intestate on 30<sup>th</sup> May 2001. He was survived by three widows:- Dorcas Waithera, Seraphine Wanjiku and Susan Nyambura and 22 children. His first wife, Tabitha Wanjiku predeceased him. Maina Wathuko, James Nderi Wathuko, Peter Nderi Chongo (the 2<sup>nd</sup> applicant) and Nderi Wathuko Chongo (the 1<sup>st</sup> applicant) petitioned this Court for a grant of letters of administration intestate in their capacity as sons of the deceased. The grant of letters of administration intestate was issued to the petitioners on 10<sup>th</sup> November 2003 and confirmed on 6<sup>th</sup> May 2013 subsequent to a consent agreement recorded in court on the same day on the mode of distribution.

2. The applicants filed summons dated 9<sup>th</sup> February 2016 seeking the revocation of the certificate of confirmation of grant dated 6<sup>th</sup> May 2013 and that the respondents be compelled to give an account of the monies withdrawn from Barclays Bank Nakuru East Branch Accounts Nos. 8291782 and 82025127. Their application was premised on grounds that the proceedings to obtain the certificate of confirmation of grant were defective in substance; the grant was obtained fraudulently by use of false consent of mode of distribution and concealment from court of facts material to the cause; and that the applicants being the administrators of the estate were never consulted on the mode of distribution that was adopted on 6<sup>th</sup> May 2013. It was the applicants' case that on or about 19<sup>th</sup> May 2006 the family of the deceased from all the four houses entered into an agreement on the mode of sub-division of the estate in the presence of senior chief James G. Mwangi of Kipipiri location. Subsequently, each beneficiary took possession of respective

shares as per the agreement. The applicants assert that the purported consent dated 6<sup>th</sup> May 2013 on the mode of distribution was different from the agreement entered into by the family members on 19<sup>th</sup> May 2006 on the mode of subdivision of the estate and it was unfair and pre-judicial to all other beneficiaries. It was further stated that the respondents had made fraudulent withdrawals from the accounts of the deceased without consent of the applicants who are also co-administrators. It was their case that the initial consent on the mode of distribution entered into on 19<sup>th</sup> May 2006 should be adopted by the court. The applicants filed another application dated 10<sup>th</sup> March 2015 seeking to set aside and or vacate the consent order entered on 6<sup>th</sup> May 2013 on the ground that the 1<sup>st</sup> and 4<sup>th</sup> houses were not consulted when it was recorded.

3. Each respondent swore a replying affidavit to oppose the summons for revocation. The respondents stated that despite the family holding several meetings to discuss the mode of distribution of the estate, no final agreement had been reached on the same until the consent entered into on 6<sup>th</sup> May 2013. It was stated that the grant was confirmed on 6<sup>th</sup> May 2013 by consent of all parties where each house was represented by its respective counsel. It was the respondents' case that a consent judgement could only be set aside on ground of fraud which had not been shown by the applicants. Lastly, the respondents stated that the consent provided for the utilization of monies in accounts Nos. 8291782 and 82025127 held at Barclays Bank of Kenya Nakuru East Branch for the part payment of lawyers' fees, and hence the allegation that the same were misappropriated by the respondents was unfounded and baseless. They asked the court to dismiss the summons for revocation with costs as the same was made in bad faith and full of misrepresentations.

4. The confirmation that was done on 6<sup>th</sup> May 2013 by my brother Justice Kimaru followed a consent on the distribution of the estate of the deceased that was signed by counsel representing the four houses of the deceased. The late Mr. G. Kamonde represented the 1<sup>st</sup> and 4<sup>th</sup> houses, Mr. Mbutia Kinyanjui represented the 2<sup>nd</sup> house and M/s Ndirangu represented the 3<sup>rd</sup> house. The consent that was signed by them on 6<sup>th</sup> May 2013 was handwritten, and was presented in court on the same day by all the counsel. The document had six (6) pages and was quite elaborate in the description of the properties of the deceased, and to whom each property was to go. After the grant was confirmed, a certificate of confirmation was issued which reflected the consent that was entered into. This is the certificate of confirmation that the applicants have attacked in the summons for revocation filed on 10<sup>th</sup> February 2015, and the application to set aside the consent.

5. The 1<sup>st</sup> applicant of the 1<sup>st</sup> house and Wathuko Nderi Chongo of the 2<sup>nd</sup> house testified. They had filed affidavits to support the application and the respondents had filed affidavits to oppose the same. By the time the application came for hearing Mr. G. Kamonde had passed on. Parties filed written submissions for and against the application. The gist of the application was that the family had signed an agreement on 19<sup>th</sup> May 2006 on the distribution of the estate and therefore there was no basis of the consent of 6<sup>th</sup> May 2013. Better still, the applicants contended, the consent of 6<sup>th</sup> May 2013 did not receive the blessings of the applicants, and other beneficiaries. As for the applicants, they stated that they did not instruct their advocate Mr. G. Kamonde to enter into the consent of 6<sup>th</sup> May 2013, or at all. These are the reasons why they want this consent reviewed and set aside, and the confirmation that was based on it to be revoked.

6. The question for determination was whether a case had been made for the review and setting aside of the consent entered on 6<sup>th</sup> May 2013. Depending on the answer to the question, whether the certificate of confirmation that was issued in this case should be revoked.

7. It is material to mention that M/s Muigai represented the applicants in the application.

8. As was pointed out by M/s. Ndirangu, it is now trite that a consent judgment or order has a 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 Wasike –v- Destimo Wamboko**

[1988]1 KAR 625). Secondly, in the case of **Brooke Bond Liebig (T) Limited –v- Mallya [1975] E A 266** it was held that:-

**“Prima facie any order made in the presence and with the consent of the counsel is binding on all parties to the proceedings or action, and on 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.”**

9. A consent judgment or order is a contract which can only be set aside if fraud, non disclosure of material facts, mistake or misrepresentation can be proved, or if the contract is against public policy. It is also now accepted that an advocate who is properly on record has ostensible authority to compromise a suit, or consent to a judgment or order as far as the opponent is concerned.

10. There is no dispute that the applicants were represented by the late Mr. G. Kamonde at the time when the consent was recorded on 6<sup>th</sup> May 2013. It is notable that on 10<sup>th</sup> July 2014 Mr. Mbuthia Kinyanjui for the 2<sup>nd</sup> house filed an application seeking that a surveyor be appointed to survey the deceased's parcels Nyandarua/Ol'Aragwai 288, Nyandarua Mumui/Ol'Aragwai/185 and 186, Mawingo Scheme Plots 49 and 50, Kiarutara Location 16 and 14, Mwagu 16/135 and Turasha Ridge Plot 3, etc, and subdivide them to the beneficiaries as directed in the certificate of confirmation. Mr G. Kamonde was still alive, and on 15<sup>th</sup> October 2014 all counsel, him included, consented to having the parcels surveyed and that each house to contribute Kshs.75,000/= towards the survey. It is clear that it was after Mr. G. Kamonde died that the present applications were filed. When he was alive all the parties, the applicants included, were ready to share the estate as shown in the certificate of confirmation. I find that, on the material that has been presented, the allegation that the applicants were not party to the consent that was entered on 6<sup>th</sup> May 2013 on the distribution of the estate of the deceased was an afterthought.

11. **Section 76** of the **Law of Succession Act (Cap. 160)** grants this court the power to revoke or annul a grant, whether or not confirmed, on the application of a party, or on its own motion. Under **section 76(b)** the grant may be revoked if it was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case. This is the ground on which the applicants relied. In particular, it was alleged that the parties had on 19<sup>th</sup> May 2006 agreed on the mode of distribution and that the consent entered on 6<sup>th</sup> May 2013 was without the consent of the applicants. I have found in the foregoing that the consent entered on 6<sup>th</sup> May 2013 was with the concurrence of all the parties as represented by their respective counsel. Something about the alleged consent of 19<sup>th</sup> May 2006. Parties were capable of varying that consent by a subsequent consent. However, this agreement (of 19<sup>th</sup> May 2006) (exhibit 1) is shown to have been signed by only 13 beneficiaries out of 25. The parties were in the meeting leading to it and were not represented. The meeting was before Senior Chief James G. Mwangi of Kipipiri location. It was deponed by the respondents in their replying affidavits that there was no reference by the applicants to this agreement at the time the consent of 6<sup>th</sup> May 2013 was entered into. This was not disputed. I find that the agreement of 19<sup>th</sup> May 2006 did not involve all the beneficiaries and therefore could not be the basis for the distribution of the estate of the deceased. If indeed it was entered into, it was superseded by the consent recorded in court on 6<sup>th</sup> May 2013.

12. In conclusion, I find that the consent entered on 10<sup>th</sup> May 2013 by Justice Kimaru was a valid basis for the distribution of the estate of the deceased as contained in the certificate of confirmation that issued. Consequently, the application dated 9<sup>th</sup> February 2016 for revocation of the grant and the application dated 10<sup>th</sup> March 2015 for setting aside or vacating the consent order each lacks merit and is dismissed with costs.

**DATED and SIGNED at NAIROBI this 7<sup>th</sup> day of SEPTEMBER 2016.**

**A.O. MUCHELULE**

**JUDGE**

**DELIVERED and SIGNED this 14<sup>th</sup> day of SEPTEMBER 2016**

**W.M. MUSYOKA**

**JUDGE**