



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 355 OF 2007**

**IN THE MATTER OF THE ESTATE OF M'MWIRICHIA MUCHUGU (DECEASED)**

JAMES MURIUNGI M'MWIRICHIA.....PETITIONER

VERSUS

AGNES NTHANGI MWIRICHIA BUNDI.....RESPONDENT

**RULING**

1. The Petitioner/Applicant James Muriungi M'Mwirichia through an application dated 2<sup>nd</sup> September, 2013 pursuant to Rule 73 of the Probate and Administration Rules seeks that the Honourable court be pleased to set aside very and/or review the consent order dated 28<sup>th</sup> August, 2013 and proceed to make other orders as may meet the ends of justice. The application is based on the ground inter alia; that the consent was entered without applicant's express permission; that the consent order is illegal, irregular and fraudulent. That all the beneficiaries of the deceased estate were not involved in the consent, and that the consent doesn't comply with the provisions of the Succession Act. The application is further supported by affidavit of the applicant which depones that he was not consulted by the lawyer when he agreed to enter into consent which consent he purports denied him the right to administer his father's estate and denied him the share of the deceased estate. That the consent he purports is illegal and it purports to distribute the deceased estate while all beneficiaries were not consulted nor involved in the recording of the consent and that all deceased estate was not identified before distribution. He further depones that the consent was fraudulent in the sense that it failed to state the fact of other deceased children and dwelt on the objector. He further stated he is the beneficiary of the deceased estate which comprised of LR No. Nkuene/Mikumbune/581 and it was wrong for the court to deny him his rightful share. He averred that Nkuene/Mikumbune /577 is property of the deceased and was not distributed and that Abogeta/Kithangari/69 has not been distributed and the consent purported to deal with it. He further challenged the consent as it gave the widow of the deceased share instead of life interest and that the consent dealt with part of the estate instead of the whole estate.
2. The Applicant's/Petitioner's application is opposed. The respondent filed grounds of opposition to the effect that the application is frivolous, vexatious and bad in law for reasons that no reasonable grounds have been raised to warrant granting of the orders sought, that the applicant participated fully in the recording of the consent as captured in the court record of 27<sup>th</sup> August, 2013. That there was no consent order recorded on 28<sup>th</sup> August, 2013 to be dealt with by the applicant's application and that the court has jurisdiction to excise its jurisdiction in order to advance the interest of justice and that the application is premised on inaccurate and misleading averments.
3. When the matter came up for hearing both counsel agreed that the application be determined by way of written submissions. The Petitioner's/Applicant's submissions were filed on 05/11/2013 whereas the submission on behalf of the respondent were filed on 29<sup>th</sup> October, 2014. The court

has carefully considered the application, affidavit in support and the ground of opposition. The issue for consideration arising from the pleadings is whether there is a consent dated 28<sup>th</sup> August, 2013? Whether the applicant has met the conditions for setting aside a consent order?.

4. The Applicant/Petitioner is challenging a consent by parties advocates dated 28<sup>th</sup> August, 2013. I have very carefully perused the court file and have noted that on 28<sup>th</sup> August, 2013 this matter was not placed before court and no consent order was made on the said date. The only consent on record is dated 27<sup>th</sup> August, 2013 as rightfully pointed out by the respondent's counsel. The Petitioner's averments relates to events purported to have taken place on 28<sup>th</sup> August, 2013. It is therefore clear that the consent order of 27<sup>th</sup> August, 2013 is not in issue in the Applicant's/Petitioner's application. A party is bound by his pleadings and as such this court cannot speculate that the Applicant intended to challenge the consent order of 27<sup>th</sup> August, 2013.
5. The consent order of 27<sup>th</sup> August, 2013 was made in presence of Applicant's/Petitioner's counsel by then, the late V.P. Gituma who in actual fact dictated the consent order. The Applicant in that consent was replaced as an administrator by consent. A consent order at any rate can be set aside if the applying party satisfies the requirements as set out under **order 45 of Civil Procedure Rules**. That the applicant has to establish discovery of new and important matter or evidence or on account of some mistaken or error apparent on the face of the record or for any other sufficient reason and an application should be made without unreasonable delay. The Court of Appeal in several decisions has set out the conditions under which a consent order can be set aside. In the case of the **NATIONAL BANK OF KENYA VERSUS NDUNG'U NJAU (1997) Eklr** the Court of Appeal held:-

***“A review will be granted whenever the Court considers it is necessary to correct an error or omission on the part of the Court. The error or omission must be self-evident and should not require an elaborate argument to be established”***

In the case of **FLORA N. WASIKE VERSUS DESTIMO WAMBOKO (1982 – 1988) KAR 625** The Court of Appeal held that a consent judgment can only be set aside on ground as would justify the setting aside of a consent for example fraud, mistake or misinterpretation.

**In PURCELL VERSUS FC TRIGELL LTD (1970) 3 ALL ER 671** WINN LJ SAND at 676

***“It seems to me that, if a consent order is to be set aside, it can really only be set aside on grounds which would justify the setting aside of a contract entered into with knowledge of material matters by legally competent persons, and I see no suggestion here that any matters that occurred would justify the setting aside or rectification of this order looked at as a contract”***

**In HIRANI VERSUS KASSAM (1952) 19 EACA 131 at page 134** Court OF Appeal stated:-

***“The mode of paying the debt is part of the consent judgment that being so the court cannot interfere with it except in such circumstances as would afford good ground for varying or rescinding on contract between the parties. No such ground is alleged here. The position is clearly set out in section.....On judgments and orders (7<sup>th</sup> edition) volume 1 page 124 as follows:-***

***“Prima facie, only order made in the presence and with the consent of 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.....or if the consent was given without sufficient material facts, or in general for a reason which would enable the court to set aside an agreement”.***

The Applicant's counsel participated fully on the making of the consent order. The consent given by counsel binds the client and one cannot turn about turn and allege the counsel acted without his

consent.

6. Under Rule 61 of the Probate and Administration Rules; it provides the Civil Procedure Rules which are applicable in the Probate and Administration Rules. Order XLIV now order 45 of the repealed Civil Procedure Rules is applicable in the succession matters. I therefore find and hold the application is properly founded but the applicant has failed to meet the criteria as set out under the said order and further has challenged a non-existing order. The consent of 27<sup>th</sup> August, 2013 is as I have found not subject of the applicant's application before this court and court cannot be left to act on speculation.
7. The Applicant in the instant application has brought an application to challenge a non-existent order and as such I find the application to be frivolous and an abuse of the court process. The application is therefore dismissed with costs.

**DATED, SIGNED AND DELIVERED AT MERU THIS 4TH DECEMBER, 2014**

**J. A. MAKAU**

**JUDGE**

**DELIVERED IN OPEN COURT IN THE PRESENCE OF:**

- 1. Mr. Kimathi for the petitioner/applicant**
- 2. Mr. Murithi for the respondent**
- 3. CC Penina/Mwenda**

**J. A. MAKAU**

**JUDGE**