

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
(FAMILY DIVISION)
SUCCESSION CAUSE NO. 40 OF 1977
IN THE MATTER OF ABDULRAHIM MOHAMED MAHDI BAJNAF
(DECEASED)

ABDULLAH ABDULRAHIM MOHAMED.....APPLICANT/RESPONDENT

VERSUS

SAID ABDULRAHIM MOHAMED.....1ST RESPONDENT/APPLICANT

ALYA ABDULARAHERIM MOHAMED.....2ND RESPONDENT/APPLICANT

RULING

1. Before the Court is a Summons dated **26th February 2025** vide which the respondents/applicants, **Said Abdulrahim Mohamed** and **Alya Abdulrahim Mohamed**, seek the following orders: -
 - (1) Spent;
 - (2) Spent;
 - (3) The consent order recorded in Court on **28th January 2020** and extracted on **3rd February 2020** be set aside in its entirety and all applications made after **25th November 1990** be declared as null and void;
 - (4) Upon settling a side, the consent of **28th January 2020**, the Court be pleased to review the ruling of **28th January 2020**, by revoking the grant issued on **28th January 2020** and confirmed on **6th February 2025**; and
 - (5) Costs.

2. The grounds upon which the application was brought were that there was material non-disclosure by the applicant (Mr. Abdullahi Abdulrahim Mohamed)

and the advocates for the respondents/applicants of the fact that the administrator, Zainab Mahdi, died on 25th November 1990, 30 years before the consent was entered into. Further, the death of Zainab Mahdi was within the knowledge of the applicant and the respondents' advocates.

3. It was stated that the advocates for the respondents could not have acted for Zainab Mahdi at that point, as the agency relationship ended at the time she died. They contended that the consent was therefore unlawful and non-binding. They further claimed that they were not formally made parties to the proceedings, nor were they administrators of Zainab Mahdi's estate, and could therefore not represent her.
4. The respondents/applicants contested this Court's jurisdiction to issue the orders that were granted on **6th February 2025**.
5. The foregoing grounds were restated on the affidavit sworn by Mr Said Abdulrahim Mohamed on **26th February 2025**, to which were attached various documents, including the death certificate of Ms Zeinab Bamragha, the order dated 3rd February 2020, and the ruling that this Court delivered.
6. The application was opposed. The applicant/respondent, Mr **Abdullahi Abdulrahim Mohamed**, filed a deposition dated **10th March 2025** in which he opposed the application. He stated that the consent was recorded in Court on **28th January 2020**, and that it took the Court's personal intervention for the parties to agree.

7. Mr Abdullahi deposed that what the application sought to do was to have this Court sit on appeal against its decision, which action was impermissible under our system of law. He averred that the threshold for setting aside a consent order had not been met.
8. The 1st respondent/applicant deposed to a supplementary affidavit vide which he annexed a copy of the title, which shows that Title No Mombasa/Block XVI/884 is registered in the name of the deceased, Zainab Mahdi aka Zeinab Bamragha. Curiously, in paragraph 4, thereof, he stated that: -

“I believe that it is in the interest of justice and fairness that the applicant’s Notice of Motion be denied.”
9. The applicant was canvassed by way of written submissions. Both parties filed written submissions, which I have perused.
10. It should be noted that the application seeks to review the Court’s orders of **28th January 2020** and for the grant to be revoked.
11. In the submissions dated **29th April 2025**, the counsel for the Respondents/Applicants urged the Court to find that the consent recorded in Court on **28th January 2020** was null and void and of no effect, and that the ruling of **28th January 2020** be reviewed by revoking the grant issued on **28th January 2020** and confirmed on **6th February 2025**.
12. It was urged that the consent of **28th January 2020** was obtained through material non-disclosure of the death of the previous administrator. The proceedings were therefore defective. Mr Karina, learned counsel for the

respondents/applicants, submitted that the counsel for Mrs Zainab Mahdi lost instructions after she died. He further submitted that the appointment of new administrators could be made only with the consent of all the beneficiaries, which wasn't done in this case.

13. Relying upon the case of **IN THE MATTER OF THE ESTATE OF MWANGI MUGWE ALIAS ELIEZA NGWARE (DECEASED) [2003] KEHC 872 (KLR)**, counsel urged that the Applicant/respondent ought to have applied for a grant de bonis non pursuant to the provisions of Section 76(e) of the Law of Succession Act on the ground that the grant had become useless and inoperative following the death of the sole administrators.

14. It was urged that, as advocates are the agents of their clients and operate under the principles of the law of agency, their authority was terminable upon the demise of their client. In support of the said contention, reliance was placed on the case of **Ummer Suleiman Kara v Maa Zabeen Sidik [2014] KEHC 2491 (KLR)**, where it was held that: -

“In common law jurisdictions, it is generally accepted that a Power of Attorney is of the generic nature of forms of agency. The legal consequences of the creation of an agency will equally be applicable to the appointment of an attorney in fact. This being the case, the death of the principal has the effect of instantaneously terminating the agency by operation of the law. As an agent can only perform such duties as may be effected by his principal, he is precluded from effecting duties for which he is merely a substitute. When the principal dies, the substitution dies by operation of the fact of death and the law.”

15. It was therefore urged that the application be allowed.
16. Mr. Egunza, learned counsel for the applicant/respondent, filed written submissions dated 7th May 2025. Counsel urged that the consent recorded before this Court was lawful and that the Court did not err in recording it. He submitted that the consent was recorded in the presence of the applicant/respondent, the 1st respondent/applicant, and their respective advocates.
17. Mr Egunza submitted that it hadn't been shown that the consent was obtained by coercion, duress, misrepresentation, or fraud for the Court to set it aside. He relied on the case of **Flora N. Wasike v Destimo Wamboko [1985] KECA 149 (KLR)**, where it was held that: -
- “It is now settled law that a consent judgment or order has 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: see the decision of this court in *J M Mwakio v Kenya Commercial Bank Ltd* Civil Appeals 28 of 1982 and 69 of 1983. In *Purcell v F C Trigell Ltd* [1970] 2 All ER 671, Winn LJ said 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 the material matters by legally competent persons, and I see no suggestion**

here that any matter that occurred would justify the setting aside or rectification of this order looked at as a contract.””

18. It was urged that Mr. Said Abdulrahim Mohamed signed the Form 37 of the P&A Forms knowingly and could not resile from it. Further that all he was doing was making life difficult for the applicant/respondent.
19. Counsel stated that Mr Said Abdulrahim Mohamed had been intermeddling with the assets of the estate by selling some of the properties.
20. Based on the foregoing, it was urged that the application be dismissed with costs.
21. I have considered the application dated **26th February 2025**, the response thereto, as well as the submissions of the parties. Having carefully ruminated on the matter, I have distilled the issues as being: -
 1. Whether this Court can review the consent orders made on 28th January 2020;
 2. Whether there are grounds for setting aside a consent order;
 3. Whether it is possible to substitute a deceased administrator;
 4. Whether the respondents' interest in the estate flows from that of Ms Zainab Mahdi, or is independent of her; and
 5. What orders should be issued?
22. It is a common ground that Mr **Abdullahi**, Mr **Said**, and Ms **Alya** are siblings. They are the children of **Abdulrahim Mohamed Mahdi Bajnaf**. Mr Abdullahi's mother was Gamar, while that of Mr **Said** and Ms **Alya** was Zainab

Mahdi, aka Zeinab Bamragha. As the children of the deceased person whose estate is the subject of these proceedings, they were his dependents under section 28(a) of the Law of Succession Act and ranked just below the deceased widow in the order of priority given in section 66 of the said Act. That being the case, they didn't need to apply for a grant in respect of their mother's estate for them to file an application herein or to seek any orders.

- 23.** I have perused the documents in the Court file and note that the firm of Omar Said & Co. Advocates always represented the 1st respondent. On **28th January 2020**, Mr. Egunza, for the applicant/respondent, was in Court, as was Mr. Hamisi Mgandi for Mr Said Abdulrahim Mohamed. In his deposition, Mr Abdullahi Abdulrahim Mohamed averred that Mr Said was in Court when his counsel executed the consent. This averment has not been controverted.
- 24.** Courts have jurisdiction to review their previous decisions under section 80 of the Civil Procedure Act. The said provision is given effect by Order 45, Rule 1, of the Civil Procedure Rules. Rule 63 of the Probate & Administration Rules provides that Order 45 of the Civil Procedure Rules applies to Probate & Administration matters.
- 25.** Order 45 Rule 1 of the Civil Procedure Rule states that: -
“(1) Any person considering himself aggrieved: -
(a)by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
(b)by a decree or order from which no appeal is hereby allowed,

and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

- 26.** What is clear from the foregoing is that a review application ought to be made where: -
- i. Discovery of a new or important fact of evidence which was not possession of the applicant at the time the decision was made;
 - ii. There is an error apparent on the face of the record; and
 - iii. For any other sufficient reason.
- 27.** It hasn't been stated that there has been a discovery of a new fact or document. It is a common ground that Zainab Mahdi has been dead since 1990. The agency, or lack thereof, of her alleged advocates was within the knowledge of Mr Said or Ms Alya, or could have been within their knowledge with the exercise of a basic level of diligence.
- 28.** It is likely that the application is based on an error on the face of the record. I say 'likely' based, as that has not been directly suggested as the basis for the application. The question then is whether that is the case.

29. In the case of **National Bank of Kenya Limited v Njau [1997] KECA 71 (KLR)**, it was held that: -

“A review may be granted whenever the court considers that it is necessary to correct an apparent 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. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.”

30. With respect, I am unable to see the error that is said to have been made by the Court. As direct beneficiaries of the estate, Mr. Abdullahi, Mr. Said, and Ms. Alya were entitled to take part in the succession proceedings as dependents of the deceased.

31. I must also state that once Mrs Zainab Mahdi died, the grant in her favour became useless and inoperative. In such circumstances, the Court had the discretion, under section 76(e) of the Law of Succession Act, to revoke the grant, and under section 66 of the said Act, to appoint other administrators.

32. In his submissions, Mr Karina has approbated and reprobated substitution, appearing to say that it is possible and should have been done, on the one hand, while also quoting a case in which it was held that substitution isn't possible, on the other hand. With respect, the view of this Court is that where a grant has become useless and inoperative, the dependants may apply for

the appointment of new administrators who shall be issued with a new grant *de bonis non*.

33. My view is that a grant is issued *in personam*, to the administrator by the Court. Where the sole administrator dies, the Court must appoint another administrator upon the parties' application or on its own motion.

34. In the case of **In re Estate George Ragui Karanja (Deceased) [2016] KEHC 6519 (KLR)**, W Musyoka, J held that: -

“It would appear to me that once all the holders of a grant die, section 81 of the Act would be of no application. Indeed, the said grant becomes useless and inoperative, and liable to revocation under section 76(e) of the Law of Succession Act, to pave the way for the appointment of new administrators. The appointment of fresh administrators to take the place of the previous ones following their death is subject to the provisions of sections 51 through to section 66 of the Act.”

35. The Court was alive to the said legal position and used its discretion judiciously to appoint the new administrators.

36. I note that the appointment was made pursuant to a consent of the parties. Consent orders can only be set aside on the same grounds that would justify setting aside a contract, that is to say, where fraud, mistake, or misrepresentation is proved.

37. The Court of Appeal, while considering whether to set aside a consent order, in the case of **Mwalambe & another v Freedom Limited [2025] KECA 252 (KLR)**, stated as follows: -

“Unfortunately, in this case, the appellants failed to substantiate the allegations that their counsel did not have authority to execute the consent judgment. The element of fraud or misrepresentation on the former appellants’ advocates was not demonstrated, not even by a simple sweeping statement that they had taken any action against the counsel for misrepresenting their instructions to the court. This is a conclusive testament that they knew that they could not support the assertion that they had not instructed the counsel to sign and file the consent judgment. We are therefore not persuaded that the appellants were not aware of the terms of the consent. We are therefore not persuaded that the appellants were not aware of the terms of the consent.”

38. Apart from the sweeping statements which Mr Said made, no proof of lack of instruction on the part of the firm of Omar Said & Co. Advocates has been provided, nor has Mr Said indicated what steps he has taken against them, if indeed they didn’t have instructions. In the circumstances, I am unable to agree that the consent was entered into without instructions.

39. What flows from the foregoing is that the application dated **26th February 2025** has no merit. The same is dismissed.

40. Although the Family Court does not ordinarily grant costs to the successful party, it is my view that in this instance the Court should depart from that

practice. Mr Said knowingly entered into a consent which he now wishes to rescind. His conduct is reprehensible. The Court must express its displeasure with his actions. In the circumstances, I award the applicant/respondent the costs of the application.

41. It is so ordered.

Dated and signed this 14th day of November 2025. Delivered virtually through **Microsoft TEAMS.**

Gregory Mutai
JUDGE

In the presence of:

Mr Tom Kongere, holding brief for Mr Karina, for the Respondents/Applicants;
Mr Egunza, for the Applicant/Respondent; and
Arthur – Court Assistant.