

**REPUBLIC OF KENYA**

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

**FAMILY DIVISION**

**SUCCESSION CAUSE NO. 1797 OF 2014**

**IN THE MATTER OF THE ESTATE OF FELIX NDUNGU**

**MWATHA (DECEASED)**

**BETWEEN**

**TERESIA WAITHIRA KARANU .....**

**APPLICANT**

**VERSUS**

**MARY WANGUI NDUNGU ..... 1<sup>ST</sup>**

**RESPONDENT**

**JOSEPH WAINAINA NDUNGU ..... 2<sup>ND</sup>**

**RESPONDENT**

**RULING**

1. The parties involved in this ruling have been engaged in a long-standing succession matter. There were parallel succession proceedings in two separate files that were

subsequently flagged and consolidated. The Court set down the matter for *viva voce* evidence to determine whether the estate will be administered testate or intestate.

2. The matter was referred to Court Annexed Mediation; when it was not successful, it was set down for hearing. It was partially heard, and when the case was scheduled for further hearing, a consent dated 11<sup>th</sup> February, 2025 was recorded and adopted as an order of the Court, thereby marking the matter as settled.
3. The Applicant has applied to have that consent set aside, and that is the subject of this ruling. The prayers on the face of the application are as follows;

**(i) THAT the consent order dated 11<sup>th</sup> February, 2022 and adopted by the honourable court on 12<sup>th</sup> May, 2025, purporting to distribute the estate of the deceased, be reviewed and/or set aside for having been obtained through misrepresentation, fraud, mistake and without the Applicant's authority or knowledge;**

- (ii) THAT Certificate of Confirmation of Grant issued or set to be issued in accordance with the said consent be revoked, stayed, and/or reviewed pending the determination of this application;**
- (iii) THAT any other consent(s) purporting to determine the mode of distribution of the deceased's estate, entered between the Respondent and any other party without the participation of the Applicant, be declared invalid and of no legal effect;**
- (iv) THAT the court be pleased to issue such further or other directions as may be necessary for the proper and lawful administration of the estate of the late Felix Ndungu Mwatha;**
- (v) THAT the Respondent do bear the costs of this application.**

4. The application is opposed.

5. The Applicant argues that the consent was entered into without her knowledge, consent or instructions and has

asked the court to set it aside. She argued that the advocates who were on record did not consult her and neither disclosed the contents of the consent to her prior to its adoption.

6. She further stated that she was surprised to learn of the adoption of the consent after she attended Court physically on the same date and discovered that the matter had been handled earlier via the online platform and marked as settled.
7. The 1<sup>st</sup> Respondent passed away on 1<sup>st</sup> July, 2025, a few days after the filing of the application. The 2<sup>nd</sup> Respondent, through the replying affidavit, opposed the application. He argued that the main contention in the matter revolved around Ndumberi/Ndumberi/664 and stated that the consent was entered into to address the distribution of the parcel.
8. According to the Respondent, the consent was entered into after extensive discussions during the mediation and with the parties' respective advocates.
9. I have considered the application, the affidavits, and the submissions filed by the parties. The issue for

determination is whether the Court should set aside the adopted consent.

10. The impugned consent was recorded in the following terms;

**(a) “Joseph Wainaina Ndung’u and Teresia Waithira Karanu are hereby appointed as the administrators of the estate of Felix Ndung’u Mwatha (Deceased);**

**(b) A certificate of Confirmation of Grant do issue forthwith in line with the proposed distribution as per the schedule herebelow:-**

<b>PROPERTY</b>	<b>BENEFICIARY</b>	<b>SHARES</b>
Ndumberi/ Ndumberi 664	Teresia Waithira Karanu	3 Acres
	Mary Wangui Ndung’u - wife	To share equally the remainder thereof which measures 6.29 acres, or thereabout
	Joseph Wainaina Ndung’u - son	
	Ziporah Nyambura	
	Gachuhi - daughter	
	Jackson Ndungu Waithira - grandson	
	Martin Wanda Waithira - grandson	
	Hannah Njeri Ndungu - daughter	
	Margaret Wambui Ndungu - daughter	
	Paul Mbogo Ndungu - son	
	Hannah Ngirote Waituna - daughter-in-law	
	James Mwaura Ndungu -	

	<i>son Leonard Njuguna Ndungu - son Peter Muchiri Ndungu - son John Mathegi Ndungu - son</i>	
<i>Ndumberi/ Ndumberi 1259</i>	<i>Mary Wangui Ndun'u Joseph Wainaina Ndung'u Zipora Nyambura Gachuhi Jackson Ndungu Waithira Martin Wanda Waithira Hannah Njeri Ndungu Margaret Wambui Ndungu</i>	<i>To share equally among all the listed beneficiaries</i>

<b>PROPERTY</b>	<b>BENEFICIARY</b>	<b>SHARES</b>
<i>Ndumberi/Ndumberi 1259</i>	<i>Paul Mbogo Ndungu Hannah Ngirote Waituna James Mwaura Ndungu Leonard Njuguna Ndungu Peter Muchiri Ndungu John Mathegi Ndungu</i>	<i>To share equally among all the listed beneficiaries</i>
<i>Langata Residential Unit House No. B7- 68. Ngong 2 acres parcel. Karagita 4 plots - Certificate Nos.002, 238, 1182, 1205.</i>	<i>Joseph Wainaina Ndung'u Ziporah Nyambura Gachuhi Paul Mbogo Ndungu James Mwaura Ndungu Leonard Njuguna</i>	<i>To share equally among all the beneficiaries</i>

<p>Njamba Tikere 2 plots. Dandora 4 plots. Kanjata - 1 plot Kangoya. Karangatha Farmers Plot 43/79. Plot No.454 Githurai.</p>	<p>Ndungu Peter Muchiri Ndungu John Mathegi Ndungu</p>	
<p><b>Shares:</b> Nation Media Group Limited. Liberty Kenya Holdings Limited. Co-operative Bank of Kenya Ltd. TPS Eastern Africa Limited. Williamson Tea. Kenya Commercial Bank Limited. CFC Stanbic Holdings Limited. National Bank of Kenya. B.A.T Kenya Limited. East Africa Breweries Limited. Kengen Ltd. Safaricom Limited. C.F.C Bank Account. National Bank of Kenya Ltd. Co-operative Bank of Kenya. Standard Chartered Bank of Kenya.</p>	<p>Joseph Wainaina Ndung'u Ziporah Nyambura Gachuhi Paul Mbogo Ndungu James Mwaura Ndungu Leonard Njuguna Ndungu Peter Muchiri Ndungu John Mathegi Ndungu</p>	<p>To share equally among all the beneficiaries</p>

**(c) All costs including court fees, advocates fees and survey fees shall be borne by the estate.**

**SIGNED**

**SIGNED**

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**J.M. Njengo & Co.  
Associates**

**Manasses Mwangi &**

**Advocate for the Applicants/  
the Objector/**

**Advocate for**

**Beneficiaries**

**Beneficiary.”**

11. In **Flora Wasike -vs- Destimo Wamboko [1982 - 88] 1 KAR 266**, the Court of Appeal held that:

- i. “It is settled law that the consent judgment can only be set aside on the same grounds as would justify the setting aside of a contract for example fraud, mistake or misrepresentation.**
- ii. An advocate would have ostensible authority to compromise a suit or consent to a judgment so far as the opponent is concerned.**
- iii. The court would not readily assume that judgment recorded by a Judge as being by consent was not so unless it was demonstrably shown otherwise.”**

12. The test is whether the Applicant has met the threshold for the grant of the orders.

13. The application was filed within a month of the proceedings that adopted the consent. It was thus filed without inordinate delay.
14. The consent indicates that it was signed by an advocate who was then acting for the Applicant.
15. While examining a similar issue as the present one, the Court in **Mwalambe & another v Freedom Limited (Civil Appeal E022 of 2023) [2025] KECA 252 (KLR)** held as follows;

*“Undeniably, advocates are recognized agents of parties on behalf of whom they make their appearances and address the court. In so acting as an agent, an advocate is bound to obey the instructions of his/her principal, in this case the client, and should neither exceed nor fall short of those instructions lest he/she be held liable for any misrepresentation he/she may make. The general assumption, unless otherwise proved, is that, an advocate being the authorised agent of a party, is deemed to be fully authorised by his/her client and that*

***whatever he/she transacts is assumed to be within the full knowledge and authority of the client.”***

16. I have reviewed the record to assess the conduct of the Applicant and her advocate concerning the adoption of the consent. This case has been proceeded as a contested matter; the detailed procedural history shows that it was a part-heard case at the time of the adoption of the consent.
17. On the specific date when the two counsel notified the Court of their agreement regarding the adoption of the consent, the matter was originally scheduled for a physical hearing in open Court. However, the actual adoption proceedings were conducted during a virtual session on an online platform.
18. The Applicant states that pursuant to the earlier directions on the hearing, she was in Open Court and was prepared for an in-person hearing only to learn that the matter had been disposed of through a consent adopted during the online session. Counsel for the parties are

generally expected to properly inform their clients about the transition from a physical to an online session.

19. The consent was filed with the court on 14<sup>th</sup> February, 2022 but the parties stated during their subsequent attendance on 8<sup>th</sup> June, 2022 that they wished to negotiate further. The Respondent's counsel asked the Court to expunge the document, while the Applicant's counsel informed the Court that they had information suggesting the consent had not been accepted and that they were back to square one (See pages 40 and 41 of the handwritten proceedings).

20. Additionally, the mediation report, submitted at the time the case was referred to mediation, clearly states that the parties involved had failed to reach a settlement. It is plausible from the procedural history of the matter that the parties, despite their efforts to discuss the issues, had not reached a full consensus on them. They reported negative outcomes severally.

21. The request for adoption was made three years after the consent was originally signed. This significant delay, along with the procedural history, suggests that there

was an ongoing dispute. The Applicant argues that the adoption of the consent was not authorized.

22. The Applicant has presented justification that there was a reasonable expectation that the matter was still actively progressing and had not been compromised in any way, indicating that the counsel did not possess the necessary authority to invite the court to adopt the consent.

23. The application dated 4<sup>th</sup> June, 2025 is allowed with costs in the cause. The consent order dated 11<sup>th</sup> February, 2022 and adopted in Court on 12<sup>th</sup> May, 2025 is consequently set aside. The parties are to take directions towards the further hearing and determination of the matter.

24. It is so ordered.

**DATED, DELIVERED and SIGNED at NAIROBI** through the Microsoft Teams Online Platform on this **10<sup>th</sup>** day of **NOVEMBER, 2025.**

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**C. KENDAGOR**

## **JUDGE**

### **In the presence of:**

Court Assistant: Beryl

Ms. Asiago, Advocate for the Applicant

Mr. Ngure, Advocate holding brief for Mr. Njengo, Advocate  
for the Respondent