



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MISCELLANEOUS APPLICATION NO. E058 OF 2023**

**MUTUKU MBITHI & BUTONYI ADVOCATES .....**  
**APPLICANT**

**VERSES**

**JAMES KIMUTAI CHERONO &**

**JOHN ROTICH LIMO (SUED AS EXECUTORS OF THE WILL**

**OF REBECCA JEPKEMOI CHERONO (DECEASED) .....**

**RESPONDENTS**

**AND**

**TOROITICH CHERONO ..... 1<sup>ST</sup>**  
**BENEFICIARY/INTENDED**

**APPLICANT**

**ROSEMARY CHEBET CHERONO..... 2<sup>ND</sup>**  
**BENEFICIARY/INTENDED**

**APPLICANT**

**NATALIE JEPKOSGEI CHERONO ..... 3<sup>RD</sup>**  
**BENEFICIARY/INTENDED**

**APPLICANT**

**LUCAS OKUKU MBOYA (suing as a next**

**friend to AIMEE ASINJO AND WILLIAM KENAI .. 4<sup>TH</sup>**

**BENEFICIARY/INTENDED**

**APPLICANT**

## **RULING**

1. The summons by the Beneficiaries/Applicants dated 1<sup>st</sup> October 2024 seeks the following orders:-
  - (a) That the intended Beneficiaries/Applicants be joined as parties in this suit.**
  - (b) That the court grants stay of execution of the decree dated 13<sup>th</sup> September 2024 pending the determination of this application.**
  - (c) The court do set aside the consent judgement and consequential orders dated 30<sup>th</sup> July 2024 ordering that the firm of Mutuku Mbithi & Butonyi Advocates be paid the sum of Kshs. 5,129,980 being the sum taxed for advocates costs on 6<sup>th</sup> June 2023 from collection of monthly rent from apartment B1, B3, B7, B8, B9, AND B10 at Bella Orchids apartments.**
  - (d) That the firm of Mutuku Mbithi & Butoyi Advocates by themselves and or their agents or employees or any person under them be restrained from receiving any rent from the tenants of apartments B1, B3,B7 ,B8 ,B9 and B10 of the Bella Orchids apartments pending the hearing and determination of this matter.**
  - (e) That the court substitutes the taxed fee of Kshs. 5,129,980 with the agreed legal fees as per the settlement agreement dated 24<sup>th</sup> August 2024 and the legal payment schedule filed in HCCC SUCC. Cause No 1434 of 2019.**

**(f) Costs to the Applicants.**

2. The application is based on the grounds thereof as well as the supporting affidavit of Toroitich Cherono sworn on even date and his further affidavit sworn on 15<sup>th</sup> May 2025.
3. The intended Applicants are beneficiaries of the estate of the late Rebecca Jepkemoi Cherono vide Succession Cause No. 1434 of 2019.
4. The Applicant deponed that they entered into a settlement agreement on 24<sup>th</sup> August 2021 in which all the issues relating to the above estate were discussed and agreed. Each of the Applicant was bequeathed some specific properties including apartments.
5. He further deponed that part of the agreement was the issue of legal fees due to the firm of Mutuku Mbithi & Butoyi Advocates who had acted in the succession matter. According to the Applicants the same was to be settled by the Applicant Executor James Kimutai Cherono and it was incorporated into the agreement.
6. Unbeknown to them the Applicant entered into a consent agreement with the said law firm in which they agreed that the taxed costs amounting to Kshs. 5,129,980 would be paid through rent deductions from the apartments B1, B3, B7, B8, B9, AND B10 at Bella Orchids.
7. It is the Applicant's case therefore that this was contrary to the settlement agreement in which it had been agreed that the Applicant was to personally settled the legal fees due to the advocates. That they did not consent to the bill and

more importantly the mode of payment consented to by the applicant and the advocates.

8. In his replying affidavit dated 7<sup>th</sup> October 2024 the Applicant/Executor James Cherono vehemently denied that the Applicants were not privy to the advocates charges and that they had agreed to share out the same on equal portions.
9. He deponed that the counsel had taxed the costs minimally taking into account that the value of the estate was over Kshs. 200million.
10. He deposed that he had since disposed off one of his units namely apartment B11 since he was relocating from Nairobi to Eldoret and out of his proceeds he had paid Kshs. 1 million to the said firm.
11. He accused the beneficiaries of not making any payments towards the settlement of the taxed costs despite each receiving rent from the apartments.
12. The court directed the parties to file their written submissions which they have complied. The court notes that the said firm of advocates did not file any response to the application.

### **Analysis and determination**

13. The substance of the submissions on record is whether a consent like the one entered between the Applicant and the counsels can be set aside.

14. The case of **Intercountries Importers and Exporters limited v. Teleposta Pension Scheme Registered Trustees & 5 Others (2019) KECA 928(eKLR)** is worth reproducing here as it sets the grounds upon which a consent can be set aside. The learned judges stated that:-

**“The principles that appertain to setting aside of a consent order are well established in a line of cases including Brooke Bond Liebig vs Mallya (1975) EA 266 where Mustafa Ag. VP stated thus;**

**“The compromise agreement was made an order of the court and was thus a consent judgment. It is well settled that a consent judgment can be set aside only in certain circumstances, e.g. on grounds of fraud or collusion, that there was no consensus between the parties, public policy or for such reasons as would enable a court to set aside or rescind a contract. In this case the parties and their advocates consented to the compromise in very clear terms; they were certainly aware of all the material facts and there could not have been any mistake or misunderstanding. None of the factors which could give rise to the setting aside of a consent agreement existed.”**

15. And in the case of **Flora N. Wasike vs Destimo Wamboko [1988] eKLR** Hancox JA cited Setton on Judgments and orders (7th edition) vol 1 page 124, and reiterated that:

***“Any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and 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 a court set aside an agreement.”***

16. The consent agreement between the Applicant/Executors and Mutuku Mbithi & Butoyi advocates dated 30<sup>th</sup> July 2024 clearly spelt out that:-

***“(2) That the sum be recovered by collection of monthly rent from apartments B1,B3,B7,B8,B9 AND B10 at Bella Orchid Apartments off Riara road Nairobi.”***

17. Who were the owners of the above apartments as per the agreement dated 21<sup>st</sup> August 2021? Paragraph 10.8 thereof states that:-

***“Toroitich Cherono, inherits B1, James Kimutai Cherono inherits B2 and B11, Rosemary Chebet Cherono inherits B3, Aimee Asinjo and William Kenai inherit B7, Natalie Jepkosgei Cherono inherits B8, Rosemary Chebet Cherono and Aimee Asinjo and William Kenai inherit B9 in equal shares and Toroitich Cherono and Natalie Jepkosgei Cherono inherit apartment B10 in equal shares.”***

18. Effectively therefore the Applicant /Executor from 21<sup>st</sup> August 2021 could not have dealt with the above apartments without the input and consents of the owners.
19. The consent entered by the Applicant and the firm of Mutuku Mbithi & Butoyi advocates on 30<sup>th</sup> July 2024 ought to have incorporated the owners of the above apartments who should have allowed the rent proceeds to settle the legal fees as taxed.
20. More importantly is item 11 of the Settlement Agreement mentioned above. The same states that:-

***“ James Kimutai Cherono is inheriting apartment B11 of Bella Orchids apartments on condition that he settles the debt owed to Creative Joiners and any fees claimed by Mutuku (Advocate) as legal fees for attending to matters concerning the estate of RJC as per the legal fees payment schedule that is part of and is in its entirety binding on this settlement agreement execution of which automatically assimilates the legal fees payment schedule.,”***

21. The legal fees payment schedule under paragraph 4 states that:

***“It is a condition of James Kimutai Cherono inheriting Apartment B11 of Bella orchid apartments that in addition to settling the debt owed to Creative Joiners he will pay any fees above Kshs 500,000 that is claimed by Mutuku (Advocate) as***

***legal fees owing for attending to matters concerning the estate of RJC”***

22. My simple understating of the above agreement is that by taking apartment B11 the applicant was indemnifying so to speak the rest of the beneficiaries against any legal charges over Kshs. 500,000 that may be owed to Mutuku advocates.
23. Turning to the consent between him and the lawyers, it was wrong and completely out of order to commit the applicants' apartments in the payments of the legal charges without their input. If he wanted them to shoulder the responsibility and noting that by the agreement of settlement each of them including him had already been given their bequest the proper approach was to seek their consent and not to enter into any undertaking on their behalf.
24. I'm therefore satisfied as per the earlier cited authorities that the consent was entered without disclosure by the Applicant/Executor of all material facts and in particular that he was no longer in control of the estate and that the apartments he was consenting to no longer belonged to the estate but individual beneficiaries.
25. As a matter of fact, what remained was simply to transmit the properties to the beneficiaries as is expected of the administrators of the estate.
26. By burdening them with other liabilities which he ought to shoulder was manifestly wrong. The apartment number

B11 which he claimed to have even sold was a way of ensuring that he pays the estates debts including those owed to Creative Joiners as well as Mutuku Advocate.

27. The only liability which the rest of the beneficiaries owed the firm of Mutuku is anything below Kshs. 500,000 as agreed. Anything over and above that ought to be shouldered by the Applicant/EXecutor.
28. In view of the above findings and if indeed the firm of Mutuku Mbithi & Butoyi advocates have been receiving rent in whatever manner, they must refund as a matter of priority and demand their fees from the applicant.
29. I shall refrain from discussing the amount owed to the said firm for the amount arrived at is between the lawyers on record and the Executor/Applicant. To that extent it is upon them to effect the consent agreed as legal fees outstanding without involving the Beneficiaries /Applicants.
30. **The application is merited and I direct that:-**
  - (a) **The Applicants/Beneficiaries are hereby enjoined as parties in this suit.**
  - (b) **The consent entered between the Applicants/ Administrators and the firm of Mutuku Mbithi & Butoyi Advocates dated 30<sup>th</sup> July 2024 is hereby set aside together with all attendant consequences.**
  - (c) **Any amount of rent collected by the firm of Mutuku Mbithi & Butoyi Advocates from Apartments B1, B3, B7, B8, B9 AND B10 at Bella**

**Orchids must be refunded to the Beneficiaries within 14 days from the date herein and any further collection must cease forthwith.**

**(d) In default on (c) above the same can be recovered as a civil debt.**

**(e) Costs of this application to the Applicants/Beneficiaries.**

**Dated signed and delivered via video link at Nairobi this 20<sup>th</sup> day of November 2025.**

**H K CHEMITEI  
JUDGE**