



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Benjamin Mwangi Mboga (Deceased) (Probate & Administration
141 of 2010) [2025] KEHC 17040 (KLR) (21 November 2025) (Ruling)**

Neutral citation: [2025] KEHC 17040 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
PROBATE & ADMINISTRATION 141 OF 2010
JRA WANANDA, J
NOVEMBER 21, 2025**

IN THE MATTER OF THE ESTATE OF BENJAMIN MWANGI MBOGA (DECEASED)

BETWEEN

**PETER MBUGUA MWANGI 1ST ADMINISTRATOR
DANIEL NDUNGU MWANGI 2ND ADMINISTRATOR
LABAN THEURI MWANGI 3RD ADMINISTRATOR
LEAH WANGARI MATHU 4TH ADMINISTRATOR**

AND

RUTH JEPTUM KABARAK RESPONDENT

RULING

1. The background of this matter is upon the death of the deceased herein, Benjamin Mwangi Mboga, on 12/01/2002, one Ruth Njeri Mwangi, the widow of the deceased, through Messrs Ledisha J.K. Kittony & Co. Advocates, on 12/01/2010 petitioned for Grant of Letters of Administration over the estate of the deceased. The Petition was then processed and the Grant dated 1/11/2011 issued as prayed, thus appointing the Petitioner as the sole Administratrix. Pursuant thereto, the Petitioner, filed the Summons for Confirmation of Grant dated 4/07/2012. However, before the Summons could be heard, the Petitioner's own 3 sons, Peter Mbugua Mwangi, Laban Theuri and Samuel Wandai, through Messrs Rioba Omboto & Co. Advocates, filed the Chamber Summons dated 13/12/2012 seeking Revocation of the Grant. The grounds alleged were that the Petitioner concealed from the Court the true list of beneficiaries and assets of the estate, and also that not all the beneficiaries' consents were obtained to file the Petition. According to them therefore, the Grant was obtained fraudulently.
2. The Petitioner however herself died on 26/01/2014, and was then substituted with two of her said sons, Peter Mbugua Mwangi, Daniel Ndungu Wangai, Laban Theuri Mwangi, and a daughter, Leah Wangari Mathu, as joint Administrators. The matter was then referred to Court Annexed Mediation



- which culminated into the Mediation Settlement Agreement adopted by the Court on 18/12/2020, whereof the estate was distributed amongst the beneficiaries. Pursuant thereto, an Amended Grant of Letters of Administration was issued on 3/12/2018, and later confirmed on 23/03/2021.
3. There have been several Applications thereafter but of interest to this Ruling is the Application dated 9/06/2023 filed by the Respondent, Ruth Jeptum Kabarak, who claimed to have purchased one of the parcels of land owned by the deceased, namely, Uasin Gishu/Kimumu Scheme/2851, which was however erroneously left out of the distribution. By the consent dated 9/10/2023, this Application was allowed, and an Amended Certificate of Confirmation issued on 27/11/2023.
 4. Before Court for determination is now the Summons dated 6/03/2025 filed through Messrs Ledishah J.K. Kitttony & Co. Advocates. From the face thereof, I presume that it is filed on behalf of the 2nd Administrator, Daniel Ndungu. It is then supported by the 4th Applicant, Leah Wangari Mathu, and seeks orders as follows:
 - a. [.....] spent.
 - b. The Consent order dated 9/10/2023 be set aside to the extent of distribution of the subject parcel of land No. Uasin/Kimumu Scheme/2851, to Ruth Jeptum Kabarak.
 - c. The Certificate of Confirmation issued herein on 29/11/2021 be amended to include parcel No. Uasin/Kimumu Scheme/2851 and the same be distributed and issued to Leah Wangari Mathu, Laban Theuri Mwangi, Daniel Ndungu Mwangi and Peter Mbugua Mwangi.
 - d. Costs of this application be in the cause
 5. In her Affidavit, the 2nd Applicant deponed that the Application is brought in good faith and in the best interest of justice and fairness. He deponed that at the time when the Administrators' late mother filed these proceedings, she provided an inventory of the estate assets which they were all along aware of, including some which the deceased had disposed of to different purchasers, though they are not sure of the extent of payment of the consideration and the status at the time of the deceased's demise. He urged that as a family, they agreed, during the Mediation, that the sold properties be first transferred to the Administrators who would then, subsequently transfer to the purchasers, upon clarification of any pending issues, including the balance of consideration, if any. He urged that in the course of these proceedings, they were informed by their Advocate that there was introduction of an additional parcel of land known as Uasin Gishu/Kimumu Scheme/2851 registered in the name of the deceased, but which was left out, and that the property is said to have been sold to the Respondent, but that they however do not know the Respondent, and do not know whether she actually purchased the property.
 6. He however deponed that they do not have a problem with transferring the property to her but after confirming the status of the property, and that the terms of the sale agreement were complied with. He urged further that they have been informed by their Advocate that she erroneously signed the consent drafted by the firm of Tum & Associates agreeing to the property being directly transferred to the Respondent, which was erroneous since all other sold assets required to be transferred, were first distributed to the Administrators before they can, in turn, be transferred to the purchasers, and that therefore, the error goes against the family arrangement.
 7. The 3rd Administrator, Leah Wangari Mathu, and also the Advocate, Ms. Ledishah J. Kipseii, too, filed respective separate Affidavits in support of the Application
 8. The Application is opposed by the Respondent by way of her Replying Affidavit sworn on 21/03/2025. She deponed that the purchase price was paid for in full but the property was omitted the list of the assets of the deceased given in these proceedings although she was indicated as a liability



of the estate. She deponed that Applicants did not respond to the Application seeking transfer to her, and therefore never raised any issue on how she purchased the parcel of land, and that the terms of the agreement were complied with, except transfer to her name. She further urged that a consent order cannot be revoked or set aside, that there is no prejudice that would be caused to the Applicants if the property is transferred to her name as she has been in possession and occupation thereof for over 37 years, and that she is not a stranger to the Applicants. She deponed that the Applicants are misleading the Court into thinking that they have no problem with transferring the property to her name when they actually have frustrated the entire process and adamantly refused to transfer the property to her yet she has furnished them with all the necessary documents. She urged that if the orders are granted, she stands to suffer irreparable harm and loss, there is no harm or loss that the Applicants stands to suffer if the property is not distributed to the Administrators first before transfer to the purchaser, and that if there is any issue that ought to be clarified over the sale of the property, the same can be clarified without amending the Certificate of Confirmation of Grant. She urged further that the Applicants vowed to frustrate her and their malicious intentions are now depicted in the instant Application. She then prayed that the Court do issue an order compelling the Administrators to execute all necessary documents to transmit the property to her.

9. The Application was then be canvassed by way of written Submissions. The Applicants' Submissions, filed through Messrs Ledishah J.K. Kittony & Co. Advocates, is dated 4/06/2025 while the Respondent's, filed through Messrs Tum & Associates Advocates, is dated 22/05/2025.

Applicants' Submissions

10. Counsel for the Applicant submitted that the consent was executed in error in the mistaken belief that it had been drawn as per terms of the mutual understanding, however the terms of the Consent were, in part, a misrepresentation of her understanding. She submitted although a consent, once entered, is generally considered binding and final, it can be set aside under specific circumstances primarily those that would justify setting aside a contract, such as fraud, misrepresentation or mistake, and that a Court may also intervene if the Consent was given without sufficient material facts, or in arrogance of material facts. According to her, such circumstances exist herein as there was misinterpretation and mistake. She cited the case of Kenya Power & Lighting Co Ltd v Okoth [2024] KEHC 6887 (KLR), and also the case of Sarovar Hotels Pvt Limited India v Placid View Properties Limited; A.F. Gross & Co. Advocates (Third party) [2022] KEHC 85 (KLR). Counsel then urged that the law is clear that the management of the estate of a deceased person is as provided under the Law of Succession Act, and as such, the property of such a deceased shall be administered by the Administrators appointed by the Court, who have the duty to transfer the property to the rightful beneficiaries. She also cited Section 79. Counsel submitted that it is in appreciation of the above that the entire assets of the deceased, including those sold to other purchasers, have been first distributed to the Administrators who shall then transfer to the beneficiaries. She gave examples in the Certificate of Confirmation. She reiterated that allowing the subject part of the consent to stand would be against the provisions of the law, and would contradict and depart from the procedure adopted for all the other assets herein, thus a discrimination, and against public policy.

Respondent's Submissions

11. Counsel for the Respondent, on her part, reiterated that the Respondent purchased the property during the lifetime of the deceased, and the sale agreement was executed by the deceased but the transfer thereof could not be effected since the deceased passed on one month after the property was registered in her name that is, on 12/11/2002. She submitted further that the Respondent has been in possession, use, and occupation of the property at all material times, and she therefore has a beneficial interest



thereon, and that the beneficiaries of the estate had knowledge of the transaction, as the Respondent was listed as a liability of the estate in the Affidavit in support of the Petition herein. She thus insisted that the Respondent is entitled to the property hence the Administrators ought to transfer the same in her favor since she complied with her part of the sale agreement. Counsel urged that the claims by the Applicants are aimed at misleading the Court since the Respondent has never stated that the property be registered in the names of the Administrators, but that it be included in the list of assets of the deceased, and be distributed to her. He cited the Court proceedings of 5/10/2023 and the Respondent's Affidavit filed in support of her Application leading to recording of the consent. He urged that his use of the word 'transmitted' was a reflection of the conveyance process as stipulated under the *Land Registration Act*, 2012 and Land Registration (General) Regulations, 2017, since the transfer to a purchaser of an estate is through transmission then transfer as it is done by lodging form LRA 39 (transmission form) and LRA 43 (transfer to a purchaser). She also Section 79 of the *Law of Succession Act*.

12. She then reiterated that the Applicant's Counsel signed the consent, and urged that none of the information in the consent is false or misleading so as to warrant the accusation of misrepresentation, as it reflects what the Respondent expressly prayed for. She cited the case of *Flora N. Wasike v Destimo Wamboko* [1988] eKLR, and the case of *Hirani vs. Kassam* (1952/19 EACA 131). She urged further that the Applicants demonstrate malice and have no pure intentions since they state that they intend to transfer the land to the Respondent upon clarification of payment or other conditions and terms of the agreement yet the sale was entered into in the year 1987, which is 38 years ago, and the Applicants were neither parties thereto nor signatories and hence have no lawful authority to clarify any terms or conditions therein, and any clarification can be done without further amending the Amended Certificate for Confirmation of Grant. According her, if there is a dispute regarding the terms of the agreement, the Applicants should raise the issue in the Environment and Land Court (ELC). She then reiterated that the Applicants suffer no irreparable harm if the property is transferred to the Respondent directly. She also pointed out that the Applicants having stated that they have no problem with transferring the property to the Respondent, then the question is why do they want the property to be transferred to them to register in their names rather than just transferring it to the Respondent directly? She thus reiterated that it is the Respondent who will suffer irreparable harm since the necessary documents had been sent to the Applicants to effect the transfer but they refused. In conclusion, Counsel submitted that it is in the interests of justice that this Court do issue an order compelling the Administrators to execute all necessary documents so that the property can be transferred to the Respondent.

Determination

13. The question herein is “whether the Court should review and set aside or amend the Consent order dated 9/10/2023 adopted by the Court on 27/10/2023.”
14. There is no dispute that a consent, once adopted as an order of the Court, becomes a binding Agreement as between the parties, and cannot be set aside unless the party challenging it proves that there are justifiable grounds to warrant its setting aside. Such vitiating factors are similar to those applicable to all other contracts or, and include, fraud, misrepresentation, coercion and undue influence. In reiterating this principle, the Court of Appeal, in the case of *Board of Trustees National Social Security Fund versus Micheal Mwalo* [2015] eKLR, stated as follows:

“The judgment arose from a Consent of the parties to the suit. The law pertaining to setting aside of Consent judgments or Consent orders has been clearly stated. A Court of law will not interfere with a Consent judgment except in circumstances such as would provide a



good ground for varying or rescinding a contract between parties. To impeach a Consent order or a Consent judgment, it must be shown that it was obtained by fraud, or collusion or by an agreement contrary to the policy of Court.” (emphasis mine).

15. The principle was restated in the case of *Flora N. Wasike v Destimo Wamboko* [1988] eKLR in which, in which Hancox, JA, observed 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 certain conditions remained to be fulfilled which are not carried out”

16. The same was also affirmed by Court of Appeal, in the case of *S M N vs. Z M S & 3 others* [2017] eKLR, in the following terms:

“Generally, a court of law will not interfere with a consent judgment except in circumstances such as would provide a good ground for varying or rescinding a contract between parties. The factors touted for impeaching the consent in this matter were fraud and collusion. It is also alleged that counsel had no authority to enter into the consent. The onus of proving those assertions to the required standard was on the appellant. They are serious imputations bordering on crime and therefore the burden of proof is of necessity slightly higher than on a balance of probability but perhaps not beyond reasonable doubt.”

17. Generally, therefore, a consent order is binding and the Court may only be persuaded to set it aside if there is evidence that some material fact not in a party’s possession was invariably withheld or misrepresented from him, or he was mistaken about its import.

18. In this case, it is not disputed that the consent was signed by Messrs Tum & Associates Advocates, acting for the Respondent, Messrs Ledisha J.K. Kittony, acting for the 2nd and 4th Administrators, and Messrs Rioba Omboto & Co. Advocates, acting for the 1st and 3rd Administrators. The same was then adopted by the Court in the presence of all Advocates acting for all the Administrators. Indeed, the Administrators have not alleged that that the Advocates did not possess instructions to so record the consent or that there was any impropriety or, or fraud during, or in the process of signing or adopting the consent order.

19. Having considered the Applicant’s allegations offered herein, I am not persuaded that they have given any serious explanation to suggest that there was any mistake or misunderstanding on their Counsel’s part on what the consent meant. Although, I agree that ideally, as alluded under Section 79 of the *Law of Succession Act*, assets of a deceased person should in the first instance, be transferred to the Administrators before being, in turn, transmitted or transferred to purchasers, where there is no dispute over validity of the purchase, or where the Court has already made a determination upholding such validity, there should be nothing to bar the Court from accepting the direct inclusion of the purchaser in the final distribution of the estate list. This should particularly be the case where, as herein, it is the parties themselves who have presented the request that the purchaser be directly included in the Certificate of Confirmation of the Grant as the beneficiary and transmittee of that particular asset. In this case, apart from merely alleging breach of Section 79 above, the Applicants have, in my view, failed also to demonstrate the prejudice that they risk being exposed to if the property is directly transmitted to the Respondent as agreed in the consent.

20. Reliance on the ground of allegation of breach of Section 79 also suggests that this was not at all a case of a mistake as alleged. It is clear that Section 79 has only been roped in as a red-herring. I honestly cannot find any grounds qualifying the Applicants’ alleged reasons as a “mistake”. There was none.



This was simply a case of subsequent change of mind by the Applicants after entering into the consent. Whatever the Applicants' motivation for this change of mind, I will not speculate, but the Court will not assist them in executing that motivation.

21. In conclusion, regarding the Respondent's plea that this Court now compels the Administrators to transmit the property to her by executing the necessary transfer documents, I decline to make any order thereon since there being no formal Application before me, I cannot as yet, conclude that the Administrators have refused to act as alleged. My understanding is that they were still waiting for determination of this Application. Now that this Application is determined, I trust that they shall do the right thing and thus assist in facilitating the conclusion of this old matter, which has been pending in Court for 25 years now.

Final Orders

22. In premises, the Application dated 6/03/2025 fails and is hereby dismissed.
23. As I trust that the Application was made in good faith, I order that each party bears its own costs thereof.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 21ST DAY OF NOVEMBER 2025

.....

WANANDA JOHN R. ANURO

JUDGE

Delivered in the presence of:

Mr. Kibichi h/b for Ms. Kipseii for the 2nd Administrator-Applicant

Ms. Sielei for the Respondent

N/A for all other parties

Court Assistant: Brian Kimathi

