



Mbugua v Kimemia (The Legal Representative of the Estate of Josiah Munyua Kimemia); Kimemia (Interested Party) (Environment & Land Case E163 of 2021) [2024] KEELC 7193 (KLR) (24 October 2024) (Ruling)

Neutral citation: [2024] KEELC 7193 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E163 OF 2021
AA OMOLLO, J
OCTOBER 24, 2024**

BETWEEN

HON SIMON NG'ANG'A MBUGUA PLAINTIFF

AND

ELIZABETH WAMBUI KIMEMIA DEFENDANT

**THE LEGAL REPRESENTATIVE OF THE ESTATE OF JOSIAH MUNYUA
KIMEMIA**

AND

JOYCE WANJIRU KIMEMIA INTERESTED PARTY

RULING

1. The Interested Party hereafter called the Applicant moved this Court vide an application dated 13th April, 2024 brought under the Overriding sections of the [Civil Procedure Act](#) and Order 45 (1) and (2) of the [Civil Procedure Act](#). The Applicant prays for orders;
 1. That the court be pleased to review and or set aside its Order/Decree on 19th August, 2021 endorsing the Consent entered between the Plaintiff and Defendant on 18th August, 2021.
 2. That every document endorsing the Defendant as having the authority to deal in Land Reference Number 21052 (IR No. 66888) particularly the Consent signed between the Plaintiff and Defendant dated 18th July, 2023 be deemed null and void for all intends and purposes.
 3. That stay of execution of the Court Decree issued on 19th July, 2023 premised on the Consent dated 18th August 2021 do issue pending the hearing and determination of this Application.



4. That upon grant of prayer 1 above, the Interested Party's Replying Affidavit dated 15th November, 2023 be treated as her responses to the Plaintiff's case and that she be examined and cross-examined on the affidavit during hearing.
 5. That the Plaintiff and Defendant be at liberty to respond to the Interested Party's Replying Affidavit within such time as the Court may deem fit.
 6. That the Court be pleased to set the suit for pretrial and it proceed to hearing on merit.
 7. That the costs of this application be in the cause.
2. The application was based on the ground that;
- a. The Order/Decree issued on 19th August 2021 endorsing the Consent entered between the Plaintiff and Defendant on 18th August, 2021 allowing the Plaintiff to retain Land Reference Number 21052 (IR No. 66888) is against court policy. It is cardinal court policy to uphold the law and the impugned Consent allowed property that has not undergone the succession/administration process to be dealt without proper legal authority obtained under the Law of Succession Act in what allowed to countenance, making it imperative that the Court sets aside the Consent to enforce its policy of upholding the law. Albeit the Defendant is an administrator of the Late Josiah Munyua Kimemia who was the registered owner of the property, the property had not been included in the grant making the Defendant administrator and had not been assigned exclusively to the Defendant to give her legal right to sell to the Plaintiff without reference to other dependants of the estate, making any dealings between her and the plaintiff a legal nullity the Court should not enforce or recognize.
3. The application is further supported by Applicant's affidavit sworn on the 11th April, 2024. In brief, the Applicant noted with concern that despite the suit property not being administered, the Defendant who is the administrator of the estate of Hon. Joshua Kimemia - deceased entered into dealing over the property with the Plaintiff/Respondent. She cited section 45(1) of the Law of Succession Act that except as allowed by a grant of representation issued under Act, no person is allowed to take possession, dispose or otherwise intermeddle with any free property of a deceased person.
4. The Applicant avers that the impugned consent dated 18th August, 2021 is a continuation of the Defendant's act of intermeddling with the property of the deceased. She also stated that section 36(1) of the Land Registration Act provides on how interest on land is to be disposed. Consequently, she argued the Defendant's purported disposal is illegal and nothing can regularise it not even the oft-quoted doctrine of innocent purchaser for value without notice. Section 36(1) of Land Registration Act states thus;
36. A lease, charge or interest in land shall not be disposed of or dealt with except
(1) in accordance with this Act, and any attempt to dispose of any lease, charge or interest in land otherwise than in accordance with this Act or any other law, shall not, extinguish, transfer, vary or affect any right or interest in that land, or in the land, lease or charge.
5. The plaintiff opposed the application deposing inter alia that the Applicant lacks locus standi to bring any claim in this court on behalf of the estate of Josia Munyua Kimemia deceased. He deposes that the consent judgment was entered with the legal representative of the deceased estate sued as the Defendant.



6. The plaintiff stated that a consent judgment has a contractual effect and can only be set aside on grounds that would justify setting aside a contract. That he is advised that no privity of contract exists between him and the Applicant to clothe her with locus to set aside the consent. The Respondent cited the provisions of Section 47 of Cap 160 which he states vests only the High Court with jurisdiction to determine any dispute under that Act.
7. The parties filed written submissions which I have read and considered. On the face of the application, the Applicant acknowledges the Defendant is the legal administrator of the estate of Joshua Kimemia deceased who is the registered owner of the suit property. It is also discernible from the pleadings that the suit property has not been registered in the name of the Plaintiff/Respondent as the decree had not been executed as at the time of filing the application.
8. It is settled law that consent judgment can only be set aside on grounds as for setting aside a contract. This was stated in the case of *Flora Wasike Vs. Destimo Wamboko (1988) eKLR* which held that a consent judgment can be challenged on grounds of fraud or mistake or misrepresentation or on any other reason which would persuade a court to vary or set aside the consent decree.
9. The Applicant argues that the Defendant's action of selling the suit land and subsequently entering the consent judgment dated 18th August, 2021 was contrary to court policy because the property had not been listed in the petition for grant of letters of administration. She says the property has not been administered and made reference to the provisions of Section 45(1) of Cap 160.
10. Section 45(1) of the *Law of Succession Act* opens with the word "except so far as expressly authorised by this Act or any other written law or by a grant of representation under this Act, no person shall dispose..." Clearly it applies to a person who has not been authorised by the Act and the Defendant is not in the category of unauthorised persons as the Applicant has annexed a copy of the grant which appointed the Defendant as an administrator of the deceased estate.
11. She did not tell the court that the grant so issued had been revoked. Therefore, as long as the Defendant remained the administrator of the Estate of Joshua Kimemia, she has powers in law to deal with such property as the deceased would. Section 79 of the *Law of Succession Act* Cap 160 states that "the executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant and subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as the personal representative."
12. Section 82 on the powers of personal representatives includes "(b) to sell or otherwise turn to account so far as seems necessary or desirable in the execution of their duties all or any part of the assets vested in them as they think best." Provided that;
 - "(i) any purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchased; and (ii) no immovable property shall be sold before confirmation of the grant; (c) to assent, at any time after confirmation of the grant, to the vesting of a specific legacy in the legatee thereof;"
13. The property in dispute was sold after the confirmation of grant. For the exception in b(i) to apply, the Applicant ought to have moved the High Court in the Succession file for her interest to be determined and which would then form the basis of voiding the transaction between the plaintiff and the Defendant. This court lacks jurisdiction to ascertain the interest of the Applicant and her siblings. The invitation made through the submissions of interpreting high court to include ELC clothing this



court with jurisdiction to determine that the Applicant is dependant and therefore entitled to benefit from the estate is not supported by the purpose and intention of *the Constitution*.

14. At the time of filing this application, the Applicant had liberty and still has to challenge the manner in which the Defendant is administratering the estate in the appropriate forum and in particular, the family division of the High Court. However, before this Court, as long as the grant is not revoked, the Defendant remains in law the proper person to be sued, to sell and or to enter into any consent as regards the assets of the deceased. The Defendant did not file any affidavit to elaborate if there was any fraud, mistake or misrepresentation committed while executing the consent dated 18th August, 2021.
15. I would not hold that the Applicant did not have locus to bring the present application on account of the new Constitutional dispensation we are in. Under the heading for any “other reason which would persuade the court” held in the Wasike vs Wamboko case supra makes it open to any who may be affected by the order to approach the court. Had the Applicant laid good grounds for setting aside the impugned consent, I would have granted the application. Unfortunately, she failed to discharge the burden.
16. In conclusion, I find no merit in the application for the reasons stated herein above. The same is dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF OCTOBER, 2024

A. OMOLLO

JUDGE

