



REPUBLIC OF KENYA



In re Estate of Mutuma Mugambi (Deceased) (Succession Cause 15 of 2017) [2024] KEHC 7696 (KLR) (27 June 2024) (Ruling)

Neutral citation: [2024] KEHC 7696 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
SUCCESSION CAUSE 15 OF 2017**

EM MURIITHI, J

JUNE 27, 2024

IN THE MATTER OF THE ESTATE OF MUTUMA MUGAMBI (DECEASED)

BETWEEN

TITO MAINGI APPLICANT

AND

JANE NJOKI MUGAMBI RESPONDENT

RULING

1. By an application under certificate of urgency dated 3/5/2023 pursuant to section 47, 70 (b), 76 (a), 83(h) and 94 of the *Law of Succession Act*, Rules 44, 49, 63 and 73 of the *Probate and Administration Rules*, Order 45 Rule 1 of the *Civil Procedure Rules* and all other enabling provisions of the law, the Applicant seeks that:
 1. Spent
 2. This Honourable Court be please to issue an order setting aside and/or reviewing the Consent order in court on 14th December, 2022 by Messers Wangui Kathryn Kimani & Co Advocates, Messers Judy Thongori & Co Advocates and Messers Igweta Murithi & Co Advocates appointing the Respondent as Joint Executor of the Will of Mutuma Mugambi.
 3. Pending hearing and determination of this Application, this Honourable Court be pleased to issue an order restraining the Respondent Jane Njoki Mugambi from performing any acts of administering the estate of the late Mutuma Mugambi.
 4. The Respondent do provide and full inventory and accurate account of the proceeds of the Consent in Nairobi Civil Appeal No. 46 of 2020.
 5. The costs of this application be provided for.



2. The application is premised on the grounds on the face of it and supporting affidavit of the Applicant sworn on even date. He avers that he is a son to the deceased herein who died testate leaving behind a valid will and testament dated 3/10/2015. He was appointed a joint executor of the said will together with Amb Kalimi Mugambi Mworira. On 24/8/2017, this court granted letters of administration with a will annexed to him and his co-executor. On 14/12/2022, Jane Njoki Mugambi was appointed a joint executor of the will herein pursuant to a consent filed by the advocates on record. He neither consented to the appointment of Jane Njoki as a joint executor of the will nor authorized his previous advocates on record Messers Wangui Kathryn & Co. Advocates to record it. The advocates of Jane Njoki Mugambi in liaison with his previous advocates Wangui Kathryn & Co. Advocates recorded another consent for distribution of funds due to the estate flowing from the judgment of 26/8/2015 in Nairobi Industrial Cause No. 221/2010 between Mutuma Mugambi and Kenya Methodist University. He learnt of the said consent when Ksh. 64,000 alleged to be the amount due to him under the consent was sent to him through MPesa by his previous advocates. When his enquiry from his previous advocate about the source of the money was ignored, he became suspicious and appointed the firm of Jmk Partners Advocates LLP to act for him. Upon perusal of the court file, it was discovered that several consents had been signed among the parties in relation to administration of the estate, without his authority. He is advised by his advocates on record that the appointment of the Respondent as a joint executor by the consent dated 14/12/2022 is a mistake and error apparent on the face of the record. He has been sidelined in the administration of the estate of the deceased despite being appointed as an executor in the will. As a result of the foregoing, he believes that the administration of the estate of the deceased has not been conducted according to his wishes as expressed in his will, and it is in the interest of justice that the orders sought are granted.
3. The Applicant swore a supplementary affidavit on 16/11/2023 in support of the application.
4. The Respondent swore a replying affidavit on 19/5/2023 in opposition to the application. She avers that the consent arose from a mediation process encouraged by the court, following an application dated 23/8/2021 seeking to remove one of the executors namely Amb. Kalimi who is unwell. She prevailed upon to forgo the application and her objection to the Executor in consideration of becoming an Executor/administrator and thus ensuring that the estate was represented by 2 people at all times. She has been informed by her advocates that the Applicant was represented by Messrs Wangui Kathryn & Company Advocates in the preparation and execution of the said consent. It is well established in law that a consent order can only be set aside where there is fraud which has neither been alleged nor proved. The consent has already been executed because the sum of Ksh. 8,843,167.20 was distributed to the creditors of the estate and the beneficiaries as shown in the exhibited documents marked 1a, b and c. Indeed, the Applicant has confirmed to be in receipt of Ksh. 64,000, Ksh. 2,338,800 was paid to Macharia Mwangi & Njeru Co. Advocates for services rendered to the deceased in ELRC No. 221/2010 and Ksh. 5,000,000 was paid to Jane Njoki Mugambi following a Mediation Agreement dated 16/12/2021 signed by the Applicant among others and which was adopted by this court on 17/12/2021.

Submissions

5. The Applicant faults his former advocate for acting without instructions and therefore the consent of 15/12/2022 ought to be set aside. He urges that since his former advocate had no legal authority to enter into that consent, the same cannot be allowed to stand, and cites *Kenya Commercial Bank Limited v Specialized Engineering Company Limited* (1982) KLR 485 and *R v District Land Registration Nandi & Another Ex-parte Kiprono Tegerei & another* [2005] eKLR. He urges that there was misrepresentation from Igweta Muriithi Advocate that he had issued his consent. He accuses the



Respondent of intermeddling with the estate by failing to account for Ksh. 8,809,230 that she took from the estate. He urges that the Ksh.5,000,000 the Respondent awarded to herself from the Kemu proceeds is highly unjust, amounts to double enrichment and the same ought to be refunded to the estate. He urges that there were no exceptional circumstances that warranted the appointment of the Respondent as an executrix and the said appointment was against the wishes of the deceased.

6. The Respondent urges that the Applicant has not proved that the consent order was obtained by fraud, collusion or is contrary to the policy of the court, and cites *Kenya Commercial Bank Limited v Specialized Engineering Company Limited* (1982) KLR 485, *Flora N. Wasike v Destimo Wamboko* (1988) eKLR and *Board of Trustees National Social Security Fund v Michael Mwalo* (2015) eKLR.

Determination

7. The law on variation of a consent judgments and/or orders is now settled to the effect that such variation can only be on grounds that would allow for a contract to be vitiated. These grounds include but are not limited to fraud, collusion, illegality, mistake, an agreement being contrary to the policy of the Court, absence of sufficient material facts and ignorance of material facts. In *Flora N. Wasike v Destimo Wamboko* (1988) eKLR, Hancox JA (as he then was) held as follows:

“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.”

8. The Court of Appeal in *Brooke Bond Liebig (T) Ltd v Mallya* (1975) E.A. 266 held as follows:-

“A consent judgment may only be set aside for fraud, collusion, or for any reason which would enable the Court to set aside an agreement.”

9. The parties herein first executed the consent of 23/2/2018 where the Applicant herein was the 2nd Respondent. Vide that consent, the Respondent herein and Amb. Kalimi Mworira were granted letters of administration ad litem to prosecute Nairobi Industrial case No. 22/2010. The parties subsequently executed the consent of 6/2/2019 where varied assets of the deceased herein including proceeds of sale of some of the estate properties were distributed to the beneficiaries, including the Applicant herein. Despite the parties having executed 3 consents, the only consent the Applicant seeks to be set aside is the one dated 13/12/2022. That consent emanated from the compromise of the Respondent’s application dated 23/8/2021 seeking the appointment of the Respondent as a joint administrator in place of Amb. Kalimi, who was physically and mentally unfit.

10. It was incumbent upon the Applicant to prove that the consent was executed through fraud, collusion or misrepresentation to warrant its setting aside, which he has failed to.

11. In *Republic v District Land Registrar Nandi & another Ex-parte Kiprono Tegerei & another* [2005] eKLR cited by the Applicant, the Court (Daniel Musinga J as he then was) stated that;

“It is not in dispute that an advocate has general authority to compromise a matter on behalf of his client but he has to act bona fides and in the best interests of his client.

“Seton On Judgments And Orders”, 7th edition, volume 1 page 124 states as follows:-

“*Prima facie*, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on 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 consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement.”

That position was restated by the Court of Appeal in *Flora Wasike Vs Destimo Wamboko* [1988] 1 KAR 625 and recently by the same court in *Kenya Commercial Bank Ltd Vs Benjoh Amalgamated Ltd & Muiru Coffee Estate Ltd Civil Appeal No. 276 of 1997.*”

12. The court finds that there are no vitiating factors to warrant the setting aside of the consent order of 13/12/2022, and the consequential orders cannot issue.

ORDERS

13. Accordingly, for the reasons set out above, this court finds the application dated 3/5/2023 is without merit and it is dismissed.

14. Costs in the Cause.

Order accordingly.

DATED AND DELIVERED ON THIS 27TH DAY OF JUNE 2024.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Kariuki, Ms. Kendi for Ms. Mango for the Executor/Applicant Tito Maingi.

Ms. Mbetsa for Ms. Judy Thongori for Respondent Jane Mugambi.

Mr. Igweta for Amb. Kalemi Mworira (Discharged Executor).

