



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NO 96 OF 2000

IN THE MATTER OF THE ESTATE OF RAHAB WANJIKU EVANS (DECEASED)

CHRISTINE WANGARI GACHEGE.....1ST ADMINISTRATOR

ELIZABETH WANJIRA EVANS.....2ND ADMINISTRATOR

PETER GACHEGE NJOGU.....3RD ADMINISTRATOR

MARY WANJIKU GACHIGI.....4TH ADMINISTRATOR

VERSUS

ELIZABETH WAMBUI MBURU.....1ST BENEFICIARY

MARY NYAMBURA MBURU.....2ND BENEFICIARY

MARGARET WANJIRU MBURU.....3RD BENEFICIARY

SALOME NJOKI MBURU.....4TH BENEFICIARY

ANTHONY GACHIGI.....5TH BENEFICIARY

ZAINABU WANJIRU GACHIGI.....6TH BENEFICIARY

JOSEPH GACHIGI ZAMBETAKIS.....7TH BENEFICIARY

JENNIFER WANJIKU ZAMBETAKIS.....8TH BENEFICIARY

JOHN IRUNGU ZAMBETAKIS.....9TH BENEFICIARY

LUCY MUTHONI.....10TH BENEFICIARY

JANE NYAMBURA.....11TH BENEFICIARY

AGNES WAITWIKI.....12TH BENEFICIARY

MERCY WANJIRU MBURU.....13TH BENEFICIARY

AND

OIL LIBYA.....1ST INTERESTED PARTY

KIWAKA GENERAL MERCHANTS.....2ND INTERESTED PARTY

RULING

A. Introduction and Procedural Posture

1. Rahab Wanjiru Evans (Deceased) died on 16/02/2009 in Nakuru. Soon thereafter, there were protracted proceedings related to the distribution of her estate. The controversy related to both identification of beneficiaries who were to benefit from the estate of the Deceased as well as the extent of the estate and the unit distribution for each identified beneficiary.

2. After the High Court made its decision in a judgment dated 10/07/2007, several beneficiaries and heirs to the estate were dissatisfied with the judgment and appealed to the Court of Appeal. The Court of Appeal considered the appeal and cross-appeal and rendered itself in a comprehensive judgment dated 18/12/2014. I refer to the judgment as comprehensive because while it reversed the High Court findings on some issues, rather than remand the case for re-determination by the High Court, the Court of Appeal proceeded to identify the legitimate beneficiaries to the estate of the Deceased and then determined the mode of distribution.

3. The Court of Appeal, then, made the following specific order which is intitled as order “L” in the judgment dated 18/12/2014:

“Court Supervision: This is necessary for the progression of the winding up of the estate. To be supervised by the Deputy Registrar, High Court, Nakuru and the Resident Judge in Nakuru.”

4. As it will become clear shortly, this is one of the issues for determination in the present consolidated ruling. This ruling will dispose of six applications by various parties to the proceedings. I will return to this shortly.

5. In terms of distribution of the estate, the Court of Appeal made two decisions that have proved to be fecund in spawning litigation among the beneficiaries and various third parties who have become interested in the estate. The two orders on distribution I am referring to are:

“C. Properties Approved for Sale to Pay off the Estate’s Liabilities to 3rd Parties:

a) LR 209/11540

b) LR 337/1004 Mavoko Muni. Council.

.....

E. Properties Approved to be Held in Common:

LR Nku Mun. Block 4/258, Nku Mun. Block 4/259 to be held as tenants in common by the children of the late Peter Gachigi, the children of the late Salome Njoki (Anthony Sabato Gachigi and Zainabu Wanjiru Gachigi); Agnes Waitwika Zambetakis; Mary Wanjiru Gachigi; Lucy Muthoni Gachigi; Elizabeth Wanjira Evans; Jane Nyambura Gachigi; Christine Wangare Gachigi; the children of the late Zeverio Kiboi (children of the late John Irungu Zambetakis, Jennifer Wanjiru Zambetakis and Joseph Zambetakis); the children of the late Mburu Gachigi (Salome Njoki Mburu, Margaret Wanjiru Mburu, Mary Nyambura Mburu and Mercy (Mary) Wanjiru Mburu).

Alternatively: *The said properties LR Nku Mun. Block 4/258 & Nku Mun. Block 4/259 to be sold and proceeds thereof to be shared equally amongst the beneficiaries identified and named above.*

6. There appears to have been some disagreements regarding the sale of the *LR 209/11540 and LR 337/1004 Mavoko Muni. Council* but the two properties were eventually sold by private treaty following advertisements in the local dailies. The sale of those two properties is not challenged in the applications under consideration.

7. It is what happened to the two properties identified above that has been a subject of intense controversy since the matter came back to the High Court for purposes of supervising the winding up of the estate. To reiterate, the two properties are *LR Nku Mun. Block 4/258 & Nku Mun. Block 4/259*. The Court of Appeal, in the order excerpted above, held that the two properties be held in common by the identified beneficiaries or, in the alternative the two properties be sold and the proceeds to be shared equally. Tenancy in common having proved impractical, the procedure for the sale of the properties became a bane for all concerned.

8. It would appear that sometime in 2015, there were at least three Applications urging the Court to approve the sale of the two properties by either public auction or private treaty by an accredited auctioneer.

9. The first application in this regard was by the 4th Administrator, Mary Wanjiku Gachege. It is dated 05/01/2015. It was filed by her advocates then on record, Musembi Ndolo & Co. Advocates. The main prayers it sought were for the Court to appoint Joseph Mungatia M’noti T/A Prime Valuers to conduct a valuation of the properties to be sold and for Benjamin Kisoi Sila T/A Legacy Auctioneering Services to conduct the sale of the properties by way of public auction or private treaty. The Application contained other prayers which are

not relevant to the present Applications. It is instructive that the 4th Administrator, in her Supporting Affidavit deposed on 06/01/2015 swears in paragraph 4 that:

In respect of Nakuru Municipality Block 4/258 and 259, the Court decreed that we hold the property as tenants in common. This position is not tenable since we have never agreed for the last 14 years. We can never agree. Indeed, I have made an initiative to call my co-administrators and the beneficiaries but they have completely refused to attend any meeting to agree on the terms upon which we could hold the property in common. The most viable option is to sell the properties and share the proceeds.

10. The second Application in this respect was filed by Githui & Co. Advocates who indicated that it was filed on behalf of the “4th to 12th Respondents”. This was in reference to the Appeal. In any event, that Application, which was supported by the Affidavit of Mary Wanjiku Gachigi (the 4th Administrator), is dated 26/03/2015. Its principal prayer is for the sale of the two properties (in addition to the Mavoko and Nairobi properties) by Benjamin Kisoil Sila T/A Legacy Auctioneering Services through public auction or by private treaty.

11. Yet a third Application in this regard was filed by Agnes Waitwika Zambetakis. It is filed by her lawyer then on record, Kangethe, Waitere & Co. Advocates. It is dated 09/06/2015. Its primary prayer is for the two properties to be sold and the proceeds to be shared as per the orders of the Court of Appeal.

12. It is not clear what became of the Application dated 26/03/2015 and that dated 09/06/2015. However, the one dated 06/01/2015 came up for hearing on 27/02/2015. The Learned Mshila J. gave some directions on it including an order that the Government Valuers to undertake valuation of the properties and that the sale would be by Legacy Auctioneering Services unless the 1st Administrator availed the name of a reputable auctioneer.

13. An application was filed later on to stay the orders of 27/02/2015. That Application is dated 11/03/2016. That Application was consolidated with one dated 19/03/2015. The Learned Mshila J. then, on 15/04/2015 marked both as spent by consent of all the parties with certain consequential orders. They included the order that “[t]he properties to sold by private treaty are: (i) LR No. 209/11540 Nairobi and (ii) LR No. 337/1004 Mavoko.” The rest of the Consent Order contained specifics of the mode of sale.

14. Pursuant to this Consent Order, plans were made to sell the Mavoko and Nairobi by private treaty after advertisements in the local dailies. The Mavoko and Nairobi Properties are not subjects in the present Applications.

15. The matter first came up before the Learned Ndung’u J. on 24/08/2015. Mshila J. had been transferred out of the station and Ndung’u J. took over her matters in the Family Division of the High Court. The matter was before the Learned Judge on 06/10/2015. The Learned Judge recorded the Coram as including:

“Wafula for 1st Administrator

Konosi for 2nd and 4th Administrators

Githui for 1st to 9th Beneficiaries and H/B for Ms. Waitere for the 10th Beneficiary

Oonge for Interested Party

Jane Nyambura – Beneficiary

Lucy Muthoni – Beneficiary”

16. On that day, the Court recorded a Consent order which mostly dealt with the disposition of the other properties. Order 6 (in the handwritten proceedings), however, related to the Nakuru Properties and stated:

Legacy and Dikemwa Auctioneers to invite bids for the sale of Nakuru Municipality Block 4/259 and 258 and LR No. 337/1004 (Mavoko property) for another 30 days starting on 07/10/2015. Bids to be opened in the next mention date.

17. Pursuant to this order, Legacy Auctioneering Services and Dikemwa Auctioneers placed in the Daily Nation of Monday, 12/10/2015, an advertisement announcing the sale of the Nairobi, Mavoko and the two Nakuru Properties. The advertisement announced that the bids would be opened on 13/11/2015.

18. On 11/11/2015, Oil Libya Kenya Limited, the 1st Interested Party, filed an application of even date under Certificate of Urgency. After praying to be made a party to the suit, the principal prayers in that Application were two-fold included as prayers 5 and 6 in the Application:

a. *That there be a stay of the orders of this Court to invite bids for the sale of all that property known as Nakuru Municipality Block 4/258 until Libya Oil Kenya Limited is given an opportunity by way of Thirty Days Notice of first refusal to purchase the said property and upon Libya Oil Kenya Limited declining to purchase the said property.*

b. *That the Court be pleased to issue a conservatory order restraining the Administrators of the Estate of the Deceased by themselves, or their servants or agents, advocates, auctioneers or any other person acting for and/or on (sic) from doing, the follow (sic) or any of them, that is to say from further advertising for sale, inviting and accepting bids for sale, disposing off, selling by public auction or otherwise howsoever or otherwise howsoever interfering with the ownership of title to and/or interest in all that*

property known as Nakuru Municipality Block 4/258 until Libya Oil Kenya Limited is given an opportunity by way of Thirty Days Notice of first refusal to purchase the said property and upon Libya Oil Kenya Limited declining to purchase the said property.

19. This Application came up *ex parte* before Ndung'u J. on 12/11/2015. He granted interim orders. Meanwhile, the law firm of Kounah & Co. Advocates filed an Application dated 06/11/2015 seeking, first, to be allowed to come on record for the 10th and 11th Beneficiaries (Lucy Muthoni and Jane Nyambura respectively). The Application also sought certain prayers regarding the Nakuru and Mavoko properties. In essence, the Application sought to have the three beneficiaries' shares in the three properties be hived off and retained as landed property before the sale of the properties.

20. After the other parties were given time to respond, the two Applications came up for hearing on 08/02/2016. The appearances are recorded in the Trial Record as follows:

Mr. Maramba for 1st Administrator

Mr. Konosi for 2nd and 4th Administrators

Githui for 1st to 9th Beneficiaries

Wahome for 10th and 11th Beneficiaries

Mrs Oduor for the Applicant (Oil Libya)

Ms. Waitere for the 13th Beneficiary.

21. The proceedings for the day are sparse. After Mr. Githui informed the Court that matter was coming for hearing of the two Applications dated 11/11/2015 (by Oil Libya Limited) and 06/11/2015 (by the 10th and 11th Beneficiaries), the Court makes the following terse ruling:

The Application dated 11/11/2015 is hereby marked as spent subject to the acceptance of an improved bid by Oil Libya Ltd.

Ruling on Application dated 06/11/2015 is that the Application is struck out with no orders as to costs. Reasons to be provided on notice.

22. The Learned Judge, then, gave several other directions unrelated to the sale of the properties. He then ended with the direction:

Matter referred to the Deputy Registrar at 12:00pm for the purpose of opening the bids.

23. At noon that day (08/02/2016), the matter was before the Deputy Registrar, Hon. A. Towett. The Court records the appearances as only Mr. Benjamin Sila of Legacy Auctioneers and Mr. Kariuki of Dikemwa Auctioneers. However, it appears that other parties were present because later on several advocates address the Court. They include Mrs. Oduor; Ms. Waitere; Mr. Nyamwange; and Mr. Githui.

24. In any event, the Court announced that the bids were opened. When it came to bids for Nakuru Municipality Block 4/258, the Court noted as follows:

I note that though Oryx Enegols (sp?) had bidden (sic) Kshs. 135,000/- vide letter dated 19/11/2015, the highest bidder is thus Oil Libya at Kshs. 161,030,000/-

25. Regarding bids for Nakuru Municipality Block 4/259, the Court announced:

The highest bidder is Anker Investment Ltd at Kshs. 157,000,000/-

26. After this, Mrs. Oduor, Counsel for Oil Libya Limited stood to address the Court. She informed the Court that her client was upping its bid by Kshs. 30,000/- to make its bid Kshs. 161,030,000/-. She told the Court that her client will pay the deposit of 10% by the following morning and proposed to pay the remaining purchase price within 7 days of getting an indication that all the documents were ready. She informed the Court that the parties had agreed "by consent" before Justice Ndung'u.

27. The other lawyers present addressed the Court respecting the terms of sale. It would appear that the Learned Deputy Registrar took a short recess to write down the conditions of sale. During that recess, it would seem that the Learned Deputy Registrar was unable to locate the "consent" Mrs. Oduor had indicated to the Court earlier. This consent, it would seem, had allowed Oil Libya Ltd to change its bid upon opening of the other bids. Seeming confounded by the turn of events, the Learned Deputy Registrar recorded as follows in the Court file:

Upon retiring to write directions in terms of conditions of sale, the Court perused the Court file, the consent (sic) that counsel representing Oil Libya indicated that it existed which allowed variation of bid on date of opening, the Court has not found the consent in the Court file. I have been compelled to summon the lawyers with a view of assisting the Court in confirming the availability of the referred consent.

28. Upon this remarks by the Court, Mrs. Oduor is recorded as having told the Learned Deputy Registrar that "there was consent on record

before Justice Ndung'u to increase the bid amount on my part."

29. It is unclear which other lawyers were in the room by that time but the record indicates that Mr. Githui was present and that he indicated that he had no objections to Mrs. Oduor's proposal. The Learned Deputy Registrar was not persuaded. Her ruling was that:

Upon perusal of the alleged consent, it is clear that the same did not refer/relate to the bid variation as had been submitted by Ms. Oduor. In the circumstances, I recall the declaration that Oil Libya being the highest bidder premised on the varied bid price and further find as follows:

That the highest bidder in Nakuru Municipality Block 4/258 is Jeddys Displays based on the bid documents.

30. The Learned Deputy Registrar proceeded to record conditions of sale. However, Ms. Oduor, Counsel for Oil Libya Ltd, requested that the file be placed before Justice Ndung'u for directions. The Learned Deputy Registrar obliged.

31. The matter was back before the Learned Deputy Registrar at 3:49pm the same day. At that time, she recorded that:

Justice Ndung'u has referred the file back to me after indicating to me that indeed a consent was signed before him.

32. Later, the matter was called at 4:49pm. The Learned Deputy Registrar further recorded the appearances as follows:

Mr. Githui – for 1st to 9th Beneficiaries

Mr. Maramba – for the 1st Administrator

Mr. Maramba holding brief for Mr. Konosi for the 2nd and 4th Administrator

Ms. Oduor for Oil Libya Ltd

Ms. Waruhiu for the 13th Beneficiary

Mr. Oonge for the Intended Interested Party being Luziki Enterprises

Mr. Benjamin Kisoï – Legacy Auctioneers

33. Mr. Githui rose to address the Court by dictating the following consent:

By consent, Libya Oil Ltd be allowed to make the highest bid of Kshs. 161,030,000/- in respect to Nakuru Municipality 4/258.

That all successful bidders make a deposit of 10% of the bid price into Court within 3 days hereof i.e. on or before 11/02/2016.

In default of highest bidder complying with deposit of 10% by 11/02/2016, the 2nd highest bidder to be declared as the successful bidder and to deposit 10% of the respective bid prices within 3 days thereof on or before 15/02/2016.

Same order to apply to the 3rd successful bidder in the extent (sic) of a default by the 2nd successful bidder and 10% of bidden (sic) price to be deposited on or before 1st February, 2016.

Balance of purchase price to be paid within 90 days into Court by the successful bidder.

The Court to release copies of all bids to the auctioneers and parties to facilitate order no. 2 herein.

34. The Learned Deputy Registrar recorded that the consent was adopted as the order of the Court upon execution by Ms. Waitere; Mr. Githui; Mr. Oonge; Mr. Maramba; and Ms. Oduor.

35. Subsequently, two developments happened:

a. First, Oil Libya Ltd was able to pay the deposit and full purchase price as per its "improved" bid and, through a Court order, got the title to Nakuru Municipality Block 4/258 transferred to its name.

b. Second, it is alleged by the Auctioneer, Mr. Benjamin Sila, that he was unable to raise Anker Investments Limited for purposes of getting it to pay the deposit as per the terms of sale agreed by consent by the parties. In a letter dated 01/03/2016, Mr. Sila explains to the Deputy Registrar that:

We have tried to contact the highest bidder of property title No. Nakuru Municipality Block 4/259 M/S Anker Investments all in vain....We were left with no alternative other than to contact the 2nd highest bidder M/s Kiwaka General Merchants Limited and

instructed them to make a 10% deposit as per the Court Order which they did on 12th February hence becoming the purchasers of the said property Title Number Nakuru Municipality Block 4/259.

36. That marked the entry of Kiwaka General Merchants (“Kiwaka”), the 2nd Interested Party into this controversy. Kiwaka proceeded to pay the full amount of its bid. The EFT Printout for the transaction shows that Kiwaka paid Kshs. 126,500,000/- on 12/02/2016 at 11:00am.

37. There were various attempts over the months since these events occurred to set aside the sale and the consequential orders that followed it. Most of these Applications were not heard. There was an Application dated 11/02/2016 by Jeddy Displays which came up before the Learned Deputy Registrar. It sought to set aside the consent orders of 08/02/2016 recorded before the Learned Deputy Registrar. That Application was heard and a ruling given on 08/04/2016. I will return to that ruling later in this ruling.

38. There were various applications in the file but most have no direct bearing on the present ones or have been overtaken by events given my ruling delivered on 17/10/2018. That ruling dated 17/10/2018 described in detail the important events that followed the sale as described above. In short, Anker Investments Limited and Jeddy Displays filed applications to set aside the sales. To the extent that Kiwaka obtained vesting orders on 17/05/2016, the Applications sought to set aside the orders. The Applications were never heard on their merits. Instead, Kiwaka, Oil Libya, Jeddy Displays and Anker Investments purported to enter into a consent on 05/10/2016 in the following terms:

By consent John Macharia Muturi Trading As Jeddy Displays and Thomas Kungu Trading As Anker Investments be and are hereby joined as the 3rd and 4th Interested Parties. Jeddy Displays to deposit in Court a sum of Kshs. 161,000,000/- within 30 days from the date hereof in respect of Nakuru Municipality Block 2/258 being the purchase price for that property. Anker Investments Ltd to deposit a sum of Kshs. 157,000,000/- in Court within thirty days being the purchase price for Nakuru Municipality Block 2/259. In default of such deposits property No. Nakuru Municipality Block 2/258 in the name of Oil Libya (sic) remains in the name of Oil Libya Kenya Ltd. The Property Nakuru Municipality Block 2/259 to vest and title to be issued in the name of Kiwaka General Merchants Ltd. For avoidance of doubt, the deposits shall be made by John Macharia Muturi for Property No. 258 and Thomas Kungu for Property No. 259. No applications for extension of time shall be entertained whatsoever.

39. In the ruling dated 17/10/2018, that consent (of 05/10/2016) and a subsequent one of 14/02/2017 were set aside because not all beneficiaries and administrators had been involved in arriving at them. The effect of that ruling, as clarified in later directions, was that all the parties, including Jeddy Displays and Anker Investments as well as the beneficiaries and other interested parties were at liberty to file any applications challenging the sale of the two Nakuru Properties to Oil Libya and Kiwaka.

B. The Six Applications for Consideration

40. Following these directions, six Applications were filed by the various parties as follows:

- a. Chamber Summons dated 01/11/2018 by the 10th, 11th and 13th Beneficiaries.
- b. A second Chamber Summons dated 01/11/2018 also by the 10th, 11th and 13th Beneficiaries.
- c. Chamber Summons dated 06/11/2018 by the 2nd Administrator.
- d. Summons dated 16/11/2018 by the 4th Administrator.
- e. Summons dated 07/12/2018 by the 1st Administrator.
- f. Summons dated 28/02/2018 by the 12th Beneficiary.

41. As directed in the ruling of 17/10/2018, these six Applications were heard together and this consolidated ruling with dispose all six. The specific orders sought by the parties in their Applications are as follows:

42. The 10th, 11th and 13th Beneficiaries *vide* a Chamber Summons dated 1st of November 2018 filed on the 5th of November 2019 seeks the following orders:

- a. *THAT the Honourable Court be pleased to set aside the sale of Nakuru Municipality Block 4/258 and 4/259.*
- b. *THAT costs of the Application be provided for*

43. The Application is based on the following grounds and supported by the annexed supporting affidavit of Mercy Wanjiru Mburu:

- a. *On the 8th of February, this Honourable Court directed that bids for purchase of various properties of the estate be opened before the Deputy Registrar of this Honourable Court without informing the bidders*
- b. *Parties in the said date recorded a consent to the effect that Oil Libya be allowed to up their bid without affording other parties equal opportunity*
- c. *The Beneficiaries herein being parties to the suit were not represented at the time of recording the consent*

- d. The Beneficiaries were not informed of the date and time of opening the bids so as to avail themselves*
- e. No party shall be prejudiced if the orders sought are granted*
- f. It is in the interest of justice that the instant application herein be allowed as prayed.*

44. The 10th, 11th and 13th Beneficiaries vide a Chamber Summons dated 1st of November 2018 filed on the 7th of November 2019 seeks the following orders:

- a. THAT the Honourable Court be pleased to set aside the consent order dated 18th April 2016.*
- b. THAT costs of the Application be provided for*

45. The Application is based on the following grounds and supported by the annexed Supporting Affidavit of Lucy Muthoni:

- a. On the 18th April 2016, a purported consent was recorded in chambers before Hon. Justice A. K. Ndungu.*
- b. The Applicant and other beneficiaries herein being parties to the suit were neither present nor represented at the time of recording the purported consent*
- c. No party shall suffer any prejudice if the orders sought are granted*
- d. It is in the interest of justice that this application be allowed as prayed*

46. The 2nd Administrator in her Chamber summons dated 6th of November 2018 and filed on the 7th of November 2018 seeks the following orders:

- a. This Honourable Court be pleased to review and set aside the consent order dated 8th of February 2016 authorizing the sale of Nakuru Municipality Block 4/258 to Oil Libya and order that Oil Libya Ltd be refunded the purchase price*
- b. This Honourable Court be pleased to review and set aside its orders issued on the 8th of February 2016 authorizing the sale of Nakuru Municipality Block 4/259 to Kiwaka General Merchants and order that Kiwaka General Merchants be refunded the purchase price*
- c. The cost of the Application be provided for.*

47. The Application is based on the following grounds and supported by the annexed Supporting Affidavit of Elizabeth Wanjiru Evans:

- a. On the 20th of November 2015, Honourable Justice Anthony Ndungu directed that the application by the Interested Party and the 10th, 11th and 13th Beneficiaries dated 11th of November 2015 and 6th of November 2015 respectively be heard on the 8th of February 2016.*
- b. On the 8th of February 2016, this Honourable Court dispensed with the aforesaid application by the absence of the advocates for the Applicant and directed that bids for the purchase of various properties of the estate, including Nakuru Municipality Block 4/ 258 and 4/259, be opened before the Deputy Registrar of this Honourable Court at noon of the same day*
- c. The Applicant and other parties had placed bids for those properties known as Nakuru Municipality Block 4/258 and 259*
- d. The Bids for those properties known as Nakuru Municipality Block 4/258 and 259 were opened in the absence of the bidders as no prior notification of the date of opening of the bids had been given*
- e. The Applicant was not a party to any consent allowing Oil Libya Ltd to enhance/ up its bid in order to emerge the highest bidder without a reciprocal right being extended to the Applicant and other bidders*
- f. One Michael Maramba, advocate purported to hold the Applicant's advocate's brief without instructions to do so and recorded the impugned consent relating to Nakuru Municipality block 4/258 and hence the said consent is a nullity.*
- g. It is in the interest of justice the said orders and directions ought to be set aside in the interest of justice*
- h. No party shall be prejudiced if the orders are set aside.*

48. The 4th Administrator in their summons dated 16th of November 2018 and filed on the 28th of November 2018 seeks the following orders:

a. The Court be pleased to enlarge time (as fixed on the 17th of October 2018) for filing of this application and this application be deemed as duly and properly filed

b. Pending the hearing and determination of this application, the 1st interested party Oil Libya Kenya Limited and the 2nd interested party Kiwaka General Merchants Limited be restrained from transferring, executing or registering any instruments of transfer on, alienating, charging or in any other way altering the current registered proprietorship of the suit property Land Title Number Nakuru Municipality Block 4/258 and Land Title Number Nakuru Municipality Block 4/259 respectively

c. The entire bidding process and all the Court proceedings and Court orders relating to and sanctioning the bidding, sale, vesting, alienation, transfer and appropriation of the proceeds of the sale of the suit property Land Title Number Nakuru Municipality Block 4/258 and Land Title Number Nakuru Municipality Block 4/259 including the Orders dated 6th October 2015, 8th of February 2016, 18th April 2016 (by Hon A. K. Ndungu J, & Hon. A. Towett, DR) 17th May 2016 (Vesting Order) and 13th July 2016 be vacated, set aside or otherwise reviewed and varied.

d. The transfer, registration and Certificate of Lease in respect of property Land Title Number Nakuru Municipality Block 4/258 in the name of the 1st interested party Libya Oil Kenya Limited be cancelled and the said property do revert to and be vested in the estate of Rahab Wanjiru Evans (deceased)

e. The 2nd interested party Kiwaka General Merchants Limited and/ or its Advocates L. Wahome & Co Advocates do forthwith return and deliver to Court or to the Administrators herein the Original Title and the Discharge of Charge (by National Bank of Kenya Ltd) for Land Title Number Nakuru Municipality Block 4/259

f. The Administrators herein do decide and agree on how to deal with the said properties Land Title Number Nakuru Municipality Block 4/258 and Land Title Number Nakuru Municipality Block 4/259 and in default of such decision and /or agreement, the matter be referred back to the Court of Appeal for further directions and/or clarification and interpretation of its judgement dated 18th of December 2014 in respect of the said two properties

g. The cost of this application be provided for.

49. The application is grounded upon the annexed Affidavit of Mary Wanjiku Gachege and the following grounds included on the face of the Application:

a. The Applicant was unable to file this application within the 21 days allowed by the Court on the 17th of October 2018 owing to illness

b. This Court has erroneously and/ or inadvertently taken proceedings and made orders which are in clear contravention of the direction of the Court of Appeal which prescribed the limits of this Court's Mandate herein. This Court has acted outside of and in excess of its mandate

c. The Estate has suffered and/ or stands to suffer exponentially unless the said proceedings and orders are set aside

d. The two estate properties Land Title Number Nakuru Municipality Block 4/258 and Land Title Number Nakuru Municipality Block 4/259 have been or are in danger of being alienated and transferred irregularly and unlawfully and without the lawful involvement of the Administrators of the Estate and to great prejudice, detriment and loss to the Estate herein

e. There is no right of appeal against the aforesaid impugned proceedings and Orders of this Court and nor would such appeal be just, expedient or proportionate in the circumstances of this case.

50. The 1st Administrator in their summons dated 7th of December 2018 and filed on the 11th of December 2018 seeks the following orders:

a. Pending the hearing and determination of this application Oil Libya Kenya Ltd and Kiwaka General Merchants Ltd be restrained by way of injunction from transferring, alienating, charging, executing or registering any instruments of transfer or in any other manner altering the current status of the suit property to wit Land Title Number Nakuru Municipality Block 4/258 and Land Title Number Nakuru Municipality Block 4/259

b. This Honourable Court be please to review, vacate and or set aside the consent order dated 8th February 2016 authorizing the sale of Land Title Number Nakuru Municipality Block 4/258 to Oil Libya Ltd and further that Oil Libya be refunded the purchase consideration

c. This Honourable Court be please to review, vacate and or set aside the Consent order dated 8th of February 2016 authorizing the sale of Land Title Number Nakuru Municipality Block 4/259 to Kiwaka General Merchant and order that Kiwaka General Merchants Ltd be refunded the purchase price

d. In the alternative, this Honourable Court be pleased to review, set aside and or vary the entire bidding process and all Court proceedings and orders in regards to sale of Land Title Number Nakuru Municipality Block 4/258 and Land Title Number Nakuru Municipality Block 4/259

e. This Honourable Court be pleased to review and or set aside its ruling and or orders issued by the Honourable Court on the 17th October 2018 in regard to Land Title Number Nakuru Municipality Block 4/258

f. Costs of this application be provided for.

51. The Application is based on the following grounds and will be supported by the annexed affidavit of Christine Wangari Gachege:

a. Several persons and entities placed bids for properties being Land Title Number Nakuru Municipality Block 4/258 and 4/259

b. The Bids for the Impugned properties were opened in the absence of other bidders and without them having notice of the date, time and place of opening

c. Some administrators or their representatives, beneficiaries and bidders or their representatives were neither present nor parties to the consent recorded on the 8th of February 2016

d. One Michael Maramba advocate who was acting for the 1st Administrator entered into consent without the 1st Administrator's express instructions.

52. The 12 Beneficiary in her Chamber summons dated 28th of February 2019 and filed on the same date seeks the following orders:

a. The Honourable Court be pleased to review, vacate and/or set aside the consent order made on the 6th of October 2015 which authorized Legacy Auctioneers Services and Dikemwa Auctioneers to advertise for sale Land Title Number Nakuru Municipality Block 4/258 and 4/259

b. The Honourable Court be pleased to review and set aside the consent order made on the 8th of February 2016 authorizing the sale of Land Title Number Nakuru Municipality Block 4/258 to Oil Libya and order that Oil Libya be refunded the purchase price

c. The transfer, registration and certificate of lease in respect Land Title Number Nakuru Municipality Block 4/258 in the name of Oil Libya Kenya Limited be cancelled and the said property be vested in the estate of Rahab Wanjiru Evans (deceased)

d. This Honourable Court be pleased to review, vacate and/ or set aside the consent order dated 8th February 2016 authorizing the sale of Nakuru Municipality Block 4/259 to Kiwaka General Merchants and order that Kiwaka General Merchant be refunded the purchase price.

e. The Honourable Court be pleased to review and set aside the orders made on 17th May 2016 and Kiwaka General Merchants be ordered to release the original title and discharge of charge (by National Bank of Kenya) fo Nakuru Municipality Block 4/259 to the Administrators of the estate of Rahab Wanjiru Evans (deceased).

f. In the alternative, the Honourable Court be pleased to review, vacate and /or set aside the entire bidding process and all court proceedings and orders in regards to the sale of Land Title Number Nakuru Municipality Block 4/258 and Land Title Number Nakuru Municipality Block 4/259

g. The Honourable Court be pleased to review, vacate and/ or set aside consent order made 18th April 2016 authorizing the release of beneficiaries' money to their advocates

h. Costs of this application be in the cause.

53. The Application is based on the following grounds and will be supported by the annexed affidavit of Agnes Waitwika Zambetakis:

a. Ms. Perpetua Waitere advocates who represented the Applicant in these proceedings and recorded the consents on 6th of October 2015, 8th of February 2016 and 18th of April 2016 had no instructions to do so and acted for her own personal benefit which action resulted to the Applicant's complaints to the Police, the Advocates Disciplinary Tribunal and this Court

b. The Honourable Court erroneously and/or took proceedings and made orders which are in clear contravention of the orders of the Court of Appeal which prescribed the limits of this Court's mandate herein, the Court acted outside and in excess of its mandate

c. The Estate and the Beneficiaries herein have suffered and/or stand to suffer exponentially unless the said proceedings and orders are vacated and/or set aside

d. No prejudice will be suffered by the Respondent herein if this application is allowed and orders thereof granted.

C. The Issues for Determination Raised in the Six Applications

54. As a cursory glance of the Applications makes clear, the substantive prayers sought in the six Applications are essentially the same: to set aside the sale of the Nakuru Properties in general; and specifically to set aside the Consent Orders of 08/02/2016 and all other

consequential orders flowing from them. Two of the Applications, however, have more radical prayers: they seek, in essence, a declaration that all the proceedings which have been going on in the High Court are null and void for impermissibly exceeding the remit given by the Court of Appeal in its judgment dated 18/12/2014.

55. I have now had the opportunity to keenly read through all the Applications, their Supporting Affidavits and documents filed in support as well as Replying Affidavits in opposition to the various Applications. I have also keenly considered the Written Submissions by the parties and/or their advocates. After doing so, I have concluded that the following issues present themselves for determination:

- a. Are the six Applications debarred by the doctrine of *res judicata*?
- b. Did the High Court exceed its remit by ordering and seeking to supervise the sale of the individual assets of the estate?
- c. Are there sufficient grounds for setting aside the consent order of 08/02/2016, the sales of LR Nku Mun. Block 4/258 & Nku Mun. Block 4/259 to Oil Libya Kenya Limited and Kiwaka General Merchants Ltd respectively and all other consequential orders based on the consent order of 08/02/2016?
- d. Does the doctrine of restitution in integrum debar the setting aside of the sales?

56. The rather lengthy chronology of Court events and procedural posture given above makes it fairly easy to deal with each of the four questions raised. I will deal with each question in seriatim.

C.1. Are the Six Applications Debarred by the doctrine of Res Judicata?

57. Parties in opposition to the six Applications raise the doctrine of *res judicata* as a bar to their consideration on their merits. In particular, advocates of the 1st Interested Party, the 2nd Interested Party and the 1st to 9th Beneficiaries have specifically raised *res judicata* to object to the Court's jurisdiction to entertaining the Applications on their merits.

58. Section 7 of the Civil Procedure Act provides as follows:

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

59. This section codifies the doctrine of *res judicata* in Kenya. Our case law has now distilled the essential ingredients of the doctrine – see, for example, *Nancy Mwangi T/A Worthlin Marketers v Airtel Networks (K) Ltd (Formerly Celtel Kenya Ltd) & 2 others* [2014] eKLR; *Kamunye & others v Pioneer General Assurance Society Ltd* [1971] E.A. 263 and *John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others* [2015] eKLR.

60. The parties have all relied on the recent decision of the Court of Appeal in *The Independent Electoral and Boundaries Commission v Maina Kiai & 5 Others* [2017] eKLR where the Court felicitously restated the five conjunctive elements which must be present for the doctrine of *res judicata* to preclude a new suit or application. They are:

- a. The suit or issue was directly and substantially in issue in the former suit;
- b. That the former suit was between the same parties or parties under whom they or any of them claim;
- c. Those parties were litigating under the same title;
- d. The issue was heard and finally determined in the former suit; and
- e. The Court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.

61. In the present suit, the parties in opposition to the six Applications point to three previous Applications which, they say, dealt with and determined the same issues now being raised in the present Applications. The three previous Applications cited are:

- a. Summons dated 11/02/2016 filed on behalf of John Macharia Muturi T/A Jeddy Displays and Thomas Kung'u T/A Anker Investments.
- b. Chamber Summons dated 28/07/2016 by Jeddy Displays and Anker Investments.
- c. Chamber Summons dated 15/08/2016 and 22/08/2016 by the 10th and 11th Beneficiaries.
- d. Application dated 06/12/2016 by the 12th Beneficiary.

62. The Application dated 11/02/2016 was determined by way of a ruling delivered by the Learned Deputy Registrar on 08/04/2016. It is true that the substratum of the Application was to set aside the Consent Orders of 08/02/2016. The matter was heard before the Learned Deputy Registrar. She ruled that she did not have jurisdiction to hear the matter. The implication was that the Application ought to be filed before the Learned Judge handling the matter. This is what the Applicants did in their Application dated 28/07/2016.

63. Just a moment of reflection would counsel that the substance of the Application was not heard and determined on its merits. The ratio of the ruling is clear: the Learned Deputy Registrar did not have jurisdiction. Competent jurisdiction to determine a matter and a matter having been determined on its merits are two compulsory elements for the doctrine of res judicata to apply. Hence, the dismissal of the Application dated 11/02/2016 does not trigger the application of the doctrine of res judicata.

64. I will with the next three Applications contemporaneously. This is because, according to the Court records, they were all compromised *vide* two consent orders entered into on 05/10/2016 and 14/02/2017. In the ruling dated 17/10/2018, these Consent Orders were set aside by this Court. These three Applications, therefore, cannot support the claim that the matters at hand were already determined and are, therefore, res judicata. A Consent Order that has been set aside does not amount to a matter determined on its merits for purposes of the doctrine of res judicata.

65. The last Application that supposedly trigger the application of the doctrine of res judicata is the 12th Beneficiary's Application dated 06/12/2016. The singular prayer in that Application was for the Honourable Judge to recuse himself in the case. It is true that the 12th Beneficiary raised issues related to the Consent Orders of 08/02/2016 and that of 16/04/2016 as reasons to ask the Honourable Judge to recuse himself. However, the validity of those consents were not issues in the Application. And neither is it accurate to say that the validity of the Consent Orders should have been raised in that Application. An Application for recusal filed in good faith can only legitimately contain the substantive prayer for recusal. This is because if successful, the Judicial Officer who has recused himself will be disabled to make any further orders on the file. Further, an application for recusal is so different in form and substance from prayers for setting aside of Consent Orders for issue preclusion to apply to the latter because an application for the former was previously determined.

66. In my view, therefore, the issues under consideration are not precluded by the doctrine of res judicata and they are ripe for determination by this Court.

C.2. Did the High Court Exceed Its Remit in Making Orders Respecting the Sale of the Properties of the Deceased?

67. Counsel for the 4th Administrator and the 12th Beneficiary have forcefully made the argument that all the proceedings undertaken in the High Court respecting the sale of the properties of the Deceased are null ab initio because the High Court does not have jurisdiction to order and supervise the sales as it did. The radical prayers by the two parties, therefore, is that all the orders and proceedings in that regard be expunged and the Court to remand the matter to the Administrators who, if they are unable to agree or resolve, should approach the Court of Appeal for further clarification.

68. As I understand it, the parties here are making three related arguments:

a. First, the 4th Administrator and the 12th Beneficiary (and to some extent, the 1st Administrator) make the argument that the remit of the High Court was limited to "supervising" the winding up of the estate of the Deceased. They argue that it was not anticipated that the High Court will "descend" into the arena and make decisions about sale which are, by law, powers wielded by the Administrators.

b. Second, the 4th Administrator and the 12th Beneficiary make the technical argument that the Court of Appeal's decision referred the matter to the "Resident Judge" yet the matter was substantively handled by a puisne judge of the High Court who is not the "Resident Judge".

c. Third, the 4th Administrator argues that according to the law – specifically sections 79 and 82 of the Law of Succession Act, only the Administrators of the Estate of the Deceased had the power to lawfully dispose off the assets of the estate of the Deceased. Neither the Court nor the Beneficiaries had such power or authority. Yet, the 4th Administrator argues, the High Court, at the urging of the Beneficiaries, took up the role of the Administrators in devising the disposal of the assets of the estate of the Deceased – a role limited for the Administrators only.

69. I find these narrow and technical arguments by the 4th Administrator and 12th Beneficiary un-availing and unpersuasive for three reasons.

70. First, the Court of Appeal referred the matter to the High Court to "supervise" the winding up of the estate precisely because the Court of Appeal envisaged that these kinds of controversies would arise. It is, therefore, not correct to say that it was improper for the Court to make a determination that the most appropriate way to abide by the Court of Appeal's decision was to sell off the properties by way of public auction by private treaty. The powers of the High Court in succession matters are quite wide. Primarily, those powers are donated by section 47 of the Law of Succession and Rule 73 of the Probate and Administration Rules. They give the High Court jurisdiction to "entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient."

71. These are the powers that the Court of Appeal had in mind when it referred the matter to the High Court to supervise the winding up of the estate of the Deceased. It would be to impermissibly constrain the jurisdiction of the Court as statutorily given to read the Court of Appeal order as limiting the Court's ability to deal with Applications by parties on the most efficacious way to wind up and dispose off the estate of the Deceased.

72. It seems clear that even the 4th Administrator herself appreciates this jurisdiction of the High Court. She is, in fact, the one who

triggered off the flurry of judicial activities that culminated in the orders now being impugned. She did this by bringing an Application dated 05/01/2016 and filed in Court on 16/01/2016. In the Application, the 4th Administrator asks the Court, among other things, to “appoint Benjamin Kisoi Sila T/A Legacy Auctioneering Services to conduct the sale” of the named properties “by way of public auction or by private treaty.” Indeed, the 4th Administrator states as follows as one of the grounds included on the face of her Application:

That the determination of the succession cause as well as the appeal has been acrimonious and there is remote possibility that the parties will reach a consensus on the valuer and the agent to sell the properties. It is, therefore, imperative that the appointment [of the] valuer and the agent to sell the properties be done through the Court.

73. In paragraph 4 of her Supporting Affidavit in support of her Application dated 05/01/2016, the 4th Administrator is categorical that:

In respect of Nakuru Municipality Block 2/258 and 259, the Court decreed that we hold the property as tenant[s] in common. This position is not tenable since we have never agreed for the last 14 years, we can never agree. Indeed, I have made an initiative to call my co-administrators and the beneficiaries but they have completely refused to attend any meeting to agree on the terms upon which we could hold the property in common. The most viable option is to sell the properties and share the proceeds.

74. It is remarkable, to put it mildly, that the 4th Administrator has so completely resiled from this position now. In law, it is appropriate to regard her present position on the question as one not held bona fide. As an administrator, she brought an Application asking for Court’s intervention to animate the Court of Appeal’s decision. In fact, she took the literal position that the Court of Appeal’s reference to the High Court to “supervise” the winding up the estate included the power to order the sale of the properties and the mode of such sale. The 4th Administrator was right in January 2016 on this question. She is wrong on this question now.

75. What about the argument that only the “Resident Judge” was to “supervise” the winding up? I do not think that the Court of Appeal judges meant that only the “Resident Judge” or his successor in title (Presiding Judge”) was authorized to deal with the matter. First, the Court of Appeal does not have the power to restrict which High Court Judge can deal with a specific case except where an issue is administrative or in the event of a conflict of interest where the Court can rule that a particular judge cannot hear a matter. However, the Court of Appeal is bereft of judicial powers to assign cases. And neither is it what the Court was doing in this case. Here, the Court referred the matter back to the “Resident Judge” on the understanding that any High Court Judge in the Station may, if assigned the matter administratively by the “Resident Judge”, deal with it as permitted by the Constitution. This is what, in fact, happened. The matter was assigned, first to Mshila J. and later to Ndung’u J., who were the High Court Judges in the station who were handling Family and Succession matters.

76. For these reasons, the objections by the 4th Administrator and the 12th Beneficiary to the jurisdiction of the Court to order the sale of the properties are dismissed.

C.3. Are there sufficient grounds for setting aside the consent order of 08/02/2016 and the Consequential Orders Based Thereon?

77. Now that the six Applications have survived objections as to jurisdiction, the essential question must be asked: are there sufficient grounds to set aside the root Consent Order recorded on 08/02/2016? I call it the “root Consent Order” because all the other impugned orders and actions are based on it. If it falls by the wayside, so will the other consequential orders and actions. However, the reverse is not necessarily true.

78. The parties, in their erudite submissions, have laid down the decisional law and principles applicable in setting aside Consent Orders. There is no disagreement on the principles applicable. The central issue is whether those principles dictate the setting aside of the Consent Orders of 08/02/2016.

79. While the parties have cited many cases to lay down the principles applicable, two locus classicus suffice to succinctly lay down the applicable principles. In *Flora N. Wasike v Destimo Wamboko (1988) eKLR*, the Court of Appeal stated:

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...

80. In that case, the Court cited with approval another decision of the Court of Appeal to wit *Brooke Bond Liebig Ltd v Mallya (1975) EA 266* where Law Ag. P. stated:

The circumstances in which a consent judgment may be interfered with were considered by this court in Hirani vs Kassam (1952), 19 EACA 131, where the following passage from Seton on Judgments and Orders, 7th edition, Vol.1 p.124 was approved:

'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.'

81. Applying the principles set out in these cases, are there grounds for setting aside the Consent Order of 08/02/2016?

82. I will begin with the negative indications. First, I do not agree that the Applicants have proved any collusion between some of the Beneficiaries and Counsel for the 1st Interested Party as alleged. I have seen the correspondence exchanged between counsel for the 1st Interested Party and Mr. Githui, Counsel for the 1st – 9th Beneficiaries respecting the sale of Nakuru Municipality Block 4/258. The

correspondence is quite formal and professional. The 1st Interested Party learnt of the intended sale of the parcel which it believed it had a first right of refusal. Counsel for the 1st Interested Party wrote to Mr. Githui, on the belief that he acted for all the Beneficiaries informing him of her client's right. When they got no response, they proceeded to file the Application dated 11/11/2015 which became the subject of the impugned Consent Order. I see no evidence of collusion howsoever there.

83. Neither do I see any evidence of fraud as the Applicants allege. As Counsel for the 1st Interested Party, 2nd Interested Party and 1st – 9th Beneficiaries point out, fraud must be specifically alleged and proved and the threshold for such proof is quite here. Again, beyond allegations, I see no tell-tale signs of fraud by the 1st Interested Party, 2nd Interested Party and the 1st – 9th Beneficiaries in this case.

84. However, that does not end matters. A Consent Order can be set aside where there are good reasons to do so – including where not all parties necessary to the resolution of the dispute are present and participate in the Consent. It can also be set aside where the Consent Order is based on a misapprehension or ignorance of the underlying facts. I believe both factors are applicable in the present case.

85. I will begin with representation. The Court of Appeal identified the following Beneficiaries to the estate of the Deceased:

a. Christine Wangari Gachigi – who is named as a 1st Administrator.

b. Elizabeth Wanjira Evans – who is named as a 2nd Administrator.

c. The Children of Peter Gachigi Njogu. Peter is named in the proceedings as a 3rd Administrator but he had passed on by the time the case reached the Court of Appeal. His children are identified in the Court of Appeal judgment as a unit to benefit from the Deceased's assets.

d. Mary Wanjiku Gachigi – who is named as a 4th Administrator.

e. Elizabeth Wambui – who is named as a 1st Beneficiary.

f. Mary Nyambura – who is named as a 2nd Beneficiary. In the Court of Appeal judgment, she is identified as a daughter of the Late Mburu Gachigi.

g. Margaret Wanjiru - who is named as a 3rd Beneficiary. In the Court of Appeal judgment, she is identified as a daughter of the Late Mburu Gachigi.

h. Salome Njoki – who is named as the 4th Beneficiary but who is now deceased. The Court of Appeal identified her children, Anthony Sabato Gachigi and Zainabu Wanjiru Gachigi as her beneficiaries.

i. Anthony Sabato Gachigi – who is named as the 5th Beneficiary. The Court of Appeal identified him as a son of Salome Njoki, now Deceased.

j. Zainabu Wanjiru Gachigi - who is named as the 6th Beneficiary. The Court of Appeal identified her as a daughter of Salome Njoki, now Deceased.

k. Joseph Gachigi Zambetakis – who is identified as the 7th Beneficiary. The Court of Appeal identified him as a son of Zeverio Kiboi.

l. Jennifer Wanjiru Zambetakis – who is identified as the 8th Beneficiary. The Court of Appeal identified him as a son of Zeverio Kiboi.

m. John Irungu Zambetakis – who is identified as the 9th Beneficiary. The Court of Appeal identified him as a son of Zeverio Kiboi. John Irungu Zambetakis is Deceased – and had died by the time the Court of Appeal rendered its decision (See the Court's decision at page 44 where it refers to John Irungu Zambetakis as "late".)

n. Lucy Muthoni – who is named as the 10th Beneficiary.

o. Jane Nyambura – who is named as the 11th Beneficiary.

p. Agnes Waitwika Zambetakis – who is named as the 12th Beneficiary.

q. Mercy Wanjiru Mburu – who is named as the 13th Beneficiary. She is identified in the Court of Appeal judgment as the daughter of Mburu Gachigi.

86. All these Beneficiaries and heirs to the estate of the Deceased, having been specifically identified by the Court of Appeal's decision, needed to be involved in the post-judgment winding up of the estate of the Deceased. It is true that some were to be benefit as aggregates of a single unit – as in the example of Anthony Sabato Gachigi and Zainabu Wanjiru Gachigi who are to benefit as a single unit as issues of

Sophia Njoki, a daughter to the Deceased. Similarly, Jennifer Wanjiru Zambetakis and Joseph Zambetakis were to benefit together with the children of John Irungu Zambetakis as a single unit as issues of Zeverio Kiboi. The point, though, is that all the identified beneficiaries had a right and an entitlement to be involved in the proceedings for the winding up of the estate of the Deceased.

87. Did this happen? There are questions whether the children of Peter Gachigi Njogu were involved and represented during the proceedings. Although Peter Gachigi Njogu has been deceased for a while now and certainly by the time the Court of Appeal rendered its decision, there was no representation by his children who are specifically identified as beneficiaries in the estate of the Deceased in this case. In his Further Submissions, Mr. Githui claims that he represented both the children of the Late Peter Njogu Gachigi and those of John Irungu Zambetakis. There is also an affidavit filed by one Zaveriah Kiboi Zambetakis, a daughter of John Irungu Zambetakis deponing that the children of John Irungu Zambetakis retained Mr. Githui to act for them.

88. Yet, the questions of the representations of these two units persist. First of all, I have perused the entire Court record of this file and I have not seen any Notice of appointment of advocates filed by Mr. Githui's firm for the Children of the Late Peter Njogu Gachigi and the Children of the late John Irungu Zambetakis. Second, in all appearances in the matter, Mr. Githui has identified himself, for purposes of recording of the Coram as appearing for the 1st to 9th Beneficiaries. Not once did Mr. Githui identify himself as appearing for the Children of Peter Njogu Gachigi.

89. It is true that Mr. Githui has continued to identify himself as representing all first nine named beneficiaries in the suit and John Irungu Zambetakis is named as the 9th Beneficiary. It is also true that we now have the affidavit of Zaveria Kiboi Zambetakis confirming that Mr. Githui acts for her and her siblings. However, even if we were to overlook the fact that Mr. Githui has always indicated that he appears for the 9th Beneficiary who is Deceased and accepted that the children did in fact retain him, this does not dissolve the issue of representation of the Children of Peter Njogu Gachigi. I note that by the time I retired to write this ruling, a firm of advocate to wit Nyamu and Nyamu Advocates had filed a Notice of Appointment of Advocates indicating that the firm is now on record for the "Estate of the Late Peter Njogu Gachigi". While this raises questions whether there is such a legal entity capable of representation, it exacerbates concerns that the children of Peter Njogu Gachigi were, in fact, not represented by Mr. Githui during the proceedings that took place post-Court of Appeal Judgment.

90. These representational infirmities sear through all the proceedings that have taken place post-judgment by the Court of Appeal. Can the Consents entered, then, be said to be valid?

91. Perhaps the answer would be debatable were these representational infirmities not further compounded by deficient representation by parties who had actually come on record when the purported Consents were entered into. The situation is further exacerbated by procedural deficiencies in the recording of the alleged Consents.

92. First, was a consent recorded before Ndung'u J. on 08/02/2016? I have carefully perused the Court record and I not seen any such consent. What we have, as reproduced above, is the Court ruling that the Application dated 11/11/2015 (by the 1st Interested Party) was "spent subject to acceptance of an improved bid by Libya Oil Ltd." Neither does the Court give reasons for its ruling nor indicate that this is, in fact, a consent.

93. This is not merely trivial. It would appear that the Learned Deputy Registrar was unable to find the said consent later on that day when some of the parties appeared before her and Mrs. Oduor informed her of a "consent." As reproduced above, the Learned Deputy Registrar found that there was no such consent on record. The Learned Deputy Registrar only happens to have resiled from that position when Mrs. Oduor insisted that the matter be placed before the Learned Ndung'u J. for "directions."

94. After the matter was apparently placed before Ndung'u J. for directions, the Learned Deputy Registrar now recorded that the Learned Judge had "indicated" that there was a consent signed by the parties. The truth of the matter, however, is that there is no consent signed by the parties before Ndung'u J. on 08/02/2016. The record does not bear out the existence of such a Consent.

95. To this extent, the further Consent Order which was dictated by Mr. Githui to the Learned Deputy Registrar and adopted as the order of the Court by the Learned Deputy Registrar at 4:22pm on 08/02/2016 was based on the misapprehension that a predicate consent had, in fact, been signed before Ndung'u J. earlier that morning while, in fact, no such consent had been signed. This, in itself, is sufficient reason to set aside the purported Consent Order.

96. There are, however, additional representational problems apparent on the face of the record. First, as the Learned Deputy Registrar lists the Coram at 4:59pm when she finally records the Consent Order, there is no representation of the 10th and 11th Beneficiaries. As already pointed out above, there was no representation either from the children of Peter Njogu Gachigi and John Irungu Zambetakis.

97. Second, the record indicates that Mr. Maramba was present for the 1st Administrator. The record also indicates that Mr. Maramba was holding brief for Mr. Konosi for the 2nd and 4th Administrators. Mr. Konosi has denied giving any instructions to Mr. Maramba to hold his brief let alone to compromise the issues through a Consent Order. This is not simply a question of a party claiming that his lawyer did not have instructions to settle a matter. This is a matter of an attorney on record for another party claiming to hold the brief on behalf of another attorney who is on record for a different party whose interests are adverse – and then the latter claiming that no instructions were issued to the first attorney to so settle the matter. I am inclined to believe Mr. Konosi on this one because the context indicates that the matters had at all times been acrimonious which is why, in the first place, the different administrators had procured different advocates to act for them. I note that the said Mr. Maramba has not signed any affidavit confirming that he, in fact, had instructions from Mr. Konosi to settle the matter on behalf of the 2nd and 4th Administrators.

98. There are further procedural infirmities which effete the alleged Consent Order of 08/02/2016 and the opening of the bids and the subsequent sale of the properties which it allowed.

99. First, as the Applicants have variously pointed out, the terms of the sale were advertised by the Auctioneers in the Daily Nation of 12/10/2015. The advertisement was clear that the bidding would close by Close of Business on 12/11/2015. The opening of the bids was to take place on 13/11/2015. Those were the terms of the sale as advertised. If any of the terms were changed, it behooved the Auctioneers to inform all those participating in the bidding. In this case, two important changes happened and yet there was no communication to the other participants.

a. One, the date of the opening of the bids was unilaterally changed from 13/11/2015 to 08/02/2016. It is not clear why the change happened. What is clear, however, is that not all those who participated in the bidding were informed. The only bidder who was aware of the change was the 1st Interested Party by virtue of being in Court on that day.

b. Two, the terms of the bid were changed mid-stream without the other participants being informed and being given an opportunity to react or respond to the changes. This happened when the 1st Interested Party was given an opportunity to vary its bid upwards so that it could emerge the winners of the bid for the purchase of Nakuru Municipality Block 4/258.

100. In my view, it matters little that the 1st Interested Party had an alleged First Right of Refusal for the property. If it did, this needed to be advertised so that the parties bidding had the information. At the very least, all the parties that had put in their bids unaware that the First Right of Refusal would be enforced at the tail end had to be given an opportunity to renew their bids. This did not happen making the bidding process fatally flawed.

101. This is not made any better by the fact that the alleged First Right of Refusal is, in fact, contested and is a subject of a civil suit to wit ***Nakuru High Court Civil Suit No. 84 of 2008*** in which one of the Administrators of the Estate of the Deceased is challenging the very lease which gives the 1st Interested Party the alleged First Right of Refusal on the ground that she was not involved as an administrator in its negotiation and execution.

102. It is no answer to these grave concerns about the procedural defects of the bidding process to say that a Consent Order was entered into. As aforesaid, the Consent order itself suffers from serious procedural infirmities. Second, the Consent Order would not immunize the bidding process from challenges by third parties who tendered their bids and who were affected by what they find to be an unfair bidding process. These parties are not privy to the Consent Order.

103. These concerns also affect the sale of Nakuru Municipality Block 4/259 to the 2nd Interested Party. Aside from questions about the opening of the bids in the absence of the winning bidder, there are questions about what terms of sale applied. It is noteworthy that the Learned Deputy Registrar had, on 08/02/2016, after a short recess, come up with the conditions of sale for the winning bids. This was shortly after declaring the 4th Interested Party the winning bidder. The terms did not include reference to what was to happen if the winning bidder was not contacted on time or was unable to comply with the terms. These conditions of sale were supplanted by the later "Consent Order" which was recorded at 4:59pm by the Learned Deputy Registrar as discussed above. That Consent Order, with its conditions for sale, has been set aside above. That, also, nullifies the Conditions of Sale which were part of that Consent Order. That leaves the Conditions of Sale which the Learned Deputy Registrar had come up with earlier. Those did not contain a fall-back clause on what would happen if the winning bidder failed to pay the deposit on time. This would have necessitated the Auctioneers to refer the matter to Court for directions.

104. What all these means is that the subsequent sale of Nakuru Municipality Block 2/259 to the 2nd Interested Party was also fatally flawed and cannot stand. It bears repeating that perhaps if all the tenderers had been informed of the time and place of opening of the bids, the winning bidder would have been present and would have known the term and conditions for sale. As it is, the winning bidder was not aware of the time and place for the opening of the bids and was not present. It is open to debate whether, in fact, the Auctioneers utilized due diligence to find the 4th Interested Party and inform him that he was, indeed, the winning bidder or whether, as those opposed to the Applications argue, the 4th Interested Party is just a decoy; a "fake" entity with no capacity to come up with the purchase price. It may be that, indeed, the 4th Interested Party is a man of straw; but even men of straw deserve procedural due process. In this case, the 4th Interested Party was entitled to have the rules of bidding followed and to be informed of the time and place of the opening of the bids, and to be present if he so wished. This did not happen pursuant to a Consent Order to which he was not privy.

105. Given this analysis, it is without relish that the Court finds that the Consent Order recorded on 08/02/2016 must be set aside due to representational defects. The sale by private treaty which was effected by the opening of the bids on that day (08/02/2016) was done pursuant to the purported Consent Order and cannot, therefore, stand. Additionally, as analysed above, the opening of the bids was tainted by serious procedural defects which fatally vitiated the process.

C.4. Does the Doctrine of Restitutio in Integrum bar the Setting Aside of the Consent Order and the Sales Based Thereon?

106. Counsel for the 1st to 9th Beneficiaries made the argument that even if the Consent Order was a good candidate for setting aside, the Court should, prudentially, not choose that course of action because it is impossible to return the parties to status quo ante. This is because, the argument goes, the sales have been completed, title documents handed over, and, in the case of the 1st Interested Party, transfer has already taken place. Additionally, Counsel points out that the purchase price has been dissipated: the whole of the purchase price has been distributed to the Beneficiaries pursuant to the Consent Order of 16/04/2016. Further, some of the monies deposited in Court by the 2nd Interested Party have been spent on various disbursements on behalf of the estate as ordered by the Court. Counsel forcefully argues that this is a good argument militating in favour of refusing to set aside the Consent Orders and the consequential sales.

107. It is true that the doctrine of *restitutio in integrum* is applicable whenever a Court is faced with the prospects of having to set aside a Consent Order or a contract. There are two aspects to the doctrine: whether the parties can be returned to the status quo ante and whether the Applicants have demonstrated a willingness and capacity to return all the parties to the status quo ante.

108. In the present case, the significant change of circumstances is that money has been paid. Money is fungible. It can be returned. The

only question is whether the Estate of the Deceased is in a position to refund the monies paid. Looking at the size of the estate, I have no reason to doubt that the estate can, indeed, refund the monies paid by the purchasers. It is important to note that the two properties might yet be sold and part of the proceeds utilized for this purpose. Indeed, there is no reason to believe that the 1st and 2nd Interested Parties might not, still, emerge the winning bidders if the beneficiaries to the estate do decide to proceed with the sale of the two properties rather than hold them as tenants in common as the Court of Appeal permitted them.

D. Disposition

109. In the end, then, the Six Applications have, in the main, succeeded. The Court has made findings that:

- a. The subject matter raised by the Six Applications is not res judicata;
- b. The High Court, in its jurisdiction to supervise the winding up of the estate of the Deceased, has jurisdiction to determine if the order that the beneficiaries share the two properties (Nakuru Municipality Block 2/258 and Nakuru Municipality Block 2/259) as tenants in common has become untenable and if so how to sell the two properties and share the proceeds as ordered by the Court of Appeal.
- c. There are sufficient grounds to set aside the Consent Order of 08/02/2016 and all consequential orders and actions based on it. Parties shall be returned to the status quo ante.
- d. The doctrine of *restitutio in integrum* does not bar the setting aside of the Consent Orders of 08/02/2016 and all consequential orders and actions based on it.

110. The consequent orders and directions that the Court shall make shall be the following:

- a. That the Consent Order dated 08/02/2016 is hereby set aside.
- b. That all other subsequent orders based on and arising from the Consent Order dated 08/02/2016 are, equally, set aside. Without prejudice to the generality of the foregoing, this includes the orders dated 18/04/2016; 17/05/2016 and 13/07/2016.
- c. That, consequently, the entire bidding process, sale, vesting, alienation, and transfer of the properties known as Land Title No. Nakuru Municipality Block 4/258 and Nakuru Municipality Block 4/259 is hereby set aside.
- d. That the transfer, registration and the Certificate of Lease with respect to the property known as Land Title No. Nakuru Municipality Block 4/258 in the name of Libya Oil Kenya Limited be cancelled, and the said property do revert to the estate of Rahab Wanjiru Evans (Deceased).
- e. That the 2nd Interested Party, Kiwaka General Merchants Ltd do forthwith return and deliver to Court or to the Administrators herein the original title and the discharge of charge (by National Bank Ltd) for Land Title No. Nakuru Municipality Block 4/259.
- f. That the Estate of Rahab Wanjiku Evans does refund in full all the monies paid by the 1st and 2nd Interested Parties towards the purchase of Land Title No. Nakuru Municipality Block 4/258 and Land Title No. Nakuru Municipality Block 4/259 respectively which has been distributed to the beneficiaries or disbursed on behalf of the estate. These amounts shall attract an interest at Court rates from the date of this ruling.
- g. That the monies deposited in Court by the 2nd Interested Party (Kiwaka General Merchants Ltd) be refunded to it.
- h. That the Administrators and beneficiaries of the estate of Rahab Wanjiku Evans (Deceased) do make a decision on the next steps to take regarding their beneficial shares in Land Title No. Nakuru Municipality Block 4/258 and Land Title No. Nakuru Municipality Block 4/259.
- i. That in the event of disagreement or dispute on how Land Title No. Nakuru Municipality Block 4/258 and Land Title No. Nakuru Municipality Block 4/259 should be distributed or shared, each Administrator or Beneficiary be at liberty to file an appropriate application for relief before this Court.
- j. That there shall be a stay of execution of this ruling for forty-five (45) days from the date hereof.
- k. That, this being a family matter, each party will bear its own costs.

111. Orders accordingly.

Dated and delivered at Nakuru this 27th day of January, 2020.

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JOEL NGUGI

JUDGE