



REPUBLIC OF KENYA



In re Estate of Albert Chege Thuo (Deceased (Succession Cause 95 of 2016) [2024] KEHC 10002 (KLR) (26 July 2024) (Ruling)

Neutral citation: [2024] KEHC 10002 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
SUCCESSION CAUSE 95 OF 2016**

A MSHILA, J

JULY 26, 2024

IN THE MATTER OF THE ESTATE OF ALBERT CHEGE THUO (DECEASED)

BETWEEN

MARGARET NYANGUNU CHEGE 1ST APPLICANT

JANE NJANGO THUO 2ND APPLICANT

AND

JOHN NDUNGU MUTHAMA RESPONDENT

(From Original Maseno Senior Principal Magistrate Sexual Offences Case No. E049 of 2021)

RULING

1. Before court is the Summons dated 6th October, 2023 brought by the 2nd Applicant seeking to set aside the Mediation Settlement Agreement dated 26th January, 2022.
2. The Respondent filed Grounds of Opposition and a Preliminary Objection both are dated 10th November, 2023; the Preliminary Objection raises the issue of locus of the 2nd Applicant in bringing the application;
3. The court directed that the Preliminary Objection be addressed first and invited the parties to canvass the same by filing and exchanging written submissions; hereunder is a summary of the parties rival submissions;

1st & 2nd Applicants' Submissions

4. The Applicants submit that the agreement arrived at through mediation amounts to a consent judgment that can only be set aside by the court. In the instant case there was no meeting of minds between the parties as the alleged mediation settlement agreement was only signed by one of the Applicants as such the mediation settlement agreement cannot be binding on parties who did not sign



it. The 2nd applicant was said to be part of the proceedings having filed the summons for revocation of grant and that she is also a dependant. Reliance was placed in the case of *Amcon Builders Ltd v Vintage Investment Ltd & another* (2018) eKLR. The Applicants submit that the mediation settlement agreement is not binding as the mediator misled the court into believing that parties had reached an understanding as such the orders adopting the mediation report were irregular and ought to be set aside and the grant herein revoked. Reliance was placed in the case of *NKM v SMM & Another* (2019) eKLR.

5. The court was urged to dismiss the Preliminary Objection with costs.

Respondent's Submissions

6. The Respondent submits that the 2nd Applicant has never been a party to the suit to file the application before court. It was submitted that enjoinder of parties is not as of right in that the 2nd Applicant did not seek leave to be enjoined in the suit. In any case, there is no evidence that the 1st Applicant has consented to the filing of the instant application. The application was said to be incompetent for want of locus standi. Therefore a nullity. Further, it was submitted that the affidavit in support of the application has not been signed by its maker as such should be deemed as not being on record and as a result the instant application should be struck out. Reliance was placed in the case of *Pharmacy and Poisons Board & another; Mwiti & 21 others*, Civil Appeal E144 of 2021 (2021) KECA 97 KLR. It was submitted that the mediation was conducted by the 1st Applicant and the Respondent who are the actual parties in the suit and that there is no allegation of undue influence in arriving at the mediation report. Reliance was placed in the case of *re estate of the late Adam Chebelieny Kibosia (deceased)* (2021) eKLR. The application was said to be an afterthought having been filed 21 months after the mediation report dated 26th January, 2022.

7. The court was urged to dismiss the application and uphold the summons for confirmation of grant dated 23rd September, 2022.

Issues For Determination

8. After reading the submissions of the parties and upon reading their respective affidavits and responses this court has framed the following issues for determination;

- i. Whether the 2nd Applicant has the locus standi to bring this application.
- ii. Whether the Application should be struck out;
- iii. Who shall bear the costs.

Analysis

Whether the 2nd Applicant has locus standi to bring this application

9. The 2nd Applicant averred in the Supporting Affidavit dated 6th October, 2022 that she makes the Affidavit on her own behalf and on behalf of the 1st Applicant; She states that the deceased to whom the estate relates was her father in law in that the late Hiram Thuo Chege was her husband and a son to the deceased. That the 1st Applicant herein is her sister in law and both of them are beneficiaries to the estate of the deceased.



10. At paragraph 9 of the Supporting Affidavit the 2nd Applicant makes the following averment

‘that the purported consent from mediation that was agreed upon on the 26th day of January, 2003 stated by the mediator is not true since the 1st Applicant at that time was sick and until now she is sick and cannot understand what is happening (attached herein and marked JNT 1 and JNT2 is a copy of the mediation report and a copy of the hospital receipts.’
11. The Respondent as one of the Administrators of the estate of the deceased raised a Preliminary Objection and it was his contention that the 2nd Applicant did not have locus standi to make any averments for and on behalf of the 1st Applicant which was in gross violation of the provisions of Section 5 of the *Oaths and Statutory Declarations Act* Cap.15 Laws of Kenya; it was the Respondents contention that this court did not have jurisdiction to determine the legal issues and grant the orders sought in the Summons General dated 6th October, 2022.
12. The renowned case of *Mukisa Biscuits Manufacturing Ltd –v- West End Distributors* (1969) EA 696 is the landmark case on the issue of what constitutes a preliminary objection where their Lordships observed thus:

“...a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration”
13. In the same case Sir Charles Newbold, P. stated:

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop”.
14. The Supreme Court in *Independent Electoral & Boundaries Commission V Jane Cheperenger & 2 Others* [2015] eKLR has also pronounced itself on the same subject. The court expressed itself as follows:

“It is quite clear that a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law.”
15. The Preliminary Objection is premised mainly on Order 1 Rule 8(3) and 10 of the *Civil Procedure Rules*, 2020 and on the 2nd Applicant making a Supporting Affidavit that is defective and for want of capacity.
16. The parties availed the mediation report to help the court discern the likely merits or otherwise of the application. Just a cursory look at the trial courts proceedings on the likely parties to the suit indicates that the 2nd Applicant was not a party to the proceedings;



17. The Respondent also took issue with the 2nd Applicant who is the sister in law of the 1st Applicant in swearing the Affidavit; In particular he argues that she deponed to matters that she lacked capacity to swear as she is not a party to the cause nor a beneficiary.
18. In the case of *Obonyo Walter Oneya & Anor v Jackline Anyango Ogude (suing as the administrator of the Estate of Frederick Odhiambo Sewe (deceased))* [2018] eKLR it was held that:-
- ‘... Any person with information relevant to an action and who is duly authorized can swear an affidavit in the action...’
19. The 2nd Applicant may be a close confidant of the 1st Applicant but just from the reading of paragraph 1 of the Supporting Affidavit it is abundantly clear that the words ‘duly authorised’ are missing from the text as she only alludes to ‘being competent to swear the affidavit’.
20. Secondly at paragraph 2 of the Supporting Affidavit she states that she makes ‘this affidavit on my own behalf and on behalf of the 1st Applicant’; as the 2nd Applicant was not being a party to the proceedings she cannot purport to enjoin herself without first seeking leave of the court; neither is she a beneficiary to the deceased’s estate which would have given her leverage and competence to make or swear the Affidavit; this then renders the Supporting Affidavit defective and it can be so deemed that there is no affidavit on record.
21. The law is very clear on applications that are unsupported by competent Affidavits; and this court is satisfied that from the material placed before it that at this stage the 2nd Applicant has no legal right or ‘locus standi’ to make any affidavits on behalf of herself and her sister in law, the 1st Applicant, or be heard in these current proceedings;
22. The upshot of this is that this court is satisfied that the Preliminary Objection is meritorious and find that the application is not properly before this court.

Findings and Determination

23. In the light of the foregoing this court makes the following findings and determinations:-
- i. The Preliminary Objection is found to have merit and it is hereby upheld.
 - ii. The 2nd Applicant Jane Njango Thuo is found to have no ‘locus standi’ to make any representations for herself and on behalf of the 1st Applicant.
 - iii. The application dated 6th October, 2022 is found to be incompetent and is hereby struck out;
 - iv. The Applicants shall bear the costs of this application.

It is so ordered accordingly.

DATED, SIGNED AND DELIVERED VIA TEAMS AT KIAMBU THIS 26TH DAY OF JULY, 2024.

A. MSHILA

JUDGE

In the presence of:-

Mourice – Court Assistant

Miss Ndungi – h/b for Njuguna – for the Respondent

Maina – for the Applicants

