



REPUBLIC OF KENYA



In re Estate of Stephen Githiari Wamunyu (Deceased) (Succession Cause 12 of 2018) [2022] KEHC 15560 (KLR) (23 November 2022) (Ruling)

Neutral citation: [2022] KEHC 15560 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
SUCCESSION CAUSE 12 OF 2018
FN MUCHEMI, J
NOVEMBER 23, 2022
IN THE MATTER OF THE ESTATE OF STEPHEN GITHIARI
WAMUNYU (DECEASED)**

BETWEEN

SAMALO WANJIRU NDUNGU PETITIONER

AND

GLADYS WANGECHI WANDETO 1ST OBJECTOR

ISAIAH WAMUNYU GITHIARI 2ND OBJECTOR

RULING

Brief Facts

1. The application for determination dated March 16, 2022 brought under sections 1A, 1B & 3A of the *Civil Procedure Act*, order 51 rule 1 of the *Civil Procedure Rules*, section 47 of the *Law of Succession Act* and rule 73 of the *Probate & Administration Rules* seeks for orders of stay of execution of orders made on 7th March adopting the report of the mediation agreement. On March 17, 2022, the court granted interim orders for stay of execution of the mediation settlement pending the hearing and determination of this application.
2. The respondent filed a replying affidavit dated July 18, 2022 in opposition to the said application.

The Applicant's Case

3. The counsel for the applicant swore an affidavit in support of the application and averred that the parties attended a meeting chaired by the mediator on September 20, 2021 but they were unable to resolve the dispute. He contends that the mediator was openly biased and showed hostility towards the applicant thus concluding the meeting prematurely. The applicant's counsel further states that the



mediator followed them as they were leaving the venue and requested them to sign papers indicating that they had attended the session.

4. On September 21, 2021, counsel avers that he wrote to the Deputy Registrar communicating the events that transpired at the meeting. It was further deposed that it has been brought to the counsels attention that the mediator doctored the report indicating that parties had reached an amicable settlement which is not the case. He further states that the applicant avers that the matter do proceed by way of *viva voce* evidence in court as some of the dependants are minors and they have been excluded from the proceedings. The applicant's counsel states that his client is apprehensive that unless the matter is heard by the court, injustice shall be visited on the said minors.

The Petitioner/Respondent's Case

5. It is the respondent's case that the first mediation meeting was conducted in English and the applicant later raised an objection on the language used. The proceedings were then conducted in Kikuyu which language the appellant understands. The respondent contends that during the 2nd meeting, counsel for the applicant was present and the applicant confirmed that the session was conducted in Kikuyu and parties confirmed the evidence and signed the mediation report of June 22, 2022. The respondent avers that the applicant is not being truthful and that has the intention of causing delay in this cause.
6. The application was disposed of by way of written submissions.

The Applicant's Submissions

7. The applicant submits that the matter ought to proceed by *viva voce* evidence as some of the dependants are minors and thus the court ought to appoint another administrator to represent the said minors and determine how the estate ought to be distributed by taking into account their interests. Moreover, the applicant contends that he has raised serious issues regarding the conduct of the mediator which requires the intervention of the court. To support his contention, the applicant relies on the case of [*Kenya Alliance Insurance Company Limited v Annabel Muthoki Muteti* \[2020\] eKLR](#).

The Respondent's Submissions

8. The respondent submits that the applicant has not sworn an affidavit to depose on the facts on what transpired during the mediation. Instead the applicant's counsel has sworn the supporting affidavit which denies the court the chance to assess the credibility of the evidence by affidavit or otherwise of the applicant.
9. The respondent contends that the applicant has made general accusations against the mediator but gave no particulars of hostility or bias on part of the mediator. In any event, the letter dated September 21, 2021 addressed to the Deputy Registrar has not been copied to him or to the mediator. Furthermore, the respondent submits that the application ought to be served upon the mediator to give him a chance to respond to the allegations made against him.
10. The respondent further contends that the application is not seeking to set aside the mediation report meaning that in the event that this court grants this application, the mediation report shall be sustained. Consequently, allowing this application would create an awkward position where the matter proceeds to hearing yet the mediation report will have been sustained.
11. The respondent contends that the application was supported solely by an affidavit sworn by the advocate thus making the advocate a party to the suit. It is trite law that in matters which entail contentious evidential facts or issues of evidence, it is neither wise nor appropriate for an advocate to depone an affidavit. Where an advocate swears an affidavit in contentious and controversial evidential



issues, such an advocate steps down from being an advocate and becomes a witness and can be cross-examined. In the case of *Regina Waitbira Mwangi Gitau v Boniface Nthenge* [2015] eKLR the court observed:-

On issue number one, the established principle of law is that advocates should not enter into the arena of the dispute by swearing affidavits on contentious matters. By swearing an affidavit on contentious issues, an advocate thus makes himself a viable witness for cross-examination on the case, which he is handling merely as an agent which practice is irregular.

12. Similarly in *Simon Isaac Ngugi v Overseas Courier Services (K) Ltd* [1998] eKLR and *Kisya Investments Ltd & others v Kenya Finance Corporation Ltd* it was held that:-

.....it is not competent for a party's advocate to depose to evidentiary fact at any stage of the suit.

13. In the instant case, the instant application is supported by an affidavit sworn by the counsel for the applicant. He has deposed to contested facts particularly on the mediation proceedings and has gone to the extent of accusing the mediator of doctoring the mediation report purporting that an amicable settlement was reached by the parties. The facts sworn by the advocate raise serious questions of fact and evidence which would require the advocate to be cross-examined to determine the truth.

14. The said facts sworn by the counsel cannot be verified for the foregoing reasons. In my considered view, the said affidavit serves no useful purpose to this application. In essence, the affidavit is worthless for it adds no value to the applicant's application. It is hereby declared incompetent and is accordingly struck out.

15. Even assuming the affidavit of the applicant was competent, it is trite law that a mediation agreement is equivalent to a consent order between the parties. As such the principles applicable to setting aside consent orders ought to apply herein.

16. Generally, a court will not interfere with a consent judgment except in circumstance such as would provide a good ground for varying or rescinding a contract between parties. In the case of *S. M. N v Z. M. S & 3 others* [2017] eKLR summaries the case law and grounds upon which a consent may be varied or set aside as follows:

- a. Where the consent was obtained fraudulently;
- b. In collusion between affected parties;
- c. Where an agreement is contrary to the policy of the court;
- d. Where the consent is based on insufficient material facts;
- e. Where the consent is based on misapprehension or ignorance of material facts;
- f. Any other sufficient reason.

Similarly in *Flora N. Wasike v Destimo Wamboko* [1988] eKLR Hancox JA held the view that:-

It is now settled law that a consent judgment or order has a 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.

17. In *Kenya Commercial Bank Ltd v Specialised Engineering Company Ltd* [1982] KLR 485, Harris J:

1. A consent order entered into..... is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or collusion or by an agreement contrary to the policy of the court or where the consent was given without sufficient material



facts or in misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement.

2. A duly instructed advocate has an implied general authority to compromise and settle the action and the client cannot avail himself of any limitation by him of the implied authority to his advocate unless such limitation was brought to the notice of the other side.
18. Essentially, the above-cited authorities are clear that a consent order will only be set aside if it can be demonstrated that it was procured through fraud, non-disclosure of material facts or mistake or for any other reason, that would enable a court to set it aside. This matter was referred for mediation on May 26, 2021 in presence of the parties and their respective counsels and no objection to the referring matter was raised. Thereafter the applicant filed an objection claiming to be illiterate and that he did not understand the mediation proceedings as they were being conducted in English. The court on July 29, 2021 sent the parties back to the mediator and instructed the mediator to use a language that all the parties understood. A mediation agreement signed by all the parties was later filed.
19. The applicant now contends that the mediator's conduct is wanting and that the court ought to intervene as some of the dependants of the deceased are minors and they will suffer injustice as they were not represented before the mediator. The respondent denies these allegations and avers that the applicant is using delaying tactics.
20. I have looked at the mediation agreement reached on June 22, 2021 and noted that all the beneficiaries were present and appended their signatures to the agreement. I have also perused the mediator's proceedings dated September 7, 2021 and noted that the respondent/objector and the applicant did not attend the said proceedings despite being served. It is noted that the applicant has made general allegations against the mediator that he conducted the proceedings dishonestly. Further, the applicant has not demonstrated that the settlement was procured through fraud, mis-representation, non-disclosure of material facts or mistake. The applicant has only alleged that some of the dependants are minors and they were not represented, as such they shall suffer injustice. The said minors have not been named and their existence was in the knowledge of the applicant during the time of referral of the case to the mediator, and yet all the parties consented to the mediation. No new issues have arisen following the referral.
21. The applicant talks of appointing a second administrator to represent the unknown minors. This case has been in the court shelves for over four years with the applicant on board. Yet he has never made such an application.
22. As deposed by the respondent the applicant seem to have his own underlying issues which he is not presenting to the court. As a result, he has complained of bias of the mediator which he has not demonstrated, of language used by the mediator and lately purports to protect minors who are not known. The rest of the eleven (11) beneficiaries have no issues with the mediator's report which seems to be fair in the manner of distribution. The setting aside of the said orders and leaving the mediation report intact is really an awkward position as well said by the respondent.
23. It is my considered view that the applicant has not made out a case for setting aside the orders of the court made on September 7, 2022 adopting the mediation agreement.
24. For the foregoing reasons, I find no merit in this application and it is hereby dismissed.
25. It is hereby so ordered.

DATED AND SIGNED AT NYERI THIS 23RD DAY OF NOVEMBER, 2022.

F. MUCHEMI



JUDGE

Ruling delivered through video link this 23rd day of November , 2022

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