



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

SUCCESSION CAUSE NO. 105 OF 2006

IN THE MATTER OF THE ESTATE OF THE LATE NGAULO ARAP TANUI ALIAS MGAULO ARAP TANUI (DECEASED)

BETWEEN

CHRLES KIBIWOTT SOO.....OBJECTOR/APPLICANT

DAVID KIPRUGUT ROSIO SOO.....OBJECTOR/APPLICANT

DICKSON KIPKETER BUSIENEL.....OBJECTOR/APPLICANT

JOHN KIRWA.....OBJECTOR/APPLICANT

RICHARD KIMUTAI SOO.....OBJECTOR/APPLICANT

EMILY CHEPCHIRCHIR SOO.....OBJECTOR/APPLICANT

WILIAM MUREI.....OBJECTOR/APPLICANT

AND

WILSON CHEPKOCHOI KORIR.....PETITIONER/RESPONDENT

RULING

The respondent herein petitioned this court for Grant of Letters of administration with will annexed and a grant to that effect was issued on 8/3/2016.

On 9/2/2017 the applicants herein filed summons for revocation or annulment of grant.

The matter was then screened and on 26/11/2019 parties agreed to refer the matter for a court annexed mediation.

On 14/9/2020, the petitioner's counsel applied for the mediation agreement to be adopted as an order of the court and the court directed that the agreement be typed and filed.

On 17/2/2021 the Applicants filed summons for revocation of grant seeking for orders *inter alia* that the grant of letters of administration intestate issued to Wilson Chepkochoi Korir on 8/3/ 2016 and confirmed on 14/9/2020 and subsequently amended on 3/11/2020, be revoked.

The application is supported by the affidavit of Charles Kibiwott Soo and David Kiprugut Rosio Soo.

The deponents in their affidavits have majorly deposed that the said confirmation was effected pursuant to a Mediation Settlement Agreement dated 5/12/2019 of which agreement was not signed by all the beneficiaries as required, but was largely signed by the children of the fourth house and their children. They also depose that the same constitutes a material concealment of facts which entitles them to seek the revocation of the grant aforesaid.

The respondents have filed a preliminary objection dated 15/3/2021 on the grounds that;

The matter was settled through a Mediation Process and a Certificate of Confirmation of Grant issued as per the Mediation Report which was endorsed by court and whereas *Rule 14* of the *Judiciary Mediation Manual* provides that no appeal shall lie against a Judgment or Order of the court arising from mediation settlement.

The Petitioner/Respondent therefore prays that the Application dated 17/2/2021 be struck out with costs.

The respondents did not file any response to the preliminary objection.

On 22/3/2021 when the matter came up for directions, it was agreed that the preliminary objection be argued by way of written submissions and each of the parties was granted 7 days to file their submissions.

The respondent filed their submissions on 21/4/ 2021 while the applicant filed theirs on 10/5/2021. It is therefore clear that none of the parties met the deadline for filing submissions as directed by the court. However, the said submissions will be weighed.

APPLICANTS' WRITTEN SUBMISSIONS.

On behalf of the applicants, counsel for the applicants has reiterated the contents of the preliminary objection and submitted as follows;

That the said Mediation Settlement Agreement was not signed by all the beneficiaries as required but was largely signed by the children of the fourth house and their children.

He also submitted that the deceased herein was married to four (4) wives and that his estate comprises of the following dependents:

1st House

1. Chemenjo Tanui — widow — Deceased
2. Christina Jeptangi Singoei — Daughter — Deceased
3. Aron Soo — son - Deceased
4. Christopher Soo — son – Deceased
5. Rodah Kaptich — Daughter

2nd House

1. Jerono Tanui — widow — deceased
2. Wilson Soo — son
3. Paulina Jepkoech — daughter – deceased
4. Richard Kimutai Soo — son

3rd House

1. Selly Jeruto Ngaulo Tanui — Widow- Deceased
2. William Murei
3. Dickson Kipketer — son
4. John Soo — Son
5. Elvis Soo — Son
6. Charles Kibiwott Soo — son
7. David Kiprugut Rosio Soo — son
8. Thomas Kipkirui Soo — son

4th House

1. Salome Jeptoo Tanui — widow
2. Ruth Rotich — daughter

3. John Kirwa Togom — son
4. Leah Jepwambok
5. Wilsom Kipsugut — son- Deceased
6. Dorcas Jerubet Soo – Daughter
7. Martha Jepkemboi — Daughter — Deceased
8. Aggrey Kimeli Kiriswo — Son – Decease
9. Rinny Jepkoech Soo — Daughter

He further submitted that the Mediation Settlement Agreement was signed by the following:

1. Ruth Jepkirong — 4th House
2. Dorcas Jebet — 4th House
3. Milka Jepchumba — Daughter — in law, widow of Christopher Soo — Deceased, 4th House
4. Priscilah Soo — Daughter —in law, Widow of Aron Soo — Deceased, 1st House
5. Leah Jepwambok — 4th house
6. Wilson K. Soo — 2nd house
7. Jonah Tarus — Grandson, son to Priscila Soo of the 4th House
8. Jane Jeptanui — daughter —in law, widow of Wilson Kipsugut of the 4th House
9. Cheruiyot Soo — Grandson, son to Dorcas Jebet Soo of the 4th House
10. Rodgers Magoi — Grandson, son to Rinny Soo of the 4th House.

He further submitted that the Mediation Settlement Agreement was not signed by the following who are the dependents of the deceased by virtue of being the children of the deceased:

1st House

Rodah Kaptich — Daughter

2nd house

Richard Kimutai Soo

3rd House

- i. William Murei -Son
- ii. Dickson Kipketer — Son
- iii. John Soo — Son
- iv. Elvis Soo — Son
- v. Charles Kibiwott Soo — Son
- vi. David Kiprugut Rosio Soo — Son
- vii. Thomas Kipkirui Soo-Son

4th House

- i. Salome Jeptoo Tanui — widow
- ii. John Kirwa Togom — son
- iii. Rinny Soo — daughter

Counsel submitted that the main issue for determination is whether or not the mediation settlement agreement dated 15/12/2019 is binding on all the parties.

That agreement arrived at through mediation and adopted by the court amounts to a consent judgment which can only be set aside by leading evidence to the satisfaction of the court that indeed there was a vitiating factor to warrant revocation of a contract.

That the pertinent question in this case is whether there was Mediation Settlement Agreement between the parties in the first place.

Counsel cited the Black's Law Dictionary, 11th Edition at page 470 which defines a Contract as an agreement between two or more parties, Preliminary Step in making of which is offer by one and acceptance by other, in which minds of parties meet and concur in understanding of terms and that there must be a meeting of minds, otherwise known as *consensus ad idem*.

That the meeting of minds is seen in the execution of the mediation agreement and that when a party signs the agreement, there is reason to believe that the party has read and understood the terms of the agreement and in the absence of any vitiating factor; he is bound by the terms of that agreement.

He therefore submits that in the circumstances of this particular case, there was no meeting of minds between the parties to the dispute in that the Mediation Settlement Agreement was largely signed by children of the 4th house and as such the Mediation Settlement Agreement cannot be binding on parties who did not sign it.

Counsel further submitted that the invocation of *Rule 14* of the *Judiciary Mediation Manual* is therefore misconceived in the premises.

He relied on the case of *Amcon Builders Ltd v Vintage Investment Ltd & Another [20181] eKLR* where the court had an occasion to interrogate the question of whether there can be settlement when the parties do not sign the Mediation Agreement and that at page 3 - 4 of the ruling the court stated as follows;- paragraph 18:

“.....Did mediation end with an agreement?”

18. Unlike arbitration or litigation mediation process ends with an agreement not an award. The success of a mediation process is that parties come up with own resolution. The part of the mediator is merely to guide the parties by setting an atmosphere of mutual, candid and honest discussions. He makes no own findings nor does he make any coercive determination at all. His is to listen and assist the parties settle. Once a settlement is reached, he must assist in drawing and crafting the agreement which is then owned by the parties by each appending his signature thereto. Even where the parties agree on the dispute but decline to sign the agreement, the mediator should report lack of agreement. Indeed, parties can reach a partial agreement which if signed is reported by the mediator as such. A mediator merely helps parties reach a mutually agreeable solution.”

He further submitted that the Mediation Settlement Agreement in this particular case is not binding as the mediator misled the court into believing that parties had reached an understanding.

That the orders adopting the mediation report were therefore irregular and needs be set aside.

Counsel's submission was further that this being a succession cause and a grant having been confirmed, the only remedy that the Applicant has is to come to court through *Section 76* of the *Law of Succession Act* and seek revocation of the grant.

That the mediation did not end in a settlement and the Mediator should have given a report to that effect hence the procedure of obtaining the grant was defective in substance and that this is one of the grounds upon which the Applicants are seeking revocation of the grant as provided for under *Section 76(a)* of the *Law of Succession Act Cap 160, Laws of Kenya*.

The authorities relied upon by the petitioner/Respondent being:

NKMv SMM & Another [20191] eKLR; and *John Juma & 2 Others vs Patrick Lihanda & 30thers; Zedekiah Orera and 466 Others (Interested Parties) [20191] eKLR* are distinguishable from the facts of this case in the sense that the parties who sought to set aside the orders adopting the reports had signed the settlement agreements unlike in the present case where the Applicants did not sign the Mediation Settlement Agreement dated 15/12/2019.

In conclusion, he submitted that the Preliminary Objection is devoid of merit and the same be dismissed with costs to the Applicants and the Application dated 17/02/2021 be set down for hearing on priority basis.

THE RESPONDENT'S WRITTEN SUBMISSIONS

Counsel for the respondent submitted that the matter was settled through a mediation process and a certificate of confirmation of grant issued as per the mediation report which was endorsed by court and whereas *Rule 14 of the Judiciary Mediation manual* provides that no appeal shall lie against a judgment or order of the court arising from mediation and the petitioner/respondent therefore prays that the application dated 17/2/2021 be struck out with costs.

The issue for determination by this court according to counsel's submission is whether a judgment or order of the court arising from mediation can be set aside.

Counsel submitted that when the matter was fixed for hearing before the mediator, all the parties including the applicants were present and they participated during the mediation process whereas they refused to append their signatures on the report prepared by the mediator and thus their action to oppose it is ill intended and in bad faith in that the orders sought are made in bad faith as the same is geared towards frustrating the ends of justice.

Further, counsel submitted that the adoption of the mediation agreement in court was in presence of the applicants who failed to raise any objection before the same was adopted and during mediation.

That Court annexed mediation enhances access to justice, reduces backlog of cases and most importantly, allows parties an opportunity to generate homegrown solutions to their disputes. Solutions that they can live with and which can bolster their long-term relations and that ordinarily, such a solution is not appealable as it is a contract mutually arrived at and which would not ordinarily, be subject of review.

That the adoption is to be done in the presence of the parties so that the court is to record any such objection that may be raised.

He further submitted that a Certificate of confirmation of grant was confirmed on the strength of the mediation settlement agreement dated 5th December, 2019 which is deemed as consent order that was arrived at after all the parties undertook the mediation process thus binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud which has not been proved by the applicants as alleged.

He cited Lady Justice L.A. Achode's decision in *NKM vs SMM & Anor [2019] eKLR* where it was stated that:

"The purpose of this court is to determine whether the settlement agreement adopted was obtained by fraud, or collusion or by an agreement contrary to the policy of the court, or where the consent was given without material fact, or misapprehension or ignorance of such facts or in general for a reason which would enable the court to set aside an agreement or consent judgments..... The applicant has not proved the existence of any of the ingredients which would merit the setting aside of the consent orders, arrived at with his full participation.

He also submitted that the court became *functus officio* when it adopted the mediation report as stated by Justice J. Njagi in the case of *John Juma & 2 others v Patrick Lihanda & 3 others Zedekiah Orera & 466 others (interested parties) [2019] eKLR* where it was stated;

"From the foregoing, it is clear that the court has jurisdiction over a matter pending mediation for purposes of hearing and determining interlocutory applications between parties. A mediation matter is deemed to be settled only after the settlement has been adopted as a judgment of the court. Only after that can the court be said to be functus officio over the matter. "

In conclusion, counsel submitted that no appeal shall lie against a judgment or order of the court arising from mediation and prayed that the application dated 17/2/2021 be struck out with costs.

ANALYSIS AND DETERMINATION.

The process of Court annexed mediation is governed by the Judiciary of Kenya Practice Directions on Court Annexed Mediation issued by the Chief Justice pursuant to *Article 159 of the Constitution and Section 59B (1) (a), (b) and (c) of the Civil Procedure Act.*

Article 159 (2)(c) of the Constitution of Kenya provides as follows: -

"In exercising judicial authority, the courts shall be guided by the following principles: -

alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted subject to clause (3)."

Also, Under *Section 59 C of the Civil Procedure Rules Cap 21 (Laws of Kenya)*, it is provided that: -

"1. Any suit may be referred to any other method of dispute resolution where the parties agree or the court considers the case suitable for such referral.

2. Any other method of alternative dispute resolution shall be governed by such procedure as the parties themselves agree to or as the court may in its discretion order ..."

In addition, under *Order 46 Rule 20 (1) of the Civil Procedure Rules, 2010*, it is stipulated as follows: -

“Nothing under this order may be construed as precluding the court from adopting and implementing of its own motion or at the request of the parties, any other appropriate means of dispute resolution (including mediation) for the attainment of the overriding objective envisaged under Sections 1A and 1B of the Act.”

The Judiciary Mediation Manual provides as follows: -

Clause 1.3 (f) that:

“The Court may at any stage of court proceedings, make an order requiring parties to participate in additional mediation.”

Clause 1.5 provides that:

“There shall be a Mediation Judge in each Division/Court. The Mediation Judge will handle interlocutory applications arising when the mediation process is ongoing.”

Clause 1.7 provides for the role of the Deputy Registrar assigned to handle mediation matters which include *inter alia*:

- d) Place interlocutory applications before the Mediation Judge.**
- i) Place the Mediation Report before the Judge for action as may be required.**
- j) Place the mediation agreement before the Judge for adoption.**

Clause 4.3 provides that:

“Upon receipt of the Mediation Settlement Agreement:

- a) The Deputy Registrar or Magistrate or Kadhi shall file the Agreement in the Court file.**
- b) The file shall be placed before the Judge or Magistrate in charge or Kadhi in charge for adoption of the Agreement as a Judgment or Order of the Court.”**

Clause 4.5 provides that:

“The Agreement adopted shall be enforceable as a Judgment or Order of the Court.”

Section 12 of the Practice Directions [As amended in the Practice Directions on Court Annexed Mediation (Amendment) 2018] provides that:

- (a) Where there is an agreement resolving some or all of the issues in dispute, such agreement shall be in the prescribed Form 8, duly signed by the parties and shall be filed by any of the parties, with the Deputy Registrar or Magistrate or Kadhi as the case may be within ten (10) days of conclusion of the mediation.**
- (b) Any agreements filed with the Deputy Registrar or Magistrate or Kadhi as the case may be shall be adopted by the Court and shall be enforceable as a Judgment or order of court.**

The preliminary objection is premised on the provisions of *Rule 14* of the *Judiciary Mediation Manual* which provide as follows;

Rule 14 of *The Judiciary of Kenya Practice Directions on Court Annexed Mediation* provides as follows;

“.....14. No appeal against settlement

No appeal shall lie against a judgment or order of the Court arising from mediation.....”

Having carefully considered the pleadings and the submissions of the respective parties in this matter, it is my view that the substantive issue for determination is whether the preliminary objection is merited.

The jurisprudence of what amounts to a preliminary objection was set out in the celebrated case of;

MUKISA BISCUIT MANUFACTURER LTD VS WESTEND DISTRIBUTORS LTD (1969) EA 696 as per law JA, that:

"...so far as I am aware, a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit.

Sir Charles Newbold P in that case 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 instant preliminary objection is premised on the provisions of *Rule 14 of the Judiciary Manual on Court Annexed Mediation*.

It is therefore my considered opinion that the preliminary objection at hand raise a point of law.

The impugned consent herein was entered into on 14/9/2020, after the court adopted the Mediation Settlement Agreement dated 5/12/2019 on the mode of distribution of the deceased's estate. The Mediation Settlement Agreement was reached after the main suit was referred to mediation and a mediator was appointed to assist in the mediation process.

Subsequently, the sessions culminated in the execution of a Mediation Settlement Agreement which has been presented as evidence. The Mediation Settlement Agreement was later adopted by this court as a consent order.

On 14/9/2020, the petitioner/Respondent's counsel applied that the mediation agreement dated 5/12/2019 be adopted as an order of the court. The court directed that the agreement be typed and filed.

Subsequently and pursuant to the mediation Settlement Agreement, the grant was confirmed on 14/9/2020 and later amended on 3/11/2020. However, on 17/2/2021 the Applicants filed summons for revocation of the said grant seeking for orders *inter alia* that the grant of letters of administration intestate issued to Wilson Chepkochoi Korir on 8/3/ 2016 and confirmed on 14/9/2020 be revoked for the reason that the Mediation Settlement Agreement dated 5/12/2019 was not signed by all the beneficiaries as required but instead was largely signed by the children of the fourth house and their children and that the same constitutes a material concealment of facts which entitles them to seek revocation of the grant.

Upon perusal of the Mediation Settlement Agreement annexed to the application dated 17/2/2021 as annexure "CK 3", I have noted that indeed the applicants did not sign the said mediation settlement agreement.

It has been held time and again that a mediation settlement agreement once adopted as an order of the court becomes a binding agreement as between the parties and cannot be set aside unless the party seeking to have it set aside proves that there were vitiating factors such as in any other contract such as, fraud, misrepresentation, coercion, undue influence etc.

This position was set down in the case of;

NAIROBI HIGH COURT CIVIL CASE NO. 21 OF 2015, NKM VS SMM &ANOR [2019] eKLR where the court relied on the case of;

Kenya Commercial Bank Ltd Vs Specialized Engineering Co. Ltd [1982] KLR 485, where it was held that an order entered into by consent 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 misrepresentation or ignorance of such facts in general for a reason which would enable the court to set aside an agreement. Justice Harris thus at page 493 opined:

"The making by a court of a consent order is not an exercise to be done otherwise than on the basis that the parties fully understand the meaning of the order either personally or through their advocates, and when made, such an order is not lightly to be set aside or varied save by consent or one or other of the recognized grounds."

In the application dated 17/2/2021, the applicants are inviting the court to vacate the consent order emanating from a court annexed mediation agreement entered into on 5/12/2019.

The guiding principles to be applied by courts in setting aside consent judgments or orders are well established as set out in the case of;

FLORA N. WASIKE V DESTIMO WAMBOKO [1988] eKLR where Hancox, Ja, as he then was, 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 certain conditions remained to be fulfilled which are not carried out"

Further, this position was clearly articulated in the English Case of **PURCEL VS F. C. TRIGELL LTD, (trading as SOUTHERN WINDOW AND GENERAL CLEANING CO. AND ANOTHER), [1970] 3 ALL ER 671,** as cited by the court in **NAIRIBI HIGH COURT CIVIL CASE 21 OF 2015, NKM VS SMM &ANOR [2019] eKLR** where Winn, LJ, opined:

“It seems to me that, if a consent order is to be set aside, it can only be set aside on grounds which would justify the setting aside of a contract entered into with knowledge of the material matters by legally competent persons, and I see no suggestion here that any matter that occurred would justify the setting aside or rectification of this order looked at as a contract.”

Therefore from the foregoing, it is my considered view that the mediation agreement dated 5/12/2019 is invalid to the extent that some of the parties to the suit and in particular the applicants herein who are the objectors in the main suit, never appended their signatures on the said agreement, a fact of which the respondent’s counsel has admitted in their submissions when she stated that the applicants were present during the mediation processes but refused to append their signatures on the agreement.

I also find that the applicants’ refusal to sign the mediation agreement is a clear indication that they were not in agreement with its terms and the Mediator should have indicated so. There was no settlement.

I am fortified by the court’s decision in the case of;

NAIROBI HIGH COURT SUCCESSION CAUSE NO. 2129 OF 2015 CONSOLIDATED WITH SUCCESSION CAUSE NO. 1975 OF 2015; IN THE MATTER OF THE ESTATE OF BM (DECEASED)RMM VS RCM & 3 OTHERS, where the court stated

“...13. The Family Division and the Judiciary as a whole have embraced mediation in the resolution of civil disputes filed by the parties. Mediation is an informal and no-adversarial process where an impartial mediator encourages and facilitates resolution of a dispute between two or more parties. Like was stated by Judge P.J.O. Otieno in Amcon Builders Ltd –v- Vintage Investments Ltd & Another [2018] eKLR, the mediator merely guides the parties by setting an atmosphere for mutual, candid and honest discussions. He makes no determination. Where the parties have agreed on all, or some of, the issues in dispute he helps in the drafting of the agreement which is then owned by the parties by them appending their signatures. The agreement, known as the mediation settlement agreement, is then filed into court which adopts the same as the order or judgment of the court. The agreement becomes enforceable.....if the mediation collapses, or no agreement is reached, the matter returns to court to be heard in the normal manner. The parties may ask the judge to refer their matter to mediation, or the judge may on his/her motion refer the matter to mediation. Parties are under obligation, when referred to mediation, to attend the mediation sessions, and to act in good faith during the process.

15. Court Annexed Mediation enhances access to justice, reduces backlog and, most importantly, allows parties an opportunity to generate home-grown solutions to their disputes. Solutions that they can live with and which can bolster their long-term relations. This is why, ordinarily, such a solution is not appealable. It is a contract mutually arrived at, and which would not, ordinarily, be the subject of review.

It is clear that the final deed of settlement had not been agreed upon. The parties hoped to agree before 28th February 2018. On this, the parties agreed and appended their signatures. But, the attached template (both handwritten and typed) was not signed by the parties. It could not have been signed because the deed of settlement was yet to be adopted. It was to be adopted later (to be ready for lodging in court before 28th February 2018).

24. In conclusion, I find that the documents dated 14th February 2018 and 14th December 2017 did not amount to a mediation settlement agreement. The parties had not reached a settlement. They had not appended their signatures to any settlement. With respect, the mediator misled the court into thinking that the parties had reached a settlement. It was a misrepresentation on the part of the mediator that led the court to endorse the alleged settlement. There being no mediation agreement settlement, therefore, I allow the respondent’s application dated 20th November 2018 with costs. I set aside the orders of this court dated 12th March 2018.....”

From the foregoing and the settled facts of this matter, I come to the conclusion that the mediation agreement is invalid ab initio and the mediator misled the court into believing that Parties had reached an agreement.

The upshot of the foregoing is that the preliminary objection dated 15/3/2021 has no merit and is hereby dismissed with costs to the applicant.

S.M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 22nd day of June, 2021.

In the presence of:-

Ms Tum for the respondent

Mr. Kiptoo holding brief for Mr. Sambu for the applicant

