



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

SUCCESSION CAUSE NO 1274 OF 2015

IN THE MATTER OF THE ESTATE OF OYOSI OYUOYA alias OYOSI OYWOYA (DECEASED)

AND

TITUS ODWARY ODIWA.....1ST ADMINISTRATOR

MARIKO OLWAL OGAL.....2ND ADMINISTRATOR

MAURICE OTIENO NYANJONG'.....3RD ADMINISTRATOR

AND

RICHARD NONDO KEKE.....1ST OBJECTOR

SABINA AKOTH ONDIWA.....2ND OBJECTOR

JULIUS ABUTO AMOLLO.....3RD OBJECTOR

AND

DANIEL MOSES OOKO OGUTA.....INTERESTED PARTY

DIRECTIONS

1. In her decision of 5th December 2020, Hon Cherere J ordered that:

1. The deceased's estate comprising of Kisumu/Gem-Rae/14; Kisumu/Gem-Rae/40; North Nyakach/Gem-Rae/74 and Kisumu/Gem-Rae/103 shall devolve in equal shares to his children.

2. The deceased's grandchildren shall inherit the shares that would have been inherited by their deceased parents, not as individuals but jointly as a household from where they shall distribute according to the number of grandchildren in that household.

3. This cause is hereby referred to a Court Annexed Mediator to assist the parties come up with an amicable mode of distribution

4. Mention on 10th February 2020 to confirm if parties have reached a settlement.

2. When the matter came up for mention on the said 10th February 2020, the Deputy Registrar, noted that some of the parties were disputing the court-annexed mediation settlement and referred the matter to the Judge for further directions.

3. On 1st February 2021 when this matter was mentioned, this court noting that the matter is very contested, directed parties to file their written submissions in respect of the Mediator's Report. The parties filed Replying Affidavits instead. The court considered the same as Article 159 (2)(d) of the Constitution of Kenya, 2010 mandates courts to administer justice without undue regard to technicalities.

4. From the submissions that were made to this court, it was evident that the deceased's estate comprised of Kisumu /Gem-Rae/14 (hereinafter referred to as "Plot No 14") Kisumu /Gem-Rae 40 (hereinafter referred to as "Plot No 40"), North Nyakach/Gem-Rae/74

(hereinafter referred to as “Plot No 74”), Kisumu/ Gem-Rae/103 (hereinafter referred to as “Plot No 103”).

5. On 7th February 2020, the Mediator and the area Chief mediated the dispute herein. He reported that according to the beneficiaries only plot No 103 was in dispute as the other parcels had no issues for the reasons that the fathers to the parties herein never raised any issue about them as they had agreed on how to share them.

6. As per the Mediation Settlement Agreement, Plot No103 was to be distributed to the four wives and then be given to the lastborn children of each house, being, Noah Odiwa Oyosi, Joash Abongo Oyosi, Ogal Oyosi and Nyanjong Oyosi. Thereafter the same would be given to the following grandchildren namely: Titus Odwary Odiwa, Moris Otieno Nyanjong, Sabina Akoth Ondiwa, Ogal Oyosi therefrom. Each house was to get three (3) acres each.

7. The said Mediation Agreement also indicated that that Plot No 74 measuring 0.42 Ha was to be given to Keke Oyosi and Nondo Keke. The distribution which was done by the sons of the deceased being Odiwa Oyosi, Abongo, Ogal Nyariaro and Amollo was not contested.

8. It was further agreed that Plot No 40 measuring 1.8 Ha be given to four wives of the deceased being, Martha Mwango, Maruwa, Leba and Ochindo and to be given to their lastborn children.

9. It was further agreed that Plot No 14 measuring 0.7 Ha was to be given to the deceased’s three (3) wives, Martha Mwango, Marua and Leba to the exclusion of Keke Oyosi’s mother who was given Plot No 74.

10. Having considered the affidavit evidence, this court noted that, the 1st and 2nd Administrator opposed the Court-Annexed Mediation Settlement Agreement whereas the 1st, 2nd and 3rd Objectors were in support of the said mediation agreement.

11. In his Affidavit sworn on 20th May 2021, the 1st Administrator averred that he did not oppose the Mediator’s Report in whole. His main issue of contention was that there was no equality in the distribution of Plot No103. His argument was that if each house was to be given three (3) acres each as provided by the agreement, then the house with one son only would have benefited more than the house with three sons.

12. The 1st Administrator also disputed the distribution of plot 74 and contended that his mother’s house was left out hence it should be given a bigger portion in another plot to compensate that. He and the 2nd Administrator argued that since the 3rd Objector’s mother was inherited by his father Amollo Oyosi, he was not their family member despite residing in their father’s Plot 148 as he belonged to a different Clan.

13. Both 1st and 2nd Administrators proposed a different mode of how Plot 103 should be distributed to make it fair. They contended that they should each get four (4) hectares, the 3rd Administrator three (3) hectares while the 2nd Objector gets one (1) hectare. They added that the law should take its course with regard to Section 45 of the Law of Succession Act concerning the Interested party and other purchasers.

14. In his affidavit sworn on 3rd June 2021 and filed on even date, the 2nd Administrator averred that the 2nd Objector had not been chased from her matrimonial home in Kasipul/Kabondo in Homabay County and for that reason, she should not claim an equal share of the deceased’s estate. He added that the 3rd Objector is not a family member and ought not to inherit from the deceased’s estate.

15. He further submitted that he only signed the Mediator’s report because he was at the meeting but that did not mean he could not object to the said report. He argued that he is worried that if the agreement is adhered to, several other people living on the said parcel will be evicted.

16. All the three (3) Objectors submitted on the same agreed issues. They contended that they supported the recommendations of the Mediator’s Report and that with its proposed distribution, no beneficiary would be evicted from plot 103 as alleged by the 1st and 2nd Administrators, and that in fact it’s the said Administrators who want to evict other beneficiaries in their proposed mode of distribution of the said plot.

17. In his Affidavit sworn on 29th March 2021 and filed on 14th April 2021, the 1st Objector averred that even before the mediation process, Plot No 103 was already sub-divided to five lastborn grandchildren. He opposed the 1st and 2nd Administrator’s proposal of allocating the said Title as follows: Titus Odwary Odiwa (4 ha), Mariko Olwal (4 ha), Maurice Otieno Nyanjong (3 ha) and Sabina Akoth (1ha).

18. In her Affidavit sworn on 29th March 2021 and filed on 14th April 2021, the 2nd Objector was in agreement with the 1st Objector’s averments above but averred that Joshua Abong’o Oyosi, her father, did not distribute his share to his children before he passed on. She urged the court to assist since there are about 13 people who live in this impugned parcel of land. She further submitted that under the current Constitution, she’s allowed to inherit her father’s property regardless of her gender.

19. In his Affidavit sworn on 29th March 2021, the 3rd Objector averred that he was the deceased biological grandson. He stated that his biological father was Amollo Oyosi, and that the allegations made by 1st and the 2nd Administrator were not true. He added that the beneficiaries of the said Plot No 103 were thirteen (13) and not sixteen (16). He emphasized that the said parcel was sub-divided among the four wives of the deceased namely; Maruwa, Ochindo, Mwango and Leba and was inherited by their children who later handed the ownership to the deceased grandchildren.

20. They argued that the Administrators signed the said agreement that indicated that the decision was applauded by all without duress and cannot purport to reject it now.

21. The judgment that was delivered by Cherere J gave directions on how the deceased's estate should be distributed. The deceased's estate was to devolve equally to the deceased's children only and then it would devolve down to the grandchildren who shall inherit the shares that would have been inherited by their deceased parents, not as individuals but jointly as a household from where they would distribute the estate according to the number of grandchildren in that household.

22. In the present case, the Mediator guided the family in the distribution of Plot No 103. The 1st and 2nd Administrators did not object to the 2nd Objector inheriting the deceased's estate despite her not having been married. The Court-Annexed Mediation Settlement Agreement was prepared by Mediator, Handson Bandari and filed in court on 6th March 2020. Notably, all the beneficiaries who included the parties to the dispute herein attended the said meeting and appended their signatures thereto.

23. The complaint by the 1st and 2nd Administrators that they signed the Mediation Agreement because they were Administrators of the deceased's estate despite not agreeing with its contents was baseless. They did not adduce any evidence before the court that there was coercion or undue influence when they signed the said Mediation Agreement.

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

25. Mediation is an informal and non-adversarial process where an impartial mediator encourages and facilitates resolution of a dispute between two or more parties. The mediator does not determine the dispute and/or come up with a decision. The parties propose how a dispute should be settled and once they agree, the mediator leads them to signing a mediation agreement.

26. Once the mediation agreement is signed, it becomes final and binding as to the disputes that have been amicably resolved. Under the Court Annexed Mediation, the Mediation Report is filed in court and is subsequently adopted as an order of the court. However, if the parties are unable to agree on the issues that had been referred to mediation, the Mediator files a Non-Compliance Report and the matter is then referred back to court for determination.

27. It is procedural that once parties had signed a Mediation Settlement Agreement which was then lodged into the court, it became incumbent upon the courts to adopt it to enable enforcement to set into motion. Paragraph 12 of **The Judiciary of Kenya Directions of Court Annexed Mediation** (as amended in 2018) provides as follows:-

“12. (a) Where there is an agreement resolving some of all 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 of Kadhi as the case may be within ten (10) days of conclusion of the mediation.

(b) Any agreement 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.”

28. The court considered the implication of a consent in the cases of **Flora N. Wasike vs Destimo Wamboko [1988] e KLR** and in **Board of Trustees National Social Security Fund vs Michael Mwalo [2015] e KLR**. The common thread was that **“a consent order entered into by the parties has a contractual effect, 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 or for reason which would enable the court to set aside an agreement.”**

29. Due to the final nature of the Mediation Agreement and no demonstration of vitiating factors such as misrepresentation, mistake, coercion, undue influence and/or duress, the 1st and 2nd Administrators did not persuade this court that there was merit in setting aside the Mediation Agreement. This court took the firm view that litigation had to come to an end. This cause is an old matter and ought to be settled without any further delay.

DISPOSITION

30. For the foregoing reasons, this court hereby directs that this matter be mentioned on 8th November 2021 for purposes of adopting the Mediation Settlement Agreement herein as consent order of this court. To bring an end to this matter, the court will proceed to adopt the Mediation Settlement Agreement as a judgment of the court irrespective of whether or not the parties herein attend court.

31. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 27TH DAY OF JULY 2021.

J. KAMAU

JUDGE