



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**FAMILY DIVISION**

**SUCCESSION CAUSE NO. 2129 OF 2015**

**CONSOLIDATED WITH SUCCESSION CAUSE NO. 1975 OF 2015**

**IN THE MATTER OF THE ESTATE OF BM (DECEASED)**

RMM.....EXECUTOR

VERSUS

RCM.....RESPONDENT

SM.....1<sup>ST</sup> INTERESTED PARTY

DR. MVU.....2<sup>ND</sup> INTERESTED PARTY

**RULING**

1. The deceased BM died on 4<sup>th</sup> June 2015 at Karen in Nairobi. He left a Will dated 4<sup>th</sup> November 2011 whose executor was RMM. On 11<sup>th</sup> August 2015 the executor filed a petition for probate of written Will. The respondent RCM was the wife of the deceased before they divorced on 15<sup>th</sup> June 1992. There is a property LR No. [xxxx] Watamu which she alleged that they jointly bought with the deceased in 1983-1984 which they thereafter owned as joint tenants. In the divorce proceedings, it was her case, the property was settled to her. She later found out that the deceased had instead transferred the property to a company known as [particulars withheld] Limited. She challenged the validity of the transfer of the property to the company. Between the deceased and the respondent was a daughter SHM (1<sup>st</sup> interested party).

2. There is a limited liability company known as [particulars withheld] (Africa) Limited which the deceased incorporated about 1974. The respondent alleged she was involved administratively in the company. In the course of marriage, she alleged, they acquired LR No. 1160/XXX (original No. 1160/XXX/X) and LR No. 1160/XXX (Original No. 1160/XXX/X) Karen Nairobi, Mbagathi Ridge which was vested in their joint tenancy. There was question whether these properties belonged to the estate of the deceased or belonged to the respondent.

3. Dr. MVU (2<sup>nd</sup> interested party) stated that she was the widow of the deceased with whom she lived between 1990 and when he died.

4. It does appear from the Will that the deceased bequeathed his assets to the interested parties in equal shares. There was contention about what constituted the estate of the deceased.

5. This matter was handled by Justice W. Musyoka who has since left the station. On 29<sup>th</sup> May 2017 the dispute was by consent referred to Court Annexed Mediation (C.A.M.). Following this, the mediation deputy registrar allocated the matter to Phylis E. Namachanja Wangwe.

6. On 12<sup>th</sup> March 2018 (in chambers) the Judge recorded as follows:-

**“1. The mediation settlement agreement dated 14<sup>th</sup> December 2018 (14<sup>th</sup> December 2017?) and filed herein on 21<sup>st</sup> December 2017 duly executed by the parties and their respective counsel is hereby adopted as an order of the court.”**

7. On 27<sup>th</sup> November 2018 the respondent filed the instant motion seeking to vacate and set aside the orders of 12<sup>th</sup> March 2018 and any

subsequent steps, processes or proceedings pursuant to the order. Her case was that although there were several mediation sessions held by the mediator at which various compromises were discussed there was no settlement reached and signed by the parties. What happened, she stated, was that the mediator handwrote a basic template to be used as a framework for the preparation of a settlement that would be executed by the parties once all the terms were agreed upon. This is the template, according to the respondent, that the mediator filed in court. She stated that the filing was without the parties' knowledge and consent.

8. The executor opposed the application. His case was that the mediation had succeeded and had resulted into a settlement on 14<sup>th</sup> December 2017 which the mediator had lodged in court. The endorsement of the settlement had therefore been procedurally done, and the parties were subsequently bound by its terms.

9. The 1<sup>st</sup> interested party agreed with the respondent that there was no agreement reached, despite various meetings. The purported settlement filed in court, she contended, had not been signed by the parties. In fact, she stated, the alleged agreement were notes made by the mediator in the course of discussion and were confidential, and therefore the mediator breached **rule 12** of the **Mediation (Pilot Project) Rules 2015** when she filed the notes as if they were a settlement.

10. The 2<sup>nd</sup> interested party opposed the application by the respondent. According to her, the mediator conducted the mediation in an impeccable manner, and guided the parties into reaching an agreement on the substantial issues of the dispute. She reduced this into the settlement which she filed into court.

11. The second application dated 14<sup>th</sup> November 2018 was by the executor. He sought to enforce the terms of the mediation settlement agreement as filed by the mediator and endorsed by the court. The reaction to the application took a similar pattern. The respondent said there was no agreement that could have formed the basis of the endorsed orders. The 2<sup>nd</sup> interested party agreed with the executor. The 1<sup>st</sup> interested party agreed with the respondent.

12. The executor was represented by Mr Muchiri, the respondent by Mr Kuyo, the 1<sup>st</sup> interested party by Ms Effendy and the 2<sup>nd</sup> interested party by Mr. Angwenyi. Each filed written submissions on the applications. I have considered what each had to say on the matter.

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. The process of 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**.

14. The mediation is court annexed because it is conducted under the umbrella of the court. It follows the filing of the dispute in court, and after parties have filed their pleadings. The deputy registrar (deputy mediation registrar) screens the file and informs the parties that the matter is being referred to mediation. He appoints a mediator for them. 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. The entire mediation exercise will take up to 70 days only. All information obtained orally or in writing in the course of mediation is treated confidentially, and cannot be used in evidence thereafter. The **Judiciary Mediation Manual** has details of the process of Court Annexed Mediation.

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.

16. In the instant case, therefore, the court is called upon to determine whether the parties reached a settlement. The court has to decide whether the mediation settlement agreement filed on 21<sup>st</sup> December 2017 and adopted on 12<sup>th</sup> March 2018 was the result of what the parties discussed and agreed on. I would opine that a mediation settlement agreement would, upon adoption, be treated as a consent order, in which case the order would only be set aside on grounds which would justify the setting aside of a contract (**Flora N. Wasike -v- Destimo Wamboko [1982-88] IKAR 625**). The grounds would include fraud, collusion, illegality, mistake, misrepresentation, or if the contract is against public policy.

17. The parties herein voluntarily subjected their dispute to court annexed mediation. They were assigned a mediator. They admittedly attended several sessions.

18. The document filed on 21<sup>st</sup> December 2017 is headed "**Mediation Settlement Agreement**" and goes on to state as follows:-

**"We, the undersigned parties have agreed on a template (attached) to be adopted in drafting of the final Deed of Settlement to be presented and lodged in court before 28<sup>th</sup> February 2018."**

It was dated 14<sup>th</sup> December 2018 and signed by all parties. That date, I find, was a mistake. This is because the lodgement was supposed to be on 28<sup>th</sup> February 2018 and the document was filed on 21<sup>st</sup> December 2017. Secondly, the signature of the executor was dated 14<sup>th</sup> December 2017 next to it. My view is that the date of the document was 14<sup>th</sup> December 2017.

19. Attached to it were three documents. One was handwritten, headed **“Mediation Settlement Agreement”**. It stated that the estate of the late Bernard Martens will be distributed in the following manner:-

- “(a) .....
- (b) .....
- (c) .....
- (d) .....
- (e) .....

It talks of the costs of the executor. It provides that the costs

**“will be apportioned as amongst the parties and or beneficiaries in a ratio to be agreed by them and set out in the deed of settlement to be signed by the parties.”**

It then talks of tax and provides that

**“3. The tax (if any) in respect of the estate of Bernard Martens will be apportioned as amongst the parties and or beneficiaries in a ratio to be agreed by the parties.”**

20. The second attachment is the typed version of the handwritten agreement. Like the first document, it shares the estate. It is dated 14<sup>th</sup> December 2017. The parties have not signed it. The same for the first document.

21. The third document is the mediator’s report dated 14<sup>th</sup> December 2017 and signed by her. It transmits the two documents to the mediation deputy registrar saying that the

**“parties have agreed, reached a settlement and duly filed in court.”**

22. The executor and the 2<sup>nd</sup> interested party contended that the mediator managed to bring the parties together into reaching the settlement which was adopted on 12<sup>th</sup> March 2018, and which should be enforced. The respondent and the 1<sup>st</sup> interested party, on the other hand, contended that during the mediation sessions the parties agreed to the basic template which set out the general basics upon which the parties would subsequently enter into a mediated settlement; that, however, no settlement was arrived at; it was that template that the mediator filed in court; and, lastly, that that template did not signify any agreement.

23. I have anxiously considered this matter, the rival affidavits and the submissions. It is clear that the **“Mediation Settlement Agreement”** dated 14<sup>th</sup> February 2018 was only introducing the template, which it attached. The two attached documents are, infact, the same documents. One is handwritten and the other is typed. They are the “template.” The parties were saying that the template (which they attached) was to be adopted in drafting the –

**“final Deed of Settlement to be presented and lodged in court before 28<sup>th</sup> February 2018”**

It is clear that the final deed of settlement had not been agreed upon. The parties hoped to agree before 28<sup>th</sup> 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 28<sup>th</sup> February 2018).

24. In conclusion, I find that the documents dated 14<sup>th</sup> February 2018 and 14<sup>th</sup> 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 20<sup>th</sup> November 2018 with costs. I set aside the orders of this court dated 12<sup>th</sup> March 2018.

25. I find that the executor’s application dated 14<sup>th</sup> November 2018 has no merits and is dismissed with costs.

**DATED and DELIVERED at NAIROBI this 29<sup>TH</sup> OCTOBER 2019**

**A.O. MUCHELULE**

JUDGE