



REPUBLIC OF KENYA



**In re Estate of Nyamai Kilili (Deceased) (Succession Cause  
E374 of 2013) [2025] KEHC 1465 (KLR) (21 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 1465 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
SUCCESSION CAUSE E374 OF 2013**

**NIO ADAGI, J**

**JANUARY 21, 2025**

**IN THE MATTER OF THE ESTATE OF NYAMAI KILILI (DECEASED)**

**BETWEEN**

**CHARLES MATA YUMA ..... 1<sup>ST</sup> PETITIONER**

**CHRISTINE KAVENI NYAMAI ..... 2<sup>ND</sup> PETITIONER**

**AND**

**CHARLES WALI NYAMAI ..... 1<sup>ST</sup> RESPONDENT**

**DANIEL MUSUNGU NYAMAI ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. Before me is a Notice of Motion application dated 03/10/2023 by the 1st Petitioner/Applicant seeking prayers under Order 46 Rule 20 (3), 51 Rule 1 of the Civil Procedure Rules, 2010 and Sections 1A, 1B and 3A of the *Civil Procedure Act*, Article 159 (2) (d) and all other enabling provision of the Law that:-
  1. this Honourable Court be pleased to set aside the Mediation Settlement Agreement dated 28/03/2023.
  2. the costs of the application be in the cause.
2. The application is based on the grounds on the face of the application and is supported by the affidavit of Tatyana Ondijo, Advocate, for the Applicant herein. The Applicant contended that the matter came up for mediation on 28/3/2023 and a Mediation Settlement Agreement was recorded by the appointed Mediator. That on the said date, the Applicant's advocate had a physical hearing at the ELC Court in Machakos and the Mediator proceeded with the mediation and recorded a Mediation Settlement duly signed by all parties involved. The Applicant's Advocate proceeded to the Mediators Chambers and was informed that the parties had agreed to equally distribute the Deceased's assets among the survivors. The Applicant's Advocate asked the Parties present whether this was indeed the position



and they all agreed. It later came to the Advocate's attention that the parties in question had lacked comprehension of the contents within the Mediation Settlement Agreement, consequently, they were unaware of the implications of their signatures. In light of the above circumstances, the applicant seeks this honourable court to set aside the Mediation Settlement Agreement dated 28/03/2023. That the Applicant shall be greatly prejudiced if the orders sought are not granted.

3. The Respondents in opposing the application filed a Replying Affidavit sworn on 03/03/2024 and contended that the application is bad in law, incompetent, an abuse of the court process, ill advised and falsehood.
4. The application was canvassed by way of written submissions and both parties have filed their respective submissions.

### **Analysis & Determination.**

5. I have considered the application, the Replying Affidavit and the rival written submissions, the cited authorities and it is my view that the issue for determination is whether the instant application is merited.
6. As to whether the grounds set out by the Applicant meet the threshold for the setting aside of the said Mediation Settlement Agreement. I bear in mind that a Mediation Settlement Agreement has to be treated, upon adoption, as a consent order. Such an order would only be set aside on grounds which would justify the setting aside of a contract (Re Estate of B.M. (Deceased) [2019] eKLR). In Kenya Commercial Bank Ltd –v- Benjoh Amalgamated Ltd, Civil Appeal No. 276 of 1997, the Court of Appeal stated that it is now settled law that a consent judgment or order had a contractual effect and can only be set aside on grounds which would justify the setting aside of a contract. The threshold for setting aside consent orders was discussed in the case of Kenya Commercial Bank Ltd v Specialized Engineering Company Ltd (1980) eKLR wherein it was held that:-

“... prima facie any order made in the presence and with the consent of counsel is binding on all parties to the proceedings and cannot be varied- or discharged unless obtained by fraud or collusion or by an agreement contrary to the policy of the court or if the consent was given without sufficient materials or in misapprehension or ignorance of material facts in general for a reason which would enable the court to set aside an agreement.”,

7. I note that the then Applicant's advocate Tatyana Ondijo read and explained to the Applicant what the Agreement entailed and the Mediator read the Agreement to all the parties and after they were all satisfied, all the parties accepted and signed the Mediation Settlement Agreement.
8. I also note that the application herein is supported by an affidavit sworn by Tatyana Ondijo, Advocate, for the Applicant herein. The said Advocate depones that the matter came up for mediation on 28/3/2023 and a Mediation Settlement Agreement was recorded by the appointed Mediator. That on the said date, he had a physical hearing at the ELC Court in Machakos and the Mediator proceeded with the mediation and recorded a Mediation Settlement duly signed by all parties involved. That he proceeded to the Mediators Chambers and was informed that the parties had agreed to equally distribute the Deceased's assets among the survivors. He asked the Parties present whether this was indeed the position and they all agreed. It later came to the his attention that the parties in question had lacked comprehension of the contents within the Mediation Settlement Agreement, consequently, they were unaware of the implications of their signatures.
9. From the foregoing, it is clear that when the Applicant's named Advocate asked the Parties present whether this was indeed the position and they all agreed. I am meant to believe that the Applicant's



advocate concern is that he expected to be present when the parties signed the agreement. In the case of *Kinyua v Consolidated Bank of Kenya Limited* No. 16 of 2018, the court held that the mediation process does not require representation by an advocate and lack of representation by an advocate cannot be a basis for setting aside the mediation agreement.

10. In addition, although the advocate alleged that it later came to his attention that the parties in question had lacked comprehension of the contents within the Mediation Settlement Agreement, consequently, they were unaware of the implications of their signatures, the said advocate does not state how the parties including the Applicant lacked comprehension of the contents within the Mediation Settlement Agreement or how the same came to his attention. It is strange that it is only the Applicant who has objected to the agreement whereas it is alleged the parties were unaware of the implications of their signatures.
11. There is no allegation of fraud or coercion. From the affidavits filed, it is clear that the matter was referred to mediation by consent of the parties. The Applicant does not deny attending and voluntarily participating in the mediation process. He does not deny signing the mediation settlement agreement. There's no evidence of misconduct on the part of the mediator(s).
12. There is no explanation why the Applicant has not deponed an affidavit in his personal capacity to raise any allegations of not having fully comprehended the contents of the Mediation Settlement Agreement and /or not being unaware of the implications of his signature. These are contentious matters of fact which could only have been deponed to by the Applicant personally and not by his advocate because it is only the Applicant who had the knowledge of the said facts in support of the matters in dispute. Several decisions have been made by various courts deprecating the practice by advocates to swear affidavits on behalf of their clients particularly where the contents deponed thereto are contentious and are based on hearsay. In the case of *Kisya Investments Ltd & Others v/s Kenya Finance Corporation Ltd* NBI HCCC No. 5304 of 1993 (UR), Ringera J as he then had this to say:-
  - a. "..... By deponing to such matters, the advocate courts an adversarial invitation to step from his privileged position at the bar into the witness box. He is liable to be cross-examined on his disposition. It is impossible and unseemly for an advocate to discharge his duty to the court and to his client if he is going to enter into the controversy as a witness. He cannot be both counsel and witness in the same case....."
13. I find that, from the foregoing, the Applicant did not demonstrate that there was anything unconscionable, unfair or oppressive about the mediation that was conducted, or the Mediation Settlement Agreement that the parties arrived at.
14. I could stop there but I consider it necessary in the interests of justice to consider the matter of prejudice. Mr Ondijo deponed in his affidavit that the Respondents will not be prejudiced in any manner should the orders sought herein be allowed. I do not agree with him. In effect, there is no evidence to show that prejudice will be sustained by the Applicant if his application is denied.
15. Least but not last, I have to consider whether the application is competently before this court. Rule 39 of the Mediation Rules provides that :-
  1. No application for setting aside of an order or decree arising from a mediation settlement agreement shall be filed except with the leave of the court.
  2. An application for leave under sub rule (1) shall be supported by an affidavit detailing the grounds upon which the applicant intends to rely on in setting aside the order or decree.



16. I have not come across evidence demonstrating that the Applicant first sought for leave of the court to apply for setting aside of the Mediation settlement Agreement. In the absence of leave by the Applicant to file the instant application, I find that this court lacks jurisdiction to entertain the application which is incompetent.
17. I hope I have said enough to show that the Applicant's notice of motion dated 3<sup>rd</sup> October 2023 lacks merits. The same is dismissed with costs assessed at Kshs.15,000/= to be shared equally amongst the 2nd Petitioner, the 1st and the 2nd Respondents.
18. I so order.

**RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 21ST JANUARY 2025.**

**NOEL I. ADAGI**

**JUDGE**

**DELIVERED VIRTUALLY ON TEAMS AT MACHAKOS THIS 21ST JANUARY 2025**

In the presence of :

Odongo hb for Makau..... for Applicant

Kamolo N/A for ..... for Respondent

Milly..... Court Assistant

