



**In re Estate of Kabuthi Kathitu (Deceased) (Miscellaneous Succession Cause 87 of 2013) [2025] KEHC 1861 (KLR) (20 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1861 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERUGOYA  
MISCELLANEOUS SUCCESSION CAUSE 87 OF 2013  
RM MWONGO, J  
FEBRUARY 20, 2025  
(FORMERLY EMBU HC SUCCESSION CAUSE NO. 304 OF 2011)  
IN THE MATTER OF THE ESTATE OF KABUTHI KATHITU (DECEASED**

**BETWEEN**

**RICHARD MURIITHI KABUTHI ..... 1<sup>ST</sup> APPLICANT  
PETER NGARI KABUTHI ..... 2<sup>ND</sup> APPLICANT  
MURIMI KABUTHI ..... 3<sup>RD</sup> APPLICANT  
BERNARD MUCHANGI KABUTHI ..... 4<sup>TH</sup> APPLICANT**

**AND**

**JUDITH WAMARWA KABUTHI ..... 1<sup>ST</sup> RESPONDENT  
KARUANA KABUTHI ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**BENSON MIANO KANYORO ..... INTERESTED PARTY**

**JUDGMENT**

**Background**

1. The application before the court is summons dated 18<sup>th</sup> June 2024, by which the applicant seeks the following orders:
  1. That the honourable court be pleased to expunge the mediation agreements filed on 10<sup>th</sup> August 2023 and 17<sup>th</sup> August 2023 from its record;



2. That the honourable court be pleased to review and set aside the order on 18<sup>th</sup> May 2023 which ordered the mediation report filed on 07<sup>th</sup> September 2022 to remain in abeyance; and
3. That the costs for this application be provided for.

The application is premised on grounds set out on its face and in the supporting affidavit to the application.

2. By way of brief background, the court referred the parties to court annexed mediation to attempt a resolution of the issues raised in summons for revocation of grant dated 19<sup>th</sup> July 2011. The disputed issues revolved around the fact that the deceased died on 6<sup>th</sup> May, 1989, leaving behind numerous beneficiaries from his five (5) and according to one party, six (6) wives. The administration and distribution of the deceased's estate had been a long contentious issue since the deceased's death.
3. Following the court reference, the mediation process resulted in a settlement agreement which was filed in court on 07<sup>th</sup> September 2022. Later, the 7<sup>th</sup> interested party through counsel, informed Court that some parties had not been involved in the mediation, which caused the said settlement agreement to be held at abeyance through an order of the court on 18<sup>th</sup> May 2023. Some of the other parties were absent at that proceeding, and the court directed the matter to be referred to a different mediator. However, some of the other parties to the summons for revocation failed to participate in the mediation initiated at the instance of the 7<sup>th</sup> interested party.
4. The issues raised by the 7<sup>th</sup> interested party were that he is claiming purchaser's interest in the estate yet he purchased land from the beneficiaries and not from the deceased. The parties to the summons for revocation stated that they refuse to participate in the mediation with the 7<sup>th</sup> interested party because mediation is voluntary and, in this case, they are not willing to do so for the named reasons. The subsequent mediation proceedings were not consented to by the parties and the court ought not to have entertained a mediation agreement which includes a stranger to the proceedings.
5. The 7<sup>th</sup> interested party opposed the application through a replying affidavit in which he stated that on 18<sup>th</sup> May 2023, the court set aside the mediation agreement dated 07<sup>th</sup> September 2022 and referred the matter back to mediation before a different mediator and all the parties were duly notified. The applicant intentionally refused to participate in the mediation. The 7<sup>th</sup> interested party stated that he has been party to these proceedings all along and he filed a replying affidavit dated 31<sup>st</sup> August 2022 through which he raised his purchaser's interest claim for the first time.
6. He stated that he purchased a portion of parcel number Inoi/Thaita/122 and from the beneficiaries and he has been living on the said land to date. That the decisions made in this case will directly affect his interest, which is why he sought to have the first mediation settlement agreement set aside. He stated that the applicant is well aware of his presence as a party in the proceedings and she should not feign knowledge of that fact. Through the affidavit, he produced several documents to prove his claim over the land.
7. The application was also opposed through a replying affidavit by Karuana Kabuthi, a daughter of the 1<sup>st</sup> wife of the deceased (Muthoni Kabuthi), on behalf of the beneficiaries of the estate from the 3<sup>rd</sup> and 4<sup>th</sup> houses. She stated that when the first mediation was conducted, the mediator chased away some of the beneficiaries and interested parties and their interests were not captured. This is why the parties moved to court to have the settlement agreement dated 07<sup>th</sup> September 2022 set aside.
8. Consequently, the court ordered that the mediation be conducted afresh before a different mediator. The parties agreed with the settlements reached on 10<sup>th</sup> August 2023 and 17<sup>th</sup> August 2023 that the



land parcel number Inoi/Thaita/122 be shared among the 5 houses and the share belonging to the 7<sup>th</sup> interested party be removed from the share of the 5<sup>th</sup> house, who had sold the land to him. She deposed that the applicant intentionally refused to attend the mediation. She urged the court to finalize distribution of the estate to enable each party to settle on their inheritance.

9. In her written submissions, the respondent urged the court to dismiss the application since it lacks merit. She argued that the applicant herein only seeks to delay the matter further without just cause. That the applicant who is the deceased's 5<sup>th</sup> wife has a problem giving the 7<sup>th</sup> interested party his portion of the estate which that house will inherit yet they already sold it to him in 2008. She stated that the mediation settlement agreements reached on 10<sup>th</sup> and 17<sup>th</sup> August 2023 are agreeable to all the parties present and the applicant's absence and unwillingness to participate was duly noted and recorded.
10. The applicant submitted that the 7<sup>th</sup> respondent ought not to have been included in the mediation proceedings because he was never a party to the suit. That the mediation proceedings are unprocedural and should be expunged from the court's record. She relied on the case of *In re Estate of Leah Nyawira Njega (Deceased)* [2021] KEHC 6300 (KLR) and urged that none of the parties will be prejudiced if the orders sought are granted.
11. It was her case that the court may review its orders since there is an error apparent on the face of the record as the mediation agreement was not consented to by the parties. She relied on the cases of *Ndungu Njau v. National Bank of Kenya Ltd.* [2001] KEHC 868 (KLR), *Kenya Farmers Association Ltd v National Bank of Kenya Ltd* [2009] KEHC 971 (KLR) and *Josphat Munke Ole Mpoe v David Waiganjo Koinange* [2015] KEELRC 115 (KLR). She argued that the respondents have not demonstrated what loss they are bound to suffer if the orders sought are not granted. She urged the court to allow the application.

### **Issues for Determination**

12. The issue for determination is whether the application has merit.

### **Analysis and Determination**

13. According to the court's record, the dispute was referred for court annexed mediation on 27<sup>th</sup> May 2022. On 18<sup>th</sup> May 2023, counsel for the 7<sup>th</sup> interested party informed the court that there is on record a mediation report which he did not agree with because some parties were not allowed to attend. The court ordered that the matter be referred back to court annexed mediation before a different mediator and that the mediation report remain in abeyance.
14. The mediation was conducted and the mediator filed a non-compliance report for the applicant herein and Simon Munene Kathanji as 'non-attendance despite adequate information and communication by counsel and mediator'. On 14<sup>th</sup> February 2024, the court issued a notice to show cause why the mediation settlement should not be adopted as an order of the court. The application herein followed.
15. The mediator filed a partial mediation settlement agreement dated 10<sup>th</sup> August 2023. According to the attendance sheet, the applicant did not attend the mediation where a partial settlement was reached. The mediator filed a certificate of non-compliance. According to Rule 8 of the Civil Procedure (Court-Annexed Mediation) Rules, 2022, the court should keep an updated record of the mediation proceedings including a certificate of non-compliance filed by a mediator, where a party fails to attend the proceedings after efforts have been made to implore upon them to attend.
16. One of the issues raised by the applicant is that the 7<sup>th</sup> interested party participated in the mediation yet he was never a party to the suit. From a perusal of the court file, there were a number of interested



parties, some whom have since died. The 7<sup>th</sup> interested party who is claiming purchaser's interest, joined the proceedings when he filed his replying affidavit dated 31<sup>st</sup> August 2022. He claimed that he bought part of the deceased's land from some of the beneficiaries of the estate from the 5<sup>th</sup> house and he produced transaction documents to show for this. He did not participate in the first mediation which resulted in the settlement agreement dated 07<sup>th</sup> September 2022, which agreement is being held at abeyance by order of this court.

17. The purpose of the court placing the initial agreement in abeyance was to allow for the 7<sup>th</sup> interested party to ventilate his claim through mediation. This was done and the partial settlement agreement is pending adoption. The 7<sup>th</sup> interested party has been party to the proceedings herein since the summons for revocation of grant were filed. He has been present during the proceedings and has had audience in court throughout, a matter that the applicant never raised until this application.
18. The applicant has asked this court to review its order placing in abeyance the initial mediation settlement agreement dated 7<sup>th</sup> September, 2022. Review is provided for under Section 80 of the [\*Civil Procedure Act\*](#) as follows:

“ Any person who considers himself aggrieved—

- (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
- (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

Similarly, Order 45 Rule 1 of the Civil Procedure Rules provides:

- (1) Any person considering himself aggrieved—
  - (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
  - (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.
19. From the foregoing, there are only 3 factors for the court to consider before reviewing its findings, these are:
  1. That there has been discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed; or
  2. That there has been some mistake or error apparent on the face of the record; or
  3. Any other sufficient reason.



20. Further, in the case of Republic v. Public Procurement Administrative Review Board & 2 others (2018) e KLR it was held: -

“Section 80 gives the power of review and Order 45 sets out the rules. The rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it to the following grounds;

- (a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or;
- (b) on account of some mistake or error apparent on the face of the record, or
- (c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay.”

21. The application for review was filed within about 12 months of the impugned order. It seems like an afterthought, given the long unexplained delay. However, this delay may be overlooked as the delay as a technicality in the spirit of Article 159 of *the Constitution*. The next issue for consideration is whether the issues raised in the application meet the scope envisioned in law for a review. In the case of Ajit Kumar Rath v. State of Orisa & Others, 9 Supreme Court Cases 596 at Page 608 the court stated:

“the power can be exercised on the application of a person on the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression “any other sufficient reason” ..... means a reason sufficiently analogous to those specified in the rule”

22. A review cannot be based on issues that would trigger arguments or re-examination of facts. It is based on discovery of new evidence which could not have been adduced at the time the order was made, or an error on the face of the court’s record; an error that is so easily spotted and does not require delving into the substance of the decision itself. It is the applicants’ case herein that the order was made in error since the party moving the court at the time was not a party to the suit. The issue has already been settled in the paragraphs hereinbefore, since the 7<sup>th</sup> interested party has all along had audience in court.

23. The court has noted that the issues surrounding the 7<sup>th</sup> interested party relate to acquisition and ownership of the land, which is how he finds himself interested in the suit herein. If the court delves into those issues, it will surpass its mandate under review and even risk determining an issue that should be placed before the Environment and Land Court. This court sitting to exercise its mandate on review, will be doing more than required by determining how the 7<sup>th</sup> interested party acquired the land he bought. However, since he has already been part of the claim which was settled through mediation, the issue should be put to rest.

24. Looking at the bigger picture here, there are mediation agreements filed in Court on 7<sup>th</sup> September, 2022, 10<sup>th</sup> August 2023 and 17<sup>th</sup> August 2023. All the agreements are pending adoption as orders of the court. The mediation agreement dated 07<sup>th</sup> September 2022 has been indicated to have been held in



- abeyance, but has not formally been adopted by the court. not set aside. The agreements were reached in accordance with the Civil Procedure (Court-Annexed Mediation) Rules 2022 and the relevant settlement agreements filed accordingly.
25. It is not uncommon for a Court to decline to adopt a mediation settlement agreement in various circumstances such as where the agreement does not make sense to the Court; where the agreement has self-contradictory provisions or is internally inconsistent; where fraud bribery or undue influence or coercion are shown.
  26. In the present case, none of the above circumstances have been alleged. However, the Court on perusal of the three-mediation settlement agreement, notes that they are not in tandem. The settlement dated 7<sup>th</sup> September, 2022 appears to be a full settlement. The other two are partial settlements.
  27. Rule 34 (2) and (3) of the Civil Procedure (Court Annexed) Mediation Rules 2022 provide for adoption by Courts of Mediation Settlement agreements as follows:
    - “(2) It shall not be necessary for the parties or the mediator to attend court for purposes of the settlement agreement and such proceedings may be conducted in chambers or virtually.
    - (3) where the Court deems it necessary, it may seek further clarification from the mediator, each party or the party’s representative before adopting the settlement agreement.”
  28. The applicant seeks that the Mediation agreements filed on 10<sup>th</sup> and 17<sup>th</sup> August, 2023 be expunged, and that the Court order placing the mediation agreement of 7<sup>th</sup> September, 2022 in abeyance be reviewed and set aside.
  29. I have noted from the partial mediation agreement of 10<sup>th</sup> August, 2023 that the participants included the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Applicants but not the Petitioner or 4<sup>th</sup> Applicant Murimi Kabuthi (although there was participation by Joseph Murimi Kabuthi).
  30. I have also noted from the Mediation Agreement and Partial Mediation Settlement Agreements that the participation in the settlement was broad. All five (5) houses of the deceased were recognized and a large number of beneficiaries participated in reaching the settlements.
  31. This succession matter commenced in Embu in 2011 and was transferred to Kerugoya in 2013. That is about 14 years of litigation. The deceased’s houses are five and the beneficiaries are many. Each beneficiary and other interested persons can continue to engage in the litigation if not involved at the earliest opportunity yet, litigation must come to an end.

## **Conclusions and Disposition**

32. In this case, I think the prudent action to take in order to move the matter forward is as follows:
  - a. Increase the number of administrators to ensure broader family participation by appointing those persons listed as administrators in the respective settlement agreements. These are: Judith Wamarwa Kabuthi (5<sup>th</sup> wife), Bernard Muchangi Kabuthi (Son of 2<sup>nd</sup> wife) and Karuana Kabuthi Kithitu (Daughter of 1<sup>st</sup> wife). They are hereby appointed as co-administrators of the deceased’s estate.
  - b. To this end, the Court invokes its inherent power in the interest of justice, pursuant to Rule 73 of the Probate and Administration Rules, to revoke the grant and set under the



confirmed grant respectively issued on 26<sup>th</sup> July, 2005 and 23<sup>rd</sup> August, 2007 on the grounds that distribution did not, prima facie, take into consideration all five (5) houses of the deceased which houses have subsequently been agreed to indisputably exist.

33. With regard to the Mediation Agreement and Partial Settlement Agreements, they shall be retained on file but shall not be adopted at this time. The information therein may be used to assist the parties and the Court in formal determination of distribution of the deceased's estate.
34. The parties, including all beneficiaries and interested parties, are directed to attempt a further mediation in terms of Rule 31 of the Mediation Rules. If parties are unable to reach an abiding all-encompassing settlement, the co-administrators shall file a summons for confirmation of grant with the proposed mode of distribution, thereafter.
35. No order as to costs is made this being a family matter.
36. Orders accordingly.

**DELIVERED VIRTUALLY AT KERUGOYA HIGH COURT THIS 20<sup>TH</sup> DAY OF FEBRUARY, 2025**

.....

**R. MWONGO**

**JUDGE**

Delivered in the presence of:

1. Ndwiga holding brief for Magee for Respondent/Applicant
2. Kahiga for Applicant Benard Muchangi
3. Ndana for 7<sup>th</sup> Interested Party Benson Kanyoro
4. Richard Murithi Kabuthi - Present in Court
5. Peter Ngari Kabuthi - Present in Court
6. Murithi Kabuthi - Represented by his wife Monica Wanjiku
7. Karuana Kabuthi – Present in Court
8. Francis Munyao - Court Assistant

