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In re Estate of Sera Wanjiru Njehia (Succession Cause 57 of 2015) [2025] KEHC 10508 (KLR) (18 July 2025) (Ruling)

Neutral citation: [2025] KEHC 10508 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

SUCCESSION CAUSE 57 OF 2015

JRA WANANDA, J

JULY 18, 2025

IN THE MATTER OF THE ESTATE OF SERA WANJIRU NJEHIA

BETWEEN

JOHN NJUGUNA NJEHIA .... PETITIONER

AND

MARGARET MAGIRI .... 1ST OBJECTOR

LILIAN WANJIKU .... 2ND OBJECTOR

SYLVIA NYANDIA WANJIRU .... 3RD OBJECTOR

RULING

1. Sera Wanjiku Njehia, the deceased herein, died on 15/12/2014 at the age of 78 years. On 19/02/2015, the Petitioner, John Njuguna Njehia, a son of the deceased, applied for a grant of Letters of Administration over the estate of the deceased. He listed himself and one Charles Wainaina Njehia, his brother, as the only 2 survivors and/or beneficiaries of the estate. He also listed 3 parcels of land as the properties comprising the estate. However, on 31/03/2015, the 3 Objectors, through Messrs Manani, Lilan, Mwetich & Co. Advocates, claiming as daughters of the deceased, filed a challenge claiming that the Petitioners had omitted them from the list of beneficiaries and/or survivors of the deceased.

2. Before the said Objection could be heard however, the Grant of Letters of Administration was issued to the Petitioner on 5/08/2015. Under these circumstances, the Objector, on 27/01/2016, filed a Summons of Revocation of the Grant. At this point, the Petitioner appointed Messrs Ngigi Mbugua & Co. as his Advocates in this matter.

3. After some subsequent litigation, by the orders made by Sewe J on 22/02/2022, the dispute was referred to Court Annexed Mediation, which process culminated into the Full Mediation Settlement Agreement indicated to be dated 17/06/2021 and in respect to which the Court Order dated

13/07/2021 was issued. A second Agreement was also later made and filed in Court on 29/08/2023. As part of the terms of the Agreements, it was agreed that to actualize the same, a Survey exercise would be undertaken. The Court Order dated 7/03/2024 giving green light to the Survey exercise to proceed was then also subsequently issued.

4. Pursuant to the above, a Survey exercise was said to have been conducted on 11/04/2024 upon which the Survey Report dated 20/11/2024 relating to the parcel of land Eldoret Municipality Block 21(Kingongo)/3XX1, signed by the County Surveyor, Uasin Gishu County, was filed in Court, together with the proposed sub-division plan. By this time, Messrs Monda & Co. Advocates appears to have taken over conduct of the Objectors' case.

5. The Application now before Court is the Petitioner's Notice of Motion dated 16/12/2024, filed through his said Advocates, Messrs Ngigi Mbugua & Co. It seeks orders as follows:

   i. [........] spent

   ii. That the Honourable Court be pleased to clarify on the Mediation Report filed in relation to the distribution of the land asset to various beneficiaries in the estate.

   iii. That the Honourable Court be pleased to direct a resurvey of the parcel of land to two beneficiaries at the expense of the majority of the beneficiaries as evidenced by the survey Report together with the survey map.

   iv. There be no order as to costs.

6. The Application is supported by the Affidavit sworn by the Petitioner, in which he deponed that he has been authorized by other beneficiaries to swear the Affidavit on their behalf. He deponed that during the survey exercise, the surveyors seemed conflicted and influenced as they never considered the concerns of the Petitioner in terms of equality and equity in division of the land. He deponed that as a result of the skewed exercise, some of the beneficiaries are on the verge of being unfairly denied their rightful share of the estate despite having already made substantial development in the affected portions. He then asked the Court to ameliorate the dire situation some of the beneficiaries are facing as a result of the skewed sub-division by deeply interrogating the two Mediation Settlement Agreements to assist the parties achieve the spirit and purpose of family unity and fairness.

7. In opposing the Application, the 3 Objectors filed the Replying Affidavit jointly sworn by all of them on 4/02/2025. They deponed that the beneficiaries of the estate are the 3 of them, the Petitioner and their one other brother, and thus wondered who the other unidentified beneficiaries whom the Petitioner alleges to have permitted him to swear the Affidavit on behalf of were. They then urged that the Petitioner is intent at frustrating the implementation of the Mediation Settlement Agreements, and especially the Objectors. They pointed out that the Survey was ordered by the Court which asked the parties to identify a Government Surveyor who was then duly appointed and conducted the Survey in the presence of the Area Chief, a Police Officer assigned to the area Chief, 4 village elders, as well as the parties herein, including the Petitioner. They thus refuted the allegation that the Survey was skewed, and deponed that the Survey plan drawn by the County Land Surveyor and filed in Court, is a representation of what all the parties agreed to.

8. They also pointed out that the Petitioner has not mentioned the names of any other beneficiaries whom he is alleging are on the verge of being rendered destitute. They deponed that the Petitioner is only enraged because 3 shops from which he has been collecting rent were found to be lying in the portion of the parcel of land allocated to the 3rd Objector. According to them, the Agreement meets the non-discrimination principle enshrined in Article 27 of the *Constitution*, that it is clear from the Survey Plan that the Petitioner actually holds the largest share of the subject parcel of land and that he is also

the sole beneficiary of the whole portion listed as the "remainder" of the subject parcel of land and it is thus absurd of the Petitioner to question the survey exercise. The Petitioners then went into listing a raft of allegations against the Petitioner touching on impropriety in dealing with the estate properties, accusing him of, among others, pocketing payments received for sale of properties and sidelining the Objectors from the estate, matters which I however do not find to be relevant to the matter at hand, and which I will therefore not recount.

9. The Petitioner then filed the Further Affidavit sworn on 6/03/2025. He however simply repeated matters already deponed in his Supporting Affidavit and responded to the new matters raised by the Objectors in their Replying Affidavit, which matters I have already termed as not being relevant to determination of the instant Application. I will therefore also not dwell on these responses. The only other relevant issue the Petitioner raised in the Further Affidavit is deponing that the photographs exhibited by the Objectors to demonstrate that he attended the Survey exercise were for an earlier survey exercise, and not the Survey in issue herein. I however note that the Petitioner has not expressly stated that he did not also attend the survey exercise the subject of the instant Application.

Hearing of the Application.

10. When the matter came up for directions on 13/03/2025, Mr. Ngigi Mbugua, Counsel for the Petitioner informed the Court that he would not be filing any written Submissions. On her part, Ms. Monda, Counsel for the Objectors, filed the Submissions dated 17/03/2025.

Objectors' Submissions.

11. Counsel for the Objectors recounted the background of the matter and then submitted that a Mediation Settlement Agreement is as good as a consent between the parties and pointed out that the Agreements herein were voluntarily signed by all the parties. She urged that save for mere allegations, no evidence has been tendered to prove that the Surveyor acted outside the scope of what was agreed upon. She also pointed out that no Affidavits have been filed by the alleged disenfranchised beneficiaries for whom the Petitioner lays basis for the Application. She also referred to Section 39(1) of the *Civil Procedure (Court Annexed Mediation) Rules 2022* and submitted that the Petitioner did not seek leave to set aside the Order and also no Affidavit stating the grounds he intends to rely on has been filed. Counsel also submitted that in proceedings under the *Law of Succession Act*, provisions of the *Civil Procedure Act* or *Rules* do not apply as the *Act* is *sui generis* with its own unique and special procedures, and that, further, under Section 59 of the *Probate and Administration Rules*, Applications ought to be filed by way of Summons, Petitions or Caveats, and not Notice of Motion as was done herein. According to her therefore, the Application is incurably defective.

Determination.

12. It is evident that the one broad issue that arises for determination herein is

> " Whether the Court should order for a repeat Survey exercise, in addition to the one already conducted on 11/04/2014 pursuant to orders arising from the Mediation Settlement Agreement adopted by the Court".

13. Before I delve further, I may mention that although this is a Succession Cause, the instant Application has been brought entirely under the provisions of the *Civil Procedure Act* and the *Civil Procedure Rules*. As correctly argued by Counsel for the Objectors, in proceedings under the *Law of Succession Act*, provisions of the *Civil Procedure Act* or *Rules* do not apply as the *Law of Succession Act* is sui generis with its own unique and special procedures. The only provisions of the Civil Procure Rules that apply

in proceedings under the *Law of Succession Act* are those expressly stated in Rules 63 of the *Probate and Administration Rules*, which is premised as follows:

> "Save as is in the *Act* or in these *Rules* otherwise provided, and subject to any order of the Court or a Registrar in any particular case for reasons to be recorded, the following provisions of the *Civil Procedure Rules*, namely Order 5, rule 2 to 34 and Orders 11, 16, 19, 26, 40, 45 and 50 (Cap. 21, Sub. Leg.), together with the *High Court (Practice and Procedure) Rules* (Cap. 8, Sub. Leg.), shall apply so far as relevant to proceedings under these *Rules*."

14. In this case, none of the provisions of the *Civil Procure Rules* listed above has been invoked in the Application. To this end, the Application is, I agree, clearly defective. It may not however be fatally defective. I say so because want of form or use of wrong procedure, alone, may not necessarily render an action fatally defective as each case ought to be determined on its own unique facts and peculiar circumstances. I say so because other factors, such as the strength of the Application on its substantive grounds may still need to be taken into account in determining whether a defect is such that it should render the Application fatally defective. What I mean is that it may not make sense to strike out an Application that by all indications would in most probability be successful, save for invoking a wrong procedure or want of form. This, indeed is the import of Article 159(2)(d) of the *Constitution* which implores upon Courts to "administer justice without undue regard to procedural technicalities". Section 47 of the *Law of Succession Act*, and Rule 73 of the *Probate and Administration Rules*, may also come into play as they clothe the Court with inherent powers to do that which renders justice.

15. Another factor that may also need to be taken into account before determining whether the procedural defect in an Application renders it fatally defective, is the number of other defects apparent in the Application. Too many blunders suggest lack of seriousness and wanton carelessness, and the Court will rarely entertain such litigant, particular where represented by Counsel presumed to be trained in law. I will therefore also analyse these other factors before I conclude whether the Application can survive the "fatally defective" onslaught.

16. In doing so, I also note another omission or defect (or another blunder?) in the Application. This is in respect to the fact that, although the Application seeks order for re-survey of "the parcel of land", it does not even disclose which "parcel of land" is being referred to. One has to "take a stroll" through the grounds of the Application and the Supporting Affidavit to unravel, though without certainty, what might possibly be the particulars of what may be meant by the phrase "the parcel of land" in the prayers. In litigation, this should never be the case. Prayers sought in an Application must be self-evident without the Court having to refer to other areas of the Application. The Court should not have to be to infer or imply what ought to have been included in a prayer. Assuming that I was to allow the Application "as prayed", how will the Court Order arising therefrom read, and how will it be implemented when the particulars of the subject "parcel of land" is not stated therein?

17. Before I delve further, I note that in prayer (2) of the Application, the Petitioner is asking the Court to clarify "on the Mediation Report filed in relation to the distribution of the land asset to various beneficiaries in the estate". This prayer is as deeply ambiguous as it is incomprehensible. It has not itself been clarified nor explained. Noting that the Mediation Settlement Agreement was a product of the parties themselves with the Court having no role in setting the terms thereof, how does the Court now become the organ to clarify it? What is to be clarified by the Court remains a mystery. I will therefore term this prayer as unfounded.

18. In respect to the substantive strength of the Application, I may state 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 challenging it proves that there are justifiable grounds

that warrant its setting aside. Such vitiating factors are similar to those applicable to all other contracts or consent orders, including, fraud, misrepresentation, coercion and undue influence.

19. In this case however, the Applicant does not seek the setting aside of the Mediation Settlement Agreement, but only a re-survey of land. To this end, the argument by Counsel for the Objectors that the Application does not lie because the Petitioner did not seek leave to file it, and thus in breach of the provisions of Section 39(1) of the *Civil Procedure (Court Annexed Mediation) Rules 2022* is not sustainable.

20. It is however also clear that the Survey exercise conducted on 11/04/2024 was itself carried pursuant to the Court Orders which arose out of, and/or were adopted by the Court in accordance with the Mediation Settlement Agreements. These Court Orders are those dated 13/7/2021, 31/10/2023 and 7/03/2024. For all intents and purposes therefore, these Court Orders which then gave the green light to the Survey exercise to proceed in terms of the Mediation Settlement Agreements dated 17/06/2021 and 29/08/2023 were consent orders. This is because it has not been denied that the Agreements were signed by all the parties, including the Petitioner.

21. The above principle was restated in the case of *Flora N. Wasike v Destimo Wamboko* [1988] eKLR where Hancox, JA, as he then was, observed as follows:

> " 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"

22. Similarly, in the English case of *Purcel v. F. C. Trigell Ltd, (Trading as Southern Window And General Cleaning Co. And Another)*, [1970] 3 All ER 671, the following was also stated:

> " 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, ….."

23. Further, in *Kenya Commercial Bank Ltd versus Specialized Engineering Co. Ltd* [1982] KLR 485, Justice Harris pronounced himself as follows:

> " The marking 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."

24. In this case, the Petitioner not denied that he attended the Survey exercise of 11/04/2024 and fully participated in the process. He also does not allege that he was blocked by anyone from having his own independent Surveyor to counter-check the process. Most importantly, he does not even allege that the Surveyor went outside the scope of the terms of reference contained in the Court Order, or that he failed to do anything that the Court Order required him to do.

25. As correctly pointed out by Ms. Monda, although the Petitioner claims that he has been authorized by "other beneficiaries" to swear the Affidavit on their behalf, the identity of these so-called "other beneficiaries" remains a mystery. The Petitioner also deponed that "as a result of the skewed exercise, some of the beneficiaries are on the verge of being unfairly denied their rightful share of the estate despite having already made substantial development in the affected portions". Again, the identity of these alleged beneficiaries who are "on the verge of being of being unfairly denied their rightful share"

remains undisclosed. How and in what manner the alleged beneficiaries are being "unfairly denied their rightful share" is also left unanswered.

26. Further, the Petitioner deponed that "during the survey exercise, the surveyors seemed conflicted and influenced as they never considered the concerns of the Petitioner in terms of equality and equity in division of the land". Yet again, the Petitioner does not disclose or explain what "concerns of the Petitioner" the Surveyors failed to consider. In short, all allegations made by the Petitioner are not founded on any explanation whatsoever.

27. The first Mediation Settlement Agreement was signed 4 years ago in the year 2021. To date, the sub-division process in respect to the parcel of land Eldoret Municipality Block 21 (Kingongo)/3XX1 agreed upon by all parties is yet to be concluded thanks to tactics employed by the Petitioner. He seems out to frustrate the whole process yet he fully participated in the Mediation and signed the Agreements.

28. Considering that the Petitioner, when he filed this Succession Cause, even went to the extent of omitting the Objectors, his own sisters, from the list of survivors and/or beneficiaries, and thus deliberately concealed their existence from the Court, I form the opinion that he is driven by pure malice and in the strong, but mistaken belief that his sisters, not being male offspring, are not eligible to inherit. The Petitioner must accept that the Kenyan *Constitution* (Article 27) guarantees equality before the law and prohibits discrimination based on gender, among other grounds. The earlier he accepts that his sisters possess the same rights as he in inheriting from their mother's estate, the better for everyone.

29. In light of the above, coupled with the defects cited earlier, it is evident that the Application cannot succeed.

30. I trust that the Petitioner's Advocates, whom I know to be very able Counsel, will objectively advise the Petitioner of the consequences of continuing to frustrate or disobeying lawful Court Orders, and that he risks being slapped with severe penalties should he fail to abide by the same. I rest my case.

Final Order.

31. In the end, the Applicant's Notice of Motion dated 16/12/2024 fails, and is accordingly dismissed with costs to the Objectors.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 18TH DAY OF JULY 2025

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WANANDA J. R. ANURO

JUDGE

Delivered in the presence of:

Mr. Ngigi Mbugua for the Petitioner

Ms. Monda for the Objectors

Court Assistant: Brian Kimathi