In re Estate of Samwel Kipletyo Arap Koskei (Deceased) (Probate & Administration E141 of 2023) [2025] KEHC 10417 (KLR) (18 July 2025) (Ruling)

Neutral citation: [2025] KEHC 10417 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

PROBATE & ADMINISTRATION E141 OF 2023

JRA WANANDA, J

JULY 18, 2025

BETWEEN

SARAH CELLY CHEPKEMBOI KOSKEI ..... OBJECTOR

AND

EZRA KOSKEI ..... PETITIONER

RULING

1. The deceased, Samuel Kipletyo Arap Koskei said to be a polygamous man with 4 wives, died on 5/07/2022. On 16/10/2023, the Petitioner, Ezra Koskei, claiming as a son of the deceased and the Executor of the last Testamentary Will of the deceased, through Messrs Chebii & Co. Advocates, applied for Grant of Probate of the Will said to be dated 14/06/2022. The Petitioner then listed several assets, including 7 parcels of land, as comprising the estate of the deceased. From the record, I note that the Petitioner is from the 3rd house.

2. Before the Petition could be heard however, some members of the family, through Messrs Muiruri & Mwangi Co. Advocates, filed the Notice of Motion dated 30/10/2023, seeking orders that the Court do order that the said Will undergo forensic analysis by a document examiner to ascertain the validity of the signature thereon. Also sought were consequential interlocutory orders for injunction and/or preservation of the estate, including a bar to intermeddling by the Petitioner and other members of the family. The Application was supported by the Affidavit sworn by one Bernard Kiplagat Koskei to which he attached the letter dated 17/10/2023 from the area Chief indicating that the deceased left behind about 18 survivors spread out in the 4 houses.

3. Before the said Application could itself be heard, the Petitioner filed his own separate Chamber Summons, dated 26/10/2023, also seeking interlocutory orders for injunction and/or for preservation of the estate, including a bar to intermeddling by some members of the family.

4. I thereafter referred the matter to Court Annexed Mediation and directed the parties, in the meantime, to maintain the status quo. The Mediation was then presided over by Catherine J. Amugohe Asundu who eventually forwarded the Full Mediation Settlement Agreement filed in Court on 19/12/2023, and which is indicated to be signed by 14 members of the family. By the Agreement, it was agreed that there be 4 joint Administrators, each from the 4 houses. Distribution of the estate was also agreed upon and particularized.

5. In the circumstances, I signed an order, in Chambers, endorsing the Agreement on 18/01/2024. Pursuant thereto, the Grant of Letters of Letters of Administration dated 12/06/2024 was issued in the names of the 4 joint Administrators, namely, Ezra Koskei, vicky Koskei, Benard Kiplagat and Lydia Jeptoo.

6. However, when the matter came up in Court on 1/08/2024, Ms. Moronge instructed by the law firm of Monda & Co. Advocates, appeared and informed me that she had been appointed to come on record for the Objector, Sarah Celly Chepkemboi Koskei. She then informed me that she had instructions to seek orders for re-opening of the Mediation and to seek variation of some of the terms contained in the Settlement Agreement. All the 4 joint Administrators who were present in Court vehemently opposed any attempt to re-open the Mediation. Upon hearing the parties, I directed that since the Agreement was already signed by the parties, and the formally forwarded to Court for adoption and already endorsed as an order, the Objector should have filed a formal Application to challenge it. In the circumstances, and in the absence of any such formal Application before me, I declined to stop the issuance of a Certificate of Confirmation of Grant and I accordingly closed the Court file.

7. Pursuant to the above, the Certificate of Confirmation of Grant dated 1/08/2024 was issued.

8. The Objector then subsequently, filed the Notice of Motion dated 26/09/2024, the subject of this Ruling. The same seeks orders as follows:

    i. [.....] spent

    ii. That this Honourable Court be pleased to set aside the orders issued on 1st August 2024 closing this Succession Cause

    iii. That the Objector/Applicant be granted leave to file an Application to set aside the order and/or decree arising from the Mediation Settlement Agreement dated 19th December 2023

    iv That upon leave being granted as sought in prayer ii] and [iii] herein, the Order issued on 18th January 2024 adopting the Full Mediation Settlement Agreement be reviewed.

    v That the Court be pleased to issue any other order or orders it deems just and fit.

    vi. That the costs of this Application be provided for

9. The Application is support by the Affidavit sworn by the Objector in which she deponed that she is the 4th wife of the deceased and that she did not attend the Mediation session on 19/12/2023 and thus, she is a stranger to the Mediation Settlement Agreement of that date. She deponed that as she was not present, she could not have signed the Agreement, and that the signature appended against her name in the Agreement is forged. She urged that the Agreement is contrary to her wishes and she does not consent to its contents. She stated that she is of the advanced age of 63 years and as such, the other parties took advantage of her to arrive at the mode of distribution adopted, and that she only became aware of the adoption of the Agreement on 1/08/2024 through the Court proceedings conducted on that date. She urged that no prejudice shall be occasioned to the beneficiaries if the order adopting the Agreement is set aside or the terms of the Agreement are varied.

10. I note from the Chief's letter that the Objector [the 4th wife] has 4 children, 3 of whom are indicated to have signed the Mediation Settlement Agreement. Only 1 out of her 4 children does not therefore seem to appear in the Agreement as a signatory.

11. There is on record the Replying Affidavit sworn on 02/12/2024 by the Lydia Jeptoo [now a co-Administrator as aforesaid] and drawn by herself in person. I note from the Chief's letter that she is one of the 4 children of the Objector and she did sign the Agreement.

12. Be that as it may, she deponed that she supports the Application by the Objector to set aside the order as the Mediation session conducted on 19/12/2023 proceeded in the absence of the Objector and the Agreement made in her absence. She deponed that the Objector, due to her old age, could not make it to the said session for her views to be captured and considered, that the Application has merit as the Objector is not merely a bystander, and that her presence before Court and the Mediation is necessary to enable the Court effectually and completely adjudicate upon and settle all the questions involved in this Cause.

13. There is also on record the Replying Affidavit filed through Messrs Chebii & Co. Advocates, and sworn on 03/12/2024 by one vicky Jebet Kosgei Jeptoo in opposition to the Application. From the Chief's letter, I note that she is from the 2nd house.

14. She deponed that these proceedings are already finally determined, that the Objector has no legal or equitable grounds to re-open the same as she is fully catered for in terms of being given her share of the estate. She admitted the averment in the Affidavit that the Objector is the 4th wife of the deceased but deponed that all parties agreed to the mode of distribution, and that the Objector admits that she was party to the Mediation process and knew what transpired.

15. The Application was then canvassed by way of written Submissions. The Objector filed the Submissions dated 18/12/2024 while the Petitioner filed the Submissions whose date is not so clear to my eyes but appears to be sometime in December 2024.

Objector's Submissions

16. Counsel submitted that acting on instructions from her clients, she sought for part-adoption of the Mediation Settlement Agreement dated 19/12/2023, and the rest of the matters be referred back to Mediation, and that it was at that point that Counsel learnt that the Mediation Settlement Agreement had already been adopted on 18/01/2024 as an order of the Court. She submitted that the Court advised that the Objector should move the Court appropriately, thus necessitating filing of the instant Application.

17. She then cited Article159[2][d] of *the Constitution*, and also the case of Essanji & Another v Solanki [1968] EA 218 on the need to determine disputes on the basis of substantive arguments, and not on procedural technicalities. She further urged that this Court is not yet functus officio in this case, and has power to re-open this Succession Cause. She cited the case of Management Coro Strata Title Plan No. 301 v Lee Tat Development Pte Ltd [2011], and also the case of Jersey Evening Post Ltd v Al Thani [2002] JLR 542. She also cited the Court's inherent jurisdiction to review, vary or rescind its decisions. She cited the case of Musiara Ltd v William Ole Ntimama, Civil Application No. 271 of 2003, the case of Chris Mahinda v Kenya Power & Lighting Co. Ltd, Civil Application Nai 174 of 2005, the case of Bremer vulcan Schiffban and Maschinenfabrik v South India Shipping Corp [1981], and also the case of Benjoh Amalgamated Limited v Kenya Commercial Bank Limited [2014].

18. She submitted that the Court is clothed with residual jurisdiction to re-open, and rehear a concluded matter where the interest of justice demands and outweighs the principle of finality in litigation.

Counsel then cited Section 39[1] of the Civil Procedure [Court-Annexed Mediation] Rules, and urged that, the Objector has sought leave to file an Application to set aside the order arising from the Mediation Settlement Agreement, and that the Objector has complied, and attached an Affidavit disclosing the grounds that she seeks to rely on in setting aside the order. She reiterated that in this case, there was fraud, and that the Objector was not aware of the contents of the Agreement and that, given her advanced age and illiteracy, the other parties took advantage of her to arrive at the mode of distribution of the estate.

Respondents' Submissions

19. Counsel for the Petitioner, on his part, submitted that the Objector's main ground for seeking Review in this case is that she did not attend the Mediation session of 19/12/2023 but submitted that, apart from merely calling for Review of the Mediation Settlement Agreement on account of the claim that she did not sign it, she does not state who signed the Agreement on her behalf, or why none of the other family members, including the Mediator, signed the same Agreement with the entire members of the family from all the other houses. He deponed further that the Objector does not disclose whether her grievance is that she was disinherited or that she was not fully represented.

20. He urged that the Agreement clearly appointed identified Administrators in respect of the 4 widows, that the Objector was given the property identified as L.R No. Chemalal Farm Sirikwa/Uasin Gishu County, Plot No.46 measuring 15 acres and her 3 children, Lydia, Roseline and Kennedy, also signed the Agreement. He observed that no indication has been given as to what part of the Mediation Agreement has led to any miscarriage of justice. On the issue of Review, Counsel cited the case of Francis Origo & Another v Jacob Kumali Mungala [2005] eKLR, and urged that the Application for review is without merit for lack of the discovery of new evidence and the fact of that the Objector has come after an unreasonable delay of 8 months after the order was issued and after everyone had moved on with their lives.

Determination

21. The issues that arise for determination are evidently the following:

    i. Whether this Court should set aside the orders made on 1/08/2024 closing this file.

    ii. Whether the Objector should be granted leave to file an Application to set aside the Mediation Settlement Agreement dated 19/12/2023

    iii. Whether upon grant of such leave, the Court should review the orders made on 01/08/2024 whereof the Mediation Settlement Agreement was adopted by the Court.

22. As already stated, this Court, upon adopting the Mediation Settlement Agreement, and directing that the Certificate of Confirmation of Grant be issued, formally marked the Court file as closed on 1/08/2024. The present Application then came about 2 months later. As the filing of the Application is permitted in law, this Court, by agreeing to entertain it up to this stage, it is presumed, although no earlier express declaration had been made, that the file has inevitably already been re-opened for purposes of hearing the Application.

23. For avoidance of doubt however, I now make the express declaration that this file is re-opened, which re-opening is deemed to have been done on 30/10/2024 when the Application came up in Court and was deliberated upon inter partes.

24. On the issue of grant of leave to the Objector to file the Application seeking to aside the order adopting the Mediation Settlement Agreement, I may first state that, in Kenya, the process of Court annexed

mediation is governed by the Judiciary of Kenya Practice Directions on Court Annexed Mediation issued by the Chief Justice pursuant to Article 159 of *the Constitution* and Section 59B [1] [a], [b] and [c] of the *Civil Procedure Act*.

25. Mediation as an alternative dispute resolution mechanism in Kenya, is itself anchored in Article 159 [2][c] of *the Constitution* of Kenya which provides as follows:

> " In exercising judicial authority, the courts shall be guided by the following principles:
>
> alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted subject to clause [3]."

26. In tandem with the above, Section 59C of the Civil Procedure Rules provides that:

> " 1. Any suit may be referred to any other method of dispute resolution where the parties agree or the court considers the case suitable for such referral.
>
> 2. Any other method of alternative dispute resolution shall be governed by such procedure as the parties themselves agree to or as the court may in its discretion order ..."

27. There is also Order 46 Rule 20 [1] of the Civil Procedure Rules which provides that:

> " Nothing under this order may be construed as precluding the court from adopting and implementing of its own motion or at the request of the parties, any other appropriate means of dispute resolution [including mediation] for the attainment of the overriding objective envisaged under Sections 1A and 1B of the Act."

28. Regarding the place of Mediation in our judicial system, Muchelule J [as he then was], in the case of In re Estate of BM [Deceased] [2019] eKLR, made the following comments:

> " 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 non-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 ..... 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. .....
>
> 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. ....."

29. On her part, Kamau J, in the case of Alios Finance Kenya Limited v Country Farms Limited [Civil Appeal E005 of 2020] [2022] KEHC 11012 [KLR] described the effect of the adoption of a Mediation Settlement Agreement by the Court, in the following terms:

> " 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."
>
> Notably, once a mediation agreement is signed, it becomes final and binding on the parties. Mediation agreements were in the nature of consents. It is for that reason that this court considered the consequences and implications of entering a consent."

30. Setting aside of a Mediation Settlement Agreement is then governed by Section 39[1] of the Civil Procedure [Court Annexed Mediation Rules] which provides as follows;

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 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 in setting aside the order or decree.

31. It is clear that the above Rules envision the seeking of leave to set aside as a separate stage from the actual filing of the Application. Further, the Rules envision the setting aside of the order arising from the Mediation Settlement Agreement, and not the Mediation Settlement Agreement itself. Setting aside of a Mediation Settlement Agreement is a different issue altogether.

32. In this case however, the Objector has filed an omnibus Application seeking both leave to file the Application, and also, upon grant of such leave, Review of the order adopting the Agreement. The supporting Affidavit also exhaustively addresses both limbs of the Application. It however appears that Counsel subsequently realized her folly since in her written Submissions, she seems to be confined herself to only the issue of leave.

33. Be that as it may, I find no prejudice that may be suffered if I were to determine both prayers in one Ruling, and thus conclusively determine both the two stages in one Ruling. I say so because Counsel for the Petitioner, both in the Replying Affidavit and in the written Submissions, has already substantively argued or submitted on the second limb. In fact, there does not seem to be any submissions from him on the issue of leave. It can therefore be presumed that what the parties want is a conclusive determination, once and for all. I also believe that, in the circumstances of this case, taking such final course is the proper option as it will expedite the whole matter and thus save the parties precious time and resources.

34. Accordingly, for similar reasons as those given when dealing with the first issue of whether to re-open the closed Court file, by entertaining this Application to this far, the presumption is that leave to file the Application is deemed to have already been granted. However, as in the first issue, for avoidance of doubt, I now make the express declaration that that leave to file the Application seeking to set aside the orders adopting the Mediation Settlement Agreement is deemed to have been granted on 30/10/2024 when the Application came up in Court and was deliberated upon inter partes.

35. Having dealt with the two issues above, I now proceed to the main issue, namely, whether I should set aside the order adopting the Mediation Settlement Agreement.

36. In this case however, although the leave sought was to apply to set aside the order, Prayer [iv] of the Application, which is the substantive prayer, seeks "Review" of the order, not its setting aside. Considering that what is in issue is simply the order whereof the Court adopted the Mediation Settlement Agreement, I wonder how such order can be reviewed. Even if this were was possible, the Objector has not disclosed which portion of that order she seeks to be reviewed, and in what manner. Prayer [iv], as drawn, is therefore obviously defective as it is not what leave was sought for.

37. This ground alone is sufficient to lead to the striking out of the Application, or even its dismissal alone. I will however still proceed to analyze the matter on merits had Prayer [iv] properly sought the setting aside of the order, rather than Review.

38. It is now agreed that a Mediation Settlement Agreement, once adopted as an order of the Court, becomes binding 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. In respect to this principle, Achode J [as she then was], in the case of NKM v SMM &Anor [2019] eKLR, put it as follows:

> " 27. . The purpose of this court is to determine whether the settlement agreement adopted 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 or in general for a reason which would enable the court to set aside an agreement or consent judgment. See Justice Harris, J, [as he then was] in Kenya Commercial Bank Ltd v Specialized Engineering Co. Ltd [Supra]"

39. In this case, had Prayer [iv] been properly drafted, then it would mean that the Objector wants the order that adopted the Mediation Settlement Agreement to be set aside on the ground that she is not a signatory to the Agreement. Indeed, an order adopting a Mediation Settlement Agreement is liable to be set side where it is demonstrated that an Applicant never signed it or the parties never reached any settlement. One such case is In re Estate of BM [supra], in which, faced with a somewhat similar scenario, Muchelule J [as he then was] found as follows:

> " It is clear that the final deed of settlement had not been agreed upon. The parties hoped to agree before 28th 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 28th February 2018].
>
> 24. In conclusion, I find that the documents dated 14th February 2018 and 14th 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 20th November 2018 with costs. I set aside the orders of this court dated 12th March 2018 ....."

40. In this case, it is not in dispute that the Objector did not personally attend the Mediation session in which the Mediation Settlement Agreement was concluded and then signed by the various family members. She could not therefore have personally signed it. There is however a signature attributed to her next to where her name has been written down. The Objector has described such signature as a forgery. I will return to this issue of the signature later.

41. Before I proceed further, as I had already stated, it is agreed that the deceased was a polygamous man with 4 wives. From the Chief's letter, it is indicated that the deceased left behind about 18 survivors, including the widows. The Petition herein was initially filed on the basis of the existence of a Testamentary Will. However, after some brief but intense litigation, the family appears to have subsequently "dropped" the Will route and treated the estate as intestate. They then, with the Court's encouragement, agreed to explore the Mediation option, which was successful as it is what culminated into the signing of the Settlement Agreement. The Mediation involved family members from all the 4 houses, who, as aforesaid, should be about 18 in total. As aforesaid, the Agreement indicates that it was signed by 14 family members and it was then also signed by 3 witnesses. Assuming that these 14 are among the 18 listed by the Chief, it means that only 4 family members did not sign. Of course, the omission to file the Agreement does not necessarily mean that these 4, assuming that they are alive, are opposed to it. It may simply be that they are in support but were, for one reason or another, not available to sign. Since none of the 4 has not come forward to oppose the of the Agreement, it may be safely presumed that they, too, approve of it.

42. Looking at the Agreement, it is clear that each one of the 4 houses was represented. I again note that the family members agreed that the 4 joint Administrators to be appointed were to be from each one of the 4 houses, and this, indeed, is what was done. As aforesaid, it is not disputed that the Objector is the 4th wife and had 4 children. Going by the Chief's letter, it is clear that 3 out of her said 4 children signed the Agreement. These are Lydia Cheptoo, Roseline Jerotich Koskei and Kennedy Kipruto Koskei. Only Christabel Jebet Koskei's name does not appear as a signatory. As aforesaid, she, or her representative, has not come forward to challenge the Agreement. Among the 4 joint Administrators, Lydia Cheptoo was selected and appointed to represent the 4th house, the Objector's.

43. Under the above circumstances, does the Objector really wish the Court to believe that her 3 adult children who fully participated in the Mediation and signed the Agreement, with one being even appointed a co-Administrator on behalf of the 4th house, did not represent the Objector's interests in the Mediation?

44. With the above facts, can the Objector really honestly claim that she was not represented in the Mediation? Although she, no doubt, did not sign the Agreement, this is because she was not in attendance. There is no allegation or evidence that her non-attendance was because she boycotted the Mediation, or that she registered any opposition to the contents of the Agreement before it was signed. She does not also say that she was not aware of the Mediation or the deliberations that were undertaken therein, and neither does she say that she was not made aware of the signed Agreement or the deliberations that preceded it. All she says is that she learnt on 1/08/2024, that the Agreement had already been adopted by the Court, not that the Agreement had been signed. This statement indicates that the Objector was fully aware that the Agreement had been signed. What she may have learnt on 1/08/2024 is only that the Agreement had been adopted by the Court. Is it therefore not curious that she waited until September 2024, 9 months later to file the current Application?

45. As stated by Muchelule J [as he then was] in the case of In re Estate of BM [supra], "parties are under obligation, when referred to mediation, to attend the mediation sessions, and to act in good faith during the process". In this case, the Objector has not alleged that she was not aware of the reference to Mediation, or the commencement of its sessions, and nor does she say that she opposed the reference to Mediation. She however does not disclose or explain why she did not attend the sessions. Is it not clearly because she had authorized her children to represent her in the Mediation? I belive so. I find support in the said Lydia Jeptoo's own Affidavit in which, in respect to the Objector's non-participation in the Mediation sessions, at paragraph 5 thereof, she depones as follows:

> " 5. That I reiterate that out of her old age, she could not make it to the said session for her views concerning the distribution of the estate of the deceased to be captured and considered."

46. With 14 out of the 18 family members having signed the Agreement and having therefore fully participated in the sessions, and with 3 out of her 4 children having been part of the participants to the end, were the family members all supposed to wait until the Objector decided to show up before commencing the sessions? Was the rest of the family to be held at ransom by one person, the Objector, yet she was fully represented therein by her children? Is it not also curious that the Objector does not even allege or deny that her said 3 children did not have her blessings to participate in the Mediation sessions?

47. With the above state of affairs, I am not satisfied that that the Objector is being sincere. She seems to be dishonestly using her alleged advance age and alleged illiteracy to attract sympathy from this Court. I am convinced that she was at all times aware of the Mediation process and gave blessings to her children to appear on her behalf as the 4th house.

48. More importantly, in as much as the Objector is seeking, first, setting aside of the adoption of the Agreement, and, once this has been done, Review thereof, she does not even disclose the nature of Review she intends to seek at the Mediation should it be reconvened. In other words, she does not state what terms currently contained in the Agreement she wants to be varied or altered. In Applications for setting aside an order, the Applicant must give the Court some material upon which the Court can then scrutinize and assess whether there are issues that merit a re-consideration such that there is necessity to set aside. In this case, what is intended to be Reviewed? It would be pointless to set aside an order which, even after being set aside, would still eventually be determined or ruled upon in the same manner it was before the setting side. That this is not how it will not eventually turn out ought to be therefore demonstrated to the Court. In this case, how is this Court supposed to assess the merits or arguability of the issues that the Objector wishes to be canvassed at the reconvened Mediation after the setting aside, when the Court has not been given any material to undertake such exercise?

49. I also find it curious, almost laughable, that the said Lydia Jeptoo, the Objector's daughter, who fully participated in the Mediation process to the end, was selected from the Objector's family [4th house] to be the co-Administrator representing its interests, and by a show of her approval, signed the Agreement, is the same one who has now sworn an Affidavit purportedly supporting the setting aside of the order adopting the same Agreement on the ground that the Objector did not sign it. In supporting the Application, she does not even allege that she and her siblings who, too, signed the Agreement, did not have their mother's blessings to represent their 4th house. She also does not allege that their mother was not aware of the reference to Mediation, the commencement thereof and even the deliberations undertaken therein. A look at the Agreement shows that members of the 4th house, and separately, the Objector on her own, have all been allocated shares of the estate, obviously

having negotiated for such shares during the Mediation. She does not however disclose what part of the Agreement her mother has a problem with. Is this not therefore an Application in vain?

50. I also note that Ms. Morange, the Objector's Counsel, both in her written Submissions, and also in her earlier oral address to the Court specifically stated that the Objector is only seeking the variation of a part of the terms agreed upon, not the whole Agreement. She states that she therefore only wanted a partial-adoption of the Agreement. This strongly hints that the Objector was always aware of the deliberations of the Mediation sessions, including the signing of the Agreement. She is clearly being insincere.

51. Regarding the allegation of forgery of the Objector's signature, no one has been cited as being the one who appended, or is suspected to have appended the signature. The Court has therefore no explanation on the circumstances around which a signature purported to be the Objector's was appended in the Agreement. With this in mind, I have carefully looked at the signature and compared it with the signature made next to it by the Objector's said daughter, now co-Administrator, the said Lydia Jeptoo. Although I am not a document examiner, I find the two, to my naked eye, to be strikingly similar. It is, in my assessment, in fact the same signature appended for both of them. Is it therefore possible that it is in fact Lydia Jeptoo who appended the signature, not forged, "for and/or on behalf of" her mother, the Objector?

52. I note that Lydia Jeptoo, although she swore the Affidavit supporting the Objector's Application for setting aside, apart from simply deponing that her mother did not attend the Mediation session, has otherwise, maintained a loud silence on the issue of the signature. Was this silence deliberate? Is it really possible to argue that somebody else, not one of the Objector's children, could have "forged" the Objector's signature on the Agreement and yet the Objector's children, without raising any issue about such evident "forgery", still went ahead to also separately append their own signatures immediately next to the "forged" one. I doubt it.

53. Is it not also curious that to date, there is no allegation that the Objector has even reported the alleged "forgery" to the police for investigations and possible prosecution of the culprits, if any? Does she therefore perhaps know something about the signature which she does want to share with the rest of us. Seems likely.

54. Looking at the matter as a whole, I am constrained to believe that the Objector was always happy with the Mediation process and even the Agreement eventually reached, but perhaps, due to influence from third parties or other unrelated factors, she has simply subsequently changed her mind. The issue of the signature seems, in my view, to be a convenient red-herring. I doubt whether it was really a "forgery" as alleged as it looks to me, more of a signing made "for and/or on behalf of" the Objector. What is not certain and which has not been explained is whether such person who appended the signature presumably "for and/or on her behalf" had the Objector's authority to do so. If it is one of her children who did so, then it is very likely that he/she had the Objector's full blessings to so sign. Looking at the matter, I suspect that this was the case. I may however be wrong on this and to this end, my view is that, if indeed the Objector deems the signature to have been an outright "forgery", then she should by now have reported the matter to the police for investigations and possible prosecution of the culprits.

55. As I have stated, I may as well be wrong in my above analysis on the issue of the signature. For this reason, and needless to state, my statements above on the issue of "forgery" should not therefore be treated as judicially conclusive, or as having finally determined the issue of the alleged forgery. What I have stated herein is simply an observation, on a balance of probabilities, and cannot therefore be interpreted to bar any authorized institution from investigating and/or reaching an independent

finding thereon. This is because the material before me is not, and cannot enable me to make a final and/or conclusive finding on that issue of forgery on the basis of mere Affidavits.

56. Having however found that the Objector was fully represented at the Mediation process by her children, who had her authority and blessings to do so, I determine this matter, not on the basis of the Objector's signature on the Mediation Settlement Agreement or absence thereof, but on the basis that the Objector was fully represented in the Mediation by her children who had her authority to enter into the deliberations undertaken therein and eventually sign the Agreement. I therefore find that the Objector, although she may not have personally signed the Agreement, is bound by it having been signed by her authorized representatives.

57. I therefore find the adoption of the Agreement by the Court to have amounted to adoption of a consent order. Accordingly, as was stated in the case of NKM v SMM [supra], setting it aside would require demonstration of the existence of a ground similar to the case of varying or rescinding a contract entered into by parties.

58. Another case in which the above principle was restated was Flora N. Wasike v Destimo Wamboko[1988] eKLR in which Hancox, JA, observed that:

> " 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"

59. Further, inKenya Commercial Bank Ltd v Specialized Engineering Co. Ltd [1982] KlR 485, Justice Harris held that:

> " 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."

60. The above was also affirmed by Court of Appeal, in the case of S M N v Z M S & 3 others [2017] eKLR, in the following terms:

> " Generally, a court of law will not interfere with a consent judgment except in circumstances such as would provide a good ground for varying or rescinding a contract between parties. The factors touted for impeaching the consent in this matter were fraud and collusion. It is also alleged that counsel had no authority to enter into the consent. The onus of proving those assertions to the required standard was on the appellant. They are serious imputations bordering on crime and therefore the burden of proof is of necessity slightly higher than on a balance of probability but perhaps not beyond reasonable doubt."

Final Orders

10. In the premises, I determine the Objector's Notice of Motion dated 26/09/2024 in the following terms:

    i. Prayer [iv] thereof seeking that the order issued on 18/01/2024 adopting the Full Mediation Settlement Agreement be reviewed is hereby declined, this Court having found that the Objector was fully represented in the Mediation.

ii. The Objector, regarding her allegation that her signature appearing on the Mediation Settlement Agreement was "forged", is at liberty to report the same to the police or any other authorized institution, for investigations and action thereon, if merited.

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

.....

WANANDA J. R. ANURO

JUDGE

Delivered in the presence of:

Ms. Moronge for the Objector

Kipkoech h/b for Dr. Chebii for Petitioner

Court Assistant: Brian Kimathi