



In re Estate of Elias Njiru Chandi (Deceased) (Succession Cause 108 of 2008) [2024] KEHC 2319 (KLR) (6 March 2024) (Ruling)

Neutral citation: [2024] KEHC 2319 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
SUCCESSION CAUSE 108 OF 2008
LM NJUGUNA, J
MARCH 6, 2024**

BETWEEN

**ESTHER NJIRO 1ST APPLICANT
REBECCA NG'ANG'A 2ND APPLICANT
FAITH NJERU 3RD APPLICANT**

AND

**PETER NDEGWA CHANDI 1ST RESPONDENT
POLYCARP KARIUKI CHANDI 2ND RESPONDENT**

RULING

1. Before the court is an application dated 16th November 2021 through which the applicants seek the following orders:
 - a. That the Honourable Court be pleased to set aside the Mediation Settlement Agreement dated 12th March 2020;
 - b. That this honourable court be pleased to set a date to hear the applicant’s summons dated 22nd October 2018 as amended on 03rd December 2018 and as further amended on 19th September 2019;
 - c. That this honourable court be pleased to order the respondents, being the administrators of the estate of the deceased, to render an account of the estate from the time they took over affairs of the estate to date; and
 - d. That the costs of this application be in the cause.

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



2. It is the applicants' case that the intended re-distribution of the estate was referred to court annexed mediation. That the applicants and the respondents managed to convene for purposes of the mediation proceedings but the same became an exchange of unpleasant words and barely bore any fruit. That during the proceedings, pertinent issues were not addressed as regards the estate and whatever issues that were agreed upon, an incomplete agreement was prepared and the same hurriedly signed. That it would be unjust to enforce the mediation settlement agreement as it disinherits some beneficiaries.
3. They stated that owing to the incompleteness of the agreement, there is a gap as to the accountability of the estate of the deceased and if the agreement is implemented, the applicants stand to be greatly disadvantaged. That the agreement was signed late in the day when the parties were tired, hungry, anxious and worn out after a full day of negotiations that were marred with hostility, yet the mediator failed to allow the parties to sleep over the resolutions and sign the agreement when their minds were alert. That the mediation agreement has not been adopted by the court and it is in the interest of justice that the same be set aside.
4. They stated that they did not know that the grant issued in the estate of the deceased had been confirmed and that when they went to peruse the court file, the same was missing from the registry and it was traced much later. That when the file became available, they filed summons dated 22nd October 2018 as amended on 03rd December 2018 and as further amended on 19th September 2019 seeking inter alia, revocation of grant. The revocation of grant was referred to mediation which culminated into the mediation settlement agreement which the applicants now seek to set aside.
5. The application was opposed through a replying affidavit in which the respondents jointly deposed that the applicants were party to the mediation proceedings and that they are literate people, being able to understand the proceedings and they were also represented at the proceedings. That it is not possible that the respondents took advantage of the applicants during mediation and so the mediation settlement agreement cannot be set aside.
6. That they are wrong to say that they signed the agreement under duress yet their advocate was present throughout the proceedings and he also signed the agreement. That the applicant's case made on behalf of their deceased brother's wife, Florence Karimi and their brother John Rugendo Chandi is misplaced as the said individuals are adults and they are well able to make their own case. They averred that the applicants fell into error in stating that the mediation process was involuntary. That there is no basis for setting aside the mediation settlement agreement.
7. The court directed the parties to file their written submissions and only the respondents complied.
8. The respondents submitted that following confirmation of the grant, the respondents took possession of the property. It is their argument that the court cannot order the respondents to give an account of the estate which they have already taken possession of following confirmation of grant. That the issue of accounts did not arise at the mediation and it should not arise at this point in time. That the applicants are enlightened people who were involved in the mediation proceedings alongside their advocates and that there is no reason to set aside the agreement.
9. It was their submission that Florence Karimi should not be part of these proceedings as she has taken up land that belonged to her deceased husband who is one of the sons of the deceased and that the property was given to him by the deceased while they were both still alive. They stated that the mediation settlement agreement can only be set aside where the applicants can prove the existence of vitiating factors such as misrepresentation, mistake, coercion, undue influence or duress. That the applicants have gotten more properties through the mediation than through the confirmation of grant. They urged the court to adopt the mediation settlement agreement.



10. The issues for determination are as follows:
- a. Whether the mediation settlement agreement should be set aside; and
 - b. Whether a statement of account of the estate should be ordered at this point in time.
11. On the first issue for determination, the parties herein entered into a mediation settlement agreement dated 12th March 2020. Through this application, the applicants have argued that the re-distribution of the estate through mediation remains incomplete and they seek to have the mediation agreement set aside. A mediation settlement agreement is of the same strength as a consent between parties to a suit. The agreement is usually adopted as an order of the court. It cannot be set aside unless vitiating factors are proven to have influenced the agreement. Court annexed mediation is provided for under the *Civil Procedure (Court-Annexed Mediation) Rules, 2022* and the court is at liberty to refer cases to mediation. This is provided for under Rule 5 of the said rules as follows:

- “(1) A court before which a case is being heard may, at any stage before final judgment, refer the case to mediation.
- (2) Any case instituted before the coming into operation of these Rules shall be subjected to screening by a screening officer to determine the suitability of the case to referral to mediation.
- (3) A case that is determined to be suitable to mediation shall, by order in writing given by the Mediation Registrar, be referred to mediation with or without further orders.
- (4) The parties to a case may, by mutual consent, request the court to refer the case to mediation.
- (5) Nothing in these Rules shall derogate from the jurisdiction of the court to refer the case to mediation in accordance with section 59B of the Act or to another method of alternative dispute resolution under section 59C.

34. Adoption of settlement agreements.

- (1) The Mediation Deputy Registrar or other officer designated for that purpose shall, within ten days after the settlement agreement being filed under rule 32, place the settlement agreement before the trial court or other designated officer for adoption.”

12. The procedure for adoption of the mediation settlement agreement is the same regardless of whether the agreement resolves the issues partially or fully. The procedure for setting aside of mediation agreements is set under Rule 39 of the rules *Civil Procedure (Court-Annexed Mediation) Rules, 2022* 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.



(3) The following shall constitute the grounds upon which an application to set aside an order or decree arising from a mediation settlement agreement—

(a) misconduct, fraud, or a fundamental mistake by the mediator as relates to the mediation proceedings that goes to the core of the matter:

Provided that the misconduct, fraud or mistake should not have been known by the applying party at the time of execution of the settlement agreement and should be one which affected the process and outcome of the mediation in such a way that it would be unfair and inequitable to enforce it in its form;

(b) fraud, collusion, or misrepresentation by any party to the mediation (other than the party applying) or any witness or person who took part in the proceedings and whose participation materially affected the outcome;

(c) a fundamental mistake by any or all of the parties to the mediation as to the existence or state of the subject matter, person or thing; or to any set of facts that materially affected the parties' decision to enter into the subject agreement and which has rendered such agreement unfair and inequitable;

(d) where a party was, at the time of the making of the agreement, under some legal incapacity to take part in the subject mediation proceedings or to conclude and execute a binding settlement; or

(e) where the settlement agreement is invalid under Kenyan or international law, or is or has become incapable of enforcement under Kenyan law.

(4) At the hearing of an application to set aside an order or decree, no party shall, without leave of court, be allowed to canvass any other ground in support of the application other than the grounds specified in sub-rule (3).

(5) The court shall hear and determine an application under this on priority basis within thirty days after filing.”

13. Going by the provision cited hereinabove, the application seeking setting aside the settlement agreement has not complied with the procedure set in the law. It is immaterial to determine whether there were any vitiating factors to the mediation settlement. The applicants were required to seek leave to file an application for setting aside the settlement agreement. The application for leave is meant to allow the court to verify the reasons given for setting aside the agreement. In my view, the application is not properly before the court.

14. The application also sought orders that the respondents do render an account of the estate from the time they took over affairs of the estate to date. The grant was issued to Ruth Gichuku Chandi, Peter Ndwiga Chandi and Polycarp Kariuki Chandi as the personal representatives of the estate of the deceased and the estate has already been distributed. As things stand, the beneficiaries, including the respondents, are already in possession of their portions of the estate and the distribution has not yet been unsettled. Since the prayer for setting aside the mediation agreement has failed. It would be unconscionable to grant the prayer seeking rendering of accounts for 2 reasons, firstly, that the estate has already been distributed and secondly, the mediation settlement agreement is still in force.

15. In the end, I find that the application lacks merit and it is hereby struck out with no order as to costs.

16. It is so ordered.



DELIVERED, DATED AND SIGNED AT EMBU THIS 06TH DAY OF MARCH, 2024.

L. NJUGUNA

JUDGE

.....for the Applicants

.....for the Respondents

