



**In re Estate of Kiberenge Kiptonui A. Mugun (Deceased) (Succession Cause 38 of 2008) [2024] KEHC 8872 (KLR) (25 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8872 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERICHO  
SUCCESSION CAUSE 38 OF 2008**

**JK SERGON, J**

**JULY 25, 2024**

**IN THE MATTER OF THE ESTATE OF THE LATE KIBERENGE KIPTONUI A. MUGUN**

**BETWEEN**

**RICHARD KIPSELIM TONUUI ..... 1<sup>ST</sup> APPLICANT**

**SARAH TONUUI ..... 2<sup>ND</sup> APPLICANT**

**JOSEPH KIPSIGEI ..... 3<sup>RD</sup> APPLICANT**

**AND**

**GRACE CHEROP A. NGOK ..... 1<sup>ST</sup> PETITIONER**

**PATRICK KIMUTAI BIRGEN ..... 2<sup>ND</sup> PETITIONER**

**RULING**

1. The application coming up for determination is a notice of motion dated 24th January, 2024 seeking the following orders;
  - (i) That this honourable court may be pleased to grant leave to the applicants to apply for orders for setting aside of decree arising from mediation settlement adopted herein on the 8th August, 2022 and all subsequent orders and/or proceedings arising therefrom.
  - (ii) That the said leave if granted to operate as stay of the execution of the decree issued on 8th August, 2022 together with subsequent orders arising therefrom proceeding pending this honourable court further direction
  - (v) That the cost of the application be provided for.
2. The application is supported by grounds on the face of it and the supporting affidavit of Richard Kipselim Tonui the applicants herein.



3. The applicants aver that the instant proceedings are in respect to the estate of the deceased herein, who died intestate on 20.12.2005 and the respondents and applicants are legitimate heirs of his estate.
4. The applicants aver that the proceedings leading to the adoption of the mediation agreement on 8th May, 2022 were erroneous and/or a consequence of an error apparent of the face of record.
5. The applicants found fault in the mediation process for the following reasons; that the mediation process proceeded and the mediator failed to ascertain whether the participants were parties and/or legitimate heirs of the deceased, that there was partial settlement only with respect to the appointment of the administrators and that the mediation proceedings proceeded in the absence of the applicants who were listed in P&A 5 Form and consequently the mediation agreement arrived at was not binding and enforceable against the applicants.
6. The applicants aver that there was no justification whatsoever as to why the estate properties should be distributed equally amongst the 3 households after which an additional share ought to be allocated to benefit the two beneficiaries from the 3rd household alone to the exclusion of the others.
7. The applicants aver that the mediation settlement does not reflect the agreement by parties seeking equal distribution of the estate properties among the 3 households and therefore its execution shall be contrary to agreement by the beneficiaries in the meeting convened on 26.3.2008 to distribute the estate properties taking into account the wishes of the deceased.
8. The applicants aver that it is necessary to seek a review of the orders issued on 8.2.2022 to allow for the redistribution of the estate properties in accordance to the wishes of the beneficiaries and further that no settlement was arrived at during mediation and therefore that the mediation settlement filed on 28th July, 2022 was erroneously adopted on 8.8.2022 as an order of the Court.
9. The applicants aver that it is apparent of the face of the record that the proceedings and orders made on 8.8.2022 and the subsequent issuance of the certificate of confirmation of grant on 8.10.2022 was done without notice and/or in the absence of the applicants and the beneficiaries of the estate.
10. The applicants aver that the application upon adoption of the mediation settlement as an order of this Court, the decree and/or orders arising shall subject to leave of the Court be set aside, varied or reviewed and further that the instant application was premised on the provisions of rule 39 (1) of the *Civil Procedure (Court Annexed Mediation) Rules 2022*.
11. The respondent filed a replying affidavit in response to the notice of motion that was sworn by Patrick Kimutai Birgen on behalf of the co-applicant.
12. The respondents aver that the instant application is mischievous, unfounded, aimed at misleading this Court and had been overtaken by events.
13. The respondents aver that the 2nd applicant; Sarah Tonui and the 3rd applicant; Joseph Kipsigei, in the present application are not parties to this succession cause and therefore have unprocedurally been included in the cause without the leave of this Court having been sought and that the original parties to this cause are the 1st applicant; Richard Kipselim Tonui and one Samuel Kipkemoi Busio and there has never been any application for substitution of parties.
14. The respondents aver that the instant application is res judicata owing to the fact that a similar application with similar prayers dated 24th May, 2023 had been dealt with and determined by this honourable court via a ruling dated 14th December, 2023.



15. The respondents further aver that they were forced to obtain orders from this Court to enable them proceed with the distribution of the estate given that the applicant herein had refused to cooperate to ensure the distribution of the estate.
16. The respondents aver that the applicants were merely out to delay the inevitable by filing frivolous applications and further that the instant succession cause was filed in 2008 and has been pending in court for over 16 years, it was therefore they prayer that the instant application be dismissed to pave way for the distribution of the estate of the deceased.
17. Having considered pleadings, the issue for determination by this court is whether to grant leave to the applicant for the setting aside of the decree and/or orders arising from the mediation settlement agreement adopted by this Court on 8th August, 2022, the answer to this is in the negative.
18. In the instant matter, I find that the instant application is res judicata this being a court of record, I have carefully perused the record and the material before this Court, I find that a similar application with similar prayers dated 24th May, 2023 was heard and determined by this honourable court vide a ruling dated 14th December, 2023 where this Court declined to set aside the mediation settlement that was subsequently adopted as a judgement of this Court on the 8th August, 2022. The doctrine of res judicata is set out in the *Civil Procedure Act* at section 7 as follows: “ No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them can claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”
19. The Court of Appeal in The *Independent Electoral and Boundaries Commission v Maina Kiai & 5 others*, [2017] eKLR), held as follows; “The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.”
20. In any event, contrary to the assertions by the applicants, I find that the instant application does not disclose any of the grounds set out in rule 39 of the *Civil Procedure (Court Annexed Mediation) Rules, 2022*.
21. Section 39 (1) of the *Civil Procedure (Court-Annexed Mediation) Rules, 2022* provides that:
  - “(1) No application for setting aside of an order or decree arising from a mediation settlement agreement shall be filed except with the leave of 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)"

22. From the applicants' supporting affidavit, I find that they have not made a case to warrant grant of leave to challenge the mediation agreement dated 28th July, 2022 and adopted by this Court on 8th August, 2022.

23. Consequently, the notice of motion dated 22nd January, 2024 is hereby dismissed with no orders as to costs.

**DELIVERED, SIGNED AND DATED AT KERICHO THIS 25TH DAY OF JULY, 2024.**

**J.K. SERGON**

**JUDGE**

In the Presence of:-

C/Assistant – Rutoh

Mutai for the Respondent

No Appearance for the Applicant

