In re Estate of Naomi Njeri Ng'ethe (Deceased) (Succession Cause 124 of 2008) [2024] KEHC 12141 (KLR) (11 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12141 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

SUCCESSION CAUSE 124 OF 2008

RN NYAKUNDI, J

OCTOBER 11, 2024

BETWEEN

STEPHEN KIARIE NGETHE ..... 1ST OBJECTOR

MONICA WANJIKU NGETHE ..... 2ND OBJECTOR

AND

JORAM KAINGWA NGE'THE ..... PETITIONER

RULING

1. This court on 7th March, 2024 issued a rectified Certificate of Confirmation of Grant of the estate of the deceased as issued to Joram Kaing'wa Ng'ethe. The confirmation was pursuant to a Mediation Settlement Agreement dated 2nd February, 2024 and subsequently summons for rectification of Grant dated 6th March, 2024 in which the Petitioner sought an order of rectification of the Grant by including all assets that had been omitted. The petitioner stated that when implementing the Mediation settlement agreement, they realized that there were assets that belonged to the estate that had not been included. The Petitioner further indicated that all the beneficiaries consented to the amendment and evidence to that effect was attached. There was no objection to the said application and distribution and as such this court rectified the Grant.

2. The Objectors are now before this court vide summons for revocation dated 11th March, 2024. The Objectors sought annulment of the impugned Grant on the basis that the Grant of Letters of Administration issued to the Respondent herein were issued based on untrue allegations of facts to justify the Grant.

3. The Objectors further stated that the proceedings leading to the confirmation of Grant were defective in form and substance and to the detriment of the Objectors/Applicants as beneficiaries of the estate of the late Naomi Njeri Ng'ethe. That the mode of distribution does not favour all the beneficiaries and the Objectors were not given an opportunity to give their consent or not to the mode of distribution.

4. Finally, that the Grant should be annulled to pave way for inclusion of all the dependants and beneficiaries to the estate of the deceased.

5. In response, the Respondent stated that the application ought to be dismissed for it is made in bad faith with malice and should be dismissed. That the Objectors were aware of the proceedings that led to the obtaining of the Grant and consented to it. After obtaining the Certificate of Confirmation of Grant on 13th September, 2023, he informed the beneficiaries and instructed their advocate to prepare the necessary forms in order to ensure transmission.

6. In further response, the Respondent stated that it was unanimously agreed to engage a mediator in addition to counsel to iron out the grievances to ensure that everyone was satisfied. That after several meetings over the assets and distribution, the parties came to a consensus and necessary changes were made. The decision reached was reduced to writing in a settlement agreement and each party appended their signature and thumbprint.

7. On the strength of the mediation settlement agreement, they decided to have the grant rectified to incorporate all the changes made. The objectors were involved in the meetings and are aware and consented to distribution, additions and amendments that were made.

8. That the allegation that Uasin Gishu Kimumu/2834 was purchased by the 1st Objector/Applicant is misleading and untrue. The same belonged to the deceased as evidenced by the search attached and was for distribution to the beneficiaries.

9. That Uasin Gishu/Kimumu/1101 was given fully to the 1st Objector and Uasin Gishu/Kimumu/1102 was fully given to the 2nd Objector as per the previous grant and the current one therefore their complaints are baseless.

Objectors/Applicants' submissions

10. In support for the summons for revocation, Learned Counsel Mr. Mwaniki argued that the confirmation of Grant was done via an application dated 18th April, 2023 made by four beneficiaries including the Petitioner/respondent and which application was never served upon the Objectors/Applicants.

11. Counsel contended that from the proceedings, the Petitioner/Respondent did not file a consent on distribution in form 37, as contemplated by Rule 40(8), *Probate and Administration Rules* duly signed by all the survivors. That the filing of a consent under the provision of Rule 40(8) is mandatory before a court can proceed to hear an application for confirmation of Grant and in this case there was need to have a written consent duly executed by all the beneficiaries consenting to the confirmation of the Grant.

12. It was counsel's argument that the proceedings to confirm the Grant in the absence of form 37 were therefore unprocedural as the mandatory requirement before hearing and confirmation of grant were not met. He cited the provisions of Section 76 of the *Law of Succession Act* and urged the court to allow the application.

Petitioner/Respondent's submissions

13. Learned Counsel Ms. Adongo filed submissions dated 10th June, 2024 in which she essentially argued that the Objectors have not met the requirements set out under Section 76 of the *Law of Succession Act*. That whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist.

14. Counsel gave a background of the facts leading to the present situation and even the mediation settlement between the parties. She invited the court to consider the decision in the *Re-estate of Amos Kiteria Madeda (deceased)* 2022 KEHC 12950 (KLR) where justice Mativo dismissed the application for revocation of grant on grounds that it failed to establish any of the grounds as set under Section 76 of the Act.

Analysis and determination

15. I have considered the summons as well as the submissions filed by both parties and the only issue I find for determination in this application is whether the Grant of Letters of Administration issued to Joram Kaingwa Ng'ethe on 7th August, 2023 should be revoked or annulled. First off, I confirm from the record that indeed the parties attempted mediation which yielded a mediation settlement agreement dated 2nd February, 2024 which has not been challenged in any manner. Better still, the Objectors in this case took part in the said mediation and equally consented to the proposed mode of distribution as attached in the summons for rectification of Grant dated 6th March, 2024 and this is not contested at all. So that then, this court is at a loss as to why the Objectors are in the business of taking this court back to starting the process again.

16. A perusal of the record does not reveal any proceedings challenging the mediation settlement agreement or the summons for rectification as filed on 6th March, 2024 because in them, the parties agreed on a mode of distribution of the initial assets forming part of the estate together with the new discovered assets.

17. The guiding principles used by courts in setting aside consent judgments or orders are well established. In *Flora N. Wasike v Destimo Wamboko* [1988] eKLR Hancox, JA, as he then was, said: -

> " 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"

18. In *Kenya Commercial Bank Ltd v Specialized Engineering Co. Ltd* [1982] KLR 485, it was held that an order entered into by consent is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it 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 representation or ignorance of such facts in general for a reason which would enable the court to set aside an agreement. Justice Harris at page 493 opined:

> " 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."

19. The Objectors' argument that the proceeding to confirm the grant in the absence of form 37 was not procedural is neither here nor there. They have not cared to comment on the mediation settlement they arrived at nor have they commented on the summons for rectification dated 6th March, 2024 in which they consented to the proposed mode of distribution as to the discovered assets forming part of the estate. What this court can only do is to examine whether the mediation settlement entered into by the parties was by any chance done fraudulently or through collusion.

20. The objectors ought to have moved this court with evidence of fraud or collusion on the part of the petitioner and the mediator and not to ask this court to revoke the grant all together on general grounds. In any event, if the parties sought to challenge the mediation agreement, they still ought to have sought leave of this court pursuant to the provisions of Rule 39 of the *Mediation Rules* on Setting aside an order or decree arising out of a settlement agreement, which stipulate 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."

21. In the instant case, there is no evidence that the applicant objectors herein first sought leave of court to apply for the setting aside of the Mediation Settlement Agreement or that they were granted such leave by this court. They have equally not challenged their consent in the rectified summons dated 6th March, 2024. They simply filed an application for revocation without solid grounds for this court to consider the same under Section 76 of the *Law of Succession Act* and this court cannot entertain such summons for the reasons aforementioned.

22. The Mediation Settlement Agreement created a binding contractual arrangement and relationship amongst the parties thereto. More so, under Section 59B (4) and (5) of the *Civil Procedure Act*:

> "(4) An agreement between the parties to a dispute as a result of a process of mediation under this Part shall be recorded in writing and registered with the Court giving the direction under subsection (1), and shall be enforceable as if it were a judgment of that Court.
>
> (5) No appeal shall lie against an agreement referred to in subsection (4)."

23. In addition, the judgment founded on Mediation cannot be set aside. Neither can it be appealed against. The intention was to give finality to the Mediation process. The consent entered into herein created a contractual relationship between the parties who are bound by it.

24. It is clear and incontestable from its context intention and spirit of section 59(b)(4) & (5) of the Act did not envisage or conceive parties to a mediation to walk in and walk out of that forum in the first place without meeting the criteria of setting aside a contractual agreement. The mediation agreement is by its very nature underpinned under Art. 159(2)(d) of the *Constitution*. The finality of its decisions as a forum is of paramount importance in the administration of justice subject only to those grounds embedded in the contract like duress, coercion, misrepresentation, mistake or if it gives rise to unconscionable terms depriving any of the parties an opportunity to be heard or deprived of the fundamental rights grounded in the dispute which was referred to mediation. In the grievances before this court, in respect of the mediation agreement, there is no cogent evidence on fraud, false evidence or testimonials given on oath, absence of participation in the proceedings before a mediator or errors of procedure of law. It must be emphasized however that the mediation jurisdiction is not to be exercised for the purposes of not settling the conflict as a whole or the issues which were in the first place placed before a court of law. It is actually a constitutional imperative by the Kenyan people that it is also a forum on equal status with the courts of law. The purpose of jurisdiction ought to be given the seriousness it deserves at the same level of any organ of our court system clothed with jurisdiction to determine disputes independently under Art. 50(1) of the *Constitution*. I have tested

the application brought and filed by the applicant on whether the criteria of setting it aside under the parameters of a consent judgment and I find no sufficient cause shown to review and set aside that mediation agreement.

25. In the event I am faulted by a superior court in this decision, I then went further to ask myself whether Section 80 of the *Civil Procedure Act* as read with Order 45 Rule 1 of the Civil procedure Rules, whether it can come to the aid of the applicant. In a nutshell, the power of review may be exercised on the discovery of new and important matter or evidence which after exercise of due diligence was not produced within the knowledge of the person seeking the review or could not be produced by him at a time when the order was made, it may be exercised where some mistake or error apparent on the face of the record is found, it may also be exercised on any analogous ground. But it may not be exercised on the ground that the decision was erroneous on the merits. That will be a province of an appeal. (See the case of *Nyamogo &Nyamogo v Kogo* [2001] EA 170.)

26. Similarly, in this same context the Supreme Court of India in *Haridas v Smt. Usha Rani Banik*, Appeal (civil) 7948 of 2004 articulated the following principles:

> " There is a distinction which is real, though it might not always be capable of exposition, between a mere erroneous decision and a decision which could be characterized as vitiated by 'error apparent'. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error. Where without any elaborate argument one could point to the error and sat here is a substantial point of law which stares one in the face and there could reasonably be no two opinions entertained about it, a clear case or error apparent on the face of the record would be made out."

27. First and foremost, the applicant has not brought himself within the doctrine of review for this court to exercise jurisdiction to interfere with the mediation agreement. Moreover, it is trite that mediation must be by the consent of the parties to mediate their dispute. It is therefore voluntary although a court has jurisdiction under Court Annexed mediation to refer matters to mediation if it sees it fit so to do under the *Civil Procedure Act* and the Constitutional Imperative under Art. 159(2)(d). This implies that mediation is a creature of the *Constitution* and Citizens should embrace it as a forum to adjudicate their disputes under a professional mediator. The settlement agreement reached at mediation is binding an enforceable as if it is a judgment of the court of law unless those other grounds which vitiate a contract or a consent judgment or on review jurisdiction exist on the critical analysis of the process leading to the outcome of the binding mediation agreement.

28. Having carefully perused the application, I do not find any shred of evidence of coercion, fraud, mistake or misrepresentation as a ground to have been advanced and proved by the applicants herein to warrant the interference with the order given by the court adopting the Mediation Settlement Agreement as the order of the court, which as a result distributed the estate and brought the matter to a finality. In the circumstances of this application, various questions will necessarily arise, but one of the critical one is whether the mediation agreement being challenged before this court will leave the applicants in such a precarious position that will deprive them the rights of inheritance including losing confidence in the administration of justice? From close examination of the process leading to the mediation agreement, the allegations by the applicants do not manifest an injustice or prejudice within the entire scheme of the probate court of identifying the beneficiaries and free assets of the deceased capable of being distributed as a net estate to all those who qualify under Section 29 of the *Law of Succession Act*. Similarly, it came out from the proceedings that the summons for rectification dated 6th March 2024 were not challenged, wherein the Applicants consented to a mode of distribution on the discovered property forming part of the estate. Reasons wherefore, it is my finding that the summons

for revocation dated 11th March 2024 is devoid of any merit and is consequently dismissed with an order that each party bear their own costs of the application.

DATED SIGNED AND DELIVERED AT ELDORET, THIS 11TH DAY OF OCTOBER 2024

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R. NYAKUNDI

JUDGE