



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Njiru Mbarire (Deceased) (Succession Cause
2 of 2018) [2023] KEHC 20564 (KLR) (19 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20564 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
SUCCESSION CAUSE 2 OF 2018
LM NJUGUNA, J
JULY 19, 2023
IN THE MATTER OF THE ESTATE OF NJIRU MBARIRE (DECEASED)**

BETWEEN

**MADARINA GACHOA MAINGI 1ST APPLICANT
TABITHA WANGARI 2ND APPLICANT
GABRIEL MUCHIRI NJIRU (DECEASED) 3RD APPLICANT
STEPHEN IRERI NJIRU 4TH APPLICANT**

AND

**HELLEN WANGUI NJIRU 1ST RESPONDENT
NATHAN IRIGO NJIRU 2ND RESPONDENT**

RULING

1. The applicants moved the court vide Notice of motion dated November 14, 2022 filed under certificate of urgency enlisting the grounds on the face thereof seeking orders that:
 - a. Spent;
 - b. The Honourable court be pleased to stay the adoption of the mediation settlement agreement dated 04 October 2019 arising from MLM/MED/60/2019 and any consequential orders arising therefrom pending the hearing and determination of this application inter parties;
 - c. The costs of this application be provided for.
2. 1st applicant/objector avers that she was admitted into the suit as an interested part claiming interest as a purchaser of Plot No 12 at Ishiara Market having purchased the same from the 2nd respondent/



- administrator and 2 others. She averred that she stands to lose the property if the orders sought are not granted.
3. Vide a replying affidavit sworn on 21 December 2022 the 1st respondent on her own behalf and that of the 2nd respondent/administrator, averred that the 1st applicant/objector is not a beneficiary to the estate of the deceased. She stated that the 2nd respondent/administrator had no capacity to sell the property following revocation (by consent) of the grant that had been issued in his name. That the proceedings at mediation confirmed that the parties agreed that the purchase was flawed and the only recourse was the refund of the purchase price.
 4. The court directed that the application be dispensed with by way of written submissions and the parties complied with the directions.
 5. In her submissions, the 1st applicant/objector stated that vide agreement dated 18 July 2018 the 2nd respondent/administrator and the 4th applicant/objector sold to her Plot No 12 at Ishiara Market and that a certificate of lease was issued to that effect. She stated that she ought to have been a party to the mediation process which led to a settlement that was duly filed in court. She drew the attention of the court to the fact that the subject property was sold with the consent of both houses and the purchase price was equally divided between them. That the mediation processes and the agreement emanating from it, is contradictory to the position taken by the 2nd respondent/administrator in his affidavit wherein he confirmed that the 1st applicant/objector was the bona fide owner of the property.
 6. The respondents filed their submissions in which they averred that the mediation settlement agreement dated 04 October 2019 was adopted as the order of the court on 10 November 2022 and the 1st applicant/objector was present in court but no objection was raised. That per the said agreement, the property was awarded to Purity Wangari Njiru. That the allegations of the 1st applicant/objector cannot be cured in this court but she should bring a separate civil suit against the people who sold the property to her.
 7. The 2nd respondent/administrator had filed a succession cause through which a grant of letters of administration was issued on 06 January 1993 and confirmed on 28 May 1993. This grant was revoked by consent of the competing parties on 20 April 2015 in order to allow for inclusion of all the beneficiaries and properties of the deceased. Before the grant was revoked and certificate set aside, the 2nd respondent/administrator had disposed of Plot No 12 at Ishiara Market as the administrator of the estate. In my view, the issue for determination is whether or not revocation of the grant dated 06 January 1993 nullified purchase of the property by the 1st applicant/objector.
 8. According to section 76 of the *Law of Succession act*, “a grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion...” This section being read together with Section 67(2) of the *Civil Procedure Act* and Order 49 rule 3 of the *Civil Procedure Rules 2010*, empowered the parties to enter a consent and such consent when ordered by the court cannot be appealed against. The court did its duty to record the consent and adopt it as an order on 20 April 2015. It follows that the effect of revocation of the grant automatically sets aside the certificate of confirmation.
 9. Upon perusal of the consent, I deduce that it was ordered;
 - “6) the purchaser of plot No 12 Madalina Gachoa Maingi who is now the registered proprietor do continue occupying and utilizing the plot without any interference from any of the beneficiaries pending the hearing and determination of the succession cause.”



The consent did not state that the property would revert to the deceased for purposes of application of the new grant.

10. After the revocation of the grant by consent, the estate of the deceased was redistributed, including Plot No 12 at Ishiara Market which had been purchased by the 1st applicant/objector. I find that the property is exempted from the estate of the deceased upon redistribution by virtue of the court order by consent. The court rightly referred the matter to mediation which culminated into an agreement. This was pursuant to Section 59B of the [Civil Procedure Act](#) which provides provides:

59B. Reference of cases to mediation

- (1) The Court may—
 - (a) on the request of the parties concerned; or
 - (b) where it deems it appropriate to do so; or
 - (c) where the law so requires, direct that any dispute presented before it be referred to mediation.
- (2) ...
- (3) A mediation under this Part shall be conducted in accordance with the mediation rules.
- (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).

Rule 5 of the [Civil Procedure \(Court-Annexed Mediation\) Rules, 2022](#) provides:

“ 5. Referral to mediation.

- (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.”



11. The court has affirmed this position and also noted that a mediation settlement agreement is as good as a consent reached between parties to a suit, which the court can adopt as its order. This is provided for under Rule 34 of the [Civil Procedure \(Court-Annexed Mediation\) Rules, 2022](#) as follows:

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.
- (2) It shall not be necessary for the parties or the mediator to attend court for purposes of adoption of the settlement agreement and such proceedings may be conducted in chambers or virtually.
- (3) Where the court deems it necessary, it may seek further clarification from the mediator, each party or the party's representative before adopting the settlement agreement.

In the case of [Alios Finance Kenya Limited vs Country Farms Limited](#) (Civil Appeal E005 of 2020) [2022] KEHC 11012 (KLR) where it was held:

"17. The process of CAM is governed by the Judiciary of Kenya Practice Directions on Court Annexed Mediation issued by the Chief Justice under Article 159 of [the Constitution](#) and Section 59B (1) (a), (b) and (c) of the [Civil Procedure Act](#).

18. Paragraph 12 of The Judiciary of Kenya Directions of Court Annexed Mediation (as amended in 2018) provides as follows:-

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." (emphasis court).

19. 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."

12. At the point of adopting the consent as an order of the court, the 1st applicant/objector was present at the mention on 10 November 2022 for adoption of the mediation settlement agreement but she did not object to any of the proceedings. Rule 34 of the [Civil Procedure \(Court-Annexed Mediation\) Rules, 2022](#) would have come into play if the 1st applicant/objector had raised an issue at the time. That being the case, the power of the court to make further orders is curtailed by the nature of the orders by consent of the parties, I do find that the 1st applicant/objector was indolent in redeeming her claim herein. In the case of [Amina Karama vs Njagi Gachangua & 3 others](#) [2020] eKLR the court held:

"It has been held that equity aids the vigilant and not the indolent. It has also been held that delay defeats equity. In the case of Ibrahim Mungara Mwangi Vs Francis Ndegwa Mwangi [2014] eKLR the court quoted the following passage from Snell's Equity by John MC Ghee Q.C. (31st Edition) at page 99:

"The Court of equity has always refused its aid to stale demands where a party has slept upon his rights and acquiesced for a great length of time. Nothing can call



forth this court into activity but conscience, good faith and reasonable diligence; where these want the court is passive, and does nothing.”

13. I therefore find that the application lacks merit and is hereby dismissed with no orders as to costs.

14. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 19TH DAY OF JULY, 2023.

L. NJUGUNA

JUDGE

.....Applicants

.....Respondents

