



REPUBLIC OF KENYA



**Massa & another v Makhanu & 10 others (Succession Cause  
283 of 2010) [2023] KEHC 20659 (KLR) (21 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20659 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
SUCCESSION CAUSE 283 OF 2010**

**DK KEMEL, J**

**JULY 21, 2023**

**IN THE MATTER OF THE ESTATE OF THE LATE LIVINGSTONE M. WAKOLI (DECEASED)**

**BETWEEN**

**DAVID WAKOLI MASSA ..... 1<sup>ST</sup> PETITIONER  
ISAAC KHISA WAFULA ..... 2<sup>ND</sup> PETITIONER**

**AND**

**SYLVESTER WEBALE MAKHANU ..... 1<sup>ST</sup> OBJECTOR  
GEORGE WAFULE WAMASEBE ..... 2<sup>ND</sup> OBJECTOR  
JOSPHAT B WEPUKHULU ..... 3<sup>RD</sup> OBJECTOR  
JOSHUA WAMANGA ..... 4<sup>TH</sup> OBJECTOR  
JOHN LUTAKAI MAINA ..... 5<sup>TH</sup> OBJECTOR  
MARK NAMBWILA SIMIYU ..... 6<sup>TH</sup> OBJECTOR  
GEOFFREY WANJALA SITUMA ..... 7<sup>TH</sup> OBJECTOR  
ABEL KASUTI NABENDE ..... 8<sup>TH</sup> OBJECTOR  
ROBERT JUMA WANJALA ..... 9<sup>TH</sup> OBJECTOR  
JANTRIX BARASA MUNIALO ..... 10<sup>TH</sup> OBJECTOR  
PROTUS KNISA WALUBENGO ..... 11<sup>TH</sup> OBJECTOR**

**RULING**

1. Vide a Notice of Motion application dated February 7, 2023 and filed in Court on February 9, 2023 and premised on section 70 of the [Law of Succession Act](#), section 1A, 1B of the [Civil Procedure Act](#)



- and Order 51 of the Civil Procedure Rules, the 6<sup>th</sup> Objector/Applicant seeks orders inter alia: that this Court be pleased to re-view its orders and/or set aside the mediation settlement read and adopted by it on January 23, 2023; that the matter be reset for mediation before a different mediator and that in the alternative, the matter be listed down before this Court for hearing and final disposal.
2. The application was supported by the affidavit sworn by the 6<sup>th</sup> Objector/Applicant on February 7, 2023. He averred that he bought 6 acres of land out of parcel land No S Malakisi/ Mwalia/654 in the year 1995 and the same was part of the subject matter in this substantive succession cause.
  3. He averred that he has since done some massive development on the said parcel. According to him, in the year 1979 he purchased 10 acres from the deceased Livingstone M. Wakoli out of land parcel No. S. Malakisi/ Mwalia/654. He later agreed to reduce the acreage to 6 acres since he could not afford to purchase the 10 acres.
  4. He averred that on December 9, 2022, this Court informed him that this matter was listed before a mediator for discussions and settlement and that the same was reserved for mention on December 19, 2022.
  5. He argues that on December 16, 2022 at 11.00 am he received a phone call from one Jane Naliaka who informed him that his presence was urgently required at Bungoma Law Court to give evidence on his land. He was informed to bring his original documents concerning the same. He protested due to the short notice as he was aware the matter was coming up on December 19, 2022 but still attended.
  6. He deponed that on arrival, he found parties involved in the matter discussing the case and the lady who called her introduced herself and without any discussions instructed him to sign on a blank piece of paper. The lady further told him to give her all his original purchase agreements, which he did but the same were never returned to him. He later came to realize that he had signed away his 2 acres
  7. He averred that when the matter was mentioned in Court on January 23, 2023, he took the opportunity to register his protest as he insisted that he only signed a blank paper but that the one he was shown by his Counsel was filled up with names and acreage per person.
  8. He maintained that his share of the estate of the deceased is 6 acres and not 4 acres and that the mediation settlement was a forgery and thus ought to be disregarded by this Court.
  9. He deponed that the particulars of fraud, deceit, falsehoods and deception are: deliberate giving of short notice for the hearing of the case; failure to consider his age; failure to explain the various stages in mediation; deception; conclusion of the mediation session without him stating his case; failure to record his protest.
  10. In response to this application, the 1<sup>st</sup> Petitioner/Respondent vide a replying affidavit sworn on February 21, 2023 and averred that the application is bad in law and that the same ought to be stuck out with costs. According to him, the application is full of nothing but lies and that deliberations were done in the open and thus nothing malicious occurred. He deponed that the 6<sup>th</sup> Objector/Applicant lacked a genuine sale agreement but had a series of sale agreements and that he is lying about purchasing land from the deceased in 1979 worth 10 acres yet the deceased died on September 8, 1978. He urged this Court to dismiss this application and confirm the adopted mediated report dated December 16, 2022.
  11. In response to the application, the 1<sup>st</sup> Objector/Respondent with the authority of the 2<sup>nd</sup> Objector/Respondent vide a replying affidavit sworn on February 21, 2023, wherein he averred that the application is bad in law and the same ought to be stuck out with costs. According to him, the mediator stated her role after introducing herself as Edelly Nekesa Marangachi. He deponed that the allegation by the 6<sup>th</sup> Objector/Applicant signing a blank paper was false as he was the last person to sign the



mediation report dated December 16, 2022 and that the allegation of loss of his sale of agreement is total lies.

12. He urged this Court to adopt the mediation report on record for onward processing of the title to all beneficiaries without any unnecessary delay.
13. Vide Court directions the 6<sup>th</sup> Objector, Mark Nambwila Simiyu, proceeded to file a further affidavit sworn on March 17, 2023 wherein he depones that he purchased 10 acres from the family of the deceased, Livingstone M. Wakoli, vide an agreement dated April 25, 1979 and that some of the family members present were, Alice Massa, the widow of the deceased and Martin Khasete Massa, the eldest son of the deceased. Both witnesses are now deceased. According to him, the said agreement was clear on the size of the initial 10 acres which was paid in installments with animals as indicated below:
  - I. April 25, 1979-6 animals
  - II. April 4, 1979-2 animals
  - III. May 19, 1979-1 animal
  - IV. July 10, 1979-1 animal
  - V. April 23, 1980-1 animal
  - VI. August 17, 1982-2 animals
  - VII. April 25, 1983-1 animal
  - VIII. March 22, 1984-4 animals
  - IX. May 21, 1985-1 animal
14. He averred that in the year 1986, the family of the deceased felt that he was taking too long to raise the balance of the 9 heads of cattle hence it was agreed that he sheds off 4 acres leaving him with 6 acres. He averred that he has been in peaceful and continuous occupation of the 10 acres from 1979 up to the year 1986 when he decided to hand back 4 acres. He finally averred that he would not have signed off his two acres just like that.
15. Vide Court directions dated February 28, 2023, parties were instructed to canvass the application by way of written submissions. Parties later opted to rely on their rival affidavits.
16. I have considered the foregoing averments of the respective parties. I find the only issue for determination in this application is whether there are enough grounds to set aside the mediation settlement agreement dated December 16, 2022 and adopted as a Court's judgement on January 23, 2023.
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. This position is clearly articulated in the English Case of *Purcel V. F. C. Trigell Ltd, (trading as Southern Window And General Cleaning Co. and Another)*, [1970] 3 ALL ER671, where Winn, LJ, opined:

“It seems to me that, if a consent order is to be set aside, it can only be set aside on grounds which would justify the setting aside of a contract entered into with knowledge of the material matters by legally competent persons, and I see no suggestion here that any matter that occurred would justify the setting aside or rectification of this order looked at as a contract.”

19. It is common ground that the High Court has power of review, but such power must be exercised within the framework of Section 80 of the *Civil Procedure Act* and Order 45 Rule 1. Section 80 of the *Civil Procedure Act* provides as follows:

80. Any person who considers himself aggrieved-

- (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
- (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgement to the court, which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

20. Order 45 Rule 1 of the *Civil Procedure Rules, 2010* provides as follows;

45 Rule 1 (1) Any person considering himself aggrieved-

- a. By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- b. By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgement to the court which passed the decree or made the order without unreasonable delay.”

21. A clear reading of the above provisions shows that Section 80 gives the power of review while Order 45 sets out the rules. The rules restrict the grounds for review. They lay down the jurisdiction and scope of review. They limit review to the following grounds- (a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or; (b) on account of some mistake or error apparent on the face of the record, or (c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay.

22. In *Kenya Commercial Bank Ltd Versus Specialized Engineering Co. Ltd* [1982] KIR 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.”

23. The consent herein was entered into on December 16, 2022 when the Court adopted the mediation settlement agreement dated January 23, 2023 on the disputed acreage ownership of the deceased's estate. The mediation settlement agreement was arrived at prior to the determination of Petitioners Summons for Rectification of grant.

24. The 6<sup>th</sup> Objector/Applicant herein has alleged that the mediator Miss Edelly Nekesa Marangachi whom he insists introduced herself to her as one Miss. Jane Naliaka conducted the mediation process in an irregular manner and has further accused her of being biased in undertaking her duty as a mediator. No evidence whatsoever has been tendered before this court to substantiate such allegations. Further, he has stated that the mediator tricked him into signing a blank paper which was then presented in Court as the mediation settlement agreement in the guise of signing an attendance list. From the record, no evidence has been adduced by the 6<sup>th</sup> Objector/Applicant to prove the existence of any deception, or trickery by the said mediator in dispensing her duties during the mediation session. One would then wonder how the 6<sup>th</sup> Objector/Applicant can allege use of trickery by the mediator while in fact he was present on that given day. It is trite law that he who alleges must prove. Section 107(1)(2) of the Evidence Act provides: -

“(1) 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.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

25. Section 112 of the Evidence Act provides thus:

“In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

26. The 6<sup>th</sup> Objector/Applicant initially deponed that he purchased the 10 acres of land from the deceased himself in 1979 then filed a further affidavit indicating that he purchased the land from the family of the deceased and both his witnesses were deceased and that when he was unable to complete payment he ceded 4 acres back to the family of the deceased leaving him with 6 acres. I have perused the Court record and confirmed vide the attached land sale agreement that indeed the 6<sup>th</sup> Objector/Applicant purchased 10 acres from the family of the deceased and that he indeed made his payments in form of cattle. According to the agreement as of 21<sup>st</sup> May 1985, he had made a payment of a total of 19 cows leaving a balance of 9 cows. On further inspection of the Court records, the form filled by the 6<sup>th</sup> Objector/Applicant and signed by the chief Malakisi Location confirmed that 1<sup>st</sup> Petitioner/Respondent sold 6 Acres of the contentious subject matter to the 6<sup>th</sup> Objector/Applicant and that the same was witnessed.

27. It is imperative to note that the 1<sup>st</sup> Petitioner/Respondent in his replying affidavit termed the averments of the 6<sup>th</sup> Objector/Applicant as mere allegations and further claimed that the 6<sup>th</sup> Objector/



Applicant lacked a genuine sale agreement. The 1<sup>st</sup> Petitioner/Respondent did not avail any evidence to substantiate his averments thus failing to meet the threshold as set out in section 107 and 112 of the *Evidence Act*.

28. According to section 3 of the *Law of Succession Act*, Cap 160 Laws of Kenya “estate” means “the free property of a deceased person” while “free property”, in relation to a deceased person, means “the property of which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death.” It is therefore clear that the property that forms part of the estate of the deceased is the property which the deceased herein was legally competent to dispose of during his lifetime and of which by the time of his demise, his interests had not been terminated.
29. The duty 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.
30. The 6<sup>th</sup> Objector/Applicant has not proved the existence of any of the ingredients which would merit the setting aside of the mediation settlement agreement of December 16, 2022 and adopted as the judgment of this court on January 23, 2023.
31. Upon perusal of the Mediation Settlement Agreement, I have noted that indeed the parties did sign the said mediation settlement agreement. I have seen the signature of the 6<sup>th</sup> Objector/Applicant alongside the other parties and it is obvious that his claim that he was given a blank page to sign is not believable. Again, the claim that his original documents were taken away by the mediator and not returned to him is false because there is no evidence that he has lodged a report of theft of his documents to any institution.
32. The 6<sup>th</sup> Objector/Applicant averred that he is 88 years old and that the mediator took advantage of his age. I am of the view that the 6<sup>th</sup> Objector/Applicant ought to have attended the sessions with one of his children who would have guided him on what was happening.
33. I am aware that it has been held time and again that a mediation settlement agreement once adopted as an order of the Court becomes a binding agreement as between the parties and cannot be set aside unless the party seeking to have it set aside proves that there were vitiating factors such as in any other contract such as, fraud, misrepresentation, coercion, undue influence etc. Even though the Judiciary Mediation Manual Clause 1.3 (f) allows the court to direct parties to participate in additional mediation, I find the circumstances does no warrant the same since the 6<sup>th</sup> Objector/Applicant has failed to prove on a balance that the mediation settlement was obtained irregularly.
34. In the result, it is my finding that the 6<sup>th</sup> Objector/Applicant’s application dated February 7, 2023 lacks merit. The same is dismissed with no order as to costs.

It is so ordered.

**DATED AND DELIVERED AT BUNGOMA THIS 21ST DAY OF JULY,2023.**

**D. KEMEI**

**JUDGE**

In the presence of:

No appearance 1<sup>st</sup> Petitioner/Respondent



No appearance 2<sup>nd</sup> Petitioner/Respondent

No appearance 1<sup>st</sup> Objector

No appearance 2<sup>nd</sup> Objector

No appearance for 3<sup>rd</sup> -12<sup>th</sup> Objector

No appearance 4<sup>th</sup> Objector

No appearance for 5<sup>th</sup> Objector

Sabwami for 6<sup>th</sup> Objector/Applicant

Kizito Court Assistant

