



REPUBLIC OF KENYA



**In re Estate of Jumo Mabwai Masa (Deceased) (Succession Cause
E056 of 2021) [2023] KEHC 22506 (KLR) (20 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22506 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
SUCCESSION CAUSE E056 OF 2021
JK SERGON, J
SEPTEMBER 20, 2023
IN THE MATTER OF THE ESTATE OF JUMO MABWAI MASA (DECEASED)**

BETWEEN

JOEL KIPGENO MABWAI 1ST PETITIONER

WILSON KIPRONO MABWAI 2ND PETITIONER

AND

NICHOLAS KIPKEMOI MABWAI OBJECTOR

AND

PETER CHERUIYOT MABWAI RESPONDENT

RULING

1. The application coming up for determination by this court is summons dated 24th February, 2023 seeking the following orders;
 - (i) Spent
 - (ii) That pending the hearing and determination of this application, there be a stay of execution or enforcement of the mediation settlement agreement that was endorsed by this honourable court on 13th December, 2022
 - (iii) That pending the hearing and determination of this application, the status quo in respect of the estate of the deceased as at the time of his demise be maintained
 - (iv) That the honourable court be pleased to set aside the mediation settlement agreement that was endorsed by this honourable court on 13th December, 2022



- (v) That there be a stay in the issuance of certificate of confirmed grant in relation to the estate of the deceased pending the hearing and determination of ELC Cause No. E003 of 2023
- (vi) That costs be in the cause.
2. The application is supported by an affidavit in support of summons sworn by Nicholas Mabwai Masas the objector/ applicant herein he avers that he is one of the sons of the deceased to whom the estate herein relates and that he is conversant with the matter.
 3. The objector/applicant avers that his late father Jumo Mabwai Masas died on the 27th day of January, 1995 and was survived by seventeen (17) children from two (2) households, that he was from the 2nd household and further that until the death of the deceased he was the sole registered proprietor of the following listed assets L.R. No. Kericho/nyamanga/57-10 Acres, L.R. No.Kericho/Roret/42 – 14 Acres, L.R. No.Kericho/Roret/120 – 8.4 Acres, L.R. No. Kericho/Roret/1068 – 15.64 Acres, L.R. No.Kericho/Roret/878 – 4.3 Acres and that the listed properties are a total of 52.34 Acres.
 4. The objector/applicant avers that there is a dispute relating to one of the properties namely L.R. No Kericho/Roret/42, currently active in court being litigated under E.LC Cause No. E003 of 2023 and further that the said land parcel was never included as part of the deceased's estate to be shared among beneficiaries yet it is one of the deceased's properties.
 5. The objector/applicant avers that the property in question was fraudulently acquired and illegally subdivided by one of the appointed administrators one Peter Cheruiyot Mabwai (Micah) hence the reason why the subject land parcel is subject of litigation before the Environment and Land Court attached hereto and marked as "NKM 2a, 2b and 2c" are copies of the green cards for the resultant subdivisions of L.R. No. Kericho/Roret/42.
 6. The objector/applicant avers that the subject land parcel in question constitutes free property of the deceased which the deceased was legally competent to dispose of during his lifetime and in respect of which his interest was not terminated by his death.
 7. The objector/applicant avers that the mediation agreement endorsed by this honourable court on 13th December, 2022 was entered into by some of the beneficiaries without disclosure of all the properties of the deceased hence the same is a misrepresentation which ought to be set aside.
 8. The objector/applicant avers that he and some of the other beneficiaries of the estate of the deceased herein never consented to the said mediation agreement as evidenced by the lack of signatures against their names hence it is in the interest of justice that the same be set aside since it does not reflect the wishes of all the beneficiaries of the estate of the deceased.
 9. The objector/applicant avers that owing to the fact that the mediation agreement was entered into without disclosure by the parties of all the properties of the deceased against the requirement for material disclosure, it was therefore in the interests of justice that the same be set aside and enforcement stayed pending hearing and determination of ELC No. E003 of 2023.
 10. The objector/applicant avers the instant application is not perpetuated by malice rather it is in the interest of the beneficiaries of the estate of the deceased herein and in the interests of the subject estate.
 11. There is a replying affidavit sworn by one Peter Cheruiyot Mabwai (Micah) In opposition to the application dated 24th February, 2023.
 12. He avers that he is one of the beneficiaries of the estate of the deceased who died on 27th February, 1995 and not on 27th January, 1995 as alleged in the affidavit in support of the summons and that



at the time of his demise he had the following properties to wit L.R. No Kericho/Roret/878 - 4.3 Acres, L.R. No Kericho/nyamanga/57 - 10 Acres, L.R. No Kericho/Roret/120 - 8.4 Acres, L.R. No Kericho/Roret/1068 - 15. 64 Acres.

13. He further avers that during the lifetime of the deceased, specifically in the year 1984, the land parcel known as L.R. No Kericho/Roret/42 was subdivided into three parcels of land namely: L.R. No Kericho/Roret/1068; L.R. No Kericho/Roret/1069 and L.R. No Kericho/Roret/1070. He further avers that L.R. No Kericho/Roret/42 ceased to be a property of the deceased after it was subdivided and thus the register closed and the new plot numbers issued and further that pursuant to a sale L.R. No Kericho/Roret/1069 and L.R. No Kericho/Roret/1070 were transferred to him and as such the said parcels do not form part of the estate of the deceased.
14. He asserted that the subdivision of L.R. No Kericho/Roret/42 was regularly done and the same consented to by the deceased who was present at the Land Control Board meeting which approved the sub-division and further that the entire sub-division and transfer of the land parcel in issue was done with the consent and active participation/involvement of the deceased, which fact was never questioned by anyone before the demise of the deceased in 1995 and even afterwards until recently.
15. He avers that the property in dispute does not form part of the estate of the deceased hence not subject to the instant succession proceedings and thus a stay in proceedings was tantamount to interference with the beneficiaries right to conduct and conclude the succession cause herein.
16. He avers that the parties voluntarily agreed to go through mediation and thus the mediation settlement agreement was to give finality to the mediation process and therefore the consent entered into created a contractual relationship between the parties who are bound by it.
17. He avers that the parties were accorded an opportunity to be heard during the mediation process and therefore the mediation settlement was arrived at through regular means and furthermore that there was no contention or affidavit sworn to challenge the mediation proceedings.
18. He avers that the objector/applicant herein has not demonstrated that the mediation settlement agreement herein was obtained by fraud or collusion or by agreement contrary to the policy of the court or that the consent was arrived at through undue influence, coercion or intimidation of the parties.
19. He maintains that the probate and administration court is vested with the jurisdiction to determine the assets of the deceased, identify the rightful beneficiaries of the estate and persons beneficially entitled to the estate, ascertain their respective shares and distribute the estate accordingly and thus the grant of stay of proceedings will be an impediment to the exercise of the court's power. He reiterated that the court should proceed to distribute the properties that form part of the estate of the deceased.
20. He maintains that the instant application was misguided and frivolous as the objector/applicant failed to disclose any grounds to warrant the relief for stay of proceedings and setting aside the mediation settlement executed by the parties on 13th December, 2022 and therefore the instant application should be dismissed with costs.
21. There is a replying affidavit sworn by one Joel Kipng'eno Mabwai the 1st Petitioner herein in response to the application dated 24th February, 2023.
22. He avers that he supports the instant application to stay the instant proceedings pending the hearing and determination of ELC Suit No. E003 of 2023 and that he filed the suit against Peter Cheruiyot Mabwai seeking to have the title deed to the land parcel known as L.R. Kericho/Roret/42 in his name canceled, the crux of the dispute being that the said land parcel belonged to the deceased herein and was fraudulently transferred to Peter Cheruiyot Mabwai.



23. He avers that it is his responsibility as the administrator of the estate of the deceased to preserve the estate for the benefit of the beneficiaries and hence precipitated filing of Kericho ELC Suit No. E003 of 2023 and that the delay in filing the suit was occasioned by a misrepresentation by Peter Cheruiyot Mabwai that he would lay no claim to any of the properties registered in the name of the deceased during the succession proceedings. He further avers that when the matter was referred to mediation it became obvious that Peter Cheruiyot Mabwai wanted shares in the deceased's properties contrary to what he had indicated during family meetings.
24. He avers that the mediation settlement agreement filed in this court ought to be set aside as it did not reflect what was agreed upon and further that some beneficiaries did not sign it.
25. He contends that the estate of the deceased will suffer great and irreparable harm should the instant application not be allowed as some of the deceased's properties would not be included in the succession proceedings.
26. I have considered the summons filed in the application herein and the replying affidavits filed in response to the said application dated 24th February, 2023 and I find that the sole issue for this court's determination is whether the mediation agreement endorsed by this court on 13th December, 2022 should be set aside and consequently a stay in issuance of a certificate of confirmed grant in relation to the estate of the deceased.
27. The applicant filed submissions and maintained that the mediation settlement agreement should be set aside as the objector/applicant herein as well as some of the beneficiaries never appended their signatures on the document as they were not in agreement with the outcome of the mediation process therefore rendering the mediation settlement invalid ab initio.
28. The applicant therefore urged the court to stay confirmation of grant for two main reasons; firstly, they were contesting the validity of the mediation settlement agreement and secondly, they had filed Kericho ELC Suit No. E003 of 2023 contesting exclusion of L.R. Kericho/Roret/42 as part of the estate of the deceased. The applicant therefore urged this court to stay confirmation of grant pending hearing and determination of the matter as it would have a huge implication on the estate of the deceased to be distributed to the beneficiaries and relied on the ruling.
29. I have considered the instant application and the averments in the replying affidavit, it is clear the main issue for this court's determination is whether or not this court should set aside the mediation agreement. I have keenly studied the mediation agreement the subject matter of this suit and it is clear that it was not signed by all the parties to mediation proceedings. The applicant states that the mediation agreement was entered into by some of the beneficiaries without disclosure of all the properties of the deceased hence the same is a misrepresentation which ought to be set aside. It is pointed out that there is a matter pending hearing and determination i.e. Kericho ELC Cause No. E003 of 2023. Furthermore, the applicant maintains that he and some of the other beneficiaries of the estate of the deceased herein never consented to the said mediation agreement as evidenced by the lack of signatures against their names hence it is in the interest of justice that the same be set aside since it does not reflect the wishes of all the beneficiaries of the estate of the deceased. In the case of *Amcon Builders Ltd v Vintage Investment Ltd & Another* [2018] eKLR the court had an occasion to interrogate the



question of whether there can be a settlement when the parties do not sign the Mediation Agreement and that at page 3 - 4 of the ruling the court stated as follows;- paragraph 18:

“... Did mediation end with an agreement?

Unlike arbitration or litigation, the mediation process ends with an agreement not an award. The success of a mediation process is that parties come up with their own resolutions. The part of the mediator is merely to guide the parties by setting an atmosphere of mutual, candid and honest discussions. He makes no own findings nor does he make any coercive determination at all. His is to listen and assist the parties settle. Once a settlement is reached, he must assist in drawing and crafting the agreement which is then owned by the parties by each appending his signature thereto. Even where the parties agree on the dispute but decline to sign the agreement, the mediator should report lack of agreement. Indeed, parties can reach a partial agreement which if signed is reported by the mediator as such. A mediator merely helps parties reach a mutually agreeable solution.”

30. In conclusion, I find that the document endorsed by this court on 13th December, 2022 did not amount to a mediation settlement agreement. The parties had not reached at a settlement and therefore some of the parties did not append their signatures to the purported settlement.
31. Accordingly, I find that the summons dated 24th February, 2023 is merited, I allow the same giving rise to issuance of the following Orders;
 - i. The mediation settlement agreement that was endorsed by this honourable court on 13th December, 2022 is set aside.
 - ii. There be an order for stay of the issuance of the certificate of confirmed grant in relation to the estate of the deceased pending the hearing and determination of Kericho ELC Cause No. E003 of 2023
 - (iii) Each party to bear its own costs

DATED, SIGNED AND DELIVERED AT VIRTUALLY THIS 20TH SEPTEMBER, 2023

J.K. SERGON

JUDGE

In the presence of:

Court Assistant - Rutoh

