



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Cherotich Ambani (Deceased) (Succession Cause
290 of 2012) [2024] KEHC 13616 (KLR) (6 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 13616 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
SUCCESSION CAUSE 290 OF 2012
JRA WANANDA, J
NOVEMBER 6, 2024**

IN THE MATTER OF THE ESTATE OF CHEROTICH AMBANI (DECEASED)

BETWEEN

EZEKIEL KIPLETING BITOK PETITIONER

AND

ANNE CHEMISEK BARNGETUNY 1ST OBJECTOR

ANTHONY KIPCHIRCHIR SIGILAI AMBANI 2ND OBJECTOR

STEPHEN TIPIT TALANGO 3RD OBJECTOR

AND

JOSHAT KIPCHIRCHIR CO- ADMINISTRATOR

RULING

1. The background of this matter is that the deceased, Cherotich Ambani, died intestate on 9/01/1994 at the age of 80 years. On 18/09/2012, the Petitioner, Ezekiel Kipleting Bitok, as a son of the deceased, Petitioned this Court for a Grant of Letters of Administration over the estate of the deceased. In the Petition, he stated that the estate had 8 beneficiaries (2 widows and 6 children). He also stated that the deceased left behind the parcel of land known as Plot No. 134 Tapsagoi Settlement Scheme measuring approximately 76 Hectares, later described as UG/TS/134/56 (hereinafter referred to as “the estate property”. The Grant was then issued to the Petitioner on 22/11/2012.
2. However, on 25/10/2013, the 1st and 2nd Objectors (claiming as grandson and daughter in law, respectively, of the deceased), through the firm of Messrs Songok & Co Advocates, filed Summons seeking Revocation and/or Annulment of the Grant, on the ground that they were not involved in the filing of the Petition. The firm of Nyachiro Nyagaka & Co. Advocates then came on record for the Petitioner. Fortunately, the parties entered into a consent which was filed in Court on dated 5/07/2018



- whereof the Summons for Revocation (Objection) was compromised in terms that the 2nd Objector, Anthony Kipchirchir Sigilai Ambani was appointed a co-Administrator, while the Petitioner, Ezekiel Kipleting Bitok, was replaced as Administrator, and substituted with one Josphat Kipchichir Tuwei as a co-Administrator, but whose connection to the family was however not disclosed.
3. The parties then agreed to discuss a settlement in respect to distribution of the estate. Consequently, the matter was referred to Court Annexed Mediation. After a series of false starts, including collapse of the Mediation at the first attempt, the parties subsequently returned to the Mediation for a second attempt, and eventually, the Settlement Agreement dated 15/06/2022 distributing the said estate property amongst the 8 beneficiaries aforesaid, and also a portion was allocated for what was described as “Water Catchment Area - family”, was agreed upon before the Mediator, Rebecca Cherotich Korir. The same was duly adopted as an order of the Court and a Certificate of Confirmation of Grant subsequently issued on the said basis on 13/04/2023.
 4. However, on 18/07/2022, the 3rd Objector, Stephen Tipit Lakengo, filed an Application seeking the setting aside of the Mediation Settlement Agreement on the ground that he was never involved in, and was not notified to participate in the Mediation. However, according to the 3rd Objector’s Advocates, they noted a blunder in the Application as the 3rd Objector filed it in person yet he had the Advocates on record, Messrs D.K. Korir & Associates Advocates representing him. They therefore withdrew and filed a fresh one on 6/04/2023.
 5. That fresh Application, which is the subject of this Ruling, seeks orders as follows:
 - i. [.....] spent
 - ii. [.....] spent
 - iii. The Grant of Letters of Administration issued to Ezekiel Kipleting Bitok on 22nd November 2012 be revoked or annulled.
 - iv. The adopted Mediation Settlement Agreement dated 15/06/2022 and decree issued on 30/06/2022 and all consequential orders be set aside.
 - v. This Honourable Court be pleased to order the Land Registrar, Uasin Gishu County to cancel any kind of registrations entered in respect of that parcel of land known as UG/Ts/S/134/134/56-76 HA.
 - vi. Costs of this application be provided for
 6. The Application is premised on the grounds appearing on the face thereof and is expressed to be brought under the provisions of Section 76 of the Law of Succession Act, Rule 44 and Paragraph 16 of the 5th Schedule of the Probate & Administration Rules. It is then supported by the Affidavit sworn by the 3rd Objector.
 7. The 3rd Objector deponed that though he is among the beneficiaries of the estate herein, he was never served with Summons or notice of Mediation or of any other processes relating to this Cause. He deponed that the deceased left behind 6 survivors, including the late Moses Sigilai Barngetuny, the 1st born. He then deponed that he is the 1st born son of the said Moses Sigilai Barngetuny, and therefore a grandson of the deceased. He deponed further that his father, the said Moses Sigilai Barngetuny, was polygamous and had 3 wives, that he was surprised to learn that Mediation proceedings had taken place and finalized, that as the 1st house, they were never informed of the 2nd Mediation and were only aware of the 1st Mediation attempt which collapsed, and that they are beneficiaries of the estate who rank in equality



8. He deponed further that that it is untrue that the 2nd Objector, Anthony Kipchirchir Sigilai Ambani (now a co-Administrator) is among the children of the deceased, that their prior engagement had settled on the 2nd Objector as the Administrator of the estate and himself, 3rd Objector (Stephen Tipit Talengo) as the chairperson of the family of the said the late Moses Sigilai Ambani. He reiterated that the family was never informed of the Mediation, and deponed that the 1st house which he comes from has been excluded in the distribution of the estate, that it is unfair and against the interest of justice that the 2nd house got double the share of the estate to the exclusion of the 1st house, and that the apportionment of the estate to only the 2nd and 3rd houses causes prejudice, irreparable loss and damage. According to him therefore, the entire process of obtaining the Grant amounts to an abuse of process of the Court.

Replying Affidavit

9. The Application was opposed by the 2nd Objector (co-Administrator) who responded vide the Replying Affidavit filed through Messrs Songok & Co Advocates on 19/04/2023. He deponed that the Succession Cause was filed way back in 2012 and that the 3rd Objector was aware of the Cause as confirmed by the documents that he (3rd Objector) has himself exhibited to his Affidavit, including minutes of family meetings, which indicate that the 2nd Objector was purportedly elected as the “Chairman” and that moneys were collected for the said purpose. He deponed further that the instant Application does not qualify as an Objection, that it is disguised as an appeal against the Mediation Settlement Agreement and seeks ambiguous orders of simply staying the Agreement, and that Court orders should not be issued in vain. He contended that the 3rd Objector is a busybody and a stranger in this Cause as he is not among the children of the deceased, that being a grandson of the deceased, he is a secondary dependent under the provisions of Section 29(b) of the [Law of Succession Act](#) but has failed to demonstrate that he was being maintained by the deceased.
10. He deponed further that the 3rd Objector has not proved that the dependants of his late father, Moses Sigilai have not been provided for and submitted that he is in fact one of the dependants of the same Moses Sigilai Barngetuny, that a Succession Cause over the estate of the late Moses Sigilai Barngetuny has been commenced and that they, the bona fide dependents have filed an Objection therein against the 3rd Objector as he is not a biological child of their father, Moses Sigilai Barngetuny nor is he a dependent, that the 3rd Objector’s mother, one Sophia Noonkoito Sikilai divorced their father before the 3rd Objector was born, by which time she had only 3 children, moved out of the matrimonial home and got married elsewhere in Kilgoris, that the 3rd Objector was born in Kilgoris where his mother got married to a Masai man and that this is why he bears a Masai name, Stephen Tipit Talango. He added that the 3rd Objector only came to the estate as an adult alongside his mother as a courtesy call once to visit their ailing father and for his burial, that despite the 3rd Objector not being a dependent of their grandfather, their father, the late Moses Sigilai Ambani, prior to his death, still gave the 3rd Objector ½ acre of land in Ndalat Farm where the 3rd Objector resides to date.
11. He deponed further that the at the time filing of this Succession Cause, they presented a letter from the Chief and in which the name of the 3rd Objector’s mother does not appear as a dependent, that it only included 2 wives/widows and that this is because the 3rd Objector’s mother had separated from their father and remarried. He also averred that the alleged minutes of a family meeting exhibited by the 3rd Objector is a forgery because one Anna Barngetuny, the 2nd widow of the deceased, listed therein as a signatory is illiterate and attests documents using thumb print, that he (2nd Objector) was also not present in that meeting and his purported signature thereon is also a forgery. He denied that the family has ever contributed any money for the Succession Cause as alleged in the said minutes, and



contended that it is him (2nd Objector) whom the family appointed as the Administrator in the meeting of 16/10/2020, and that this is the genuine meeting that gave rise to the filing of the Succession Cause.

12. He urged further that the 3rd Objector attended a family meeting of 6/03/2020 and signed the attendance sheet and in which meeting he is indicated to have stated that he was bitter about the rumours that he was not a son of the late Moses Sigilai, that as for the estate property, he will not interfere with the Succession proceedings and that he and his mother were contented with the land given to them by the late Moses Sigilai Barngetuny at Ndalat. He contended further that contrary to the 3rd Objector's lies that he was not involved or was not aware of the Succession proceedings, the 3rd Objector and his mother have been visiting the Petitioner's Advocates and in fact, his mother, the said Sophia Noonkoito Sikilai, swore an Affidavit in support of confirmation of the Grant and consented to the mode of distribution as agreed by the family. He pointed out that the version of the Chief's letter exhibited by the 3rd Objector which lists the 3rd Objector's mother as a "widow" contradicts the earlier letter relied on at the time of filing of the Petition and written by the same Chief. In conclusion, the 2nd Objector urged that the 3rd Objector and his mother should be presented for cross-examination.

Separate Affidavit filed in opposition to the Application

13. The above Replying Affidavit is supported by the 2nd Administrator, Josphat Kipchirchir, who swore his own separate Affidavit filed on the same 19/04/2023, also through Messrs Songok & Co Advocates.

Separate Affidavit filed in support of the Application

14. I also note that on 15/11/2023, 7 months after the 2nd Objector had filed the said Replying Affidavit, the firm of Messrs D.K. Korir & Co. filed another Affidavit in support of the Summons for Revocation and sworn by one Esinasi Talai Kiptarus. The Court record does not indicate that leave was sought from the Court and/or obtained to file this Affidavit. There is also no indication whether the same was even served on the other parties and if so, what their reaction was. In the circumstances, I decline to admit this belatedly filed Affidavit "sneaked" into the record without leave of the Court and I swiftly expunge it therefrom.

Hearing of the Application

15. The parties initially agreed to prosecute the Application by way of viva voce trial. The Court accepted the request and the matter came up for such viva voce hearing on several occasions but unfortunately it had to be adjourned for various reasons. For this reason, the parties then requested the Court to allow the matter to be canvassed by way of Written Submissions. Again, the Court accepted the request and pursuant thereto, the 3rd Objector-Applicant filed his Submissions on 12/04/2024 whereas the 1st & 2nd Objectors filed theirs on 15/03/2024.

3rd Objector's Submissions

16. Counsel for the 3rd Objector submitted that he has met the threshold for Revocation or annulment of grant. He cited Section 76 of the *Law of Succession Act* and the case of *In Re Estate of Prisca Ong'ayo Nande (Deceased)* 2020 eKLR and submitted that the proceedings to obtain the grant were defective in substance and were obtained by making of a false statement or concealment of material facts. He submitted that the legal requirements for grant of representation are set out in Section 51(2)(g) of the *Law of Succession Act* which requires the Petitioner to disclose all the surviving spouses and children of the deceased and any grandchild of the deceased whose own parent is dead and that the provision is couched in mandatory terms. He submitted further that the 3rd Objector is the grandson of the deceased by virtue of being the son of the 1st born son of the deceased, Moses Sigilai Barngetuny, who



was polygamous and had 3 wives as confirmed by the Chief's letter that he exhibited. He urged that the question as to whether he is a son of the said Moses Sigilai is fully answered by the averments made in the Affidavit of Esinasi Talai Kiptarus, a daughter of the deceased (As aforesaid, I have expunged the said Affidavit from the record).

17. He contended that, in fact, the 3rd Objector was involved in several family meetings concerning Succession proceedings for the estate and was even elected the Chairman of the Moses Sigilai family as evidenced by the exhibited minutes of the meetings and that this shows appreciation and acceptance by the entire family that indeed, he is a son to the late Moses Sigilai. He termed the claims that he is not a son of the late Moses Sigilai as untrue and misleading (Counsel then attempted to answer that allegation by submitting matters that are contained in the Affidavit that I have already expunged. Accordingly, I disregard the submissions).
18. Counsel submitted further that the Succession proceedings proceeded well until a time when the matter was referred to Mediation, that the 1st Mediation failed and it is from this point that the Petitioner excluded involvement of the 1st house that was represented by the 3rd Objector, proceeded to a 2nd Mediation and went ahead to sign a Mediation Settlement Agreement, all without involving the 1st house and that this amounts to making of a false statement. He submitted that in furtherance of this illegality, the Petitioner forged several documents, including the Affidavit in support of the confirmation of grant allegedly signed by the 3rd objectors' mother, that this Court should take cognisance of the fact that the alleged Affidavit is neither dated nor signed nor commissioned and is therefore null and void and that the forgery was reported to the police (Again, Counsel made submissions on this issue by what amounts to an attempt to introduce new evidence not contained in the Replying Affidavit and which I therefore disregard).
19. Regarding the allegations that the 3rd Objector and his mother were in attendance at the alleged family meeting of 6/03/2020 and even signed the minutes, Counsel denied the same and termed it as untrue and as an act of fraud intended to mislead this Court that the 3rd Objector was in agreement with the distribution adopted (Again, in his further submissions, Counsel attempted to introduce new evidence not contained in the Replying Affidavit and which I also disregard).
20. Counsel insisted that the 1st house was not involved in the 2nd Mediation meeting which led to the Settlement Agreement dated 15/06/2022. He reiterated the claim that the 2nd Objector, Anthony Kipchirchir is not one of the children of the deceased as captured in the Decree dated 30/06/2022 and that he was thus improperly allocated 2.8 acres of the estate property. He cited the case of *Estate of the late Epharus Nyambura Nduati (Deceased)* eKLR, Section 71(2) of the *Law of Succession Act* and Rule 40(4) of the *Probate and Administration Rules* and submitted that the Court is required to satisfy itself that the beneficiaries entitled to share in the estate have been properly ascertained, and that this is also in line with Rule 40(4) of the *Probate and Administration Rules*. He added that therefore, all the beneficiaries ought to have been involved in the Succession proceedings which did not end when the matter was referred to Mediation, whether or not they were to get a share of the estate or whether or not the share due to them had been distributed. He also cited the case of *Justus Thiora Kiungu & 4 Others v Joyce Nkatha Kiungu & Another* [2015] eKLR.

1st & 2nd Objectors' Submissions

21. On his part, Counsel for the 1st and 2nd Objectors submitted that the 3rd Objector, being a grandson of the deceased, and a son of the Moses Sigilai Barngetuny, who was duly considered in the distribution and in respect to whose estate Succession proceedings are ongoing, the 3rd Objector has no locus standi. He submitted that there exists a plethora of cases and a gargantuan body of authorities governing the



establishment or proving act(s) of fraud in succession matters and that, first, allegations of fraud must be strictly pleaded, secondly, the same must be strictly proved, thirdly, the standard of proof has to be higher than that of “a balance of probabilities” but not to the standard of criminal cases, and fourth, the burden of proof lies on the person alleging fraud. (He cited as much as about 12 cases. Due to this long list of cases, I will not expressly mention them).

22. Counsel urged that in applying the above principles to this case, the 3rd Objector has failed to establish fraud on the part of the Petitioners, that he did not specifically point out and/or particularize the instances of fraud, other than merely throwing assertions to that effect, that he never specifically proved the allegations but merely alleged the same, that he also merely alleges that statements of untrue allegations of fact were made, but given that the 3rd Objector’s own legitimacy or standing to commence the Succession proceedings against the parties herein is in doubt, given that he is not a son or a dependant of the said Moses Sigilai Barngetuny, then his allegations remain unsubstantiated.
23. He submitted that once a Succession Court has confirmed a Grant, it becomes functus officio and in that sense the prayers sought by the 3rd Objector are untenable and impractical in law. He cited the case of *In re Estate of the Late Kipngeny Arap Chepkwony (Deceased)* [2021] eKLR and also the case of *In re Estate of Juma Shitseswa Lunani (Deceased)* [2021] eKLR. According to Counsel, the correct procedure that ought to have been followed is that the 3rd Objector ought to have appealed the decision, or at the very least, sought Review thereof, rather than seeking Revocation of the Grant. Counsel submitted that this Succession Cause is very old, having been commenced in 2012, and the 3rd Objector was all along aware of its existence as he has shown vide the annexures to his Affidavit, that the said exhibits paint the picture that the 3rd Objector was aware of the proceedings all along, that the minutes of family meetings held on 16/10/2010 and 23/09/2011 show that he was appointed as the “chairperson” of matters concerning the estate of the late Moses Sigilai Barngetuny, that this fact alone is sufficient proof on a balance of probability that the 3rd Objector was aware of the Cause, and renders him untrustworthy and therefore unworthy of the prayers that he has sought. He submitted further that the sons of Moses Sigilai Barngetuny have been catered for, that it is trite law that “He who alleges must prove” and that the onus was on the 3rd Objector to substantiate his allegations, that from the 1st Objector’s Replying Affidavit, it is discernible that first, the interests of the dependants of the deceased have been taken care of; secondly, that there are serious doubts over legitimacy of the 3rd Objector’s credibility to institute the Summons for Revocation when even his own claim of dependency is questionable and thirdly, that despite these doubts over the 3rd Objector’s legitimacy, nevertheless he has been adequately provided for.
24. Counsel reiterated that the Replying Affidavit is categorical that there is already an ongoing Succession Cause in respect to the estate of the late Moses Sigilai Barngetuny, that the bona fide dependents have filed an Objection against the 3rd Objector on the ground that he is not a biological child of the late Moses Sigilai Barngetuny, that despite not being a dependent, nonetheless, he was given ½ acre of land in Ndalat Farm where he lives currently, that the 3rd Objector’s name was not included in the Chief’s letter relied on at the time of filing the Petition and that there is no proof that the 3rd Objector contributed any money for the Succession Cause. He urged that the evidence that emerges from the minutes of the meeting held on 6/3/2020 is that the 3rd Objector refused to participate in this Succession proceedings because he was bitter that there were rumours that he was not the son of the late Moses Sigilai, that he and his mother stated that they will not interfere with the Succession proceedings and that his mother stated that they were contented with the land given to them at Ndalat.

Determination

25. The broad issues that arise for determination in this matter are evidently the following:



- i. Whether the Grant of Letters of Administration issued herein should be revoked.
- ii. Whether the Mediation Settlement Agreement adopted herein should be set aside.
- iii. Whether the confirmed Grant issued herein should be Revoked

26. I now proceed to analyze and determine the said issues

i. Whether the Grant of Letters of administration should be revoked

27. Regarding Revocation of a Grant, Section 76 of the *Law of Succession Act* provides as follows:

“76. Revocation or annulment of grant

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—

- (a) that the proceedings to obtain the grant were defective in substance;
- (b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;
- (c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;
- (d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—
 - (i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or
 - (ii) to proceed diligently with the administration of the estate; or
 - (iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or
- e) that the grant has become useless and inoperative through subsequent circumstances.”

28. Evidently, the grounds relied upon by the Applicant are those falling within sub-Sections (a), (b) and (c) above.



29. Section 76 was expounded upon by Hon. Justice W. Musyoka in the case of *Re Estate of Prisca Ong'ayo Nande (Deceased)* [2020] eKLR in which he stated as follows:

“Under section 76, a court may revoke a grant so long as the grounds listed above are disclosed, either on its own motion or on the application of a party. A grant of letters of administration may be revoked on three general grounds. The first is where the process of obtaining the grant was attended by problems. The first would be where the process was defective, either because some mandatory procedural step was omitted, or the persons applying for representation was not competent or suitable for appointment, or the deceased died testate having made a valid will and then a grant or letters of administration intestate was made instead of a grant of probate, or vice versa. It could also be that the process was marred by fraud and misrepresentation or concealment of matter, such as where some survivors are not disclosed or the Applicant lies that he is a survivor when he is not, among other reasons. The second general ground is where the grant was obtained procedurally, but the administrator, thereafter, got into problems with the exercise of administration, such as where he fails to apply for confirmation of grant within the time allowed, or he fails to proceed diligently with administration, or fails to render accounts as and when required. The third general ground is where the grant has become useless and inoperative following subsequent circumstances, such as where a sole administrator dies leaving behind no administrator to carry on the exercise, or where the sole administrator loses the soundness of his mind for whatever reason or even becomes physically infirm to an extent of being unable to carry out his duties as administrator, or the sole administrator is adjudged bankrupt and, therefore, becomes unqualified to hold any office of trust.”

30. This first issue is an easy one to determine. I say so because it is evident that the 3rd Objector was always aware of the filing of the Succession Cause in the year 2012. He has confirmed that he was aware of the same up to the stage of the 1st Mediation. The following is what he stated in his Supporting Affidavit:

“9. That as the 1st house, we were neither informed of the 2nd mediation proceeding nor consent sought from us after lapse of the 1st mediation that failed to reach a conclusive agreement

.....

12. That the 1st house has neither been involved nor informed of the 2nd mediation

31. Similarly, the 3rd Objector’s Counsel, in his Submissions stated as follows:

“The succession proceedings in the cause proceeded well until a time when the matter was referred to mediation. The first mediation failed as parties could not agree on the distribution of the property of the deceased. It is from this point that the petitioner excluded involvement of the first house having been represented by the 3rd objector in the court proceedings and proceeded to the 2nd mediation without involving the 1st house of Moses Sigilai

32. From the above quotes, it is clear that even if the 3rd Objector and/or the 1st house to which he belongs were not involved in the filing of the Succession Cause, they definitely immediately thereafter became aware of the same but had no problem with it proceeding as it was, including the issuance of the Grant of Letters of Administration to the initial Petitioner. This explains why they never challenged the Cause earlier. From the above quotes, it is clear that they were in support of the 1st Mediation that however failed. The 3rd Objector’s prayer for Revocation of the Grant of Letters of Administration is



therefore evidently mischievous and dishonest, particularly, coming 10 years after the Grant was issued. Accordingly, I reject this prayer.

ii. Whether the Mediation Settlement Agreement adopted herein should be set aside

33. The process of Court Annexed Mediation 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](#). Paragraph 12 of said Directions (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.”

34. The 3rd Objector’s claim herein is on the basis that he as a grandson of the deceased, claiming the share of his now late father, Moses Sigilai, the 1st born son of the deceased. Although his paternity and “dependency” have been challenged, it is not disputed that his mother, Sophia Noonkoito Sikilai, either is or was the deceased’s 1st wife. Should the 3rd Objector surmount this paternity or “dependency” hurdle, then the law would indeed allow him to claim his father’s share. Regarding claims of this nature by grandsons, the first port of call is Section 41 of the [Law of Succession Act](#), which provides as follows:

“41. Property devolving upon child to be held in trust

Where reference is made in this Act to the “net intestate estate”, or the residue thereof, devolving upon a child or children, the property comprised therein shall be held in trust, in equal shares in the case of more than one child, for all or any of the children of the intestate who attain the age of eighteen years or who, being female, marry under that age, and for all or any of the issue of any child of the intestate who predecease him and who attain that age or so marry, in which case the issue shall take through degrees, in equal shares, the share which their parent would have taken had he not predeceased the intestate.” (emphasis added)

35. Section 41 therefore provides that where one of the children of the deceased is himself/herself deceased, and such deceased child is survived by a child or children of his/her own, then the share due to him/her ought to devolve upon his/her said child, and where more than one, the children would take equally. This question was addressed in the case of [Re Estate of Wahome Njoki Wakagoto](#) (2013) eKLR where W. Musyoka J held as follows:

“Under Part V, grandchildren have no right to inherit their grandparents who die intestate after 1st July 1981. The argument is that such grandchildren should inherit from their own parents. This means that the grandchildren can only inherit their grandparents’ indirectly through their own parents, the children of the deceased. The children inherit first and thereafter grandchildren inherit from the children. The only time grandchildren inherit directly from their grandparents is when the grandchildren’s own parents are dead. The grandchildren step into the shoes of their parents and take directly the share that ought to have gone to the said parents.”



36. Further, the Court of Appeal in the case of *Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 Others* [2014] eKLR also held as follows:

“Although Section 35 and 38 of the *Law of Succession Act* is silent on the fate of surviving grand children whose parents predeceased the deceased, the rate of substitution of a grandchild for his/her parent in all cases of intestate known as the principle of representation is applicable. The Law is section 41. If a child of the intestate has pre-deceased, the intestate then that child’s issue alive or in centre as mere on that date of the intestate’s death will take in equal shares per stirpes contingent on attaining the age of majority. Per stirpes means that the issue of a deceased child of the intestate take between them the share their parents would have taken had the parent been alive at the intestate’s death”.

37. As already stated, it is clear that the 3rd Objector’s problem is only with the 2nd Mediation which gave rise to the Settlement Agreement adopted herein and which the 3rd Objector faults for excluding him and/or the 1st house. According to the Objector, while they were involved in the 1st Mediation, they were inexplicably excluded from the 2nd. The 2nd Objector and his Counsel did not however sufficiently respond to or address this allegation by the 3rd Objector and dwelt majorly on the prayer for Revocation of Grant. My perusal of the Mediation Settlement Agreement indeed confirms that no one from the 1st house, including the 3rd Objector, participated in the 2nd Mediation. No evidence has also been produced to demonstrate that they were even notified to participate therein. The 2nd Objector having avoided to respond to these allegations, I am persuaded that there was no valid reason why the 1st house in which the 3rd Objector belongs was excluded from the 2nd Mediation.
38. Although the 2nd Objector does not expressly say so, from his Replying Affidavit, it is apparent that he justifies the exclusion of the 3rd Objector from the 2nd Mediation because according to him, the 3rd Objector is not the biological child of the deceased, that the 3rd Objector’s mother separated from the deceased before the 3rd Objector was born, and that the 3rd Objector’s mother remarried elsewhere where the 3rd Objector was later born. He also alleges that although not a dependent or a son of the deceased, their father still nevertheless, allocated the 3rd Objector land at Ndalat.
39. The 2nd Objector also has not denied or controverted the 3rd Objector’s claim that the 1st house, through the 3rd Objector, participated in the pre-litigation family meetings and also in the 1st Mediation which however, as aforesaid, collapsed. I therefore take that claim as being correct. In the circumstances, the fact that the family allowed the 3rd Objector to participate in the meetings and the fact that the deceased allocated land to the 3rd Objector gives a strong indication that the family indeed “acknowledged” the 3rd Objector as being one of their own. Although the 2nd Objector has also claimed that the 3rd Objector’s mother swore an Affidavit confirming her consent to the mode of distribution presented, that Affidavit has been disowned and termed a forgery by the 3rd Objector. The authenticity of that Affidavit being therefore in contention, I cannot conclusively rely on it. It has also not been alleged that the deceased, during his lifetime, at any time denied that the 3rd Objector was his son. These are all facts that are yet to be determined but the scenario portrayed above convinces me that the 3rd Objector ought to have been included in the 2nd Mediation, particularly since the 2nd Objector does not deny that indeed, the 3rd Objector participated in the 1st Mediation. Until and unless the 3rd Objector’s locus is determined by the Court, his interest in the estate cannot be summarily disregarded.



40. In the case of *In re Estate of BM (Deceased)* [2019] eKLR, Muchelule J (as he then was) pronounced as follows:

“ ...
13. The Family Division and the Judiciary as a whole have embraced mediation in the resolution of civil disputes filed by the parties. Mediation is an informal and no-adversarial process where an impartial mediator encourages and facilitates resolution of a dispute between two or more parties. Like was stated by Judge P.J.O. Otieno in *Amcon Builders Ltd –v- Vintage Investments Ltd & Another* [2018] eKLR, the mediator merely guides the parties by setting an atmosphere for mutual, candid and honest discussions. He makes no determination. Where the parties have agreed on all, or some of, the issues in dispute he helps in the drafting of the agreement which is then owned by the parties by them appending their signatures. The agreement, known as the mediation settlement agreement, is then filed into court which adopts the same as the order or judgment of the court. The agreement becomes enforceable if the mediation collapses, or no agreement is reached, the matter returns to court to be heard in the normal manner. The parties may ask the judge to refer their matter to mediation, or the judge may on his/her motion refer the matter to mediation. Parties are under obligation, when referred to mediation, to attend the mediation sessions, and to act in good faith during the process.”

15. Court Annexed Mediation enhances access to justice, reduces backlog and, most importantly, allows parties an opportunity to generate home-grown solutions to their disputes. Solutions that they can live with and which can bolster their long-term relations. This is why, ordinarily, such a solution is not appealable. It is a contract mutually arrived at, and which would not, ordinarily, be the subject of review.”

41. It is therefore the case 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 challenging it proves that there are justifiable grounds that warrant its setting aside. Such vitiating factors are similar to those applied to all other contracts or consent orders, namely, fraud, misrepresentation, coercion and undue influence.

42. In respect to the setting aside of Mediation Settlement Agreements orders, Achode J (as she then was), in the case of *NKM v SMM & Anor* [2019] eKLR, put it as follows:

“27. The purpose 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. See Justice Harris, J, (as he then was) in *Kenya Commercial Bank Ltd V Specialized Engineering Co. Ltd (Supra)*”



43. There is also the case of *Flora N. Wasike v Destimo Wamboko* [1988] eKLR where Hancox, JA (as he then was), observed as follows:

“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”

44. Further, in *Kenya Commercial Bank Ltd v Specialized Engineering Co. Ltd* [1982] KLR 485, Justice Harris, pronounced himself as follows:

“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.”

45. Having laid out the law as above, in this case, the 3rd Objector and/or the 1st house never participated in the 2nd Mediation at all. Due to the principle of privity of contract, it cannot be said that they are bound by the Settlement Agreement that came out of the process. As I have already stated, the 3rd Objector and/or the 1st house, until and unless the Court determines their fate, were for all intent and purposes parties having an interest in the 2nd Mediation. Their exclusion was therefore wrong.

46. I now need to determine whether I should set aside the Mediation Settlement Agreement. Since the basis of the confirmed Grant was the same Mediation Settlement Agreement, I will consider these twin issues together.

47. The suit property is approximately 74-76 hectares. In the Mediation Settlement Agreement, which was then adopted in the confirmed Grant, as aforesaid, 2.83 hectares was reserved for the item described as “Water Catchment Area - family”. The rest was then shared out amongst the 6 children of the deceased and/or their households.

48. In respect to the 3rd Objector’s father, Moses Sigilai, who had during his lifetime married 3 wives, his share was distributed between 2 of those wives, Ann Chemisik Barngetuny (2nd wife) and Viola Jepkosgei (3rd wife), with each getting 4.05 hectares and one son, Anthony Kipchirchir Ambani Sigilai (2nd Objector-1st Administrator), son to the said Ann Chemisik Barngetuny (2nd wife) getting 2.83 hectares. The 3rd Objector’s mother was excluded (possibly on the alleged basis that she had separated from the deceased and re-married). The aggregate acreage distributed from the 3rd Objector’s father’s share was therefore approximately 10.93 hectares, as illustrated hereinbelow.

Distribution of parcel of land, UG/TS/S/134/56 within the household of Moses Sigilai Barngetuny

1. Sophia Noonkoito Sigilai (1st wife / “former wife)) Nil
 2. Ann Chemisik Barngetuny (2nd wife) (3rd Objector’s mother) 4.05 Ha
 3. Viola Jepkosgei (3rd wife) 4.05 Ha
 4. Anthony Kipchirchir Sigilai Ambani (2nd Objector-1st Administrator) 2.83 Ha
- Total 10.93 Ha



49. It is therefore also clear from the above that out of the 10.93 hectares allocated to the 3rd Objector's father's (among the 3 households comprising the 3rd Objector's father's family), while the 3rd Objector's house (1st wife) was completely excluded, cumulatively, the 2nd house got 6.8 hectares (4.05 + 2.83) while the 3rd house got 4.05 hectares. The 3rd Objector therefore has a valid claim when he cries foul and feels that the 1st house was discriminated upon.
50. It is however clear that the dispute or contention herein is only within the household of the late Moses Sigilai and does not affect the rest of the beneficiaries. No allegation or challenge having been raised against the shares distributed amongst the rest of the beneficiaries, there is no ground or reason to interfere with that other portion of the Mediation Settlement and the Certificate of Confirmation of Grant. I will therefore leave the rest intact but will set aside the distribution made as within the 3 houses comprising the household of the late Moses Sigilai and re-open the same for review. Even within that household however, only 3 people having been made beneficiaries in the Agreement and only the 3rd Objector amongst all the other members of that household not included as beneficiaries, having come out to challenge the distribution, I will limit the re-distribution strictly among those 3 and the 3rd Objector.
51. I will however first give the 4 affected parties an opportunity to return to the Mediation and attempt a fresh negotiated settlement limited to only the 10.93 hectares in dispute within the 1st house. Should they however fail to reach such mutual agreement, then, since the parties agree that a Succession Cause has already been commenced over the estate of the late Moses Sigilai Barngetuny, that is where I will remit the dispute for determination and proceed to close this file since, in my view, its intent and purpose has now been concluded.

Final Orders

52. In the end, the Summons dated 6/04/2023 only partially succeeds and only to the extent that only a portion of the Mediation Settlement Agreement dated 15/06/2022 is hereby set aside. Consequently, I order as follows;
- i. Only the portion of the Mediation Settlement Agreement relating to the share of the parcel of land, UG/TS/S/134/56 allocated to the family of the late Moses Sigilai Barngetuny is hereby set aside and whose mode of distribution will need to be reviewed and/or re-distributed within that family of the late Moses Sigilai Barngetuny.
 - ii. For avoidance of doubt therefore, only the following allocation made to the family of the late Moses Sigilai Barngetuny out of the parcel of land, UG/TS/S/134/56 in the Mediation Settlement of Agreement dated 15/06/2022 and reflected in the Certificate of Confirmation of Grant dated 14/04/2023 is set aside:



Distribution of 10.93 hectare share within the household of Moses Sigilai Barngetuny		
1.	Ann Chemisik Barngetuny (2 nd wife) (3 rd Objector's mother)	4.05 Ha
2.	Viola Jepkosgei (3 rd wife)	4.05 Ha
3.	Anthony Kipchirchir Sigilai Ambani (2 nd Objector-1 st Administrator)	2.83 Ha
Total		10.93 Ha

- iii. The rest of the contents of the Mediation Settlement Agreement dated 15/06/2022, reflected in the Certificate of Confirmation of Grant and pertaining to allocation of shares to the rest of the children of the deceased, other than the late Moses Sigilai Barngetuny, therefore remain intact, unaffected, undisturbed and binding.
- iv. With the above declarations now made, I give the four (4) members of the house of the late Moses Sigilai Barngetuny who are parties or beneficiaries in this matter, namely, Stephen Tipit Talengo (3rd Objector), Anne Chemusik Barngetuny (1st Objector), Viola Jepkosgei and Anthony Kipchirchir Sigilai Ambani (2nd Objector/Administrator), a period of sixty (60) days to return to the Court Annexed Mediation and attempt to discuss and reach a settlement amongst themselves on the manner in which they wish to redistribute the 10.93 hectares of the parcel of land, UG/TS/S/134/56 allocated to the family of the late Moses Sigilai Barngetuny.
- v. If within the said period of sixty (60) days, the parties would have not reached a settlement, and unless the time is extended by this Court, then the following shall automatically ensue and/or or take effect:
 - a. The issue of the mode of distribution of the 10.93 hectares of the parcel of land UG/TS/S/134/56 allocated to the family of the late Moses Sigilai Barngetuny to be shared amongst the four (4) members of the house of the late Moses Sigilai Barngetuny who are parties or beneficiaries in this matter, namely, Stephen Tipit Talengo (3rd Objector), Anne Chemusik Barngetuny (1st Objector), Viola Jepkosgei and Anthony Kipchirchir Sigilai Ambani (2nd Objector/Administrator), shall be remitted for hearing and determination in the Succession Cause in respect to the estate of the late Moses Sigilai Barngetuny whose details the parties have not disclosed but have indicated that it has already been commenced and is ongoing.
 - b. Among the issues that may need be determined in the said Succession Cause stated to have been commenced over the estate of the late Moses Sigilai Barngetuny, shall be whether the said Stephen Tipit Talengo (3rd Objector) is entitled or eligible to inherit in, or to a share from, the estate of the late Moses Sigilai Barngetuny.
 - c. Another issue that may need to be determined in the said Succession Cause stated to have been commenced over the estate of the late Moses Sigilai Barngetuny shall be whether a portion of land in what has been described as Ndalat Farm was already



allocated to the said Stephen Tipit Talengo (3rd Objector) or his mother's household and therefore, whether the same would have any bearing or effect on his claim for inheritance or a share in the parcel of land, UG/TS/S/134/56.

- d. If, and should the default clause herein take effect in the event of a failure to reach an settlement within the prescribed timelines, then the Certificate of Confirmation of Grant shall be rectified in respect to the shares in the parcel of land, UG/TS/S/134/56 that currently appears in the name of Ann Chemisik Barngetuny, Viola Jepkosgei and Anthony Kipchirchir Sigilai Ambani aggregating to a total acreage of 10.93 hectares, to reflect that the same is cumulatively allocated to and to be held in the name of the "Estate of the late Moses Sigilai Barngetuny" awaiting distribution in the Succession Cause stated to have been commenced and ongoing in respect to the "Estate of the late Moses Sigilai Barngetuny" awaiting.
- vi. In the interim, the *status quo* prevailing over the parcel of land UG/TS/S/134/56 shall be maintained by all parties and also the Lands Registry and there shall be no sale, sub-division, transfer or charging of the property or any portions created from sub-division thereof, if any, by any person, in any manner, pending further directions of the Court.
- vii. Each party shall bear his/her own costs of the Application.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 6TH DAY OF NOVEMBER 2024

WANANDA J. R. ANURO

JUDGE

Delivered in the presence of:

All parties absent

Court Assistant: Brian Kimathi

