



REPUBLIC OF KENYA

IN THE HIGH COURT

AT ELDORET

SUCCESSION CAUSE NO. 303 OF 2007

IN THE MATTER OF THE ESTATE OF THE LATE DAUDI KIPSOI CHEBOI ...DECEASED

HELLEN JEBOTIP TOYOI

JABEZ KIPKOECH CHEBOI

ALFAYO CHEPTUM

KIPKOSGEI BUIGUT.....PETITIONERS/RESPONDENTS

VS

MONICA CHEBOI.....OBJECTOR/APPLICANT

RULING

By Notice of Motion dated 23rd October, 2020 the Objector/Applicant seeks orders that;

1. That the Honourable Court be pleased to set aside the mediation settlement agreement dated 24th April, 2019.
2. That the Honourable Court be pleased to set aside the court orders and the proceedings of 25th April, 2019 and all other consequential orders.
3. That the Honourable Court be pleased to reopen the mediation sessions and parties be heard afresh.
4. That the Honourable Court be pleased to appoint a different mediator from the previous one.
5. That the costs of this application be in the cause.

The application is supported by the affidavit of Monica Cheboi, sworn on 23rd September, 2020 and is premised on the following grounds;

- a) That the matter was referred for mediation by Honourable court.
- b) That during mediation parties only agreed on some issues but did not agree on all the issues.
- c) That the mediator never gave the parties a chance to agree on the commercial plot at Kabiyeet market which belongs to the estate of Daudi Kipsoi Cheboi and the same is not mentioned in the mediation settlement agreement.
- d) That it is only fair that the Objector gets an equal share from the share of Joseph Kiplagat Cheboi who is the Objector's late husband.
- e) That the Objector did not agree to the 7 acres set aside as costs of the land surveyor and subdivision and transmission because the said costs is way too high as the value of the said acreage is approximately Ksh. 7,000,000/= (seven million shillings).
- f) That it is in the best interest of justice that this application is allowed.

g) That the Petitioners will suffer no prejudice if this application is allowed.

The application is opposed by the Petitioners/Respondents who rely on a replying affidavit sworn on 5th March, 2021 by Alfayo Cheptum and Kipkosgei Buguit. They averred that the application is not only devoid of merit but also an abuse of due process of the court, backed with malice and intends to waste judicial time. Further, they averred that when this matter was referred for mediation, on 24th April, 2019 all parties attended the session and also signed the mediation settlement agreement that was later adopted as an order of this court on 25th April, 2019. It is their contention that the mediation settlement agreement was not partial as alleged and that it was worth noting that this matter has been in court close to 14 years. Further, the Petitioners averred that they had agreed in total about parcel of land known as Nandi/Kabiyet/Nduele/387 measuring 58 Acres and that there is nothing left for discussion in that part. The Petitioners also acknowledged that the commercial plot at Kabiyet market had been omitted in the mediation settlement agreement and the subsequent court orders. They contended that they had agreed entirely on the distribution of the deceased estate and could still agree on the distribution of the commercial plot in issue that was erroneously left out. They also averred that they were aware that the family of the deceased herein had settled and agreed that the said commercial plot be given to Jasime Tum and further on 24th March, 2012 parties agreed that the said land be given to Grace Tum who is the widow of Jasime Tum the widow of the deceased herein. It was their contention that the distribution of land parcel known as Nandi/Kabiyet/Nduele/387, was not undecided and or unagreed as alleged by the Objector herein.

The Objector also filed a further affidavit on 3rd May, 2021 in which she reiterated that all parties attended the mediation sessions, but the agreement that they signed is not consistent with the issues that parties agreed upon.

The parties argued the application orally in Court and reiterated the contents of their affidavit evidence.

ANALYSIS AND DETERMINATION

Having carefully considered the pleadings and the submissions of the parties in this matter, I do find that the mediation settlement agreement of 24th April, 2019 upon adoption by this court on 25th April, 2019 became a consent order. A consent order would only be set aside on grounds which would justify the setting aside of a contract.

From the record, it is clear that all parties to this dispute attended the mediation session held on 24th April, 2019. Further, parties admit that they signed the mediation settlement agreement arrived at on the said date. The applicant herein however, alleges that the agreement they signed is not consistent with the issues that the parties agreed upon. She also contends that the mediator instructed her to sign the said agreement without allowing her to read and understand the terms of the said agreement. However, no evidence whatsoever has been tendered by the Applicant to support these assertions.

The Applicant has also submitted that the parties herein did not agree on the issue of the 7 acres set aside as costs for the land surveyor. She contends that setting aside the 7 acres for costs is way too high as the value of the said acreage is approximately Kshs. 7,000,000.00.

A perusal of the mediation settlement agreement indicates that parties agreed that 7 acres of LR. No. Nandi/Kabiyet/Nduele/387 be set aside to cater for costs of land survey and sub-division and the same should be valued to determine its cost. It is my finding that the allegation by the Applicant that parties did not agree on the issue of the 7 acres is therefore not true. Further, the Applicant has alleged that the 7 acres of land is valued at approximately

Kshs. 7,000,000.00. She however, has not availed a Valuation report in support of the said assertion. It is trite law that “**he who alleges must prove**”.

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”

Similarly, in *Board of Trustees National Social Security Fund v Micheal Mwalo [2015] eKLR*, the Court of Appeal stated as follows:

“A Court of law will not interfere with a consent judgment except in circumstances such as would provide a good ground for varying or rescinding a contract between parties. To impeach a consent order or a consent judgment, it must be shown that it was obtained by fraud, or collusion or by an agreement contrary to the policy of Court.”

A consent order entered into by the parties has a contractual effect, 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 misapprehension or ignorance of such facts in general or for reason which would enable the court to set aside an agreement. In this case, the applicant did not place before the court any evidence to demonstrate that the consent entered into between the parties on 24th April, 2017 which was adopted as an order of the court on 25th April, 2019, was obtained illegally or through fraud.

However, evidence before this court shows that a commercial plot located at Kabiyet market belonging to the deceased was not considered in the mediation settlement agreement of 24th April, 2019. It is clear that the omission by the mediator of the said asset is something material to this case. That said, the mediation settlement agreement of 24th April, 2019 by the parties herein cannot be invalidated due to the said one omission. It is worth noting that parties herein had agreed on the distribution of the rest of the deceased’s estate save for the said asset.

Accordingly, I direct that the issue of the commercial plot at Kabiyet market be referred to further mediation with a view of determining how the same should be distributed. The Mediation Deputy Registrar is to effect the said process.

No order is made as to costs.

S.M GITHINJI

JUDGE

DATED, SIGNED AND DELIVERED AT ELDORET THIS 19TH DAY OF JULY, 2021.

In the presence of:-

Mr. Kiboi for the respondent/Petitioner

Miss Cherono for the applicant (absent)

Ms Gladys – Court assistant