REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

SUCCESSION CAUSE NO. 129 OF 2019

IN THE MATTER OF THE ESTATE OF THE LATE ADAM CHEBELIENY KIBOSIA (DECEASED)

MARGARET JEMUTAI KIBOSIA.....1ST PETITIONER/ADMINISTRATOR

MILKA JEBET CHEBELIENY.....2ND PETITIONER/ADMINISTRATOR

AND

DR. JOHN KIBOSIA.....1ST OBJECTOR/APPLICANT

BENJAMIN KIBOSIA .....2ND OBJECTOR/APPLICANT

PHILIP KIPKEMBOI KIBOSIA .....3RD OBJECTOR/APPLICANT

KIPRONO CHEBOI KIBOSIA.....4TH OBJECTOR/APPLICANT

RULING

Before me are two applications brought by way of Summons dated 3rd March, 2020 and 12th January, 2021. The former seeks to set aside the mediation settlement agreement of 19th December, 2019 that was endorsed on 3rd February, 2020 by this Honourable Court. On the other hand, the application dated 12th January, 2021 seeks orders to have the Estate of Adam Chebelieny

Kibosia (deceased) distributed as per the mediation settlement agreement of 19th December, 2019.

On 18th November, 2019, this Honourable Court referred this matter for court annexed mediation. I will therefore first address the first application.

In the first application Dr. John Kibosia, the 1st Objector/Applicant seek for orders that;

> **1.** This application be certified urgent and service thereof in the first instance be dispensed with.
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> **2.** Pending the hearing and determination of this Application, there be stay of execution/enforcing the mediation settlement agreement that was endorsed by this Honourable Court on 3rd February, 2020.
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> **3.** Pending the hearing and determination of this Application, the status quo in respect of the deceased estate as at the time of the demise of the deceased herein, the late ADAM CHEBELIENY KIBOSIA- DECEASED, be maintained.
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> **4.** The Honourable Court be pleased to set aside the mediation settlement agreement that was endorsed by the Honourable Court on 3rd February, 2020 and consequently direct that this matter proceeds for full hearing to its logical conclusion.

The said application is supported by an affidavit sworn by Dr. John Kibosia, on 3rd March, 2020 the 1st objector herein. According to him on 18th November, 2019 this Honourable Court referred this matter to mediation. It is his contention that the mediator in question conducted the matter unfairly and rushed through the process without allowing all the beneficiaries to participate. He avers that only one mediation session was conducted on 19th December, 2020.

He further avers that he was not in attendance on that given day and sought to have the matter adjourned to a later date but his requested was not granted. He also contends that the mediator in question was supposed to prepare a mediation report for further deliberations by the parties but he did not.

According to him the mediator was biased and turned out be an adjudicator as opposed to a mediator. Further, he averred that most of the beneficiaries including himself did not participate in the said mediation proceedings as they were only contacted once. Additionally, he alleges that some of the beneficiaries that attended the said mediation session were duped to sign an attendance list which later turned out to be the mediation settlement agreement.

He also avers that the impugned mediation settlement agreement violates rules 11 and 12 of the Judiciary of Kenya Practice Directions and Court Annexed Mediation (Amendment) Rules 2018, and further does not conform with Form No. 7 and Form No. 8 of the said rules.

Lastly, it was his contention that in the impugned mediation settlement, the mediator ended up distributing properties that do not form part of the deceased's estate for instance he contends that land parcel **MOIBEN LR 3208** measuring approximately 511 acres had been distributed by the deceased prior to his death.

In opposition to the said application, Margaret Jemutai Kibosia, the 1st Petitioner herein filed a replying affidavit on 28th May, 2020. According to her, the objectors' application is driven by ill motive with the aim of wasting judicial time since it was the objectors that requested that the matter be referred to mediation. It is her contention that on 3rd February, 2020 all the petitioners together with the objectors herein appeared in court and that no objection pertaining to the mediation settlement agreement reached on 19th December, 2019 was ever raised by the objectors present.

She also avers that no law precludes any party from engaging in only one mediation session and reaching an agreement to that effect. It is her case that all parties were accorded equal opportunity to be heard during the said mediation proceedings. It is further her contention that no affidavit has been sworn by either of the objectors present in court on 19th December, 2019 challenging the mediation proceedings as was conducted. Dr. John Kibosia was not present and his averments should be highly disregarded as they amount to hearsay evidence of which evidence is not admissible in law. Further, she contends that although Dr. John Kibosia was not present on the said date, he had in fact issued express authority to one of their brothers, one Mr. Benjamin Kibosia, to proceed and deliberate on all issues in controversy and agree on the same. It is her case that all the children of the deceased including the objectors herein agreed on an equal distribution of the deceased's estate amongst all his children.

She further contended that a party duly notified by the mediator cannot hold others at ransom by failing to attend a mediation session for no valid reason. It was further her contention that the deceased died intestate, therefore the purported distribution and or allocation of land parcel No. **MOIBEN L.R 3208** measuring 511 acres is only aimed at self-enriching by the objectors herein. She also averred that *Article 27* of the *Constitution of Kenya, 2010* guarantees every one the right to equality and freedom from discrimination. According to her the objectors herein have blatantly disregarded the said provision of the constitution by trying to disinherit the petitioners on the basis of their sex and marital status. Further, she contended that the mere fact that the objectors have been intermeddling with the deceased's estate does not make them the only ones legally entitled to the deceased's property. It was also her case that if indeed the deceased had any intentions of effecting transfer of any of the properties to the objectors, there is no valid reason and or explanation as to why the same could not have been effected before the deceased demise in 2009.

I have considered the foregoing averments as well as the submissions filed by both parties and I find the only issue for determination in this application as whether there exists enough grounds to set aside the mediation settlement agreement of 19th December, 2019 and adopted as a court's judgement on 3rd February, 2020.

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"***

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."***

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.**

*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."**

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.

In ***Kenya Commercial Bank Ltd Versus Specialized Engineering Co. Ltd [1982] KlR 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."***

The consent herein was entered into on 3rd February, 2020 when the court adopted the mediation settlement agreement dated 19th December, 2019 on the mode of distribution of the deceased's estate. The mediation settlement agreement was arrived at after the main suit was referred to mediation.

The 1st Objector/Applicant herein has alleged that the mediator Mr. Bungei Jonathan Kipkorir conducted the mediation process in an irregular manner and has further accused him of being biased in undertaking his duty as a mediator. No evidence whatsoever has been tendered before this court to substantiate such allegations. Further, he has stated that some of the beneficiaries were tricked into signing the mediation settlement agreement in the guise of signing an attendance list. From the record, no evidence has been adduced by the Applicant to prove the existence of any deception, or trickery by the said mediator in dispensing his duties during the mediation session. One would then wonder how the 1st Objector can alleged use of trickery by the mediator while in fact he was absent 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."**

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."***

The 1st Objector has also contended that parcel of land **MOIBEN LR 3208** was included as part of the estate to be shared amongst the beneficiaries of the deceased in the mediation settlement agreement of 19th December, 2019. According to him, this property does not form part of the deceased's estate. In support of this contention, the Objectors have exhibited a copy of letter dated 20th August, 1983 in which the deceased had allegedly written to the Chairman Land Board, Eldoret seeking to have the said parcel registered in the names of the Objectors herein. I however note that from the year 1983 to the year 2009 when the deceased died, no evidence whatsoever have been presented to this court by the objectors showing that land parcel **MOIBEN LR 3208** was in fact transferred to them and subsequently registered in their names.

Further, the 1st Objector has also stated that the reason why the deceased distributed land parcel **LR MOIBEN 3208** amongst his sons is because they contributed towards the repayment of the loan that had been secured by the deceased at the time when he acquired the said parcel. There is totally no evidence that has been tabled before this court in support that the Objectors herein contributed towards the repayment of the alleged loan.

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. LR MOIBEN 3208 is therefore part of the deceased's Estate.

The 1st Objector has also stated that the mediator did not file a mediation report as per form No. 7 of the Court Annexed Mediation Amendment Rules 2018. I have perused the mediation file and have confirmed that the mediator did file a mediation report on 19th December, 2019.

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.

The 1st Objector/Applicant has not proved the existence of any of the ingredients which would merit the setting aside of the mediation settlement agreement of 19th December, 2019 adopted as the judgment of this court on 3rd February, 2020. Reasons wherefore it is my finding that the application dated 3rd March, 2020 is in want of merit and is consequently dismissed with costs.

In the second application dated 12th January, 2021 Margaret Jemutai Kibosia, the 1st Petitioner/Applicant seeks orders that;

1. The estate of the late Adam Kibosia Chebelieny (deceased) be distributed as per the mediation agreement.

2. An order of injunction to issue to restrain the male beneficiaries of the deceased's estate or their agents or representatives from leasing out, ploughing, constructing thereon or doing any other developments thereon except for residential purposes and preservation order do issue for the subject parcel namely MOIBEN LR 3208 until the determination of this application.

3. An order of injunction to issue to restrain Jonathan Kibosia and Benjamin Kibosia by themselves, their agents or servants from ploughing, planting on, constructing or in any other way utilizing parcels No. MOIBEN/CHEBARA/134 and MOIBEN/RANY MOI/203 respectively pending the hearing and determination of this application inter-parties.

4. The Certificate of Confirmation of Grant be issued and distribution be made as per the mediation settlement agreement to allow the beneficiaries to each settle on their respective portions.

5. Costs be provided for.

The application is opposed and on record is the replying affidavit of Kiprono Cheboi Kibosia sworn on 29th January, 2021. It is his case that the Applicant has ulterior motive in preferring this instant application and further wonders why the Applicant should insist on restraining family members from cultivating the land in question which land the Respondents have occupied, utilized, possessed and cultivated since 1983 even before the demise of their late father. Further, he averred that the family members the Applicant seeks to restrain from utilizing the parcels of land in question have erected their homesteads on their respective portion and therefore not possible from restraining one from accessing his or her home. It was also his case that on 14th December, 2020 parties entered into a consent and therefore the Applicant cannot revisit the enforcement of the mediation settlement agreement when she consented to the appointment of administrators, of which administrators were to sit and agree and in case of failure, parties are to propose their respective modes of distribution.

In the Summons dated 12th December, 2021, it is clear that the Objectors herein have rejected the mode of distribution proposed in the mediation settlement agreement of 19th December, 2019. The reasons for their rejection is what formed the basis upon which the Summons of 3rd March, 2020 were filed and which this court has already found to be untenable.

The Objectors herein have not presented any evidence before this Honourable Court to show that the mediation settlement agreement was arrived at through irregular means. It's worth noting that the bone of contention in this particular case is the distribution of land parcel **LR MOIBEN 3208** of which the Objectors have been adamant that the same was distributed to them before the demise of the deceased; and also parcel Nos. Moiben Chebara/134 and Moiben/RanyMoi 203. The aforementioned parcels of land are to be distributed equally amongst all the children of the deceased as per the mediation settlement agreement adopted by this court on 3rd February, 2020.

This is a case where the deceased died intestate leaving no valid Will to determine how his estate is to be distributed amongst his beneficiaries. *Section 29(a)* of the *Laws of Succession Act* recognizes 'children' of the deceased as dependants – it does not discriminate based on whether they are sons or daughters, married or unmarried.

A perusal of the mediation settlement agreement shows that the deceased's estate is to be equally distributed amongst all his children, save for the ancestral lands that were left to be shared by the (11) sons of the deceased. This is a clear case where the Objectors being the sons of the deceased are challenging the decision to have their sisters, the daughters of the deceased, equally sharing the estate.

Even before the promulgation of the Constitution in 2010, Makhandia J (as he then was) ***IN RE ESTATE OF SOLOMON NGATIA KARIUKI (DECEASED) (2008) EKLR***, while speaking about the existing provisions of the Law of Succession Act, made a very strong statement on the issue of discrimination against daughters in succession matters and had this to say:-

> *"The Law of Succession Act does not discriminate between the female and male children or married or unmarried daughters of the deceased person when it comes to the distribution of his estate. All children of the deceased are entitled to stake a claim to the deceased's estate. In seeking to disinherit the protestor under the guise that the protestor was married, her father, brothers and sisters were purportedly invoking a facet of an old Kikuyu Customary Law. Like most other customary laws in this country they are always biased against women and indeed they tend to bar married daughters from inheriting their father's estate. The justification*

for this rather archaic and primitive customary law demand appears to be that such married daughters should forego their father's inheritance because they are likely to enjoy inheritance of their husband's side of the family."

There was no allegation of undue influence, coercion or intimidation of the parties in arriving at the Mediation Settlement Agreement. The Agreement is not ambiguous. The parties finally agreed on how to settle the dispute that confronted them, and had the advice of the counsel during the exercise. The Mediation Settlement Agreement created a binding contractual arrangement and relationship amongst the parties.

Under *Section 59B (4)* and *(5)* of the *Civil Procedure Act: -*

"(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)."

In view of the foregoing considerations, it is my finding that the application dated 12th January, 2021 is merited and therefore allowed.

S.M GITHINJI

JUDGE

DATED, SIGNED and **DELIVERED** at **ELDORET** this **5th** day of **July, 2021.**

In the presence of:-

Mr. Tarigo holding brief for Ms Kipseii for the Petitioners.

Mr. Nabasenge for the objector (absent)

Ms Gladys – Court assistant