



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**FAMILY DIVISION**

**SUCCESSION CAUSE NO. 825 OF 2011**

**IN THE MATTER OF THE ESTATE OF GEORGE THUO NJUGUNA (DECEASED)**

AGRIPPINA WANGARI THUO.....1<sup>ST</sup> APPLICANT

GEORGE THUO NJUGUNA.....2<sup>ND</sup> APPLICANT

**VERSES**

RUTH NJERI MBUGUA.....1<sup>ST</sup> RESPONDENT

MICHAEL MURIU KAHUTHIA.....2<sup>ND</sup> RESPONDENT

ANGELA WANGARI KAHUTHIA.....3<sup>RD</sup> RESPONDENT

PAUL MBUGUA THUO.....4<sup>TH</sup> RESPONDENT

SAMUEL WANYOIKE THUO.....5<sup>TH</sup> RESPONDENT

**RULING**

1. Under **Article 159 (2)(c)** of the Constitution, **section 59B(1) (a), (b) and (c)** of the **Civil Procedure Act**, the **Judiciary of Kenya Practice Directions on Court Annexed Mediation** dated 26<sup>th</sup> June 2018 by the Chief Justice and the **Judiciary Mediation Manual**, the Judiciary has embraced mediation in the resolution of civil disputes filed by parties. Mediation is an informal and non-adversarial process where an impartial mediator encourages and facilitates the resolution of a dispute between two or more parties. The mediator guides the parties by setting an atmosphere for mutual, candid and honest discussions on the dispute. He makes no determination. It is for the parties to agree, or not to agree. Where they do not agree the dispute will be heard and determined by the court. Where they agree on all, or some of, the issues in dispute the mediator helps in 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 filed into court which adopts the same as the order or judgment of the court (**Amcon Builders Ltd –v- Vintage Investments Ltd & Another [2018]eKLR**).

2. Court Annexed Mediation enhances access to justice, reduces backlog and, most importantly, allows parties an opportunity to generate home-grown solutions to their disputes (**In the Matter of the Estate of Bernhard Martens (Deceased) H.C. Succession Cause No. 2129 of 2015 at Nairobi**).

3. It is now accepted that a consent order can only be set aside on grounds which would justify the setting aside of a contract. The grounds include, but are not limited to, fraud, collusion, illegality, mistake, being contrary to public policy, absence of sufficient facts and ignorance of material facts (**Flora Wasike –v- Destimo Wamboko [1982-88] IKAR 625**). Whoever seeks to set aside a consent order or judgment has to prove these, or any of these, grounds (**Samson Munikah T/A Munikah & Co. Advocates –v- Wedube Estates Limited [2007]eKLR**).

4. In **Kenya Commercial Bank Ltd –v- Specialised Engineering Co. Ltd [1982] KLR 485** it was held that -

**“A consent order entered into by counsel 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 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 for a reason which would**

**enable the court to set aside an agreement.”**

The Court further held that:

**“An Advocate has general authority to compromise on behalf of his client, as long as he is acting *bona fide* and not contrary to express negative direction. In the absence of proof of any express negative direction, the order shall be binding.”**

5. The deceased George Thuo Njuguna died on 15<sup>th</sup> June 2010. On 5<sup>th</sup> May 2011 the applicants Agrippina Wangari Thuo and George Thuo Njuguna petitioned the court for the grant of probate of written Will in which they were named as executors. The Will was dated 3<sup>rd</sup> June 1996. These two were the widow and grandson, respectively, of the deceased. The respondents Ruth Njeri Mbugua, Michael Muriu Kahuthia, Angela Wangari Kahuthia, Paul Mbugua Thuo and Samuel Wanyoike Thuo filed various applications and/or objections to the petition. The 1<sup>st</sup> respondent indicated that she was the deceased's second wife and that the 4<sup>th</sup> and 5<sup>th</sup> respondents were her sons. The 2<sup>nd</sup> respondent indicated he was the deceased's grandson. The 3<sup>rd</sup> respondent indicated she was the deceased's granddaughter. The Will was challenged in criminal proceedings before the subordinate court. On 13<sup>th</sup> October 2014 the court stayed these proceedings to allow for the determination of the validity of the Will in the subordinate court. On 6<sup>th</sup> January 2018 this matter was mentioned before this court. The court was informed that the parties were negotiating a settlement. On 18<sup>th</sup> February 2019 the matter was mentioned. It was agreed that the dispute be referred to Court Annexed Mediation. Mr. Mbaji was holding brief for Mr. Miller for the applicants, Mrs. Ngira was holding brief for Mr. Kago for the 4<sup>th</sup> and 5<sup>th</sup> respondents, Mr. Mugo was holding brief for Mrs. Wambugu for the 1<sup>st</sup> respondent and Mr. Nzaku was present for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents. The Deputy Registrar of the Family Division assigned the dispute to a mediator M/s Kinyori.

6. On 25<sup>th</sup> March 2019 an interim consent was filed showing that the following had been agreed upon as the beneficiaries of the estate of the deceased:-

- (a) 1<sup>st</sup> applicant (widow);
- (b) 1<sup>st</sup> respondent (widow);
- (c) Francis Njuguna Thuo (son);
- (d) Mary Nyokabi Thuo (daughter);
- (e) Raphael Kahuthia Thuo (son – deceased);
- (f) Mathew Mwaura Thuo (son);
- (g) Nickdemus Gatoho Thuo (son);
- (h) Jane Wambui Thuo (daughter);
- (i) 4<sup>th</sup> respondent (son) and
- (j) 5<sup>th</sup> respondent (son).

It was agreed that there be an interim board of administrators comprising the following people:-

- a) 2<sup>nd</sup> applicant;
- b) Matthew Mwaura Thuo;
- c) 5<sup>th</sup> respondent; and
- d) Diana Mukuhi Kahuthia.

7. The interim board of administrators was to appoint an auditor to establish the status of the estate and to tabulate the assets and liabilities of the estate. The mediation was to continue on 25<sup>th</sup> March 2019 at 2.30 pm to confirm compliance and to forge the way forward. All the parties and their advocates signed this consent. On 8<sup>th</sup> April 2019 the court adopted this consent as an order of the court. On 21<sup>st</sup> March 2019 there was an addendum to the interim consent which had been signed by only four parties. In so far as not all the parties to the dispute had not signed it, I do not consider it to represent the agreement of all those interested. I also consider that not all advocates had signed it. I vary and set aside the order dated 4<sup>th</sup> June 2019 that adopted the addendum.

8. Regarding the interim consent, the applicant filed an application on 28<sup>th</sup> October 2019 seeking to set it aside on the basis that there was no agreement reached when the parties went before the mediator. They stated that on 7<sup>th</sup> March 2019 they went before the mediator but not all parties had filed case summaries. They were asked to return on 18<sup>th</sup> March 2019. The summaries were filed on 15<sup>th</sup> March 2019. They went to the mediator on 25<sup>th</sup> March 2019 but that there was no agreement. The matter was adjourned to 9<sup>th</sup> April 2019. The applicants were,

however, surprised to learn of the interim consent that had been filed in court and adopted as above. The applicants went on to state that the interim consent that has their signatures was as the result of their then advocates informing them that this was to enable the appointment of the auditor to establish the status of the estate, including ascertainment of assets and liabilities. They stated that they were not properly advised on the implications of the interim consent.

9. When they became aware of the implications, they asked their advocates to file an application to set aside. The advocates did not act. Eventually, the applicants instructed their present advocates who filed the instant application.

10. It was alleged that the interim consent was never intended to be conclusive or final, it left out numerous conditions, it did not deal with the issue of the Will, it was ambiguous and had no contractual effect, was based on insufficient and immaterial facts and that it was against public policy.

11. The application was opposed by the respondents in their respective replying affidavits. The 1<sup>st</sup> respondent stated that mediation was held on 18<sup>th</sup> March 2019 in which all the parties agreed on who the beneficiaries of the estate were. That was the interim consent that was filed on 25<sup>th</sup> March 2019. Thereafter the parties embarked on negotiations to resolve the issue of audit of the estate assets and liabilities. It was at that point that the applicants opposed, and the matter came back to court. The 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents each opposed the application. The 2<sup>nd</sup> respondent asked the court to note that it was infact the then advocates of the applicants who had drawn the consent and filed it, after all the parties had signed it. The 4<sup>th</sup> and 5<sup>th</sup> respondents stated that the agreement was amicably reached and signed by all the parties. They stated that the interim consent did not settle all the issues in the dispute, but that what had been agreed on bound all the parties who had signed.

12. M/s Kingori Kariuki & Co. Advocates are the ones who filed this application after taking over from Miller & Co, Advocates. The 1<sup>st</sup> respondent was represented by M/s W.G. Wambugu & Co. Advocates, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents by M/s Nzaku & Nzaku & Co. Advocates and the 4<sup>th</sup> and 5<sup>th</sup> respondents by M/s Kago & Co. Advocates. Counsel filed written submissions which I have considered.

13. This dispute had been set down for hearing when the parties informed court they were negotiating a settlement. When they reported that no settlement had been reached, they asked that I refer them to the Court Annexed Mediation. In my understanding, the issues that the dispute raised were:-

- (a) whether the Will dated 3<sup>rd</sup> June 1996 was valid or not;
- (b) whether the deceased died testate or intestate;
- (c) whether the deceased left one house or two houses;
- (d) who the beneficiaries of the estate were;
- (e) which property constituted the estate of the deceased;
- (f) whether the estate had liabilities; and
- (g) what each beneficiary was going to get from the ascertained estate of the deceased.

14. Looking at the interim consent that was filed into court and adopted, the parties agreed that the deceased had two houses: the house of the 1<sup>st</sup> applicant and the house of the 1<sup>st</sup> respondent. They agreed on a list of the beneficiaries of the estate of the deceased. They agreed on the four persons who were going to administer the estate of the deceased. They then agreed that the administrators were going to appoint an auditor to ascertain the extent of the estate of the deceased, including the liabilities.

15. The applicants agree that they signed the interim consent. Their advocates signed. The respondents and their advocates signed it. They stated that they did appreciate the implications of what they were signing; that their advocates did not properly advise them; and that they knew that the consent was only for the purpose of the appointment of an auditor to ascertain the assets and liabilities of the estate. This matter has been in court since 2011. The applicants did not state that they are illiterate. Each signed the interim consent. They must have read its contents and agreed to it. They were represented throughout the mediation. The respondents state that the interim consent followed amicable discussions before the mediator. It is material that the interim consent was drawn by the advocates then on record for the applicants.

16. I agree that the interim consent did not settle all the issues. However, it settled some pertinent issues in the dispute. The consent is not ambiguous. It was clear on the issues it was settling and on which the parties had agreed. There was nothing against public policy that the interim consent dealt with.

17. It has to be borne in mind that after the parties have been in court since 2011 they voluntarily asked to be allowed to try an out of court negotiation and settlement. When it did not work, they voluntarily submitted to the Court Annexed Mediation. The applicants agree that they appeared before a mediator. At one point they state that there was no settlement reached, and at another point they agree to have signed the interim consent but that they did not understand its implications.

18. I find that the interim consent dated 20<sup>th</sup> March 2019 and filed on 25<sup>th</sup> March 2019 represented what the parties had discussed and voluntarily agreed on. It would be unjust, unfair and unreasonable for the court to allow the applicants to resile from the agreement reached.

Consequently, the order made on 8<sup>th</sup> April 2019 adopting the interim consent shall not be set aside, reviewed or discharged. The application dated 28<sup>th</sup> October 2019 by the applicants is therefore dismissed with costs.

**DATED and DELIVERED at NAIROBI this 19<sup>TH</sup> FEBRUARY, 2020.**

**A.O. MUCHELULE**

**JUDGE**