



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
FAMILY DIVISION
SUCCESSION CAUSE NO. 1236 OF 2011
IN THE MATTER OF THE ESTATE OF LOISE NDATA MUIRURI ALIAS ROSE NDATA MUIRURI (DECEASED)

RAHAB NJERI MUIRURI.....APPLICANT

VERSUS

ALEX MBUA.....RESPONDENT

RULING

1. The applicant filed summons dated 30th June 2017 seeking orders that:

- a. the proceedings before court on 7th June 2017 be set aside; and
- b. the adoption of the mediation agreement dated 1st December 2016 as a judgment of this Court on 7th June 2016 be set aside.

2. The application was supported by the affidavit of the applicant who stated that her advocate wrote to the court on 19th December 2016 expressing the dissatisfaction by some of the beneficiaries with the mediation agreement dated 1st December 2016; that the matter was placed before the Lady Justice Muigai on 22nd February 2017 for directions and the directions given were that all parties were to file affidavits of the list of wives/houses of the late Muiruri Githae (deceased) and the properties owned by him; that the court further directed that the matter be listed for hearing on 18th April 2017 at 2.30 pm; that pursuant to the directions, she swore an affidavit dated 6th April 2017 and which was filed on 13th April 2017; that on 7th June 2017 before the Lady Justice Muigai when the matter was coming up for hearing, it was not listed as scheduled as the court was not sitting; that she was later informed on the same day by her advocate on record, that the matter was placed before this court and the Mediation Agreement dated 1st December 2016 was adopted as a judgment of this court; that when her advocate perused the court file, he established that the proceedings before the this court were attended by Alex Muiruri, Hassan Mburu Muiruri, John Mburu Muiruri, Benson Kiarie Muiruri, Mwaura Muiruri, Jeremiah Curu Muiruri, Meshack Mwangi Muiruri and Patrick Mwangi Muiruri; that some of the above named persons together with Mr. Kiratu Kamunya advocate were in attendance when directions were given by the Lady Justice Muigai on 22nd February 2017 yet they misled this court into adopting the Mediation Agreement when they very well knew that some of the beneficiaries were not in agreement; and that the named persons were intent on stealing a march on the other beneficiaries through deception and misrepresentation, and it would be in the interests of justice and fair play if the orders sought were granted.

3. Jane Wanjiru Muiruri, a beneficiary of the estate of the deceased swore an affidavit to support the application. She stated that she was not agreeable with the mediation agreement dated 1st December 2016. She further stated that she when the matter was moved from Lady Justice Muigai to this court, she was not aware of the movement and so did not participate in the proceedings when the mediation agreement was adopted as judgment. She requested that the judgment be set aside and the mater be allowed to proceed before Lady Justice Muigai as per her directions given on 22nd February 2017.

4. Josephine Wanjiku Muiruri also swore an affidavit in support of the application. She stated that she was one of the administrators of the estate of the deceased and that she did not agree with the outcome of the mediation No.67 of 2016 in that she was not party to the mediation, she was never called to give evidence, and that the mediation failed to capture the proper position of her father's estate. She therefore prayed that the court sets aside the mediation agreement dated 1st December 2016 and adopted as judgment of this court on 7th June 2016.

5. The application was opposed by the respondent. He stated that when the matter was fixed for hearing before this court by Kiratu Kamunya Advocates, the same hearing date was served upon the applicant who acknowledged the same by signing on the face of it; that the matter was on the cause list for the day before this court and the assertions by the applicant that the matter was not listed is epitome of

falsehood geared towards delaying the final conclusion of the matter; that allocation of matters to whichever judge is a preserve of the court officials and that neither his advocate nor himself had any choice over the same; that his advocate did not mislead the court in any way, but the pronouncement made by the Judge related to a mediation agreement in which the applicant was a party to and gave the same a clean bill of health by appending her signature on it and as thus her actions to oppose it is ill intended and in bad faith; and that the orders sought are made in bad faith as the same is geared towards frustrating the ends of justice by delaying the completion of the matter.

6. The application was heard orally on 6th March 2018. Jane Wanjiru Muiruri relied on her sworn affidavit in support of the application.

7. Mr. Mbugua, appearing for the applicant, submitted that when directions were taken before Lady Justice Muigai, it was expected that parties file affidavits in relation to that mediation because the outcome of the mediation was contested and objected to. He further submitted that when the matter was brought before this court, it was not disclosed that objections had been raised to the mediation which objections required to be determined. He stated that it was fair and just to set aside the adoption of the mediation to allow us go back to Judge Muigai.

8. Mr. Kamunya appearing for the respondent submitted that the estate that went to mediation was that of John Mburu, whereas the ruling of Lady Justice Muigai determined the beneficiaries of the estate of Loice Nduta, that outside of that there was an underlying dispute on whether the estate had properly been allocated or assigned to Loice and that mediation was in respect of the estate of John Mburu Muiruri to which the estate of Loice Nduta was a subject. He further submitted that when the file came before this court, the court adopted the mediation outcome which had been endorsed by all beneficiaries. He argued that the present application was an afterthought and intended to prolong the matter. He however conceded that when the parties were before Lady Justice Muigai, there were parties that agreed with the Mediation Report and others that opposed it.

9. It was Mrs. Gachio's submission that mediation went beyond that estate of the deceased herein, and that the court had no jurisdiction over the estate of John Mburu Muiruri, and as such the mediation ought to be set aside.

10. From the evidence and submissions on record, it is clear that what is being sought by the applicant herein is a review of this court's adoption of the mediation agreement as a judgment of the court.

11. The law on review applicable to this case is **Order 45 Rule 1** of the **Civil Procedure Rules, 2010** which provides as follows:-

“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.”

12. In **National Bank of Kenya Limited v. Ndungu Njau (Civil Appeal No. 211 of 1996 (unreported))** the Court of Appeal held that:

“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the Court. The error or omission must be self-evident and should not require an elaborate argument to be established. I will not be a sufficient ground for review that another Judge could have taken a different view of the matter. More can it be a ground for review that the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be ground for review.”

13. It is evident, and even conceded by Mr. Kamunya for the respondent, that when parties appeared before Lady Justice Muigai on 22nd February 2017, there was no unanimity on the mediation agreement. Some parties were for it, and others not. This is what led the judge to re-open the matter by asking the parties to swear respective affidavits regarding the houses of the deceased and the properties owned by her. The judge was going to use that information to resolve the dispute in the cause.

14. I concede that the parties who appeared before me on 7th June 2017 did not bring the information regarding the proceedings of 22nd February 2017 to my attention. It follows therefore that the orders that I gave on 7th June 2017, adopting the mediation agreement, were in error. The error has to be corrected by review.

15. The result is that the application dated 30th June 2017 is allowed. The proceedings of 7th June 2017 and the order adopting the mediation agreement dated 1st December 2016 as the judgment of this court are hereby reviewed and set aside.

16. The matter shall be mentioned before Judge Muigai on 6th June 2018 for directions on hearing and disposal.

17. I make no orders as to costs.

DATED at NAIROBI this 9th day of May, 2018

A.O. MUCHELULE

JUDGE