In re Estate of the Late Isaac Busienei (Probate & Administration 30 of 2004) [2025] KEHC 14764 (KLR) (3 October 2025) (Ruling)

Neutral citation: [2025] KEHC 14764 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

PROBATE & ADMINISTRATION 30 OF 2004

JRA WANANDA, J

OCTOBER 3, 2025

IN THE MATTER OF THE ESTATE OF THE LATE ISAAC BUSIENEI

BETWEEN

JOYCE JERUTO BUSIENEI ..... APPLICANT

AND

JAPHETH MAIYO ..... 1ST PETITIONER

EDWARD BUSIENEI ..... 2ND PETITIONER

RULING

1. The background of this matter was captured in my Ruling dated 22/03/2024 in which, while dealing with the Petitioner's Summons for Confirmation of Grant, at paragraphs 1, 2 and 3, I stated as follows:

> " 1. The deceased, Isaac Busienei, died intestate on 21/10/2001 at the age of 68 years. On 26/01/2004, the Petitioners, as sons of the deceased, petitioned for Grant of Letters of Administration Intestate in respect to the estate. In the Petition, it was stated that the deceased had left behind 10 survivors. 3 parcels of land were then listed as comprising the estate.
>
> 2. Subsequently, various persons emerged and filed successive Applications seeking to be included as survivors. Several interlocutory Applications were also filed seeking preservatory orders of various nature and also rights to plough or cultivate portions of parcel of land comprising the estate. For these reasons, 20 years since being filed, this Cause is yet to be concluded and during the intervening period, a number of family members have since died.
>
> 3. Before the Court now is the Petitioners' Summons seeking Confirmation of the Grant of Letters of Administration with respect to the estate .....:

"....."

2. At the end of my said Ruling, I found and directed, at paragraphs 29 and 30, as follows:

> "29. In view of the foregoing observations and contradictory factual submissions made by the respective parties, my assessment is that I cannot conclusively or accurately tell who are the correct beneficiaries herein and what number they are. My view is that the Court can only determine the same if the parties were to tender viva voce evidence. The contradictory facts presented cannot be determined from the record as it stands, it would require the calling of witnesses and cross-examination.
>
> Final Orders
>
> 30. In light of all the foregoing, I make the following orders:
>
> i) The determination of the Summons for Confirmation of Grant dated 23/5/2023 and filed in Court on 24/5/2023 is hereby deferred.
>
> ii) I direct that a date(s) be fixed when the parties shall be allowed opportunity to tender viva voce evidence in respect to the mode of distribution of the estate and be cross-examined thereon.
>
> iii) Costs shall be in the Cause."

3. Upon delivery of the Ruling, after conferring with Counsels for the respective parties, and with their consent, I referred the matter to Court Annexed Mediation, which then took off and subsequently culminated into the Mediation Settlement Agreement which was then presented to me and in respect to which I signed the order dated 4/10/2024 adopting the same.

4. Now before the Court for determination is the Applicant's Notice of Motion dated 12/08/2024, filed through Messrs Dagaye & Co. Advocates, and which seeks orders as follows:

i. Spent [.....]

ii. That leave be and is hereby granted to the Applicant to change her Advocates from the firm of Messrs Rotich Nyongio & Co. Advocates to Messrs Dagaye & Co. Advocates.

iii. Spent [.....]

iv. That the Honourable Court be pleased to grant leave to the Applicant to set aside the Mediation Settlement Agreement presented before this Honourable Court signed by the Mediator, Catherine Jackline Amugohe, together with the subsequent order adopting the said Mediation Settlement Agreement, dated 4/10/2024.

v. That upon grant of prayer (4) above, the Hon. Court be pleased to set aside the Mediation Settlement Agreement dated 7/08/2024 together with the order of the Court dated 4/10/2024.

vi. That the Honourable Court be pleased to set down the matter for hearing by way of viva voce evidence pursuant to the orders of 22nd March 2024.

vii. That the costs of this application be in the cause.

5. The Application is supported by the Affidavit sworn by the Applicant, in which she deponed that she is a beneficiary of the estate of the deceased herein who was her father She then stated that sometime in August 2024, a person who introduced herself as the Mediator in this matter called her when she was rushing to work, and demanded that she immediately attends Mediation proceedings, but since she was in hurry to attend work, she sought the Mediator's indulgence. She urged that she informed the Mediator that her sister-in-law, Christine, was admitted in hospital in Nairobi and since she was heavily involved both emotionally and financially, it was not a good time to discuss distribution of the estate. She stated that however, the Mediator engaged her in a diatribe and dictated, in a dismissive tone, that the estate was going to be distributed with or without her presence. She then deponed that the said sister-in-law subsequently died on 8/08/2024, the family got involved in burial arrangements and that she never received any further notice or communication for any Mediation meeting.

6. She then averred that sometime in October 2024, she perused the Court file and noted that the Mediation Settlement Agreement dated 7/08/2024 signed by the Mediator, Catherine Jackline Amugohe, was presented in Court and adopted, that she also learnt that the Court, through Hon. Lady Justice E. Ominde, had, on 18/09/2024, adopted the same as an order of the Court and the matter was closed, and subsequently, the order dated 4/10/2024 was issued. She urged that the Court proceeded under the mistake that all parties, including herself, executed the Agreement, which was not the case, that she neither took part nor participated in the Mediation process, and she is greatly prejudiced. According to her, alleged purchasers included in the Agreement are strangers, and she has not known of any sale of the estate land. She posited that in April 2019, Hon. Justice H.A Omondi, issued an order herein restraining any dealings or sale of estate land, and the Grant issued in 2004 is yet to be confirmed, thus neither the Administrators nor beneficiaries have any legal capacity to sell any estate land. She contended further that the Agreement is one sided and discriminates against her and her sisters by allocating larger and prime shares to their brothers, that it grossly violates the express provisions of equality, and that there must have been collusion and/or misconduct on the part of the Mediator considering the manner in which she handled the whole process. and she is shocked that their mother, Evaline Busienei, was not listed in the Agreement. She also opposed the appointment of Stanley Kirwa Maiyo, James Kipkemboi, and Dorcas Jepkaz, as Administrators since there was no consent to their appointment.

7. The Application is opposed by way of the Replying Affidavit sworn by the 2nd Petitioner, Edward Busienei on 13/12/2024, and filed through Messrs Songok & Co. Advocates. He deponed that the Applicant has made blatant lies alleging she was in Nairobi yet she has always been abroad, the parties resolved the dispute herein amicably and conclusively during Mediation, and that the Application is an afterthought aimed at delaying determination of this matter. He insisted that the Applicant was accorded the opportunity to participate in the Mediation process but she failed and/or refused to attend. He denied the Applicant's allegation that the Mediator notified her of the Mediation through a phone call on the very morning of the 1st Mediation session and insisted that all parties were given sufficient notice of the Mediation dates and time, and all except the Applicant attended. He pointed out that the Applicant's claim that she failed to attend the mediation session because she was attending to her sick sister-in-law in hospital is not supported by any documentary evidence, and also refuted her claim that the Mediator engaged her in a diatribe and dismissed her, and averred that the claims are only meant to negatively paint the image of the Mediator to influence the Court. He also contended that although the late Christine Tuwei could not attend the Mediation sessions, that she was represented in all the sessions. He also maintained that the Administrators were lawfully appointed, and denied that no estate land had been sold, or any strangers were included in the Agreement. He further denied that the Mediation Settlement Agreement was discriminatory to female beneficiaries, and asserted that the allocations were consented to by the female beneficiaries.

8. The Application is also opposed by two other daughters of the deceased, Divinah Jepkazi, and Divinah Jepkurgat Mutai by way of separate Affidavits, but both sworn on 16/01/2025. They refuted their sister's (Applicant) allegations, and insisted that a consensus was reached during the Mediation whereof all the daughters were allocated 10 acres each. They also deponed that all Advocates on record herein, including Songok & Co., Kipnyekwei & Co., and also Rotich Nyongio & Co., (acting for the Applicant.) were all notified of the Mediation. Dorcas Jepkazi deponed further that she spoke with their now late sister-in-law, Christine Chepkoech Tuwei, about the Mediation sessions and who, although she could not attend because of her sickness, gave the process her full blessings. She further stated that the Applicant and their other sister, the said Grace Chepchumba, both live out of Kenya, in France, and as such it cannot be true that the Applicant was taking care of the late Christina Chepkoech Tuwei during her sickness, and that she only flew in to attend the funeral. According to them, the Application is only meant to delay determination of this old case.

9. The Application is however supported by one Grace Chepchumba Busienei vide the Affidavit which she swore on 13/02/2025 and filed through Messrs Khalagai Law Advocates. She deponed that she, too, is a daughter of the deceased and a beneficiary of the estate. She, too, deponed that the Mediation Settlement Agreement dated 7/08/2024 is strange to her as she was not notified of any appointment of a Mediator, or of any directions referring the matter to Mediation nor was her consent sought before the reference, and that she was not given an opportunity to take part in the process. She stated that she has reviewed the Agreement and finds it discriminatory and as ratifying illegal sale of land, and their mother, Evaline Busienei, was not listed in the Agreement. She, too, opposed the inclusion of Stanley Kirwa Maiyo, James Kipkemboi, and Dorcas Jepkaz, as Administrators since she did not give any consent for their appointment, that they also never filed any Affidavits affirming that they will administer the estate according to law, and their suitability is questionable having previously misapplied the estate by selling parcels of land before confirmation of the Grant. and they have also not filed any Affidavits of Guarantee by Personal Sureties. She deponed further that the Agreement advantages some beneficiaries who have disposed of estate assets while the rest of them have been disinherited, that such sale and disposal are an illegality which however, the Settlement Agreement sanitised, and that a full inventory of the estate assets has also not been disclosed in the Agreement. She, too, contended that some persons mentioned in the Agreement are strangers to her, and are not beneficiaries of the estate. She also claimed that the deceased left a written Will which is in the custody of the 2nd Petitioner, Edward Busienei, but that the Agreement does not respect the wishes of the deceased.

10. One Collan Kipruto Tuwei also by his Affidavit sworn on 20/02/2025, supported the Mediation Settlement Agreement and thus opposed the Application. He deponed that he is the son of the late Charles Tuwei (a son of the deceased herein) and the late Christine Tuwei. He denied the allegation that her mother, the late Christine Chepkoech Tuwei, Grace Chepchumba, and the Applicant were excluded from the process. He then gave his blessings to the Mediation Settlement Agreement which, according to him, ensures that each beneficiary receives a fair share of the estate.

11. The Applicant, with leave of the Court filed the Further Affidavit sworn on 18/02/2025. She however basically only unnecessarily repeated the same matters that she had already deponed earlier. She however added that the 2nd Administrator does not have any authority to swear an Affidavit on the 1st Petitioner's behalf, and that Devina is not the deceased's child and is thus not a beneficiary. Regarding her allegation that parts of the estate land have been unlawfully sold by some beneficiaries, she exhibited copies of a number of Sale Agreements.

12. The Application was then canvassed by way of written Submissions. The Applicant's is dated 26/2/2025, the Petitioners' is dated 12/02/2025, while the Advocates for Grace Chepchumba Busienei filed the Submissions dated 7/03/2025.

Applicant's Submissions

13. Counsel for the Applicant submitted that in my said Ruling of 22/03/2024, I observed that there were serios constitutional issues regarding the allocation of lesser shares to the daughters. He then cited Rule 39 of the Civil Procedure (Court Annexed Mediation) Rules, 2022, (Mediation Rules) which sets out the grounds upon which a Mediation Settlement Agreement can be set aside, and contended that there being serious constitutional issues, the Mediator had no jurisdiction to proceed with the process. He cited the case of Gachuri v Attorney General & another; Kenya Judges Welfare Association & another (Interested Parties) (Constitutional Petition E0304 of 2023) [2024] KEHC 1632 (KLR) and also Article 165(3) of the *Constitution*, and urged that the jurisdiction to determine constitutional issues cannot be delegated to a quasi-judicial body, let alone a Mediator. According to him, the Agreement is a nullity. He urged that this Court deferred the Confirmation of Grant because that there was necessity for viva voce evidence to determine the list of beneficiaries, and that by adopting the Agreement, the parties have regressed to the position before the Ruling of 22/03/2024, which the Court had attempted to cure. He submitted that the Applicant successfully contested the initial proposal to allocate her only 10 acres, however the Mediation, in which she did not participate, has reintroduced the same discriminatory distribution proposal.

14. He alleged misconduct and fundamental mistakes on the part of the Mediator, and cited Rule 15(2) and 16(1) of the Mediation Rules, and submitted that the Mediator, in violation of this Rule, never served any Form 5 upon the Applicant and the said Grace Jepchumba, and that although the Applicant had an Advocate on record, no notification was served upon the Advocates. He also cited Rule 20(1) which allows the Mediator to adjourn the Mediation session, and pointed out that the Applicant formally requested an adjournment but the Mediator declined. He also observed that Rule 24(1) mandates parties to execute an Agreement to mediate before proceeding but none was executed. He urged that the Rules are elaborate on what a Mediator should do if a party is uncooperative, that Rule 28 provides a mechanism for dealing with non-complying party and that the only recourse available to a Mediator is to cite the non-complying party for contempt in line with Rule 29. According to him, the Mediator ought to have listed the matter for Mention for directions before the Mediation Deputy Registrar if indeed the Applicant was non-compliant and thereafter issue a certificate of non-compliance since the Mediator was not only supposed to make every effort to prove to the satisfaction of the Court that she made frantic attempts to contact the parties.

15. According to her, the Mediator simply decided to proceed with the process after a single phone call. He added that the Mediation Rules do not envision or permit a Mediation process to proceed to conclusion without attendance of a party, and averred that the mediation was not only unconstitutional for non-participation by the 3 mentioned parties. He cited the case of Soi & another (Suing as the administrator of the Estate of William Kimutal Soi alias Kimutal Sol Arap Cherugut - Deceased) v Soi &another [2023] KEELC 713 (KLR), the case of In re Estate of Loise Nduta Muiruri (Deceased) (Succession Cause E056 of 2021) [2023] KEHC 9166 (KLR), and the case of In re Estate of Jumo Mabwai Masa (Deceased) (Succession Cause E056 of 2021) [2023] KEHC 9166 (KLR), and submitted that the lack of consent and signatures from all the parties renders the Agreement incurable. He also submitted that the Mediator acted in violation of Rule 32(2) as she did not supply the parties with a copy of the Agreement within 10 days.

16. He thus termed the Agreement as incapable of enforcement under the Kenyan law, and reiterated matters already stated in his client's Affidavits to the effect that there were misrepresentations made by the parties who participated in the Mediation process and concealment of material information in regard to sale of portions of estate land, and concealment of several assets. Counsel also reiterated that appointment of the Administrators was done in contravention of to Section 7(6) and (7) and 51 of the *Law of Succession Act*, and also that the Agreement distributed the estate land to strangers who are neither beneficiaries nor dependants of the deceased. He then submitted that the Applicant having established the irregularities apparent in the Mediation process, the burden of proving that the same was regularly conducted shifted to the Petitioners, and which burden they failed to discharge. In conclusion, he submitted that upholding the defective Agreement would set a dangerous precedent that would undermine the integrity of Court Annexed Mediation and the legal safeguards governing Succession matters.

Submissions on behalf of Grace Chepchumba Busienei

17. On the part of Grace Chepchumba Busienei, her Counsel made submissions akin to those made by the Applicant. He however cited the case of Flora Wasike vs Destimo Wamboko (1988) 1 KAR 625, the case of Commercial Bank Limited v Benjoh Amalgamated & Another [19887] KECA 236 (KLR), and also the case of Brooke Bond Libig vs Mallya (1975) EA 266, on the principle that a consent judgement can only be set aside on grounds which would justify setting a contract aside. He further contended that the two said law firms of Songok & Co. and Kipnyekwei & Co., were not present in the Mediation process, and if they did, Grace Chepchumba never instructed any of the two law firms to represent her.

18. He cited the case of Re Estate of the late Ngaulo arap Tanui (Deceased) [2021] KEHC 4703 (KLR), and also Nairobi High Court Succession Cause No. 2129 of 2015 consolidated with Succession Cause No. 1975 of 2015; In the Estate of BM (Deceased) RMM vs RCM & 3 Others. He submitted that under Rule 14 of the Mediation Rules, no appeal lies against an order Court arising from Mediation, and thus the Court should do justice.

Respondent's Submissions

19. Counsel for the Respondent submitted that the Grant herein was issued 21 years ago, and that out of 18 beneficiaries, only the Applicant has raised objections all through, and has embarked on a mission to sabotage her siblings. He insisted that all along, the persons mentioned, including the Applicant, were in direct contact with the Mediator and the beneficiaries, and were aware and involved in the Mediation, and that the Mediator confirms in the body of the Agreement that she notified all parties. He contended that the Applicant had an Advocate on record and whom she fired after the Mediation Settlement Agreement was adopted, and the Advocate has not sworn an Affidavit. He submitted that it is trite law that he who alleges must prove, he cited Section 107-112 of the *Evidence Act*, and submitted that the Applicant failed to discharge this evidentiary burden. He also cited the case of Kirugi and Another Vs Kabiya & 3 others (1987) KLR 347. Counsel then introduced a new issue by contending that the matters raised in the Application are Res-judicata. He cited Section 7 of the *Civil Procedure Act*, and several authorities. He also cited Rule 39 (3) of the Mediation Rules, 2022, and submitted that once a Mediation Settlement Agreement is signed and adopted, it becomes final and binding. He further cited the case of Alios Finance Kenya Limited v Country Farms Limited (Civil Appeal E005 of 2020) [2022] KEHC 11012 (KLR) (27 July 2022) (Judgment), and the case of Tiego & another v Mahagwa & another (Environment & Land Case E004 of 2023) [2024] KEELC 6182 (KLR) (19 September 2024) (Ruling).

Determination

20. The issue that arises for determination herein is "whether leave should be granted to the Applicant to seek for setting aside of the Mediation Settlement Agreement dated 2/08/2024 and adopted by the Court, and if so, whether the Agreement should accordingly be set aside.

21. I may first state that, in Kenya, the process of Court annexed mediation is governed by the Civil Procedure (Court-Annexed Mediation) Rules, 2022, otherwise referred to as the Mediation Rules, 2022.

22. Mediation as an alternative dispute resolution mechanism in Kenya, is itself anchored in Article 159 (2)(c) of the *Constitution* of Kenya which provides as follows:

> " In exercising judicial authority, the courts shall be guided by the following principles:
>
> alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted subject to clause (3)."

23. Regarding the place of Mediation in our judicial system, Muchelule J (as he then was), in the case of In re Estate of BM (Deceased) [2019] eKLR, made the following comments:

> " 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 non-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. ....."

24. On her part, Kamau J, in the case of Alios Finance Kenya Limited v Country Farms Limited (Civil Appeal E005 of 2020) [2022] KEHC 11012 (KLR) described the effect of the adoption of a Mediation Settlement Agreement by the Court, in the following terms:

> " 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."
>
> Notably, once a mediation agreement is signed, it becomes final and binding on the parties. Mediation agreements were in the nature of consents. It is for that reason that this court considered the consequences and implications of entering a consent."

25. Setting aside of a Court order adopting a Mediation Settlement Agreement is then governed by Section 39(1) of the Civil Procedure (Court Annexed Mediation Rules) which provides as follows;

(1) No Application for setting aside of an order or decree arising from a mediation settlement agreement shall be filed except with the leave of court.

(2) An Application for leave under sub-rule (1) shall be supported by an affidavit detailing the grounds upon which the Applicant intends to rely in setting aside the order or decree.

26. The above Rules therefore clearly envision the seeking of leave to set aside as a separate stage from the filing of the substantive Application. The Rules also envision setting aside of the order arising from the Settlement Agreement, and not the Settlement Agreement itself. Setting aside of a Mediation Settlement Agreement is a therefore different issue altogether.

27. In this case however, the Objector has filed an omnibus Application seeking both leave to file the Application, and, upon grant of such leave, setting aside of the Agreement. There is also the prayer for leave to be granted to the current Advocates for the Applicant to come on record. Be that as it may, I find no prejudice that may be suffered if I were to determine all the prayers in one Ruling, and thus conclusively determine both the two stages in one Ruling. I say so because Counsel for the Petitioners/ Respondents, both in the Replying Affidavit and in the written Submissions, has already substantively submitted on the second limb. It can therefore be presumed that what the parties want is a conclusive determination, once and for all. I also believe that, in the circumstances of this case, taking such final course is the proper option as it will expedite the whole matter and thus save the parties precious time and resources.

28. On the first limb of the Application, by entertaining this Application this far, the presumption is that leave to file the Application is deemed to have already been granted. However, for avoidance of doubt, I now make the express declaration that that leave to file the Application seeking to set aside the orders adopting the Mediation Settlement Agreement is hereby deemed to have been granted on 22/10/2024 when the Application came up in Court and was deliberated upon inter partes. The same finding and order applies to the prayer for leave to Messrs Dagaye & Co. Advocates to come on record for the Applicant.

29. Regarding the second limb, the prayer for setting aside the order adopting the Mediation Settlement Agreement, it is now agreed that a Mediation Settlement Agreement, once adopted as an order of the Court, becomes binding as between the parties and cannot be set aside unless the party challenging it proves that there are justifiable grounds and vitiating factors similar to those applicable to all other contracts or consent orders, including, fraud, misrepresentation, coercion and undue influence. In

respect to this principle, Achode J (as she then was), in the case of NKM vs 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)"

30. The above principle was restated in the case of Flora N. Wasike v Destimo Wamboko [1988] eKLR in which, though not a Mediation case, Hancox, JA, observed that:

> " 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"

31. The same was also affirmed by Court of Appeal, in the case of S M N vs. Z M S & 3 others [2017] eKLR, although also not a Mediation issue, in the following terms:

> " Generally, 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. The factors touted for impeaching the consent in this matter were fraud and collusion. It is also alleged that counsel had no authority to enter into the consent. The onus of proving those assertions to the required standard was on the appellant. They are serious imputations bordering on crime and therefore the burden of proof is of necessity slightly higher than on a balance of probability but perhaps not beyond reasonable doubt."

32. In this case, the Applicant basically wants the order that adopted the Mediation Settlement Agreement set aside majorly on the ground that she was not given sufficient opportunity to participate in the Mediation process, and was also not a signatory to the Agreement eventually adopted. Indeed, an order adopting a Mediation Settlement Agreement is liable to be set side where it is demonstrated that an Applicant never signed it or the parties never reached any settlement. One such case is In re Estate of BM (supra), in which, again, Muchelule J (as he then was), found as follows:

> " It is clear that the final deed of settlement had not been agreed upon. The parties hoped to agree before 28th February 2018. On this, the parties agreed and appended their signatures. But, the attached template (both handwritten and typed) was not signed by the parties. It could not have been signed because the deed of settlement was yet to be adopted. It was to be adopted later (to be ready for lodging in court before 28th February 2018).
>
> 24. In conclusion, I find that the documents dated 14th February 2018 and 14th December 2017 did not amount to a mediation settlement agreement. The parties had not reached a settlement. They had not appended their signatures to any settlement. With respect, the mediator misled the court into thinking that the parties had reached a settlement. It was a misrepresentation on the part of the mediator that led the court to endorse the alleged settlement. There being no mediation agreement settlement, therefore, I allow the respondent's

application dated 20th November 2018 with costs. I set aside the orders of this court dated 12th March 2018 ....."

33. I must however disabuse the Applicant's Counsel of the wrong impression that he seems to be under, to the effect that the Applicant's consent was required for the Court to refer the matter to Mediation. As is apparent from Rule 5 of the Mediation Rules, 2022, such consent is not necessary. Indeed, the Court has powers to even suo motu, without even hearing the parties, refer a case to Mediation. Once such reference has been made by the Court, it becomes a Court order and all parties must comply. As stated by Muchelule J (as he then was) in the case of In re Estate of BM (supra), "parties are under obligation, when referred to mediation, to attend the mediation sessions, and to act in good faith during the process".

34. Another erroneous view advanced by the Applicant's Counsel is that the Mediator did not have jurisdiction over the matter allegedly because there were constitutional issues arising. As aforesaid, all Counsels in this matter, including Mr. Nyongio, who was at that time on record for the Applicant, agreed by consent to proceed to Mediation where they could explore a possible out of Court settlement. Nothing in this case turns on the issue of jurisdiction whatsoever as this is not even a Constitutional Petition. Whether or not there were constitutional issues, nothing would bar the Mediator from presiding over the matter as the parties agreed to discuss possible settlement before her. This is because a Mediator does not give or render any Judgment or Award but simply provides a legally recognized structured forum within which parties attempt to reach their own home-grown agreement. Counsel clearly interpreted the case of Gachuri v Attorney General (supra), out of context.

35. Back to the issue at hand, it is not in dispute that the Objector did not personally attend the Mediation session in which the Settlement Agreement was concluded, and then signed by the various family members. She could not therefore have signed it. It is however clear, from her own admission, that she was notified of the Mediation by the Mediator who personally phoned her and requested her attendance. In any event, her then Advocate was party to the consent reference to the Mediation. The Applicant has however claimed that she sought an adjournment from the Mediator because she was not emotionally in the right state of mind, her sister-in-law being admitted in hospital at that time, and who, in fact, passed on the next day. She claimed that however, the Mediator declined the adjournment and proceeded with the Mediation to the end her absence notwithstanding. Be that as it may, the fact is that the Applicant did not personally participate in the Mediation, and there is no evidence that she authorized any of the participants to represent her therein.

36. As in all situations, there will always be people who, for whatever reasons, would be out to frustrate or delay the determination of disputes in Court, or who sabotage settlement efforts. Such people employ trickery and would deliberately become unco-operative. In appreciating these risks, the drafters of the Mediation Rules put in place elaborate mechanisms to deal with parties who consistently fail to attend Mediation sessions or prove unco-operative. In respect thereto, Rules 28 and 29 of the Mediation Rules provide as follows:

    28. Non-compliance.

        (1) A party or the party's representative who fails to comply with any of the mediator's directions, consistently fails to attend mediation sessions or engages in deliberate misconduct may be cited for contempt of court and dealt with in the manner provided for under rule 29.

        (2) The mediator may, in the first instance, request that the case be listed for mention before the Mediation Deputy Registrar or other officer designated for that purpose

for directions aimed at facilitating the uninterrupted continuation of the mediation process.

(3) If, after several attempts by the mediator to continue the mediation process forward, a party fails to comply, the mediator shall file a certificate of non-compliance in Form 11 as set out in the Schedule.

(4) The Mediation Deputy Registrar or such other designated officer shall, upon the filing of the certificate of non-compliance, refer the file back to the trial court.

(5) It shall be the obligation of the mediator to satisfy himself or herself that sufficient effort has been made to continue the mediation process without success before filing a certificate of non-compliance under sub-rule (4).

(6) In assessing whether this obligation was met by the mediator, the court shall consider, among other things, the attempts made at contacting the parties, the number of sessions held if any, and the attempt by the mediator to explain the process to the parties."

29. Consequences of non-compliance.

Upon the referral of the file under rule 28(4), the court may—

(a) order the party in default to pay a penalty fee as the court may deem fit unless the party satisfies the court that there was a good cause for non-compliance;

(b) strike out the pleadings of the non-complying party unless the party satisfies the court that there was a valid reason for non-compliance and that striking out the party's pleadings would be inequitable in the circumstances; or

(c) make any other order as the court deems fit, including an order that the parties conduct fresh mediation sessions a period to be specified in the order.

37. It is therefore true that the Mediation Rules are elaborate on what a Mediator should do if a party is uncooperative. For starters, a Mediator is duty-bound to make every effort to prove to the satisfaction of the Court that she made frantic attempts to contact the parties. Reading Rules 28 and 29 above, I am constrained to agree with the Applicant's Counsel that the Mediation Rules provide a mechanism for dealing with a non-complying party, and that the recourse available to a Mediator appears to be only to cite the non-complying party for contempt of Court and refer the matter back to the Court. I thus agree with Counsel that if the Mediator reached the conclusion that the Applicant was un-cooperative, the Mediator ought to have listed the matter for Mention for directions before the Mediation Deputy Registrar, and if this did not bear fruit, she was supposed to issue a certificate of non-compliance and them refer the matter back to Court for action. It appears therefore that the Mediation Rules do not envision or permit a Mediation process to proceed to conclusion without participation of a party, or at least evidence that he/she has authorized another participant to represent her. There must also be proof that all parties have mutually agreed on the final Settlement Agreement which agreement is most preferably, to be confirmed by way of appending a signature of the party in question. In this case, there is no evidence to disprove the Applicant's assertion that the Mediator simply decided to proceed with the process after only a single phone call made to her, and there is also no evidence that any other participant in the Mediation session had the Applicant's authority to represent her. She also did not sign the Agreement and neither is there any evidence that she ratified the same subsequently.

38. Having reached the above findings, despite this being a very old case, and despite only the Applicant and the said Grace Jepchumba Busienei being apparently the only two family members opposed to

the Settlement Agreement, I find that the Agreement cannot be sustained. Application of the law is not about numbers, or majority versus minority. Even if all the other members of the family support the terms of the Settlement and outnumber the two opposers, the Court's obligation is to ensure that each person's legal rights are recognized and protected. As the record stands, the Applicant cannot be said to be bound by the terms of the Settlement since clearly the manner in which the Mediation was concluded failed to meet the threshold required under Rule 28 and 29 of the Mediation Rules. As has now been established, it cannot be said with finality that the Applicant was party to the final Agreement that was adopted by the Court. Adoption of the Agreement by the Court was thus done under a mistaken belief and upholding will run afoul the intention and spirit of the Mediation laws.

39. In reaching my above decision, I have also taken into account the Applicant's allegations that portions of the estate property have, in breach of Section 45 of the Law of Succession prohibiting intermeddling with the estate of a deceased person, been clandestinely sold off by some of the family members, that this fact has not been addressed in the Settlement Agreement, and that the Agreement is therefore intended to sanitize this illegal act or "to sweep it under the carpet". These are serious allegations and cannot simply be wished away. I take cognisance of the fact that the Applicant produced copies of a number of Sale Agreements to support her allegations, and which Agreements the Petitioners did not challenge or controvert.

Final Orders

40. In light of the foregoing, the Application dated 12/08/2024 succeeds, and I make the following orders:

    i. The firm of Messrs Dagaye & Co. Advocates is hereby deemed to be properly on record for the Applicant.

    ii. Leave is also hereby deemed to have been granted to the Applicant to apply for setting aside of the order dated 4/10/2024, and/or any other order on record adopting the Mediation Settlement Agreement presented before this Honourable Court signed by the Mediator, Catherine Jackline Amugohe.

    iii. The order dated 4/10/2024, and/or any other order on record adopting the Mediation Settlement Agreement presented before this Honourable Court signed by the Mediator, Catherine Jackline Amugohe is hereby set aside.

    iv. The order made in the Ruling dated 22/03/2024 to the effect that this matter shall be canvassed by way of viva voce trial is therefore reinstated.

    v. THAT the costs of this application be in the cause.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 3RD DAY OF OCTOBER 2025

.....

WANANDA JOHN R. ANURO

JUDGE

Delivered in the presence of:

Ms. Sila h/b for Mr. Dagaye for the Applicant

Ms. Sila h/b for Ms. Kategei for Grace Chepchumba Busienei

N/A for Petitioners

Court Assistant: Brian Kimathi