

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO
SUCCESSION CAUSE NO. 31 OF 2019
IN THE MATTER OF THE ESTATE OF KIPTURGUT ARAP
CHERUIYOT ALIAS KIPTURGUT CHERUIYOT (DECEASED)

**SAMUEL
CHERUIYOT.....PETITIONER/RESPONDENT**

KIPLANGAT

VERSUS

**DAVID MALAKWEN TURGUT.....1ST
APPLICANT**

**FLORENCE CHERUIYOT.....2ND
APPLICANT**

RULING

1. The application coming up for determination is a chamber summons dated 8th April, 2025 seeking the following orders;

(i) Spent

(ii) Spent

(iii) That this honourable court be pleased to set aside the mediation agreement that was endorsed/adopted by the honourable court on 2nd December, 2024 and

consequently direct that this matter proceed for full hearing to its logical conclusion

(iv) That the costs of this application be provided for.

2. The application is supported by grounds on the face of it and the affidavit of ***David Malakwen Turgut*** in support of the application sworn by the 1st applicant herein.
3. He states that the mediation settlement agreement dated 1st September 2023 was not signed by all the beneficiaries subject to this suit.
4. He further states that rule 12 (a) of the Practice Direction on Court Annexed Mediation (Amendment), 2018, makes it mandatory for the parties to mediation proceedings to sign the mediation settlement agreement and that very requirement was lacking as only 2 out of the 7 beneficiaries appended their signatures to the mediation settlement agreement.

5. He also states that it is by signing the mediation settlement agreement that parties express their concurrence to the outcome of the mediation and therefore the failure to assent to a mediation settlement agreement in the circumstances of the instant case was an expression of dissent and disagreement.
6. It is his statement therefore that in the circumstances, there was no proper mediation settlement agreement for the court to adopt as a consent judgement, as the absence of signatures renders the settlement incomplete and incapable of forming the basis of a binding agreement and therefore the purported agreement does not represent the consent or agreement of all affected parties.
7. He therefore reiterated that it is only fair and just that the said agreement be set aside and/or not adopted as an order of this court.
8. The Petitioner/Respondent filed a preliminary objection dated 13th June, 2025 on the following grounds;

(i) THAT the application seeking to set aside the mediation settlement and the resultant Certificate of Confirmation of Grant is procedurally defective, incompetent, and bad in law, as it offends Section 39(1) of The Civil Procedure (Court Annexed Mediation) Rules, 2022, which expressly prohibits the filing of an application to set aside an order or decree arising from a mediation settlement agreement without prior leave of the court.

(ii) THAT the Applicants' failure to comply with the procedural requirements set out in Section 39 (2) of The Civil Procedure (Court Annexed Mediation) Rules, 2022 which mandates that an application for leave must be supported by an affidavit detailing the grounds for setting aside renders the entire application incompetent, misconceived, and legally untenable.

(iii) THAT this Honourable Court lacks jurisdiction to entertain the Applicants' application in its present form, as it has been prematurely and improperly filed contrary to express provisions of the law.

9. The court directed the preliminary objection be canvassed by written submissions. At the time of writing this ruling, the petitioner/respondent had not uploaded their submissions on the case tracking system.

10. The applicants submitted their submissions and argued that the mediation agreement dated 1st September, 2023 was procedurally and substantially defective for lack of consent by all beneficiaries. The applicants contended that the mediation settlement agreement was never signed by all beneficiaries thereby demonstrating a lack of consent which rendered the mediation process fundamentally flawed.

11. The applicants are adamant that the mediation settlement is therefore a nullity in law and cannot attract the requirement for leave under Section 39 (1) of the Mediation

Rules because there was no valid agreement at the onset, hence the provisions governing the setting aside of agreements cannot apply. The applicants therefore urged this court to find that the mediation agreement dated 1st September 2023 is not binding and is of no legal effect.

12. The applicants maintained that the court's review jurisdiction is properly grounded in law and is necessary to prevent the enforcement of an agreement they never consented to.

13. I have considered the application and preliminary objection and find that the issue ripe for determination is whether the preliminary objection has merit.

14. On one part, the applicant argues that the mediation agreement dated 1st September, 2023 was procedurally and substantially defective for lack of consent by all beneficiaries and therefore the provisions governing the setting aside of mediation agreements cannot apply. On the other part, the petitioner/respondent argues that the applicant's application

to set aside an order or decree arising from a mediation settlement agreement without prior leave of the court, renders the entire application incompetent, misconceived and legally untenable.

15. This court is cognisant of the legal position which dictates that upon adoption, a mediation settlement agreement ought to be treated as a consent order, the threshold for setting aside consent orders was discussed in the case of ***Kenya Commercial Bank Ltd v Specialized Engineering Company Ltd (1980) eKLR*** wherein it was held that:- ***“... prima facie any order made in the presence and with the consent of counsel is binding on all parties to the proceedings and cannot be varied or discharged unless obtained by fraud or collusion or by an agreement contrary to the policy of the court or if the consent was given without sufficient materials or in misapprehension or ignorance of material facts in general for a reason which would enable the court to set aside an agreement.”***

16. I have considered the respective cases of the parties and without delving further into whether the mediation settlement agreement is valid, I find that it is of utmost importance to consider whether the application to set aside the mediation agreement is competently before this court, Rule 39 of the **Civil Procedure (Court Annexed Mediation) Rules, 2022** which is set out in mandatory terms provides that :- ***“No application for setting aside of an order or decree arising from a mediation settlement agreement shall be filed except with the leave of the court.***

An application for leave under sub rule (1) shall be supported by an affidavit detailing the grounds upon which the applicant intends to rely on in setting aside the order or decree.”

17. I have carefully studied the contents in the file, I have not come across evidence demonstrating that the applicant first sought for leave of the court to apply for setting aside of

the mediation settlement agreement. In the absence of leave by the applicant to file the instant application, I find that this court lacks jurisdiction to entertain the application which is incompetently before it and on this premise the preliminary objection succeeds.

18. In the upshot, the chamber summons dated 8th April, 2025 is incompetent and the same is hereby ordered struck out. Each party to bear their own costs.

**Delivered, signed and dated at Kericho this 18th day
of December, 2025.**

.....
**J.K. SERGON
JUDGE**

In the Presence of:-

C/Assistant - Rutoh

Okok for the Applicant

Miss Chepngetich for one of the Beneficiaries

No Appearance for the Petitioner

