

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT HOMA BAY
SUCCESSION CAUSE NO. 84 OF 2014
IN THE MATTER OF THE ESTATE OF JEREMIAH AGAR
NDINYA (DECEASED)

GRACE ATIENO OWINO.....1ST
PETITIONER
COLLINS OGWE AGAR.....2ND
PETITIONER

AND

EVANS OTIENO AGAR.....
.....APPLICANT

RULING

[1] The Notice of Motion dated 7th October 2025 was filed herein by the 1st petitioner, **Grace Atieno Owino**, under **Section 3A** of the Civil Procedure Rules and **Rule 39** of the Civil Procedure (Court Annexed Mediation) Rules, 2022. She prayed for the following orders:

[a] That the Court be pleased to set aside the Mediation Settlement recorded on the 28th May 2025.

[b] That the Court be pleased to order for another court annexed mediation session to be conducted in the presence of all the parties.

[2] The application was premised on the grounds that counsel for the applicant was not notified that a mediation session had been scheduled for the 28th of May 2025. The applicant

complained that although her counsel was not in attendance, the mediator went ahead to conduct the session in spite of her protests. She added that she did not fully understand the settlement as recorded or its consequence since the same was not explained to her. The applicant took issue with the fact that the effect of the Mediation Settlement Agreement was to disinherit her yet she never ceded her rights as a beneficiary of the subject estate.

[3] It was therefore the assertion of the applicant that it is only fair and just that her application be allowed to enable all the parties participate in the mediation sessions. She added that no prejudice will be occasioned to the respondent herein.

[4] The application was duly served on the respondent but no response was filed. The Court was also satisfied that the respondent was duly served with a Hearing Notice for 16th February 2026 per the Affidavit of Service sworn on 24th November 2025 by **Mr. Obach Humphrey, Advocate**, but failed to attend court for the hearing. The application is therefore unopposed.

[5] A perusal of the record confirms that the parties were referred to Court Annexed Mediation to resolve the issue of distribution amicably. A Mediation Settlement Agreement was thereafter filed herein dated 28th May 2025. However, before the Agreement could be adopted as an order of the Court, the instant application was filed. It is indeed evident that the applicant is not

listed as one of the beneficiaries of the estate at paragraph 3 of the Mediation Settlement Agreement.

[6] Having perused and considered the grounds relied on by the applicant in her Supporting Affidavit, I am satisfied that sufficient cause has been shown for the setting aside of the Mediation Settlement Agreement for purposes of **Rule 39** of the Civil Procedure (Court Annexed Mediation) Rules. The right to legal representation by counsel of choice is at the core of fair hearing and therefore it was a mistake for the Mediator to insist on proceeding with the mediation in the absence of counsel for the applicant. Accordingly, I find merit in the application. The same is hereby allowed and orders granted as hereunder:

[a] That the Mediation Settlement Agreement dated the 28th May 2025 be and is hereby set aside in its entirety.

[b] That the process be conducted afresh before another Mediator and in the presence of the parties and their counsel.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT HOMA
BAY IN THIS 17TH DAY OF FEBRUARY 2026**

.....

OLGA SEWE

JUDGE

ORIGINAL