



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
FAMILY DIVISION
SUCCESSION CAUSE NO. 749 OF 1994
IN THE MATTER THE ESTATE OF MUTU KIMANI (DECEASED)

**SAMUEL KIMANI MUTU
APPLICANT
VERSUS
ABRAHAM MWANGI MUTU 1ST
RESPONDENT
JANE WAMBUI KHIKO 2ND
RESPONDENT**

RULING

1. This ruling relates to the application dated **24th July, 2024** filed by the Applicant, Samuel Kimani Mutu seeking for **ORDERS THAT:**
 1. **Pending the hearing and determination of this application, there be a stay of execution enforcing the mediation settlement agreement dated 20th January, 2023 that was endorsed by this honourable court on 20th June, 2023.**
 2. **Pending the hearing and determination of this application, the status quo on respect of the deceased's estate as at the time of the demise of**

the deceased herein, the late Mutu Kimani - Deceased, be maintained.

3. This honourable court be pleased to set aside the mediation settlement agreement dated 20th January, 2023 that was endorsed by the honourable court on 20th June, 2023 and consequently direct that this matter proceeds for full hearing to its logical conclusion.

4. The cost of this application be in the cause.

2. The application is based on the grounds thereof and supported by affidavit sworn by Samuel Kimani Mutu on **24th July, 2024.**

3. He avers *inter alia* that he is one of the administrators of the deceased's estate. He states that a mediation agreement dated **20th January, 2023** and later adopted by this court on **20th January, 2023**, outlines how the estate should be distributed. However, he claims that several assets mentioned in the agreement are either nonexistent, unavailable or not actually part of the estate. For instance, the shares of the Karatu Coffee Factory are just a membership number and not actual transferable shares, there is no documentation for Phase V Plot No. **824** in Nairobi, **Ngama/410** is registered under someone else's name and is involved in ongoing litigation in **Machakos ELC Case No. 180 of 2014**, the shares of Gatuanyaga Dairy

- Farm were sold off while the deceased was still alive and **Plot No. R01/02** has already been sold to another party.
4. Additionally, he mentions that the estate owes Njenga Njuguna **Kshs. 579,600/=** due to a court-approved mediation order and this debt should be cleared before any distribution takes place. He also claims a personal interest in Gatuanyaga Dairy Farm share certificate No. **824**, which he holds jointly with the deceased and he asks the court to consider his application given the discrepancies in the asset list and the estate's outstanding debt.
 5. The application is opposed vide replying affidavits sworn by Abraham Mwangi Mutu on **7th August, 2024** and Jane Wambui Kihiko on an unknown date.
 6. Abraham avers *inter alia* that the Applicant, who is a co-administrator, has repeatedly recognized and even sought to include the disputed assets, specifically the shares of Karatu Coffee Factory No. **804** and the **Ngama/410 parcel (2 acres)**, through several applications for rectification of the grant in **1998, 2013** and **2014**. This effort led to an amended certificate of confirmation of grant issued on **17th November, 1998**.
 7. He argues that the Applicant is, therefore, barred from denying the existence or availability of these assets and there's no evidence to suggest that these properties were ever sold.
 8. Additionally, he claims that the deceased legally purchased the **Ngama/410** parcel based on a sale agreement in **1978**

and any opposing claims should be raised by the vendor or through the ongoing ELC proceedings, which the Applicant has not disclosed.

9. He challenges the alleged estate liability of **Kshs. 579, 600/=** to Njenga Njuguna, arguing that the mediation order in question was overturned and, in any case, that party is not involved in the current case.
10. He asserts that the mediation agreement dated **20th January, 2023**, was properly adopted as a court order on **20th June, 2023**, with the agreement and participation of all parties involved. According to the Court-Annexed Mediation Rules, this order is final, cannot be appealed, and can only be set aside if there's proof of fraud, misconduct, or a fundamental mistake; none of which has been shown.
11. He also claims that the current application is invalid due to lack of permission, constitutes an abuse of process and reflects a pattern of the Applicant trying to delay the resolution of this matter since 1994, which has harmed the Respondent.
12. Jane avers *inter alia* that she is a beneficiary of the deceased's estate. She states that the properties mentioned in the mediation agreement are the same ones the Applicant previously identified and relied on in his own pleadings and applications, which makes his current stance contradictory and misleading.
13. She emphasizes that the Applicant was actively involved in the mediation process, signed the settlement agreement and

that this agreement was officially adopted as a court order on **20th June, 2023**, with all parties present and consenting. Additionally, she points out that according to the Court-Annexed Mediation Rules, there's no option to appeal an adopted settlement agreement and any request to set it aside requires the court's permission. She believes that the current application is invalid since no such permission was sought and the Applicant has not provided any valid reasons like fraud, misconduct or a fundamental error that would justify interfering with the settlement. She argues that the Applicant has been dragging out this matter since 1994, which has harmed the beneficiaries and she urges the court to put an end to the litigation by dismissing the application.

14. The Applicant has filed written submissions dated **27th October, 2025** and the 1st respondent has filed written submissions dated **21st November, 2025**.

ANALYSIS AND DETERMINATION:

15. I have read the application before this court, the responses thereto and the rival submissions.
16. In Kibosia & 11 others v Chebelieni & another [2024] KECA 1269 (KLR) the court pronounced itself as follows: “... **19. In dealing with an application seeking to set aside a consent judgment, the court in *Flora Wasike v Destimo Wamboko (1982-1988) 1 KAR 625* held 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 if certain conditions remain to be fulfilled, which are not carried out: see the decision of this court in JM Mwakio v Kenya Commercial Bank Ltd Civil Appeals 28 of 1982 and 69 of 1983. In Purcell v FC Trigell Ltd [1970] 2 All ER 671, Winn LJ said at 676;" 20. In Samuel Wambugu Mwangi v Othaya Boys' High School [2014] eKLR, the court identified the grounds for setting aside a consent judgment as follows: "Circumstances under which a consent judgment may be interfered with were considered in the case of Brooke Bond Liebig (T) Limited v Maliya (1975) EA 266. It was stated that prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action and those claiming under them 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 material facts or in misapprehension or ignorance of material facts or in general for a reason which would enable the court to set aside an agreement." 21. Even though not in existence at the time material to this appeal, the provisions of the Civil Procedure (Court-Annexed Mediation) Rules, 2022 adopted the traditional grounds for upsetting a consent judgment or order by providing at rule 39(3)

that: “The following shall constitute the grounds upon which an application to set aside an order or decree arising from a mediation settlement agreement— a. misconduct, fraud, or a fundamental mistake by the mediator as relates to the mediation proceedings that goes to the core of the matter: Provided that the misconduct, fraud or mistake should not have been known by the applying party at the time of execution of the settlement agreement and should be one which affected the process and outcome of the mediation in such a way that it would be unfair and inequitable to enforce it in its form; b. fraud, collusion, or misrepresentation by any party to the mediation (other than the party applying) or any witness or person who took part in the proceedings and whose participation materially affected the outcome; c. a fundamental mistake by any or all of the parties to the mediation as to the existence or state of the subject matter, person or thing; or to any set of facts that materially affected the parties’ decision to enter into the subject agreement and which has rendered such agreement unfair and inequitable; d. where a party was, at the time of the making of the agreement, under some legal incapacity to take part in the subject mediation proceedings or to conclude and execute a binding settlement; or e. where the settlement agreement is invalid under Kenyan or

international law, or is or has become incapable of enforcement under Kenyan law."

17. The main issue for consideration is whether the mediation settlement agreement, which was adopted as an order of the court on **20th June, 2023**, can be overturned.
18. The only way to challenge an adopted mediation settlement agreement is by proving significant issues like fraud, misrepresentation or mistakes that go to the heart of the agreement.
19. The Applicant claims that some assets referenced in the mediation settlement agreement adopted on **20th June, 2023** are either non-existent, unavailable or not part of the estate and that there are outstanding liabilities related to the estate.
20. However, the respondents have shown, through previous pleadings and rectification applications, that the Applicant has consistently recognized the disputed assets as part of the estate, leading to their inclusion in the confirmed grant. Without solid evidence of fraud, significant non-disclosure, or a major mistake during the mediation, the Applicant's claims seem to challenge the fairness of the distribution rather than the legitimacy of the settlement itself.
21. When it comes to the request for status quo to be maintained, the Applicant needs to show substantial loss, act promptly and provide some form of security.

22. The Applicant has not shown any specific or irreparable harm that would be occasioned from enforcing the adopted mediation settlement agreement, nor have they provided any security. Simply claiming that there is an outstanding debt and disputed assets does not meet the necessary criteria for a stay, especially since the mediation settlement agreement was agreed upon and is binding.
23. The averment that certain properties being under third-party claims or having been previously disposed of should be addressed in the appropriate courts that are clothed with the requisite jurisdiction rather than being used to challenge a finalized mediation settlement agreement.
24. In light of the foregoing, I find that the Applicant has not provided any valid reasons to overturn the mediation settlement agreement or to grant the interim relief being sought and that the instant application incompetent for failure to seek this court's leave to file it.
25. **The application dated 24th July 2024 is therefore dismissed with costs to the Respondents.**

**Dated signed and delivered via video link at Nairobi this
9th day of April 2026.**

**H K CHEMITEI
JUDGE**