



In re Estate of Erastus Kimutai Ngeno (Deceased) (Succession Cause 32 of 2023) [2026] KEHC 5334 (KLR) (28 April 2026) (Ruling)

Neutral citation: [2026] KEHC 5334 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
SUCCESSION CAUSE 32 OF 2023
JK NG'ARNG'AR, J
APRIL 28, 2026**

IN THE MATTER OF THE ESTATE OF ERASTUS KIMUTAI NGENO (DECEASED)

BETWEEN

STEPHEN MUTAI 1ST APPLICANT

JOEL MUTAI 2ND APPLICANT

AND

SARAH CHEPNGENO NGENO RESPONDENT

RULING

1. In this matter, a Grant was issued to the Respondent on 1st December 2023.
2. The 2nd Applicant filed an Application for Revocation of the Grant dated 9th October 2024. The 2nd Applicant wanted the Grant revoked because members of the 1st household were not involved in the succession proceedings hence making the proceedings defective.
3. The matter was referred to Mediation and a Mediation Settlement Agreement dated 30th April 2025 was filed in court. The same was adopted as an order of the court on 15th May 2025.

Chamber Summons Application dated 15th July 2025

4. The 1st Applicant sought the following orders: -
 - I. Spent.
 - II. THAT pending the hearing and determination of this Application, the survey process scheduled for 8th and 9th August 2025 be temporarily stayed.
 - III. THAT the Settlement Agreement dated 30th April 2025 adopted in court be set aside.



- IV. THAT the court be and is hereby pleased to set aside order number 3 of the Settlement Agreement dated 30th April 2025 adopted in court on 15th May 2025.
- V. THAT in the alternative, the court be and is hereby pleased to order that Kericho/boito/422 and 468 be divided among the houses according to the number of children in each house in accordance with section 40 of the *Law of Succession Act*.
5. The Application was premised on the grounds on the face of the Application together with the Supporting Affidavit sworn by Stephen Mutai on 15th July 2025.
6. The 1st Applicant stated that the Settlement Agreement was arrived at without his participation and his siblings from the 1st household. That at the time of the adoption of the Settlement Agreement, his advocate expressed concerns on its contents. The 1st Applicant further stated that the Settlement Agreement was not signed by all the beneficiaries of the 1st household and they were aggrieved by the proposal to share equally land parcels known as KERICHIO/BOITO/422 and 468. That the proposal offended section 40 of the *Law of Succession Act* which provided for division of property in accordance with the number of children in each household.
7. It was the 1st Applicant's case that he was not notified of the Mediation meeting and that there was a collusion to short change members of the 1st household. That in his absence and members of the 1st household, the consent entered into was a nullity. It was the 1st Applicant's further case that there was a misrepresentation of the 1st household's wishes.
8. The 2nd Applicant through his Supporting Affidavit dated 15th July 2025 stated that at the time of the impugned Settlement Agreement, he had been hospitalized.
9. Through their written submissions dated 7th October 2025, the Applicants submitted that the Settlement Agreement was invalid, void and unenforceable as members of the 1st household did not participate or sign the Agreement. They relied on section 3(1) of the Law of Contract, *Flora N. Wasike vs Destimo Wamboko (1988) eKLR et.al.*
10. It was the Applicants' submission that unless the Settlement Agreement was set aside, members of the 1st household would suffer grave prejudice.

Response

11. Through a Replying Affidavit dated 26th September 2025, the Respondent stated that the Settlement Agreement was properly entered into by all the parties and their input was incorporated in the Settlement Agreement. That the Agreement reflected the wishes of the deceased. The Respondent further stated that the Applicants were frustrating her and delaying the conclusion of the succession proceedings.
12. It was the Respondent's case that the 2nd Applicant's medical documents were irrelevant as they indicated that the 2nd Applicant was admitted in hospital on February 2025 while the Settlement Agreement was entered into on 30th April 2025. It was the Respondent's further case that all the family members from both households were aware of the Mediation and the 2nd household were represented by Emily Mutai.
13. The Respondent stated that the Settlement Agreement had been adopted by this court and was binding to all the parties. That the present Application was frivolous.



14. Through her written submissions dated 20th February 2026, the Respondent submitted that the Settlement Agreement was entered into voluntarily with the knowledge and participation of the two households either personally or through briefed representatives. That the Applicants admitted that Evans Yegon was briefed to represent them during the Mediation and therefore could not allege ignorance at this point. The Respondent further submitted that the Agreement was adopted as an order of this court and was binding upon all parties.
15. It was the Respondent's submission that the 1st Applicant's wife, Emily Mutai represented them during the Mediation and the Applicants' allegations of collusion were reckless and unsubstantiated. That the present Application was an abuse of the court process and that there was need for finality in succession proceedings.
16. I have gone through the entire record including the Chamber Summons Application dated 15th July 2025, the Replying Affidavit dated 26th September 2025, the Applicants' written submissions dated 7th October 2025 and the Respondent's written submissions dated 20th February 2026. The only issue for my determination was whether the Mediation Settlement Agreement dated 30th April 2025 should be set aside.
17. Mediation Settlement Agreements are consensual in nature and the grounds for setting them aside are akin to the grounds of setting aside a contract. In re Estate of Anthony Njeru Karobia (Deceased) [2026] KEHC 1961 (KLR), the court held: -

“In law a consent order binds all the parties thereto. A consent order may only be set aside if the grounds required to invalidate a contract are shown to exist i.e fraud, mistake, collusion or if the consent runs counter to Public Policy.

In the case of Flora N. Wasike -Vs- Destimo Wamboko [1988] KLR the Court of Appeal stated thus: -

“It is well settled law that a consent judgment or order has contractual effect and may only be set aside on grounds which justify setting aside a contract.”

In Kenya Commercial Bank Ltd -Vs- Specialised Engineering Company Ltd [1982] KLR, the Court stated that

“A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it 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 in misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement.”

In Board of Trustees National Social Security Fund -Vs- Michael Mwalo [2015] eKLR the Court of Appeal held as follows: -

“The judgment arose from a consent of the parties to the suit. The law pertaining to setting aside of consent judgments or consent order has been clearly stated. 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. To impeach a consent order or a consent judgment, it must be shown that it was obtained by fraud, or collusion or by an agreement contrary to the policy of Court.” [Own emphasis]



Finally, on this point the case of S.M.N -VS- Z.M.S [2017] eKLR summarised the case law and the grounds upon which a consent may be varied or set aside as follows: -

- i. Where the consent was obtained fraudulently.
- ii. Where there was use of collusion between affected parties in securing the consent.
- iii. Where the consent agreement runs contrary to public policy.
- (iv) Where the consent is based on insufficient material facts.
- iv. Where the consent was obtained on the basis of misapprehension or ignorance of material facts.
- v. For any other sufficient reason.”

18. In regards to the particularity of Mediation Settlement Agreements, Rule 39 of The Civil Procedure (Court-Annexed Mediation) Rules provides: -

- (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 subrule (1) shall be supported by an affidavit detailing the grounds upon which the applicant intends to rely in setting aside the order or decree.
- (3) 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.



- (4) At the hearing of an application to set aside an order or decree, no party shall, without leave of court, be allowed to canvass any other ground in support of the application other than the grounds specified in subrule (3).
- (5) The court shall hear and determine an application under this on priority basis within thirty days after filing. (Emphasis mine)
19. It is clear from the above, that leave of the court must be sought by an Applicant before he/she files an Application for the setting aside of a Mediation Settlement Agreement, as is the present case. I concur with the court in re Estate of Kipturgut Arap Cheruiyot (supra), where it was held: -

“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.”

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.”

20. Similarly, in Too & another v Too & 15 others [2026] KEHC 2508 (KLR), the court held: -

“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.....”

21. I have keenly gone through the record and there was no evidence that the Applicants sought the court’s leave before filing the present Application. This means that the present Application was incompetent before this court and this court has no jurisdiction to determine it.

22. In the end, the Chamber Summons Application dated 15th July 2025 has no merit and is struck out.

23. Each Party to bear their own costs.

RULING DELIVERED, DATED AND SIGNED AT BOMET THIS 28TH DAY OF APRIL, 2026.

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HON. JULIUS K. NG’ARNG’AR
JUDGE

Ruling Delivered in the presence of;
Susan/Siele Court Assistant
Kigen for the 1st Applicant



N/A for the Respondent

