



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 42 OF 2010

**IN THE MATTER OF THE ESTATE OF YONA MUKUNGU Alias
MUKUNGU WESA (DECEASED)**

JARED OMBE MUKUNGU 1ST

ADMINISTRATOR/RESPONDENT

RUTH ANYEMBE 2ND

ADMINISTRATOR/RESPONDENT

VERSUS

AGGREY B. L. MUSIEGA INTERESTED

PARTY/APPLICANT

RULING

1. This is an old matter that has generated several rulings. In a decision dated 8/3/2012, B.T. Jaden J, delivered a ruling in which she declared that the sale of certain portions of land comprising the estate of the deceased by his dependants amounted to intermeddling and in which she declined the Interested Party's application to be enjoined in the succession proceedings and acknowledged as a beneficiary of the estate of the deceased.

2. The Interested Party was dissatisfied with the court's ruling and filed an application dated 11/3/2012 seeking inter alia, leave to appeal against the impugned ruling, stay of proceedings in this cause and for status quo to be maintained regarding the estate. He also prayed that in the interim, he should be allowed to continue in possession and use of the two portions of land comprised in **L.R. No. MARAMA/BUCHENYA/659**. The application was opposed and after hearing the parties, S. Chitembwe J, pronounced himself in a ruling dated 11/6/2012. The court declined the application for stay of the proceedings and directed that the Objection proceedings or any other proceedings herein be listed for hearing. However, the court granted the Interested Party leave to appeal and in order to maintain the status quo prevailing before the ruling on 11/3/2012, granted the prayers allowing the Applicant to continue in possession and use of the two portions of land comprised in **L.R. No. MARAMA/BUCHENYA/659** and an injunction restraining the Objector and his agents from obstructing or interfering with the Interested party's use and enjoyment of the subject land with a rider that the OCS, Butere Police Station be served for purposes of enforcing compliance.
3. The matter went into a hiatus and on 17/3/2015 when it was listed for hearing, the court was informed that the Petitioner was deceased and there was need for substitution. Subsequently, an application dated 19/10/2015 was filed seeking the substitution

of the beneficiaries which application was dismissed on 28/11/2019 for non-attendance and want of prosecution.

4. From the record, it appears that no substitution of the Petitioner was ever done but, the matter was later screened, determined as fit for mediation and referred for mediation. An agreement was reached on 28/11/2019 and a Mediation Settlement Agreement filed on 28/11/2019 and adopted as an order of the court on 29/11/2019. It is the said Agreement which gave rise to the application dated 24/2/2020 which is the subject matter of this ruling.

5. The application which is by the Interested Party is for the following substantive orders:-

“(4) The order of the Honourable Judge of 29th November 2019 on this file adopting the purported Mediation Settlement Agreement in Mediation File No. 123 of 2019 before Kakamega as judgment of the Honourable Court be recalled and set aside and or vacated in entirety.

(5) The Honourable Court do find and declare that the mediation proceedings in Mediation file No. 123 of 2019 by or under one Raphael Mwani, Mediator/2nd Respondent are and remain invalid for non-compliance with the rules governing settlement of disputes through Court Annexed Mediation and to that extent of no legal purpose.

(6) A fresh order for additional mediation be issued for settlement of the dispute through Court Annexed Mediation by or under a

Mediator to be agreed upon by the Applicant and the Advocates for the parties not being Raphael Mwani (the 2nd Respondent)."

6. I have considered the application which was not opposed by the 2nd Administrator and which was canvassed through written submissions filed by the Interested Party/Applicant and the 1st Administrator.

7. The procedure for setting aside mediation agreements is set under Rule 39 of the Civil Procedure (Court-Annexed Mediation Rules) 2022 which 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 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.

(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.”

8. I note that the Interested Party, who was never enjoined to these proceedings and therefore lacks locus standi, never sought the leave of the court before filing the application to set aside the Mediation Settlement Agreement. The said application is therefore incompetent for non-compliance with the rules. In ***re Estate of Elias Njiru Chandi (deceased) [2024] KEHC 2319 (KLR)***, the court held that:-

“...the application seeking setting aside the settlement agreement has not complied with the procedure set in the law. It is immaterial to determine whether there were any vitiating factors to the mediation settlement. The applicants were required to seek leave to file an application for setting aside the settlement agreement. The application for leave is meant to allow the court to verify the reasons given for setting aside the agreement. In my view, the application is not properly before the court.”

9. Additionally, Rule 39 (5) of the Rules stipulate that an application to set aside a Mediation Agreement should be disposed of within 30 days of filing. It is noted that the hearing of this application was disrupted by the Covid-19 pandemic. Nonetheless, on 28/9/2020 the court issued directions that the application be canvassed through written submissions. The matter was fixed for Mention on 5/11/2020 to confirm compliance. Thereafter the

matter came up for Mention severally with no progress due to absence of the parties. On 5/3/2024, Honourable P. J. Otieno J, directed that absent parties be served within seven (7) days to enable the court issue directions. The Interested Party's Advocate who was present in court was directed to serve the parties to attend on 27/6/2024 but no party appeared on the scheduled date. Later, on 6/2/2025, the Court appointed the Objector Jared Ombe Mukungu and Ruth Anyembe as joint Administrators. Thereafter, the court directed the parties to file and serve their written submissions of which it notes that the Interested Party/Applicant filed its submissions almost a month after the Respondents had filed theirs.

10. I have set out the chronology of events in order to demonstrate the fact that the Interested Party is the author of the delay in the disposal of his application and for that reason, he is guilty of laches.
11. Having said that, the court notes that at the time the mediation was done, there was no Administrator in the estate, the Petitioner who is the 2nd Administrator's husband having died on 31/8/2014. Notwithstanding that, 2nd Administrator's family was allocated the bigger share of the property comprising 0.63 hectares while the other beneficiaries got a smaller share. The 2nd Administrator has not said on what grounds she supports the application to set aside the Mediation Settlement Agreement and absent any reasons, the court cannot allow the application purely on the basis that it was not opposed by one of the Respondents.

12. Going to the substance of the Interested Party's application, he has set down the following grounds:-
- (a) That he was not notified of the mediation proceedings.*
 - (b) That John Anyembe Mukhungu who purported to sign on behalf of the late Petitioner was a stranger and not a party to the dispute.*
 - (c) The Petitioner's widow was excluded from the agreement.*
 - (d) That the estate of the deceased was dealt with illegally by the Mediator in a manner unknown to the law.*
 - (e) That there was non-disclosure of material facts.*
13. On perusal of the Mediation Settlement Agreement, it is clear that strangers were introduced into the Mediation Settlement Agreement and bearing in mind the fact that there was no Administrator at the time of the Mediation and the Agreement does not indicate who among the beneficiaries attended the mediation, the Mediation Settlement Agreement is vitiated.
14. The court however notes that the Interested Party, who was never enjoined as a party to this cause, filed a Notice of Appeal against the decision declining his application for enjoinder on 13/3/2012. That was thirteen (13) years ago. There is no indication that the appeal was ever prosecuted. Thirteen (13) years is too long for a party to prosecute an appeal particularly where the party is enjoying interim orders of injunction. It constitutes gross abuse of the court process.
15. Since the Interested Party never took further steps apart from filing the Notice of Appeal, then he has no audience in this court.

In any event, his claim is that of a purchaser from some specific beneficiaries and not from the deceased himself. His claim does not lie with the Probate and Administration Court.

16. For the aforesaid reasons, the application dated 24/2/2020 is struck off for being an abuse of the process of the court. However, due to the apparent irregularity in the mediation process that overlooked the absence of the Petitioner who was by then deceased or his personal representative, I invoke Rule 73 of the Probate and Administration Rules and set aside the Mediation Settlement Agreement.
17. This is a family matter and there is no order as to costs.

Dated, signed and delivered at Kakamega this 27th day of April 2026.

**A. C. BETT
JUDGE**

In the presence of:

No appearance for the Parties

Court Assistant: Polycap